Canada (Minister of Environment) v. Hamilton Wentworth (Municipality), 2001 FCA 347 (CanLII)

Date: 200111

Dockets: A-312-01 & A-313-

Neutral citation: 2001 FCA 3

CORAM: RICHARD C.J.

LINDEN J.A.

EVANS J.A.

BETWEEN:

MINISTER OF ENVIRONMENT and

MINISTER OF FISHERIES AND OCEANS

Appellants

and

REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH

Respondent

and

FRIENDS OF RED HILL VALLEY, HAMILTON CHAMBER OF COMMERCE

and ATTORNEY GENERAL OF ONTARIO

Interveners

Heard at Ottawa, Ontario, on November 13 and 14, 2001.

Judgment delivered from the Bench at Ottawa, Ontario, on November 14, 2001.

REASONS FOR JUDGMENT OF THE COURT BY: RICHARD C.J.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario

on November 14, 2001.)

RICHARD C.J.

[1] This is an appeal from the decision of Dawson J. in the Trial Division, 2001 FCT 381 (CanLII), 2001 FCT 381, allowing two applications for judicial review brought by the applicant, the Regional Municipality of Hamilton-Wentworth, flowing from the decision of the Minister of the Environment, made at the request of the Minister of Fisheries and Oceans to refer to a review panel under the *Canadian Environmental Assessment Act* ("*CEAA*") the completion of a major expressway corridor around the City of Hamilton.

[2] The only issue raised in this appeal is whether the *CEAA* applies at all to the expressway project. Despite the able submissions made on behalf of the appellants and of the intervener, the Friends of Red Hill Valle we have not been persuaded that the extensive and thoughtful reasons of the Applications Judge revealed that she made any error that would warrant the intervention of the Court.

[3] We note at the outset that this expressway project originated in the mid-1950s. In the last twenty yea or so it has been the subject of lengthy planning, consultations and review processes, including its approval in 198 following an environmental and planning assessment by the Ontario Joint Board. Further, substantial sums of pub money have already been invested in the project; land has been acquired, buildings demolished and construction contracts have been let. Of the 20 kms. of the whole expressway, only the final 8 kms. remain to be built in order complete an important transportation corridor linking the Queen Elizabeth Way and Highway 403 so as to form a ring road around the City of Hamilton.

[4] In all of the above circumstances, we are of the view that it would be inappropriate for the Court to impose further delays by reserving our judgment in a matter that seems to us to be quite clear. Therefore, without attempting to detail the factual background to the case, which was so ably and fully described below, we turn to th principal submissions made on behalf of the appellants.

[5] The first issue is whether the project was exempted from the *CEAA* by subsection 74(4). We agree w the Applications Judge's conclusion that the construction of the expressway was initiated prior to June 22, 1984, even though actual building had not at that time started. In a project of this complexity, it is simplistic to attach undue significance to when "the shovel hit the ground". The steps taken by the Region before June 22, 1984 ampl support the conclusion that the expressway's construction had been initiated before that date, a question that, as counsel for the respondent correctly argued, is largely one of fact.

[6] Second, we are not persuaded that the design changes made by the Region in 1998 amount to a "modification ... or other alteration to the project in whole or in part" so as to bring the project back into the *CEA* These changes were made to mitigate the impact of the road upon fish habitat in a creek that the road crossed: the involved realigning part of the creek and placing it within natural borders, rather than in a concrete bed. There wa no alteration to the route taken by the road.

[7] In our view, these alterations were aptly described in the record as "mitigating measures"; they do no constitute modifications or alterations for the purpose of subsection 74(4) because they are of minor significance i relation to the project as a whole, and the bulk of the evidence tended to establish that they would have a benefici effect on the fish habitats.

[8] Any concern on this score can be taken into account by the Minister of Fisheries and Oceans when considering the Region's application for an authorization under the *Fisheries Act*. They certainly do not justify potentially subjecting the uncompleted portion of the expressway to another full environmental assessment, including, possibly, a panel review.

[9] Third, we agree with Dawson J.'s further conclusion that the application of the *CEAA* is excluded by subsection 11(1). In our opinion, the decision in *Tsawwassen Indian Band v. Canada (Minister of Finance) et al.*, 1998 CanLII 7586 (FC), (1998) 145 F.T.R. 1; affirmed (2001) FCA 58, cannot be distinguished from the facts of this case. Here, too, the advanced stage of the project, including its partial construction, meant that by January 1, 1995, there was no "project" in existence within the meaning of the *Act* for which an environmental assessment w required. We do not regard as a material distinction the fact that, in the case at bar, minor changes had been made the design of the project.

[10] For these reasons, we would dismiss the appeal with one set of costs payable by the appellants to the respondent.

"J. Richard"

Chief Justice