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Pippy Park Conservation Society Inc. v. Canada (Minister of Environment)

Re Environmental Assessment and Review Process Guidelines Order

PIPPY PARK CONSERVATION SOCIETY, INCORPORATED v. MINISTER OF ENVIRONMENT and MINISTER OF TRANSPORT

Federal Court of Canada — Trial Division

Pinard J.

Heard: October 7, 1994

Judgment: November 10, 1994

Docket: Doc. T-2324-93

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Counsel: *V. Randell J. Earle, Q.C.*, for applicant.

Joseph De Pencier, for respondent.

Subject: Environmental

Environmental Law --- Statutory protection of environment — Environmental assessment.

Environmental assessment — Environmental Assessment and Review Process Guidelines Order — Application of Guidelines Order to provincial road project involving federal funds — Transport Canada relying in part on provincial environmental assessment documents — Transport Canada declining to refer matter for public review by panel — Applicant applying for judicial review — Transport Canada's use of provincial documents not improper delegation — Court declining to interfere with Transport Canada's decision not to refer matter for public review — Application dismissed — Environmental Assessment and Review Process Guidelines Order, SOR/84-476.

Pursuant to a 1988 federal-provincial funding agreement, Transport Canada agreed to provide federal funds to construct the Outer Ring Road project in Newfoundland. The proposal to provide federal funds triggered the application of the Environmental Assessment and Review Process Guidelines Order. Transport Canada, as the initiating department, conducted an environmental screening with input from other federal agencies. In 1991, Transport Canada determined that while the province's Environmental Impact Statement ("EIS") for the project satisfactorily addressed biophysical concerns, further work was required respecting social and economic effects and the technical justification for the project. Accordingly, Transport Canada retained consultants to undertake the necessary work.

The consultants completed and submitted an Initial Environmental Evaluation ("IEE"), which considered the impact of the project on Pippy Park. Transport Canada officials then prepared an initial environmental assessment pursuant to

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s. 10 of the Guidelines Order, and recommended that the federal funds be released to permit road construction to commence. In 1992, the Minister of Transport accepted the recommendation and the initial environmental assessment's finding that the project's potential adverse effects were insignificant or mitigable with known technology. Shortly thereafter, the Newfoundland government determined that its original EIS was still valid, and decided to exempt the project from any further provincial environmental assessment.

After the Governments of Canada and Newfoundland held a joint news conference to announce the project, Transport Canada made public the relevant documentation and invited public comment on its determinations pursuant to the Guidelines Order. Only the applicant and one other person provided written comments, and neither submission provided any information that was not previously available to Transport Canada. Based on the limited public response, Transport Canada decided against referring the matter to the Minister of Environment for public review by a panel pursuant to s. 13 of the Guidelines Order. The applicant then applied for judicial review on the grounds that the Minister of Transport failed to comply with the requirements of ss. 10(2) and 13 of the Guidelines Order.

Held:

The application was dismissed.

Section 10 of the Guidelines Order does not specify any particular form for an environmental screening or initial assessment, nor does the section specify who must actually conduct the initial environmental assessment. Similarly, while s. 10(2) prohibits the initiating department from delegating decision-making authority, nothing prohibits the initiating department from relying upon the work generated by another level of government, if relevant and reliable. In this case, there was no evidence that Transport Canada delegated its decision-making authority to any other body. Accordingly, Transport Canada's use of relevant and reliable information from the provincial environmental assessment did not constitute delegation contrary to s. 10(2).

This was not a situation warranting interference with Transport Canada's refusal to refer the proposal for public review under s. 13 of the Guidelines Order, unless there was no evidence or reasonable basis to support the conclusion that public concern did not warrant a public review panel. In this case, Transport Canada had received and monitored public input, and the applicant was provided numerous opportunities to express its views in both the federal and provincial environmental assessment processes. Thus, the decision not to refer the matter for public review appears to have been made in good faith and based on relevant considerations.

Cases considered:

Cantwell v. Canada (Minister of the Environment) (1991), 6 C.E.L.R. (N.S.) 16, 41 F.T.R. 18, affirmed (June 6, 1991), Doc. A-124-91, Pratte, Mahoney and Desjardins J.J.A. (Fed. C.A.) — referred to

Friends of the Island Inc. v. Canada (Minister of Public Works) (1993), 11 C.E.L.R. (N.S.) 253, 65 F.T.R. 180 [additional reasons at (January 5, 1995), Doc. T-1394-93 (Fed. T.D.)] — referred to

Statutes considered:

Environmental Assessment Act, The, S.N. 1980, c. 3 [R.S.N. 1990, c. E-14].

Regulations considered:

Department of the Environment Act, R.S.C. 1985, c. E-10 —

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

s. 3

s. 4(1)

s. 6(c)

s. 10

s. 10(1)

s. 10(2)

s. 12

s. 12(c)

s. 13

s. 15

s. 19

s. 19(a)

Application for judicial review.

Pinard J.:

1 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 department 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.

(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 13,

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 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 Department 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 sub-consultants, 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

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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 subs. 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 subs. 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 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 subs. 10(2) and s. 13 of the *Guidelines Order* in deciding to fund the Outer Ring Road. With respect to subs. 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

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subs. 10(2) and s. 13 of the *Guidelines Order* have been met.

Analysis

12 Dealing first with the applicant's argument based on subs. 10(2) of the *Guidelines Order*, s. 10 does not specify any particular form for the environmental screening or initial assessment,^[FN1] nor who must actually conduct the initial environmental assessment referred to in subs. (1), but does prohibit delegation of decision-making pursuant to subs. (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 subs. 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 Transport 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 subs. 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 Monitoring 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 Novem-

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ber19, 1993 in response to its invitation for public comment on its determination made pursuant to subs. 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".^[FN2] The applicant's second argument must also fail.

18 Consequently, the application will be dismissed.

Application dismissed.

^[FN1] *Friends of the Island Inc. v. Canada (Minister of Public Works)* (1993), 65 F.T.R. 180, at p. 203; and *Cantwell v. Canada (Minister of the Environment)* (1991), 41 F.T.R. 18, at p. 31, affirmed (June 6, 1991), Doc. A-124-91, Pratte, Mahoney and Desjardins J.J.A. (Fed. C.A.).

^[FN2] See *Cantwell*, supra, note 1 at p. 36.

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