

Federal Court



Cour fédérale

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February 23, 2017

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Dear Counsel:

RE: Court file: 17-T-7, *Luutkudziitwus et al v the Queen et al.*

Enclosed you will find the following document:

- Order of Mr. Justice Simon Noël rendered on February 23, 2017

Yours truly,

A handwritten signature in black ink, appearing to read 'Sheila de Santos'.

Sheila de Santos
a/Senior Registry Officer

Pursuant to section 20 of the *Official Languages Act* all decisions, orders and judgments, including any reasons given therefor, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.

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Federal Court



Cour fédérale

Date: 20170223

Docket: 17-T-7

Vancouver, British Columbia, February 23, 2017

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**LUUTKUDZHWUS, ALSO KNOWN AS
CHARLES WRIGHT AND GWININITXW,
ALSO KNOWN AS YVONNE LATTIE,
ON BEHALF OF THEMSELVES
AND IN THEIR CAPACITY AS
GITXSAN HEREDITARY CHIEFS
AS REPRESENTATIVES OF THEIR WILPS**

Applicants

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA
ATTORNEY GENERAL OF CANADA
MINISTER OF ENVIRONMENT
AND CLIMATE CHANGE
CANADIAN ENVIRONMENTAL
ASSESSMENT AGENCY
PACIFIC NORTHWEST LNG LIMITED**

Respondents

ORDER

UPON MOTION in writing brought by the Applicants under Rule 369 of the
Federal Courts Rules for:

1. An Order granting the Applicants an extension of time to file a Notice of Application for Judicial Review under ss. 18, 18.1 and 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 of:
 - (a) the decision of the Minister of Environment and Climate Change (the "Minister") dated September 27, 2016, pursuant to s.52 of the *Canadian Environmental Assessment Act*, 2012 SC 2012, c 19 s 52 ("CEAA 2012") issuing, in a decision statement pursuant to s. 54 of CEAA 2012, that the Pacific NorthWest LNG Project (the "Project") is likely to cause significant adverse environmental effects and must therefore be referred to the Governor in Council as to whether those effects are justified in the circumstances (the "Minister's Decision"); and
 - (b) The Order in Council P.C. 2016-0838, dated September 27, 2016, issued by the Governor in Council in which the Governor in Council decided that the significant adverse environmental effects that the Project is likely to cause are justified in the circumstances pursuant to s. 52(4) of CEAA 2012 (the "OIC");
2. An Order that the Applicants shall not be required to pay costs to the Respondents pursuant to Rule 400 of the *Federal Courts Rules* in the event that this motion is dismissed;
3. Such further and other relief as this Honourable Court may deem appropriate;

AND UPON CONSIDERING the motion record filed by the Applicants, as well as the motion record filed by the Respondent Pacific NorthWest LNG Limited ("PNW"), wherein it opposes the Applicants' motion;

AND UPON noting that the Federal Respondents, in a letter dated February 13, 2017, take no position with respect to the Applicants' motion;

AND UPON noting that the present motion for extension was filed on January 30, 2017, which is 95 days after the limitation period of 30 days expired and that, furthermore, the Applicants communicated their intention to challenge the September 2016 decision on January 13, 2017;

AND CONSIDERING that the Court's exercise of discretion to grant an extension of time to the limitation period of section 18.1 of the *Federal Courts Act* must consider whether or not the Applicants have demonstrated:

- i. A continuing interest to initiate and pursue the application;
- ii. That the application has some merit;
- iii. That no prejudice to the respondent results from the delay; and
- iv. That a reasonable explanation for the delay exists.

(See *Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 61);

AND CONSIDERING that each criteria depends on the circumstances of each case, and that not all criteria need to be resolved in favour of the Applicants, and that the overriding objective is that the interest of justice must be served (See *Larkman* at para 62);

AND CONSIDERING that the Applicants sworn affidavits stipulate that they wanted to “immediately” challenge the September decision, but in order to do so they required funding, and that the evidence shows that they had a continuing intention;

AND CONSIDERING that the Applicants sworn affidavits inform the Court that the reason for not initiating the Application was that they did not have the necessary funding which was being “actively sought” and that as soon as it became available on December 12, 2016, they worked to prepare the Notice of Application which was finally served and filed on January 30, 2017, after an unsuccessful attempt on January 13, 2017, and PNW’s refusal to consent to the extension sought on January 19, 2017;

AND CONSIDERING that some of the jurisprudence does not consider the search for funding as being a valid explanation for the delay to institute and proceed with an application for judicial review, but having noted that for the purposes of the present case, the following distinguishing factors give the “search for the funding explanation” a stamp of veracity, justifiability and acceptability:

- The decision to be reviewed is an Order in Council of the Governor in Council, which includes an administrative decision;
- As can be seen, the parties to be involved are public and private national entities that are well recognized in making sure that their point of view will be known and strongly defended;
- It is publicly known that, for parties like the Applicants, the search for proper public funding is not easily accessible and requires persistent work to obtain;

- Proper funding is an essential component of ensuring not only that an application for judicial review will be instituted but that it will proceed expeditiously, diligently, and raise the proper legal arguments;

AND CONSIDERING that the Applicants seek to protect their Aboriginal Title and Rights as guaranteed under section 35(1) of the *Constitution Act, 1982*;

AND CONSIDERING that a reading of the Motion Record of the Applicants, of the affidavits in support, in particular the Affidavit of Yvonne Lattie, and of the submissions of both parties, shows that the proposed Judicial Review is serious and has merit;

AND HAVING ALSO CONSIDERED the Respondent PNW's submissions on the merit issue and having noted that preliminary matters may have to be dealt with on the issue of standing of some of the Applicants, amongst others;

AND CONSIDERING that there is actually, at the present time, three other Judicial Reviews dealing with the September 2016 decision approving the project and that they are at an early stage, and that therefore the prejudice already created against PNW exists, and that furthermore, having noted that the Applicants have committed to proceed expeditiously with the Judicial Review and to comply with any timelines to be prescribed by this Court;

AND CONSIDERING as said earlier, that the Applicants have provided sworn affidavits that explain the reasons for the delay to institute the present Application for Judicial Review;

AND CONSIDERING that it is in the interest of justice that the Motion for an

extension of time to serve and file the Application for Judicial Review be granted;

AND CONSIDERING Rule 384 of the *Federal Courts Rules* that the Court may, at any time, order that a proceeding continue as a specially managed proceeding so that this Application proceeds expeditiously and in a timely manner;

THE COURT ORDERS that:

1. The Motion for an extension of time to serve and file a Notice of Application for Judicial Review of the September 2016 decision is granted; and
2. This Application shall proceed as a specially managed proceeding, without costs at this stage.
3. Costs in the cause.

"Simon Noël"
Judge