

tools, motors (except for vehicles), machine couplings and belting (except for vehicles).

[20] There will be no order as to costs.

Appeal allowed in part.

Editor: Reginald W. Curtis/gms

In The Matter Of Environmental
Assessment and Review Process Guidelines
Order

Pippy Park Conservation Society
Incorporated (applicant) v. The Minister
of Environment and The Minister of
Transport (respondents)
(T-2324-93)

**Indexed As: Pippy Park Conservation
Society Inc. v. Canada (Minister of
the Environment) et al.**

Federal Court of Canada
Trial Division
Pinard, J.
November 10, 1994.

Summary:

On August 20, 1993, the Minister of Transport publicly approved construction of the Outer Ring Road project, a four lane highway running across the area north of St. John's, Newfoundland, known as Pippy Park. Pippy Park Conservation Society Inc. applied for judicial review of the Minister's decision on the grounds that the requirements of ss. 10(2) and 13 of the Environmental Assessment and Review Process Guidelines Order (EARP Guidelines Order) were not met.

The Federal Court of Canada, Trial Division, dismissed the application.

Pollution Control - Topic 1842

Environmental assessments or impact studies - Environmental Assessment and Review Process Guidelines Order (EARP Guidelines Order) - Interpretation - S. 10(2) - On August 20, 1993, Transport Canada publicly announced its intention to proceed with construction on the Outer Ring Road in Newfoundland - Pippy Park Conservation Society applied for judicial review of the decision arguing, inter alia, that Transport Canada failed to comply with s. 10(2) of the EARP Guidelines Order because they relied upon an Environmental Impact Statement prepared by the Provincial Department of Transport - Pippy Park stated that such reliance constituted a "form of prohibited delegation", contrary to s. 10(2) - The Federal Court of Canada, Trial Division, dismissed the application - The court reviewed s. 10 and determined that nothing in the section "prohibits the reliance upon the work generated by another level of government, if relevant and reliable" - See paragraphs 12 to 14.

Pollution Control - Topic 1842

Environmental assessments or impact studies - Environmental Assessment and Review Process Guidelines Order (EARP Guidelines Order) - Interpretation - S. 13 - On August 20, 1993, Transport Canada publicly announced its intention to proceed with construction on the Outer Ring Road in Newfoundland and stated that it would receive public comment on its decision until November 19, 1993 - Receiving only two submissions, Transport Canada decided not to refer the Outer Ring Road proposal to the Minister of Environment for public review by a panel - Pippy Park Conservation Society applied for judicial review of the decision arguing, inter alia, that the Minister failed to comply with s. 13 of the EARP Guidelines Order - The

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Federal Court of Canada, Trial Division, dismissed the application where it determined that the decision was made in good faith and was based on relevant considerations - See paragraphs 15 to 17.

Pollution Control - Topic 1842

Environmental assessments or impact studies - Environmental Assessment and Review Process Guidelines Order (EARP Guidelines Order) - Interpretation - S. 13 - The Federal Court of Canada, Trial Division, stated that when a proposal is not referred to the Minister of Environment for public review by a panel, the "court ought not to interfere unless it is satisfied that there was no evidence or reasonable basis in the environmental assessment studies and other relevant documents considered by the initiating department to support the latter's conclusion that public concern was not such that a public review was desirable" - See paragraph 15.

Pollution Control - Topic 1847

Environmental assessments or impact studies - Environmental Assessment and Review Process Guidelines Order (EARP Guidelines Order) - Public review by a panel - [See second and third **Pollution Control - Topic 1842**].

Cases Noticed:

Friends of the Island Inc. v. Canada (Minister of Public Works) et al. (1993), 65 F.T.R. 180 (T.D.), refd to. [para. 12, footnote 1].

Cantwell et al. v. Canada (Minister of the Environment) et al. (1991), 41 F.T.R. 18 (T.D.), refd to. [para. 12, footnote 1].

Statutes Noticed:

E.A.R.P. Guidelines Order - see Environmental Assessment and Review Process Guidelines Order.
Environmental Assessment and Review

Process Guidelines Order, SOR/84-467, ss. 3, 4(1)(a), 4(1)(b), 6(c), 10(1), 10(2), 12(c), 13, 15, 19(a)(i), 19(a)(ii) [para. 2].

Counsel:

V. Randell J. Earle, Q.C., for the applicant;
Joseph De Pencier, for the respondent.

Solicitors of Record:

O'Dea, Earle, St. John's, Newfoundland, for the applicant;
George Thomson, Deputy Attorney General of Canada, Ottawa, Ontario, for the respondent.

This application was heard on October 7, 1994, at Ottawa, Ontario, before Pinard, J., of the Federal Court of Canada, Trial Division, who delivered the following decision on November 10, 1994.

[1] **Pinard, J.:** This is an application for judicial review in respect of "the decision announced August 20, 1993, wherein representatives for the respondent Minister of Transport approved the Outer Ring Road project for construction".

[2] The proposed Outer Ring Road is a joint project under the Newfoundland Transportation Initiative with the Government of Canada providing 68.2 million dollars in funding. If constructed, it would consist of a four-lane highway running across the area north of St. John's, Newfoundland, known as Pippy Park. All the parties agree that the project is subject to the **Environmental Assessment and Review Process Guidelines Order**, SOR/84-467 ("**Guidelines Order**") which includes the following relevant provisions:

"3. The Process shall be a self-assessment process under which the initiating depart-

ment shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision-making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

"4(1) An initiating department shall include in its consideration of a proposal pursuant to section 3

(a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and

(b) the concerns of the public regarding the proposal and its potential environmental effects.

.....

"6. These Guidelines shall apply to any proposal

.....

(c) for which the Government of Canada makes a financial commitment; or

.....

"10(1) Every initiating department shall ensure that each proposal for which it is the decision-making authority shall be subject to an environmental screening or initial assessment to determine whether, and the extent to which, there may be any potentially adverse environmental effects from the proposal.

"10(2) Any decisions to be made as a result of the environmental screening or

initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

.....

"12. Every initiating department shall screen or assess each proposal for which it is the decision-making authority to determine if

(c) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;

.....

"13. Notwithstanding the determination concerning a proposal made pursuant to section 12, if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a Panel.

.....

"15. The initiating department shall ensure

(a) after a determination concerning a proposal has been made pursuant to section 12 or a referral concerning the proposal has been made pursuant to section 13, and

(b) before any mitigation or compensation measures are implemented pursuant to section 14,

that the public have access to the information on and the opportunity to respond to the proposal in accordance with the spirit and principles of the Access to Information

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Act.

.....

"19. It is the role of every department that has specialist knowledge or responsibilities relevant to a proposal to

(a) provide to the initiating department any available data, information or advice that the initiating department may request concerning

(i) any regulatory requirements related to the project, and

(ii) the environmental effects and the directly related social impact of those effects; and ..."

The Facts

[3] Under the Newfoundland Transportation Initiative, a 1988 federal-provincial funding agreement, the Government of Canada agreed to fund improvements to the Trans-Canada Highway in Newfoundland. The Outer Ring Road has been identified as one such improvement, the concept having been originated in 1966 in the St. John's Metropolitan Area Municipal Plan. The "proposal" to provide federal funding, through Transport Canada for the Outer Ring Road, triggered the application of the **Guidelines Order**. In addition, the Outer Ring Road was subject to environmental assessment under the provincial **Environmental Assessment Act (1980)**. An Environmental Impact Statement ("EIS") was completed in December 1987 in accordance with provincial legislation. The EIS, an Environmental Protection Plan (consisting of a Landscape Rehabilitation Plan and a Noise Mitigation Plan) and a Traffic Study were submitted to Transport Canada by the Government of Newfoundland in late 1990 and early 1991.

[4] Transport Canada, "the initiating department", conducted an environmental screening of the Outer Ring Road and the provincial documentation. As part of the screening exercise, Transport Canada sought the advice of the federal departments of the Environment and of Fisheries and Oceans.

[5] In 1991, Transport Canada determined that the EIS addressed the federal assessment requirements with respect to the biophysical concerns. However, the department concluded that supplementary information was required both to confirm the technical justification for the project and to address more thoroughly the social and economic effects of the project. On August 12, 1991, Transport Canada retained Ledrew, Fudge and Associates Limited to prepare an assessment identifying the directly related social and economic effects resulting from the construction of the proposal. In fact, Ledrew, Fudge was given a broader mandate to review social and economic impacts at large, as well as to report on the technical justification and need for the proposal. Ledrew, Fudge prepared a report entitled "Outer Ring Road -- Social and Economic Initial Environmental Evaluation" ("IEE") in accordance with the Canadian Council of Resource and Environment Ministers "Environmental Assessment in Canada -- 1988 Summary of Current Practice" ("CCREM Environmental Assessment Practice") issued by the Federal Environmental Assessment Review Office ("FEARO"). Ledrew, Fudge also considered the **Environmental Assessment Guidelines (1986)** issued by FEARO (which was the final version of a 1985 draft "Initial Assessment Guide"). Ledrew, Fudge retained subconsultants, including Proctor and Redfern Ltd. (to address technical justification relating to traffic) and S. Kavanagh and Associates Ltd. (for drafting support and to conduct a traffic survey).

[6] In May 1992, Ledrew, Fudge submitted the IEE to Transport Canada. The IEE addresses, among other matters, the impact of the Outer Ring Road on Pippy Park. Based on that report, the EIS and Component Studies, the advice received from other federal government departments and agencies and its review of the Outer Ring Road, the Transport Department's Highway Policy and Programs Branch concluded and recommended that federal funds be released so that construction of the Outer Ring Road could proceed. In July 1992, Transport Canada officials prepared an initial environmental assessment pursuant to s. 10 of the **Guidelines Order** with a recommendation for the Minister of Transport that the potentially adverse environmental effects that could be caused by the Outer Ring Road were insignificant or mitigable with known technology. On August 27, 1992, the Minister accepted the recommendation and signed-off on the initial environmental assessment, thereby making a determination in accordance with s. 12(c) of the **Guidelines Order**.

[7] By a letter dated October 21, 1992, the Minister of Transport notified his Newfoundland counterpart of his preparedness to release the federal funding of 68.2 million dollars for construction under the Newfoundland Transportation Initiative, from the 405 million dollars which had been allotted for improvements to the Trans-Canada Highway.

[8] In the meantime, the Government of Newfoundland reviewed its EIS, and other relevant documents (such as the IEE) to determine if there had been any change in the conditions since September 1988, necessitating another provincial environmental assessment of the Outer Ring Road. Terence Goodyear, P.Eng., was commissioned to conduct public hearings and review the EIS.

Transport Canada withheld public notification of its s. 12 determination and the approval of federal funding pending the outcome of the review of the Government of Newfoundland. A letter dated January 22, 1993, to the Federal Minister of Transport from the Newfoundland Minister of Works, Services and Transportation, formally confirmed the plans for this review. In April 1993, Terence Goodyear reported to those provincial ministers responsible, that there had not been sufficient changes to warrant another complete environmental assessment and that the EIS remained valid. Transport Canada closely monitored the public input into the Goodyear Commission. The Government of Newfoundland accepted Terence Goodyear's conclusions and recommendations and exempted the Outer Ring Road from any requirement for further provincial environmental assessment.

[9] With both the provincial and federal environmental assessments completed, the Governments of Canada and Newfoundland announced their intention to proceed with the Outer Ring Road at a news conference held August 20, 1993. In addition, copies of the IEE, the report of Terence Goodyear and other information were available to the public at the news conference. Having publicly announced the s. 12(c) **Guidelines Order** determination by means of the news conference, and pursuant to s. 15 of the **Guidelines Order**, Transport Canada made public the documentation upon which its determination was based and announced that it would receive public comment on its determination until November 19, 1993. In addition, the documentation and Transport Canada's announcement that it would receive public comment were communicated to John C. Bear, the applicant's president, on or about October 13, 1993. Transport Canada received limited public comment in response to its invitation to the public: two written

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submissions, one by the applicant. Neither appears to have provided any information not previously available to Transport Canada. Based on that public response, Transport Canada decided not to refer the Outer Ring Road proposal to the Minister of Environment, pursuant to s. 13 of the **Guidelines Order**, for public review by a Panel. The evidence further shows that Transport Canada considered its position on referral to a Panel due to public concern, in light of the affidavit material filed in support of this application for judicial review. It concluded that almost all of the material attached to the two affidavits of John C. Bear was available to and considered by Transport Canada in the course of its determination regarding the Outer Ring Road. After reviewing the additional material, Transport Canada confirmed its position that public concern was not such that a public review was desirable.

The Issues

[10] At the hearing before me, learned counsel for the applicant argued, in essence, that the respondent Minister of Transport did not follow the requirements of s. 10(2) and s. 13 of the **Guidelines Order** in deciding to fund the Outer Ring Road. With respect to s. 10(2), he contended that Transport Canada's reliance upon the Environmental Impact Statement prepared by the Provincial Department of Transport constituted a form of prohibited delegation. With respect to s. 13, he submitted basically that Transport Canada, the initiating department, was wrong, given the lack of genuine public input, not to refer the proposal to the Minister of Environment for public review by a Panel.

[11] The real issues to be determined, therefore, are whether given the circumstances of this case, the requirements of s. 10(2) and s.

13 of the **Guidelines Order** have been met.

Analysis

[12] Dealing first with the applicant's argument based on s. 10(2) of the **Guidelines Order**, s. 10 does not specify any particular form for the environmental screening or initial assessment [see footnote 1], nor who must actually conduct the initial environmental assessment referred to in subsection (1), but does prohibit delegation of decision-making pursuant to subsection (2). Nothing prohibits the reliance upon the work generated by another level of government, if relevant and reliable.

[13] Here, Transport Canada's initial environmental assessment, made pursuant to s. 10(1), completed in July 1992 and approved by the Minister of Transport on August 27, 1992, was comprised of the following:

- (a) Transport Canada's consideration of the EIS prepared under the provincial **Environmental Assessment Act**, the **Environmental Protection Plan** and a **Traffic Study**;
- (b) The advice from the federal Departments of the Environment and of the Fisheries and Oceans pursuant to s. 19 of the **Guidelines Order**;
- (c) Transport Canada's environmental screening of the Outer Ring Road and the provincial documentation - concluding that further information was required on the technical justification and the social and economic effects; and
- (d) the Ledrew, Fudge IEE.

[14] There is no evidence that any decisions made as a result of such initial environmental assessment were delegated by Trans-

port Canada to any other body. Consequently, Transport Canada's use of the relevant and reliable information generated by the provincial assessment of the Outer Ring Road, in the circumstances, did not constitute delegation contrary to s. 10(2) of the **Guidelines Order**.

[15] Having regard to the applicant's second argument based upon s. 13 of the **Guidelines Order**, public review by a Panel due to public concern, for the purpose of such a referral, can be monitored before as well as after the determination made pursuant to s. 12. Here, the fact that Transport Canada did not refer the relevant proposal to the Minister of the Environment for public review by a Panel is not in dispute. In such a matter, this court ought not to interfere unless it is satisfied that there was no evidence or reasonable basis in the environmental assessment studies and other relevant documents considered by the initiating department to support the latter's conclusion that public concern was not such that a public review was desirable. In that regard, the Memorandum to Minister issued from Transport Canada and approved by the Minister of Transport on August 27, 1992, is supported by the document entitled Outer Ring Road Project - Background which states:

"... it is the opinion of Transport Canada that there is not significant public concern. This conclusion is based on the strong support for the project by the St. John's City Council, all municipalities on the Eastern Avalon Peninsula, the St. John's Board of Trade and the citizens of St. John's. The issue was addressed in the Initial Environmental Evaluation Study and it found that 'those against the Outer Ring Road may be characterized as comprising a "core" of individuals inalterably opposed to the concept, and a large group whose concerns may be addressed by the application of appropriate mitigation measures'. It is also recommended that a Public Moni-

toring Group be established to focus on specific issues and monitor the mitigation measures from the EIS."

[16] Transport Canada also closely monitored the public input to the Goodyear Commission and its report of April 1993. In addition, Transport Canada took into account the limited public comment that it received before November 19, 1993 in response to its invitation for public comment on its determination made pursuant to s. 12(c) of the **Guidelines Order**. Finally, Transport Canada duly considered its position regarding a possible referral for a Panel review due to public concern, in light of the affidavit material filed in support of this application for judicial review. The evidence is clear that the applicant, in particular, has had many opportunities to express the views of its members in the course of both the federal and the provincial environmental assessment processes.

[17] Thus, the decision of the initiating department not to exercise the s. 13 authority by referring the matter for panel review due to public concern, appears to have been made in good faith and to have been based on relevant considerations, despite the fact that the applicant's views were not accepted. There is no evidence that the decision was made on the basis of irrelevant or improper considerations. Under such circumstances, it is not for the court to substitute its own assessment of the weight and nature of "public concern" and thereby determine whether a public review is "desirable" [see footnote 2]. The applicant's second argument must also fail.

[18] Consequently, the application will be dismissed.

Application dismissed.

Editor: Kelli A. Simmonds/gms

Footnotes

1. **Friends of the Island Inc. v. Canada (Minister of Public Works) et al.** (1993), 65 F.T.R. 180, at 203 (T.D.); and **Cantwell et al. v. Canada (Minister of the Environment) et al.** (1991), 41 F.T.R. 18, at 31 (T.D.); affirmed, F.C.A. No. A-121-91, unreported decision of June 6, 1991.
2. See **Cantwell**, supra, note 1, at 7.

Alexander Rowse (applicant) v.
The Correctional Service of Canada
(respondent)
(T-304-94)

**Indexed As: Rowse v. Correctional
Service of Canada**

Federal Court of Canada
Trial Division
Pinard, J.
November 10, 1994.

Summary:

A prison inmate applied for judicial review of a decision to involuntarily transfer him from a medium to maximum security institution. The inmate claimed that the failure to provide him with sufficient information to rebut the allegations relied on in support of the transfer breached the duty to act fairly and violated his right to liberty (Charter, s. 7).

The Federal Court of Canada, Trial Division, dismissed the application.

Administrative Law - Topic 2266

Natural justice - Duty of fairness - Procedural fairness - What constitutes - A prison inmate applied for judicial review of a decision to involuntarily transfer him

from a medium to maximum security institution - The inmate claimed that the failure to provide him with sufficient information to rebut the allegations relied on in support of the transfer breached the duty to act fairly and violated his right to liberty (Charter, s. 7) - The Federal Court of Canada, Trial Division, dismissed the application - The inmate was advised that the incidents relied on were his involvement in the institution drug trade, his muscling and intimidation of other inmates and his involvement in the firebombing of an inmate's cell - Confidential sources need not be disclosed - There was no breach of the duty of fairness and no denial of liberty under s. 7 of the Charter - The inmate was given sufficient information to permit him to respond to the allegations, which he did.

Civil Rights - Topic 646

Liberty - Limitations on - Prisoners and imprisonment - [See **Administrative Law - Topic 2266**].

Prisons - Topic 1026

Administration - Powers re prisoners - Transfers - [See **Administrative Law - Topic 2266**].

Cases Noticed:

Gallant v. Correctional Service of Canada (Pacific Region) (1989), 92 N.R. 292; 25 F.T.R. 79; 36 Admin. L.R. 261 (F.C.A.), refd to. [para. 10].
R. v. Lyons, [1987] 2 S.C.R. 309; 80 N.R. 161; 82 N.S.R.(2d) 271; 207 A.P.R. 271, refd to. [para. 11].

Statutes Noticed:

Canadian Charter of Rights and Freedoms, 1982, s. 7 [para. 3].
Commissioner's Directive (Penitentiaries), No. 540, Annex A, para. 6 [para. 5].
Corrections and Conditional Release Act,