

Federal Court



Cour fédérale

Date: 20170726

Docket: T-1832-16

Citation: 2017 FC 725

Ottawa, Ontario, July 26, 2017

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**YAHAAN, ALSO KNOWN AS
DONALD WESLEY, ON HIS OWN BEHALF
AND ON BEHALF OF ALL THE MEMBERS
OF THE GITWILGYOOTS TRIBE**

Applicant

and

**HER MAJESTY THE QUEEN,
ATTORNEY GENERAL OF CANADA,
MINISTER OF ENVIRONMENT AND
CLIMATE CHANGE,
CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY,
PACIFIC NORTHWEST LNG PARTNERSHIP AND
LAX KW'ALAAMS INDIAN BAND REPRESENTED
BY ITS MAYOR, JOHN HELIN, AND JOHN HELIN
ON HIS OWN BEHALF AND ON BEHALF OF
ALL OTHER MEMBERS OF
THE NINE TRIBES OF LAX KW'ALAAMS,
IYOO'NS, ALSO KNOWN AS CARL SAMPSON SR.,
ON HIS BEHALF AND ON BEHALF OF ALL THE
MEMBERS OF THE GITWILGYOOTS TRIBE
AND METLAKATLA BAND**

Respondents

ORDER AND REASONS

[1] Two motions are before the Court seeking relief under Rule 114(2) of the *Federal Courts Rules*, SOR/98-106 [the Rules]. The Respondents Lax Kw'Alaams Indian Band [Lax Kw'Alaams] and Pacific Northwest LNG Partnership [Pacific Northwest] each seek to strike the underlying application on the basis that, *inter alia*, the Applicant, Yahaan (a.k.a. Donald Wesley), lacks the necessary standing to act in a representative capacity on behalf of the Gitwilgyoots Tribe [Gitwilgyoots]. All of the non-moving Respondents support the motions.

[2] Yahaan's application for judicial review challenges the environmental assessment and decision-making process connected to the approval of the Pacific Northwest LNG Project [the Project] planned for Lelu Island near Prince Rupert, British Columbia. Among other forms of relief, Yahaan seeks to quash a Project-related environmental assessment report, a decision of the Minister of Environment and Climate Change referring the matter to the Governor in Council, and Order in Council, No 2016-0838 [the OIC] authorizing the Project to move forward on conditions.

[3] At the heart of Yahaan's claim is the assertion that, prior to the rendering of the OIC, the Crown failed to fulfil its duty to consult with him on behalf of the Gitwilgyoots. While he acknowledges that consultations did take place with some of the interested Aboriginal groups including Lax Kw'Alaams and the Metlakatla Band [Metlakatla], he maintains that those discussions were selective and legally insufficient. Lax Kw'Alaams and Metlakatla [the Bands] are legally constituted Indian bands whose elected leaders have, in modern times, consistently

represented the section 35 interests of the Coast Tsimshian Nation including through treaty negotiations and related litigation with the Crown.

[4] Yahaan purports to be the Head Chief or sm'oogit¹ of the Gitwilgyoots. Gitwilgyoots is one of nine tribes that together constitute the Coast Tsimshian Nation. In his capacity as sm'oogit, Yahaan claims to be authorized to act on behalf of all members of the tribe for the purpose of asserting their unique and collective rights to consultation and accommodation. According to Yahaan, he succeeded to the position of sm'oogit upon the death of his maternal uncle, Harold Dudoward, in 2007. This status was confirmed by custom during a community feast held at Lax Kw'Alaams in 2008.

[5] The principal argument advanced by the moving parties is that Yahaan cannot bring himself within Rule 114(1) which sets the conditions for a person acting in a representative capacity. The moving parties also dispute Yahaan's tribal leadership claim and his contention that, through him, the Gitwilgyoots enjoys an independent right to external consultation with the Crown.

[6] At the outset, it is important to note that these proceedings are an unfortunate consequence of an internal governance dispute among certain groups within the larger collective of the Coast Tsimshian Nation. It is apparent that the current leadership of the two interested Bands, Lax Kw'Alaams and Metlakatla, and a clear majority of Coast Tsimshian people support the Project on certain agreed conditions. Yahaan and his supporters, on the other hand, are

¹ Also spelled sm'oogyit, sm'oogyet or s'moogit.

opposed to the Project on any basis and have, over the objections of the Bands, occupied Lelu Island.

[7] Lax Kw'Alaams seeks a broadly based determination from the Court confirming the legal right of the two Bands to consult exclusively with the Crown on behalf of the collective interests of the Coast Tsimshian people and to exclude Yahaan and, by implication, the Gitwilgyoots from any direct consultative role with the Crown.

[8] Lax Kw'Alaams and Metlakatla maintain that they have historically assumed control over the economic and political affairs of the Coast Tsimshian Nation. This role, they say, has included the representation of the collective interests of the Coast Tsimshian Nation vis-à-vis the Crown. According to this view, the interests of the individual constituent tribes have been, and continue to be, respected and considered within the context of internal governance structures and consultations. Indeed, the Bands assert, with considerable evidentiary support, that Yahaan, among others, was actively engaged in an internal dialogue with the Band leaders about the content of their ongoing consultation with the Crown. Yahaan only broke ranks when the Project began to be viewed more favourably within the Coast Tsimshian Nation.

[9] As much as the views of the Court on these larger issues of governance might be of some value going forward, I will not attempt to resolve them. My primary reason for declining Lax Kw'Alaams' request is that the record before the Court is wholly inadequate for the suggested task. A reasoned analysis of these matters would require a detailed examination of the historical record and cultural practises of the Coast Tsimshian Nation and its constituent tribes

given by knowledgeable witnesses, including First Nations members, historians and anthropologists. The paper record before me, although sturdy, is insufficient and, on a number of material points, contradictory.

[10] For the same reason, I am also in no position to resolve the Gitwilgyoots leadership dispute reflected in the respective affidavits of Yahaan and Carl Sampson Sr. Furthermore, up to this point it does not appear that any attempt has been made to resolve that matter internally. That, however, is exactly where it should be sorted out. The intervention of the Court at this stage would be premature because it would interfere with the rights of members of the Gitwilgyoots to make their own leadership choices according to their customs: see *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 at para 47, 94 BCLR (5th) 280. I would add that it is doubtful that this Court has jurisdiction over such a question.

[11] In the result, the only issue I intend to resolve is whether Yahaan is entitled to bring this proceeding in a representative capacity on behalf of the Gitwilgyoots.

[12] Rule 114 states:

114 (1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that

114 (1) Malgré la règle 302, une instance — autre qu'une instance visée aux articles 27 ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :

(a) the issues asserted by or against the representative and the represented persons

(i) are common issues of law and fact and there are no issues affecting only some of those persons, or

(ii) relate to a collective interest shared by those persons;

(b) the representative is authorized to act on behalf of the represented persons;

(c) the representative can fairly and adequately represent the interests of the represented persons; and

(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

Marginal note: Powers of the Court

(2) At any time, the Court may

(a) determine whether the conditions set out in subsection (1) are being satisfied;

(b) require that notice be given, in a form and manner directed by it, to the represented persons;

a) les points de droit et de fait soulevés, selon le cas :

(i) sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,

(ii) visent l'intérêt collectif de ces personnes;

b) le représentant est autorisé à agir au nom des personnes représentées;

c) il peut représenter leurs intérêts de façon équitable et adéquate;

d) l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

Note marginale : Pouvoirs de la Cour

(2) La Cour peut, à tout moment :

a) vérifier si les conditions énoncées au paragraphe (1) sont réunies;

b) exiger qu'un avis soit communiqué aux personnes représentées selon les modalités qu'elle prescrit;

(c) impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and

c) imposer, pour le processus de règlement de l'instance par représentation, toute modalité qu'elle estime indiquée;

(d) provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately.

d) pourvoir au remplacement du représentant si celui-ci ne peut représenter les intérêts des personnes visées de façon équitable et adéquate.

[13] Rule 184(2) imposes the burden of proof on a party claiming to act in a representative capacity where that status is challenged by an adverse party. In this case, in the face of the opposition of all of the Respondents, Yahaan carries the burden of establishing that all of the conditions set by Rule 114(1) have been met.

[14] In the face of Carl Sampson Sr.'s challenge to Yahaan's leadership claim, I am not satisfied that Yahaan is the sm'oogit of the Gitwilgyoots. Where a leadership dispute like this arises, the bare assertion of authority is legally insufficient: see *Te Kiapilanoq v British Columbia*, 2008 BCSC 54 at para 27, 164 ACWS (3d) 62. That is not to say that Yahaan does not hold the position he asserts, but only that he has failed to prove it. As noted above, until this dispute is resolved by the Gitwilgyoots' members neither Yahaan nor Carl Sampson Sr. is an appropriate person to act in a representative capacity under Rule 114.

[15] Another threshold barrier to Yahaan's assertion is the absence of evidence that he has been authorized by the Gitwilgyoots members to bring this proceeding on their behalf.

Rule 114(1)(b) requires that the putative representative be "authorized to act on behalf the represented persons". This requires the representative to consult with the members of the collective interest group to ascertain their wishes and, in the face of a dispute, to present convincing evidence that the affected community supports the representative acting on its behalf.

[16] In this case not only has Yahaan failed to produce evidence of community support, but what evidence there is suggests that he is opposed by a substantial number of Gitwilgyoots members. He has also declined to reach out to members of the tribe to ascertain their collective views on the basis that the task would be too difficult. Under cross-examination beginning at question 343, he offered the following explanation for acting unilaterally:

Q All right. Before making the decision that's reflected in paragraph 35, did you take a vote of the members of your tribe?

A I went to every house in Port Simpson of Gitwilgyoots descent and they refused to meet. On one or more occasion I have done that.

Q They refused to meet with you?

A Yes.

Q Even though they were Gitwilgyoots members?

A All these people on the affidavit. That's one family there. That's all it is. That's one family that you see there.

Q So did anyone -- any member of your tribe, other than yourself, agree that you have the power to stop them from getting benefits?

A Say it again.

Q Did anyone -- anyone in your tribe, any member of your tribe -- let me rephrase the question.

Before you made the decision reflected in paragraph 35 did you take a vote of the members of your tribe?

A Impossible because the members of the Gitwilgyoots tribe are spread out through the land.

Q Did you consult them?

A Impossible to do.

[Also see the exchange at questions 352-58.]

[17] Yahaan's representative claim involves a certain degree of irony if not disingenuity. On the one hand, he complains about ostensible deficiencies in the actual internal consultations carried on between the two Bands and the leaders of the nine tribes (including himself); but on the other hand, he purports to speak on behalf of the Gitwilgyoots without engaging in any consultation with members of the tribe. Indeed, he purports to act contrary to the views of a substantial number of those members. His position is also inconsistent with the outcome of a poll of Lax Kw'Alaams members (which included members of the Gitwilgyoots) who voted in favour of continuing consultations between the Bands and the Crown.

[18] In these circumstances Yahaan is in a clear conflict with the majority view of the members of the Lax Kw'Alaams. He is also in a conflict with many members of the Gitwilgyoots who support the Project. In the absence of any meaningful attempt by Yahaan to consult with the members of the Gitwilgyoots, it is not possible to know the full extent of his conflict of interest. His failure to ascertain the level of support he carries among members of the Gitwilgyoots also disqualifies him from purporting to act on their behalf.

[19] Yahaan's position before the Court is much the same as that described in *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517, [2006] BCTC 1517. There the putative representative party was advancing a claim inconsistent with the views of the Kwakiutl Indian Band (of which she was a member) and with the views of the majority of its members. The Court dismissed the proceeding on the basis of an obvious conflict of interest and because of the following concern:

[70] To rule otherwise would provide Ms. Hunt (and those of like mind whom she seeks to represent) a forum in which to circumvent the de-amalgamation process that would be required under the *Indian Act* to, in any way, modify the existing collective rights of all of the members of the Kwakiutl Indian Band. Such a determination would also provide an *ex post facto* veto to dissident members of the Kwakiutl Indian Band over the actions of the majority of the members of the Kwakiutl Indian Band who approved the Project in the ratification vote.

[71] It is obvious to me that the issues raised by this proceeding are in substance matters concerning the internal affairs and governance of the Kwakiutl Indian Band that do not and should not involve Orca, the Province, Canada or the 'Namgis First Nation or any of the other respondents.

[20] The Court concluded that a representative proceeding was inappropriate where members of the represented group have conflicting interests or where success for some will not be success for others: see paras 48-49.

[21] There are other reasons why Yahaan is not an appropriate person to act in a representative capacity. For one, he has not explained how he can fairly and adequately represent the interests of those members of the Gitwilgyoots who oppose his view and with whom he has not consulted, as required by Rule 114(1)(c). Acting in a representative capacity is not a platform for unilateral decision-making or indifference to the wishes of the collective.

[22] It is of additional significance that Yahaan was content with the consultations between the Bands and the Crown until very late in the process. His very late intervention and his occupation of Lelu Island are both obvious attempts to frustrate the will of the majority of the Coast Tsimshian people who are satisfied with the resulting accommodations and benefits. The fair and adequate representation required by Rule 114(1)(c) has not been demonstrated based on Yahaan's conduct to date.

[23] Finally, Yahaan has not shown that he has the capacity to carry these proceedings forward or to conduct any meaningful consultation with the Crown should he prevail in the underlying application. These types of practical considerations were recognized as relevant in *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 SCR 534:

41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

[24] For the foregoing reasons, these motions are allowed and Yahaan's application is dismissed on the basis that he lacks the necessary standing to bring it in a representative capacity.

ORDER in T-1832-16

THIS COURT ORDERS that the motions are allowed and the Applicant's application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1832-16

STYLE OF CAUSE: YAHAAN, ALSO KNOWN AS DONALD WESLEY, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE GITWILGYOOTS TRIBE
v HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, PACIFIC NORTHWEST LNG PARTNERSHIP AND LAX KW'ALAAMS INDIAN BAND REPRESENTED BY ITS MAYOR, JOHN HELIN, AND JOHN HELIN ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE NINE TRIBES OF LAX KW'ALAAMS, IYOO'NS, ALSO KNOWN AS CARL SAMPSON SR., ON HIS BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE GITWILGYOOTS TRIBE AND METLAKATLA BAND

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 7 AND 8, 2017

ORDER AND REASONS: BARNES J.

DATED: JULY 26, 2017

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