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A-430-98

Alberta Wilderness Association, Canadian Nature Federation, Canadian Parks and Wilderness Society, Jasper Environmental Association and **Pembina Institute for Appropriate Development** (*Appellants*) (*Applicants*)

v.

Minister of Fisheries and Oceans and **Cardinal River Coals Ltd.** (*Respondents*) (*Respondents*)

and

Brian Bietz, Gordon Miller and **Tom Beck in their capacity as a Review Panel Established Under the Canadian Environmental Assessment Act to Review the Cheviot Coal Project** (*Interveners*) (*Interveners*)

Indexed as: Alberta Wilderness Assn.v. Canada (Minister of Fisheries and Oceans) (C.A.)

Court of Appeal, Strayer, Robertson and Sexton JJ.A. "Toronto, November 30 and December 1; Ottawa, December 4, 1998.

Environment — Appeal from dismissal of application for judicial review of Joint Review Panel's report containing environmental assessment of proposal to build, operate open-pit coal mine near Jasper National Park — After report issued, Minister of Fisheries and Oceans issuing federal response, indicting authorizations would be issued under Fisheries Act — Applications Judge holding appellants obligated to challenge federal response in order to question sufficiency of panel report, ground claim of prohibition — As federal response issued by Minister not challenged, constituted barrier to appellant's claim — Requirements of CEAA legislated directions explicit in mandating necessity for environmental assessment as pre-requisite to ministerial action — Minister having no jurisdiction to issue authorizations in absence of environmental assessment — Assessment must be conducted in accordance with Act, including requirement imposed under s. 16 — That federal response issued, remaining unchallenged, not changing requirements — Federal response, panel report two separate statutory steps with distinct purposes, functions — Former neither superseding nor potentially curing deficiencies in latter — Combined effect of ss. 34(c), (d), 2(1), 37 that before taking course of action Minister must consider environmental assessment conducted in accordance with CEAA — Appellants entitled to question report even though not challenging federal response.

This was an appeal from the Trial Division's dismissal of the appellants' application for judicial review of a report of the Joint Review Panel, which contained an environmental assessment of a proposal to build and operate a 23 km open-pit coal mine three km east of Jasper National Park. Cardinal River Coals Ltd. applied to the Department of Fisheries and Oceans for authorizations under the *Fisheries Act* for its project. The project was referred to the Panel which issued a report. The Minister issued a federal response which indicated that authorizations would be issued. On judicial review of the report, the Applications Judge held that the appellants were obligated to challenge the federal response in order to question the sufficiency of the panel report and to ground their claim of prohibition against the Minister. The judicial review application was dismissed because the federal response issued by the Minister had not been challenged and therefore constituted a barrier to the appellants' claim. The merits of the appellants' argument were not addressed.

Canadian Environmental Assessment Act (CEAA), section 5 requires that an environmental assessment be completed before the Minister can issue authorizations. Section 13 provides that where a project is referred to a review panel, no power shall be exercised that would permit the project to be carried out in whole or in part, unless an environmental assessment of the project has been completed and a course of action has been taken in relation to the project. Section 16 requires that certain matters, such as the cumulative environmental effects and alternatives to the project, be given consideration by the panel in the report. Subsection 37(1) requires that the panel report be submitted to the Minister for consideration and response. Subsection 37(1.1) dictates the process to be taken by the Minister. Once the response has been approved by the Governor in Council, the Minister "shall take a course of action" that is in conformity with the approval of the Governor in Council.

The issue was whether the existence of an unchallenged federal response should bar the appellants from seeking prohibition against the Minister for future authorizations.

Held, the appeal should be allowed.

The Applications Judge erred in holding that the response superseded the report. The requirements of CEAA are legislated directions that are explicit in mandating the necessity for an environmental assessment as a prerequisite to ministerial action. The Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. Any assessment must be conducted in accordance with the Act, including the requirement imposed under section 16. That a federal response has been issued and remains unchallenged does not change these requirements. Thus, the appellants were entitled to argue the merits of their case.

The appellants were entitled to seek prohibition against the Minister on the basis that the panel report was materially deficient. That the federal response had not been challenged was irrelevant to the appellants' claim. The federal response does not supersede the panel report, nor can it potentially cure any deficiencies therein. The two are separate statutory steps with distinct purposes and functions.

The combined effect of paragraphs 34(*c*), (*d*), subsection 2(1) and section 37 is that before taking a course of action, the Minister must consider an environmental assessment that was conducted in accordance with the CEAA. Therefore, the appellants were entitled to question the report and were not barred from doing so because they did not challenge the federal response. The Applications Judge should have proceeded to analyze the arguments advanced by the appellants, in order to decide whether a proper environmental assessment had been conducted by the Joint Panel. The matter should be remitted to the Trial Division and heard together with the application for judicial review in T-1790-98 which raises the same issues and is based on the same facts.

statutes and regulations judicially considered

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 2(1) "environmental assessment", 5, 13, 16, 34(*c*)(i),(*d*), 37(1) (as am. by S.C. 1994, c. 46, s. 3), (1.1) (as am. *idem*).

Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Fisheries Act, R.S.C., 1985, c. F-14.

cases judicially considered

applied:

Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans) (1997), 26 C.E.L.R. (N.S.) 238; 146 F.T.R. 19 (F.C.T.D.); *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] 4 F.C. 340 (T.D.); *Bowen v. Canada (Attorney General)*, [1998] 2 F.C. 395; (1997), 26 C.E.L.R. (N.S.) 11; 139 F.T.R. 1 (T.D.); *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 F.C. 325; (1996), 22 C.E.L.R. (N.S.) 293; 4 C.N.L.R. 280; 122 F.T.R. 81 (T.D.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321.

APPEAL from Trial Division's dismissal of an application for judicial review of the Joint Review Panel's report, which contained an environmental assessment of a proposal to build and operate an open-pit coal mine near Jasper National Park (*Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] F.C.J. No. 821 (T.D.) (QL)), on the ground that the federal response, which had not been challenged, constituted a barrier to the appellants' claim. Appeal allowed.

appearances:

Stewart A. G. Elgie and *Jerry V. DeMarco* for appellants (applicants).

Patrick G. Hodgkinson and *Mary L. King* for respondent (respondent) Minister of Fisheries and Oceans.

Dennis R. Thomas, Q.C. and *Allan E. Domes* for respondent (respondent) Cardinal River Coals Ltd.

No one appearing for interveners (interveners).

solicitors of record:

Sierra Legal Defence Fund, Toronto, for appellants (applicants).

Deputy Attorney General of Canada for respondent (respondent) Minister of Fisheries and Oceans.

Fraser Milner, Edmonton, for respondent (respondent) Cardinal River Coals Ltd.

Alberta Energy & Utilities Board, Calgary, for interveners (interveners).

The following are the reasons for judgment rendered in English by

Sexton J.A.: At the conclusion of the oral hearing this Court granted the appellants' appeal with reasons to follow. These reasons are issued in accordance with that order.

This is an appeal from an order of the Trial Division, dated June 12, 1998 [[1998] F.C.J. No. 821 (QL)], dismissing the appellants' application for judicial review of a report, dated June 6, 1997, of the Joint Review Panel for the Cheviot Coal Project. The report consisted of an environmental assessment of a proposal of the Cardinal River Coals Ltd. (CRC) to build and operate a 23 km open-pit coal mine three km east of Jasper National Park in Alberta, which is an environmentally rich area that is the home for a variety of wildlife. It is argued that the construction and operation of the mine, which is expected to be in operation for 20 years, will have a dramatic impact on the environment.

The appellants seek to set aside the decision of the learned Applications Judge and ask this Court to grant, *inter alia*, an order of prohibition against the Minister of Fisheries and Oceans (MFO) from issuing authorizations under the *Fisheries Act,* R.S.C., 1985, c. F-14, on the basis that the

environmental assessment conducted by the Joint Review Panel, did not comply with the statutory requirements stipulated in the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA). The Applications Judge dismissed the application on the preliminary basis that the federal response issued by the Minister had not been challenged and therefore served as a barrier to the appellants' claim. Consequently, the merits of the appellants' argument that the panel report did not comply with CEAA were not addressed. The appellants argue that the Applications Judge erred in dismissing their application on this basis. They ask this Court to send this case back to the Trial Division where their argument concerning the sufficiency of the report can be fully argued. In the alternative, they asked that the merits of their case be heard, *de novo*, in this Court. Before turning to the discussion, I will mention the statutory sections relevant to this appeal.

Relevant Provisions

Section 5 of CEAA requires that an environmental assessment be completed before the Minister can issue authorizations. The relevant portion states:

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project . . . .

Section 5 is reinforced by section 13 which states:

13. Where a project is described in the comprehensive study list or is referred to a mediator or a review panel, notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made thereunder shall be exercised or performed that would permit the project to be carried out in whole or in part unless an environmental assessment of the project has been completed and a course of action has been taken in relation to the project in accordance with paragraph 37(1)(*a*).

Section 16 of the Act, requires certain matters, such as the cumulative environmental effects and alternatives to the project, be given consideration by the panel in the report. As will be evident, the merits of the appellants' argument are not at issue. Subsections 16(1) and (2) read as follows:

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(*b*) the significance of the effects referred to in paragraph (*a*);

(*c*) comments from the public that are received in accordance with this Act and the regulations;

(*d*) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the projects; and

(*e*) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the purpose of the project;

(*b*) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(*c*) the need for, and the requirements of, any follow-up program in respect of the project; and

(*d*) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Subsection 37(1) [as am. by S.C. 1994, c. 46, s. 3] requires the panel report be submitted to the Minister for consideration and response. It states:

37. (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23(*a*), the comprehensive study report:

(*a*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part and shall ensure that those mitigation measures are implemented; or

(*b*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

Subsection 37(1.1) [as am. *idem*] dictates the process to be taken by the Minister. It states:

37. (1.1) Where a report is submitted by a mediator or review panel,

(*a*) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

(*b*) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (*a*), require the mediator or review panel to clarify any of the recommendations set out in the report; and

(*c*) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (*a*).

As seen in paragraph 37(1.1)(*c*), once the response has been approved by the Governor in Council, the Minister "shall take a course of action" that is in conformity with the approval of the Governor in Council.

Sequence of Events

In May 1996, CRC applied to the Department of Fisheries and Oceans for authorizations under the *Fisheries Act* for its project. The MFO decided that the project may cause significant environmental effects and, therefore, should be referred to a panel under CEAA. Since an environmental review was also required under provincial legislation, the federal Minister of Environment and the Alberta Energy and Utilities Board (EUB) agreed to hold a joint federal and provincial review as is provided for under the legislation. The project was referred to the panel in the fall of 1996 and the panel conducted hearings from January 13, 1997 to February 20, 1997, with an additional hearing date on April 10, 1997.

On June 17, 1997 the Joint Review Panel issued its report and recommendations, entitled *Report of the EUB-CEAA Joint Review Panel: Cheviot Coal Project, Mountain Park Area, Alberta*. On October 2, 1997, the Minister of Fisheries and Oceans, with the approval of the Governor in Council, issued a federal response to the panel report, which indicated that authorizations for the project would be issued under the *Fisheries Act.* On October 31, 1997, the appellants initiated the application for judicial review that is the subject of this appeal. As previously mentioned, the Applications Judge dismissed the application on June 12, 1998, for the reasons now summarized.

Decision of the Applications Judge

The Applications Judge held that the appellants were obligated to challenge the federal response in order to raise the sufficiency of the panel report and to ground their claim of prohibition against the Minister. The arguments advanced by the appellants related to alleged errors on the part of the Joint Review Panel, such as failing to comply with section 16 of CEAA, and not to the federal response. The Applications Judge found that the panel report was no longer the document on which the Minister would rely, since the response dictated the Minister's course of action under section 37 of CEAA. Thus, he was of the view that once the federal response had been issued, it was too late for the appellants to rely on errors made by the Joint Panel in their report. Accordingly, he dismissed the application for judicial review, stating that the federal response constituted a barrier to the relief claimed by the appellants.

Subsequent to the Applications Judge's decision, the Minister of Fisheries and Oceans issued an authorization for part of the CRC project. The appellants seek to set aside this authorization in another judicial review application (T-1790-98) that is awaiting hearing in the Trial Division, on the same basis that they seek relief in the present case, namely that the panel report does not comply with CEAA. On September 4, 1998, Chief Justice Isaac ruled that that application could not be heard with this appeal since the authorization was issued on a date subsequent to the application hearing.

Analysis

The crux of this appeal is whether the existence of an unchallenged federal response should bar the appellants from seeking prohibition against the Minister for future authorizations. In my view, the Applications Judge was in error in accepting the respondents' argument that the response supersedes the report.

In a preliminary motion prior to this appeal [(1997), 26 C.E.L.R. (N.S.) 238 (F.C.T.D.)], the respondents sought to strike out the appellants' original application on the basis that it was time-barred. Hugessen J., starting at paragraph 4, pages 240-242, made the following comments:

Rather I think the Report should be seen as an essential statutory preliminary step required by the *Canadian Environmental Assessment Act* prior to a decision by the Minister to issue an authorization under section 35 of the *Fisheries Act*.

That decision has not been made and I think it is a fair reading of the Applicants' Originating Notice of Motion that it seeks primarily to prohibit the Minister from making it on the grounds that the Panel Report is fatally defective.

Prohibition (like *mandamus* and *quo warranto*) is a remedy specifically envisaged in section 18 of the *Federal Court Act* and like them it does not require that there be a decision or order actually in existence as a prerequisite to its exercise.

I agree with the view presented in this passage, which was adopted by Gibson J. in *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [1998] 4 F.C. 340 (T.D.), at page 352, note 7.

The view that the panel report is an essential statutory prerequisite to the issuance of approvals is supported by previous case law. I agree with the decisions of *Bowen v. Canada (Attorney General)*, [1998] 2 F.C. 395 (T.D.); *Friends of the West Country*, *supra*; and *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 F.C. 325 (T.D.) which hold that an environmental assessment carried out in accordance with the Act is required before a decision such as the Minister's authorization in the present case can be issued. This view is reinforced by the decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 which confirmed that the guidelines that were a pre-cursor to CEAA (the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467) were mandatory rather than directory in nature and, thus, failure to comply with them would deny the responsible authority the jurisdiction to proceed.

The requirements of CEAA are legislated directions that are explicit in mandating the necessity of an environmental assessment as a prerequisite to ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. It is equally clear that any assessment must be conducted in accordance with the Act, including for example, the requirement imposed under section 16 of CEAA. The fact that a federal response has been issued and remains unchallenged does not change these requirements. Thus, the appellants are entitled to argue the merits of their case.

The appellants are entitled to seek prohibition against the Minister on the basis that the panel report is materially deficient. The fact that the federal response was not challenged is irrelevant to the appellants' claim. In my view, the federal response does not supersede the panel report, nor can it, as the respondents suggest, potentially cure any deficiencies in the panel report. The two are separate statutory steps with distinct purposes and functions.

Section 37 of CEAA dictates that the Minister must consider the panel report before embarking on a course of action. Subparagraph 34(*c*)(i) establishes that this report must set out the "rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project". Paragraph 34(*d*) makes it clear that it is this report that contains the results of the environmental assessment that must be submitted to the Minister. Finally, subsection 2(1) defines "environmental assessment" as "an assessment of the environmental effects of the project that is conducted in accordance with this Act". Thus the report that must be submitted to the Minister

pursuant to paragraph 34(*d*) must contain, pursuant to subparagraph 34(*c*)(i) and subsection 2(1), the results of an environmental assessment conducted in compliance with the requirements of CEAA.

In sum, the combined effect of paragraphs 34(*c*), (*d*), subsection 2(1) and section 37 is that before taking a course of action, the Minister must consider an environmental assessment, that was conducted in accordance with the Act. Therefore, the appellants are entitled to bring into question the report and are not barred from doing so because they did not challenge the federal response.

I believe that the proper approach of the Applications Judge should have been, on the assumption that an environmental assessment in accordance with CEAA was an essential pre-requisite to the issuance of any authorizations of the Minister, to proceed to analyze the arguments advanced by the appellants, in order to decide whether a proper environmental assessment had been conducted by the Joint Panel.

In my view, the substance of the appellants' argument on the sufficiency of the panel report is best heard at the Trial Division. While it is theoretically possible to proceed with the merits of their case *de novo* in this Court, I feel that for the practical reasons given by the appellants, the matter should be remitted to the Trial Division and heard together with the application for judicial review in T-1790-98. These cases raise the same issues and are based on the same facts. We note that at the hearing of the appeal the appellants agreed to expedite the hearing of T-1790-98 if this Court was inclined to follow their suggestion that these applications be heard together. This is the proper course to follow, as it would reduce any prejudice to the respondent on account of delay.

<u>Conclusion</u>

The appeal should be allowed, the decision of the Applications Judge set aside and the matter referred back to the Trial Division for determination on the merits. Costs should be awarded to the appellants.

Strayer J.A.: I agree.

Robertson J.A.: I agree.