Date: 20080623

Docket: A-349-07

Citation: 2008 FCA 222

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR CLIFTON ISNANA,
COUNCIL CURTIS WHITEMAN and COUNCILLOR DONALD WAJUNTA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION

Applicants

and

ATTORNEY GENERAL FOR CANADA,
ENBRIDGE PIPELINES (WESTSPUR) INC.,
ENCANA CORPORATION

Respondents

Heard at Regina, Saskatchewan on June 3, 2008.

Judgment delivered at Ottawa, Ontario, on June 23, 2008.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: PELLETIER J.A.
RYER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an application for judicial review of a decision of the National Energy Board (OH-2-2007) communicated to the applicants on June 28, 2007. That decision approved the application of the respondent Enbridge Pipelines (Westspur) Inc. ("Enbridge") for a certificate of public convenience and necessity under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-6, for a project called the "Alida to Cromer Capacity Expansion Project" (the "Project"). The

applicants, Standing Buffalo Dakota First Nation and its members (collectively, "Standing Buffalo"), intervened in the proceedings before the NEB to oppose the Enbridge application, but without success. Standing Buffalo argues that this Court should quash the NEB decision because Standing Buffalo has a credible claim of Aboriginal title to the land on which the Project is located and the NEB decision was made in breach of their right to be consulted and accommodated in respect of their interest in that land, and because the NEB erred in failing to compel the Government of Canada to appear at the hearing to address the issue of consultation.

[2] Enbridge disputes these arguments, and further argues that this Court is without jurisdiction to consider Standing Buffalo's application for judicial review. For the reasons that follow, I have concluded that Enbridge is correct on the question of jurisdiction, and I would dismiss this application on that basis.

Statutory scheme

[3] The decision of the NEB was made under section 52 of the *National Energy Board Act*, which reads in relevant part as follows:

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant […].	**52.** Sous réserve de l'agrément du gouverneur en conseil, l'Office peut, s'il est convaincu de son caractère d'utilité publique, tant pour le présent que pour le futur, délivrer un certificat à l'égard d'un pipeline; ce faisant, il tient compte de tous les facteurs qu'il estime pertinents […].

Facts

[4] Enbridge owns and operates the Enbridge Westspur pipeline system. That pipeline system transports crude oil received from gathering systems and from truck terminals. It also transports natural gas liquids from a gas processing plant in Steelman, Saskatchewan to the Enbridge Pipelines Inc. terminal at Cromer, Manitoba, which interconnects to the Enbridge Pipeline Inc. mainline.

[5] This case deals with the 60 kilometre portion of the Enbridge Westspur pipeline located between Alida, Saskatchewan and Cromer, Manitoba. The purpose of the Project was to increase the annual crude oil transportation capacity over those 60 kilometres from 25,000 cubic metres per day to 29,900 cubic meters per day. The right of way for the original Enbridge pipeline between Alida and Cromer was 15 meters wide. Beginning in 1956, there were two Enbridge pipelines operating within that right of way, a 12 inch pipeline for natural gas liquids and a 16 inch pipeline for crude oil. The Project would widen the right of way by a further 20 meters, add a new 6 inch pipeline for liquid natural gas, and convert the existing 12 inch liquid natural gas pipeline so that it would be used for the transportation of crude oil.

[6] In January of 2007, Enbridge applied for a certificate of public convenience and necessity under section 52 of the *National Energy Board Act* authorizing the construction and operation of the Project. The Board decided to proceed by way of oral hearing. Enbridge informed a number of Aboriginal groups about the Project and invited them to participate in discussions and ask questions.

[7] In determining the scope of what has been referred to as Enbridge's "Aboriginal consultation program", Enbridge considered the fact that the Project involved 60 kilometres of new pipeline adjacent to an existing right of way, the fact that 94% of the additional right of way is freehold land, and the fact that during the 50 years of the operation of the pipelines on the existing pipeline right of way, it had never been made aware of any Aboriginal claim, interest or uses on or along the right of way. Based on those guidelines, Enbridge contacted First Nations and Métis groups within a 160 kilometre corridor centered on the existing right of way, including the Assembly of Manitoba Chiefs, the Manitoba Métis Federation, the Federation of Saskatchewan Indian Nations, the Métis Nation – Eastern Region, Zone III, the Canupawakpa Dakota First Nation, the Sioux Valley Dakota Nation, the Birdtail Sioux First Nation and the White Bear First Nation. Enbridge also contacted the Manitoba and Saskatchewan Regional Offices of Indian and Northern Affairs Canada, and was informed that there are no current land claims negotiations going on in the area of the Project.

[8] During this process Enbridge did not contact Standing Buffalo. Based on the facts summarized above, I assume that was because Standing Buffalo's current home community, which is a reserve near Fort Qu'Appelle, Saskatchewan, was outside the 160 kilometre corridor centred on the existing right of way, and because Enbridge was not aware that Standing Buffalo had asserted a claim of Aboriginal title that included the land on which the Project was located. It appears that the Standing Buffalo reserve is approximately 200 kilometres from the Project area.

[9] On February 22, 2007, Standing Buffalo filed an application for intervener status in the NEB proceedings to oppose the Enbridge application on the basis of Standing Buffalo's allegation of a credible claim to Aboriginal title to lands in the relevant area, and its allegation that the Crown had failed to consult with Standing Buffalo in relation to the Enbridge application. This was the first indication to Enbridge that Standing Buffalo had an interest in the Project. Enbridge provided Standing Buffalo with a copy of its application and tried without success to meet with the Chief and Council of Standing Buffalo before the hearing.

[10] Standing Buffalo was granted intervener status and was permitted to submit evidence in the NEB proceedings, partly in the form of affidavits and partly in the form of the oral history evidence of Standing Buffalo elders. Standing Buffalo asserts that its evidence establishes the following facts:

(A) The Dakota people, including Standing Buffalo, have a credible Aboriginal land claim to the area that included the land on which the Project was located.

(B) The Dakota people, including Standing Buffalo, have never entered into a treaty with the Crown like the numbered treaties relied upon by the Crown in other cases to establish the extinguishment of Aboriginal title.

(C) The Crown and the Dakota people, including Standing Buffalo, negotiated for seven years with a view to entering into a treaty, but Canada had broken off the negotiations in bad faith, failing to provide an explanation of its position.

(D) The Crown failed to consult with or even inform Standing Buffalo about the Project.

[11] The submissions of Standing Buffalo in the NEB proceedings also expressed a specific concern about the potential of archaeological finds or disturbances in the area of the Project, as earlier finds of burial sites, pottery, pipes and other objects in the general geographic area of the Project had been identified as Dakota.

[12] The Government of Canada was not represented at the hearing, did not present evidence and made no submissions. Standing Buffalo argued that the NEB should compel Canada to present evidence and explain why it had failed to consult with Stand Buffalo. The NEB did not compel the Government to present evidence and did not address this point in its reasons.

[13] The NEB rejected the opposition of Standing Buffalo and concluded that the Project is and will be required by the present and future public interest and necessity. The NEB issued a certificate of public convenience and necessity subject to certain conditions, and recommended to the Governor in Council that the certificate of public convenience and necessity be approved. The approval of the Governor in Council was obtained on September 5, 2007 (PC 2007-1234).

[14] One of the conditions to the certificate was intended to address the concern expressed by Standing Buffalo in relation to the discovery of archaeological or heritage resources prior to or during construction. If there was such a discovery, Enbridge was required to cease work immediately at the location of the discovery, notify the responsible provincial authorities, and resume work only with the approval of those provincial authorities.

[15] I summarize as follows the reasons given by the NEB for not accepting the submission of Standing Buffalo that the Enbridge application should not proceed before the Crown had entered into appropriate consultations with Standing Buffalo:

(A) The steps taken in this case were sufficient to provide Standing Buffalo with relevant information about the Project, and to accommodate and facilitate their participation in the NEB hearing.

(B) Most of the evidence provided by Standing Buffalo was of little relevance to the issues before the NEB. It is not part of the mandate of the NEB to determine contested issues of Aboriginal title (a point which all parties conceded).

(C) With respect to Standing Buffalo's objection to Enbridge's application, the NEB took into consideration the following facts:

i) The Project is located on a right of way adjacent to a right of way that has been in existence for fifty years.

ii) During that fifty year period, Enbridge had not been informed of any First Nation claim over any portion of the right of way.

iii) Standing Buffalo provided no evidence of any current traditional use of property in the vicinity of the Project.

iv) Standing Buffalo "has no legally proven rights in the area and their claim is not recognized by the Government of Canada", and even if that were not so, it provided no evidence of the specific impacts the Project could have on its

> interests, except for possible archaeological discoveries. Standing Buffalo's concern about the possibility of archaeological discoveries would be accommodated by an appropriate condition.

[16] On July 20, 2007, Standing Buffalo applied to the NEB for a review of its decision to issue the section 52 certificate to Enbridge. The NEB dismissed that application on December 6, 2007. On July 26, 2007, Standing Buffalo filed this application for judicial review pursuant to paragraph 28(1)(*f*) of the *Federal Courts Act*, seeking a judgment of this Court quashing the decision of the NEB to issue the section 52 certificate to Enbridge. On the same day, Standing Buffalo applied to the NEB for a stay of its decision. The NEB dismissed the stay motion on September 11, 2007.

[17] On July 27, 2007, Standing Buffalo filed a motion under subsection 22(1) of the *National Energy Board Act* for leave to appeal the NEB's decision. The material filed in the leave application did not mention that this application for judicial review was pending in respect of the same decision. The grounds of appeal in the leave application are substantially the same as the grounds of judicial review in this case, except that they are stated in a different order. Leave to appeal was denied on September 21, 2007. No written reasons were given.

Issues

[18] In my view, this application raises three principal issues:

(A) Does this Court have jurisdiction to consider this application, in light of subsection 22(1) of the *National Energy Board Act* and section 18.5 and subsection 18(2) of the *Federal Courts Act*?

(B) If this Court has jurisdiction, should it dismiss Standing Buffalo's application for judicial review on the basis of the doctrines of *res judicata* or issue estoppel because the issues raised are substantially the same as the issues raised in Standing Buffalo's unsuccessful application for leave to appeal?

(C) If this Court considers this application on the merits, should the decision of the NEB to issue the section 52 certificate be quashed because the NEB failed to compel the attendance of the Crown, or because there was a breach of the Crown's obligation to consult Standing Buffalo and to accommodate their interests?

Discussion

[19] Enbridge argues that this Court has no jurisdiction to consider this application for judicial review, given section 18.5 and subsection 28(2) the *Federal Courts Act* and subsection 22(1) of the *National Energy Board Act*. Standing Buffalo argues that this application falls squarely within this Court's jurisdiction by virtue of paragraph 28(1)(*f*) and is not barred by the provisions relied upon by Enbridge.

[20] The NEB is subject to judicial review by this Court rather than the Federal Court. That is the result of the combined operation of section 18, paragraph 28(1)(*f*) and subsection 28(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Those provisions read as follows:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	*a*) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	*b*) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.
[…]	[…]
28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
[…]	[…]
(*f*) the National Energy Board established by the *National Energy Board Act*	*f*) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie* […].
[…]	[…]
28. (3) 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.	28. (3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

[21] However, the jurisdiction of this Court in applications for judicial review is limited in certain circumstances by the combined operation of section 18.5 and subsection 28(2) of the *Federal Courts Act*, which read in relevant part as follows:

18.5. Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to […] the Federal Court of Appeal […] from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	18.5. Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant […] la Cour d'appel fédérale […] d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.
[…]	**[…]**
28. (2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.	28. (2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

[22] Subsection 22(1) of the *National Energy Board Act* provides that a decision or order of the NEB may be appealed to this Court, with leave of this Court, on a question of law or jurisdiction. Subsection 22(1) reads as follows:

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.	22. (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

[23] Enbridge argued, primarily on the basis of *Leroux v. Transcanada Pipelines Ltd.* (1996), 198 N.R. 316, [1996] F.C.J. No. 622 (F.C.A.), that because of section 18.5 and subsection 28(2) of the *Federal Courts Act*, the only way Standing Buffalo can challenge the decision of the NEB to

issue the section 52 certificate to Enbridge is by an appeal under subsection 22(1) of the *National Energy Board Act*. Standing Buffalo argued that this interpretation cannot be correct because it would deprive paragraph 28(1)(*f*) of the *Federal Courts Act* of any meaning. Standing Buffalo also suggested that subsection 22(1) of the *National Energy Board Act* is intended to permit appeals on issues that are within the statutory mandate and special expertise of the NEB (such as the regulation of pipelines) and section 18.5 of the *Federal Courts Act* is intended to bar applications for judicial review on issues of that kind, but it is not intended to bar applications for judicial review based on general public law principles or, as in this case, principles of Aboriginal law.

[24] I agree with Enbridge that this Court has no jurisdiction to entertain this application for judicial review. In my view, this conclusion is compelled by section 18.5 and subsection 28(2) of the *Federal Courts Act*. Standing Buffalo, as an intervener in the NEB proceedings, was entitled to have recourse to subsection 22(1) of the *National Energy Board Act* to challenge the decision of the NEB. Despite the requirement for leave and the limitation of the grounds of appeal to questions of law or jurisdiction, the existence of the statutory right of appeal deprives this Court of jurisdiction to consider Standing Buffalo's application for judicial review of the NEB's decision.

[25] I do not accept the submission of Standing Buffalo that this interpretation leaves no scope for the operation of paragraph 28(1)(*f*) of the *Federal Courts Act*. A person who is directly affected by a decision of the NEB but does not have the right to appeal may bring an application for judicial review (see, for example, *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.* (1999), 243 N.R. 205, [1999] F.C.J. No. 242 (F.C.A.), and *Arthur v. Canada*

(Attorney General) (1999), 254 N.R. 136, [1999] F.C.J. No. 1917 (F.C.A.)). Also, a person seeking relief against the NEB in a matter that does not involve a challenge to a decision or order of the NEB may do so by means of an application for judicial review.

[26] Nor do I accept that subsection 22(1) of the *National Energy Board Act* is not broad enough to include appeals based on the principles of public law or Aboriginal law. In my view, the right of appeal in subsection 22(1) of the *National Energy Board Act* may be based on any question of law or jurisdiction, and is not limited to legal issues relating to the regulation of pipelines or other technical matters within the NEB's mandate.

[27] I conclude that this Court has no jurisdiction to consider Standing Buffalo's application for judicial review. That is a sufficient basis for dismissing this application. I express no opinion on the issues of *res judicata* or issue estoppel raised by Enbridge, or on the substantive issues raised by Standing Buffalo.

Conclusion

[28] I would dismiss this application with costs.

"K. Sharlow"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-349-07
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CONCURRED IN BY:	Pelletier J.A. Ryer J.A.
DATED:	June 23, 2008

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