1992 CarswellNat 108, [1992] 3 F.C. 42, (sub nom. Vancouver Island Peace Society v. Canada (Minister of National Defence)) 53 F.T.R. 300 , 53 F.T.R. 300

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Vancouver Island Peace Society v. Canada

Vancouver Island Peace Society, Anne A. Pask, and Gregory P. Hartnell (Applicants) v. Her Majesty the Queen in the Right of Canada, Prime Minister of Canada, Minister of National Defence, Secretary of State for External Affairs, Minister of Transport, and Minister of Environment (Respondents)

Federal Court of Canada — Trial Division

Strayer J.

Vancouver: April 6, 1992
Vancouver: April 14, 1992
Docket: T-2927-91

Counsel: *Robert Moore-Stewart* for applicants.

H.J. Wruck for respondents.

Subject: Environmental

Environmental Law --- Statutory protection of environment — Environmental assessment — Practice and procedure.

Environment — Principal application to quash Orders in Council approving visits of nuclear-powered/armed vessels at Canadian ports for failure to comply with Environmental Assessment and Review Process Guidelines Order (EARPGO) and for mandamus requiring Minister to conduct initial assessment to determine if "potentially adverse environmental effects" and to refer proposal to Minister of Environment for public review — Respondents applying herein to have principal application proceed as action as difficult issues of fact as to whether significant potentially adverse environmental effects — Role of Court in reviewing decisions of initiating department under EARPGO, ss. 12, 13 — Issues to be addressed.

This was an application for an order that the applicants' motion for *mandamus* and *certiorari* (the principal application) proceed as an action. The applicants are seeking to have two Orders in Council, approving visits of nuclear-powered and nuclear-armed naval vessels to Canadian ports quashed because they were made without compliance with a "prerequisite", i.e. the requirements of the *Environmental Assessment and Review Process Guidelines Order* (EARPGO). They are seeking *mandamus* to require the responsible Minister to conduct the initial assessment to determine if there are any "potentially adverse environmental effects", and to refer the proposal to the Minister of the Environment for public review by a panel. The respondents say that the principal application should proceed as an

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action because many difficult issues of fact will arise in determining whether the visits by American and United Kingdom nuclear naval vessels would involve any "significant" "potentially adverse environmental effects". The applicants argued that converting the application into an action would seriously delay the disposition of an urgent matter.

Held , the application should be dismissed.

Both sides had misconceived the Court's role herein in assuming that it would sit on appeal from the initiating department's factual determinations as to the potential hazards created by the visits of these naval vessels. In reviewing decisions of the "initiating department" under EARPGO, section 12, the Court should not interfere unless it is satisfied that there is no reasonable basis for the department's decision. In relation to decisions under section 13 as to whether there is such public concern as to make a public review "desirable", the Court may inquire whether the Minister acted in good faith and took into account relevant considerations. Unless the Court is satisfied that the decision was based on completely irrelevant factors, it cannot quash such a decision.

Within this restricted role, there is no place for presentation of factual or expert opinion on the nature or degree of potential environmental effects. The Court and the parties must address (1) whether the activity comes within the EARPGO and an initial assessment is as a matter of law required by section 10; (2) whether the initiating department has carried out such an assessment under section 12; (3) if so, whether a decision was purportedly made under section 12, but wholly without regard to relevant factors; and (4) if a determination has been made under section 13, whether that has been made wholly without regard to relevant factors. The issue before the Court will not be whether visits by nuclear-powered or nuclear-armed naval vessels created significant potentially adverse environmental effects, but whether the initiating department made a decision on this question; if so, what material it had before it in reaching such a decision; and whether it decided so within the limits of judgment allowed to it under the Act. It is not the Court's role to become an academy of science to arbitrate conflicting scientific predictions or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected.

CASES JUDICIALLY CONSIDERED

APPLIED:

Cdn. Wildlife Federation Inc. v. Canada (Minister of the Environment) (1989), 4 C.E.L.R. (N.S.) 201

31 F.T.R. 1 (F.C.T.D.)

affd [1991] 1 F.C. 641

(1990), 6 C.E.L.R. (N.S.) 89

41 F.T.R. 318 (note)

121 N.R. 385 (C.A.)

Cantwell v. Canada (Minister of the Environment) (1991), 6 C.E.L.R. (N.S.) 16 (F.C.T.D.) .

REFERRED TO:

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3

1992 CarswellNat 108, [1992] 3 F.C. 42, (sub nom. Vancouver Island Peace Society v. Canada (Minister of National Defence)) 53 F.T.R. 300 , 53 F.T.R. 300

Apple Computer, Inc. v. Minitronics of Canada Ltd., [1988] 2 F.C. 265

(1988), 17 C.I.L.R. 308

19 C.P.R. (3d) 15

17 F.T.R. 37 (T.D.) .

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms , being Part I of the *Constitution Act 1982* , Schedule B, *Canada Act 1982* , 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 1.

Environmental Assessment and Review Process Guidelines Order , SOR/84-467, ss. 10, 12, 13, 20.

Federal Court Act , R.S.C., 1985, c. F-7, s. 18.

Application to have application to quash Orders in Council and for mandamus requiring compliance with Environmental Assessment and Review Process Guidelines Order (EARPGO) proceed as action. Application dismissed.

The following are the reasons for order rendered in English by *Strayer J.*:

1 This is an application by the respondents for an order that the applicants' motion for *mandamus* and *certiorari* (the "principal application") be proceeded with as an action.

2 The principal application is directed against two decisions of the Governor in Council, Nos. 2083 and 2084 of 1991 made on October 30, 1991. It is said that these Orders in Council approved, *inter alia* , visits of nuclear-powered and nuclear-armed naval vessels to Canadian ports. In effect, the applicants say that these Orders in Council were adopted without the respondents having met the requirements of the *Environmental Assessment and Review Process Guidelines Order* , SOR/84-467 in that there was no initial assessment of potentially adverse environmental effects of the proposed visits as required by subsection 10(1) of the Order, nor was there a reference of the proposal to the Minister of the Environment for public review by a panel pursuant to section 12 of that Order. Nor, it is said, was there any determination by the "initiating department", the Department of National Defence, pursuant to section 13 of the Order as to whether to refer the proposal to the Minister of the Environment for public review by a panel due to "public concern about the proposal". The applicants therefore seek *mandamus* to require the Minister of National Defence or other ministers to conduct the initial assessment to determine if there may be any "potentially adverse environmental effects" as required by section 10, to refer the proposal to the Minister of the Environment for public review by a panel presumably under section 12, and otherwise to comply with the Order. The respondents invoke sections 12, 13, and 20 of the Order as the basis for compelling the Minister of the Environment to hold the public review. Further, the applicants seek *certiorari* to quash the decisions of the Governor in Council referred to above. It is said that *certiorari* is justified to quash the Orders of the Governor in Council because they were made without compliance with a "prerequisite", presumably referring to a failure to comply first with the Order before making the decisions complained of.

3 The respondents bring this motion to have the principal application turned into an action because, they say, there will be many difficult issues of fact to be determined as to whether there are "significant" "potentially adverse environmental effects" (the language of the Guidelines Order) involved in the visit of U.S. and U.K. naval vessels which are nuclear-powered or which carry nuclear weapons. It is assumed that this determination is necessary for the Court to ascertain whether the respondents have complied with section 12 of the Order. The respondents also argue that it would be premature for the Court to consider whether the respondents have complied with section 13 of the Order

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which requires the initiating department, even where no public review is required pursuant to section 12, to refer a proposal to the Minister of the Environment for public review by a panel "if public concern about the proposal is such that public review is desirable". I understand the position of the respondents to be that the section 13 question cannot be addressed until the Court has determined whether a public review was required in any event by the terms of section 12.

4 The applicants strongly resist turning this proceeding into an action. They point out that four days have been set aside for a hearing of the principal application commencing June 9, 1992, and that to turn the proceeding into an action at this point would seriously delay what is for them an urgent matter. They also complain about the potential costs of having to prove their case by the more demanding means required for a trial.

5 I have concluded that both the applicants and the respondents have misconceived the nature of the role of the Court in dealing with the principal application. This matter was not adequately addressed before me, both sides seemingly assuming that it is the responsibility of the Court to sit on appeal from the factual determinations of the "initiating department" or any others of the respondents in relation to the potential hazards involved in these visits of naval vessels and in relation to the existence of such public concern that a public review would be "desirable".

6 In much of the jurisprudence arising out of the *Environmental Assessment and Review Process Guidelines Order* thus far the dispute has been as to whether the initiating department should have carried out the initial assessment required by subsection 10(1). Many issues have been addressed such as whether the guidelines are mandatory, and whether particular projects or activities fit within them.[FN1] In other cases where an initial assessment has been done and a decision made not to refer a proposal for public review, this Court has emphasized the limited nature of its role in judicial review of such decisions. In *Cdn. Wildlife Federation Inc. v. Canada (Minister of the Environment)*[FN2] Muldoon J. had held that the Minister of the Environment had erred in law in the interpretation he gave to terms such as "insignificant" and "mitigable" in paragraph 12(*c*) of the Order. On appeal, the Federal Court of Appeal stated, at page 661:

> As earlier pointed out, the second branch of Sask. Water's argument was that the learned Judge applied the wrong standard of judicial review in respect of the Minister's findings of fact and of opinion relating to the Project in that he purported to review those findings on their merits. To do so, it was argued, had the effect of substituting his opinion for that of the Minister. The jurisprudence is replete with cases cautioning a court, sitting in judicial review of a decision by a statutory authority, from interfering with that decision merely because the Court might have differently decided the matter had it been charged with that responsibility. If that is what the learned Judge did in this case, then I agree that he erred in so doing.
>
> However, as I read his reasons, I do not perceive that that was what he did. There is no doubt that, *inter alia* , he referred to the findings reported in the IEE on the question of significant, moderate and insignificant adverse environmental effects, on information deficiencies, and on mitigation measures. But he did so, not with a view to second-guessing the Minister. Rather, quite properly, he was endeavouring to ascertain whether the Minister, in deciding whether he should or should not appoint a Panel for the Public review of the Project, had proceeded on a wrong principle, taken into account legally irrelevant considerations or otherwise acted beyond the scope of his authority.

In *Cantwell v. Canada (Minister of the Environment)*[FN3] my colleague MacKay J. was asked to review an initial assessment made under the Order. He described the role of the Court, in such a review as follows [at page 31]:

> In judicial review of administrative action, as here through an application for certiorari, the role of the Court is not that of an appellant body reviewing the merits of the administrator's decision. It is not the Court's function to determine whether the decision in question is right or wrong; rather, the Court is concerned only with the question whether the administrator has acted in accord with the law.

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7 In determining whether an official or agency has acted in accordance with the law in reaching the decision in question, the Court can consider whether the official or agency has correctly interpreted the law and whether the decision has been taken on the basis of facts and reasons relevant to the purpose for which the authority was given to make such a decision. But within that permissible range, the original decisionmaker has a right to make a decision which the Court cannot reverse even if it perchance does not agree with such decision. In carrying out its responsibilities under section 12 of the Guidelines Order, an initiating department must make an informed prediction of the possibilities and likelihoods of adverse effects and some calculation as to whether those effects may be "significant". Such matters are not only incapable of precise proof but they implicitly involve value judgments as to what is "significant" in relation to both private and public interests. In reviewing the decision of an initiating department taken under section 12, the Court should not interfere unless it is satisfied that there is no reasonable basis for the decision taken by the department. In relation to decisions taken under section 13 as to whether there is such public concern as to make a public review "desirable", I agree with MacKay J. that the Court is entitled on judicial review to see if the Minister acted in good faith and took into account relevant considerations. Unless the Court is satisfied that the decision was made on completely irrelevant factors it cannot quash such a decision. It is not for the Court to substitute its own assessment of the weight and nature of public concern and determine that a public review is or is not "desirable".

8 Within this restricted role of the Court, there is no place for the presentation of factual or expert opinion on the nature or degree of potential environmental effects as such. What the Court and therefore the parties must address is (1) whether the activity comes within the guidelines and an initial assessment is as a matter of law required by section 10; (2) whether the initiating department has carried out such an assessment under section 12; (3) if so, whether a decision was purportedly made under section 12 but wholly without regard to relevant factors; and (4) if a determination has been made under section 13, whether that has been made wholly without regard to relevant factors.

9 Instead, in the present case the applicants seem to think that in hearing their application this Court will sit as an appellate body determining whether the initiating department made the correct decision about the existence or non-existence of potential adverse environmental effects flowing from the visitation of nuclear naval vessels and, if so, also determine whether such effects will be "significant". Further, in relation to the obvious failure by the initiating department here so far to make an affirmative decision under section 13 that there should, in any event, be a public review due to "public concern", the applicants apparently expect this Court to review a plethora of material being tendered by them as to the number of people concerned about these visits so that the Court can overrule the initiating department and make a determination that public concern is such that a public review before a panel is "desirable".

10 In support of their approach the applicants have filed some 40 affidavits to date and there are suggestions that more may be on the way. I have quickly perused these affidavits. I have no doubt of the sincerity and public spiritedness of the affiants but many of the affidavits have little or no probative value on the issues which the Court will have to address. Some of the affidavits appear to be intended as expert evidence on the issue of the existence and probability of adverse consequences of the visits by nuclear vessels. Similarly the respondents in their one affidavit indicate they may want to present the evidence of some 20 experts. With the greatest respect I am unable to see how the applicants' affidavits concerning the potential adverse effects can be relevant except possibly to the extent that they can demonstrate, if such is possible, that the initiating department could have had no reasonable basis whatever for concluding that there were no significant potential adverse environmental effects from the naval visits. The respondents' scientific evidence can be relevant only to the extent it shows some possible basis for that decision. In other words the issue before the Court will be not whether visits by nuclear-powered or nuclear-armed naval vessels create significant potentially adverse environmental effects but whether the initiating department made a decision on this question; if so, what material it had before it in reaching such a decision; and whether it decided so within the limits of judgment allowed to it under the Act and having regard to at least some legally relevant factors.

11 Also among the numerous affidavits of the applicants are many ostensibly related to the existence of "public concern", presumably in support of an argument that the initiating department wrongly failed to conclude under section 13 that such public concern existed as to make a public review desirable. It should be observed that the only public

concerns relevant are those which the department could or should have had in mind when it decided (if it did) not to refer the proposal for review under section 13. At least one of the affidavits, that of Mr. John Brewin, M.P. is addressed to that issue, providing evidence of public concerns communicated to the Minister of National Defence before the decision in question was made by the Governor in Council. But many of the affidavits describe personal or local concerns, some concerns expressed outside of Canada, some expressed after the decision in question or not necessarily ever addressed to the officials who made those decisions.

12 For these reasons I am unsympathetic to the arguments of the respondents that there are difficult technical factual determinations to be made which will require pleadings and a trial and the cross-examination *viva voce* of experts and others. It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the *Federal Court Act* [R.S.C., 1985, c. F-7].

13 I am therefore not going to direct that this matter be tried by way of an action. I think many of the concerns of the respondents can be met if the parties focus on the real issues. For their part the respondents could clarify their position as to what they have or have not done pursuant to the Order and what kind of information was taken into account in respect of any decisions taken. In the one affidavit filed by the respondents, that of Commander Chesley James Price, Assistant Judge Advocate General of the Pacific Region, their position is stated in part as follows:

> h. DND recently conducted an environmental assessment of the policy approving the continuation of visits to Canadian ports by U.S. and U.K. nuclear powered vessels and vessels capable of carrying nuclear weapons and concluded that this activity has an insignificant adverse environmental impact.

It is of course open to the applicants to contest this evidence but if it is correct then there would appear to be no need for a *mandamus* requiring an initial assessment. At the same time it would be open to dispute as to whether the Department of National Defence acted in accordance with the law in carrying out this assessment and that is a matter upon which the respondents are in the best position to provide evidence.

14 For their part, the applicants should reassess very carefully the way they are conducting this proceeding. The sheer volume of their affidavits can do nothing but slow the process and add to its cost. Further, the current and future affidavits filed in this matter should be reviewed very carefully and many of them excised before cross-examination is required or it becomes necessary for the Court to entertain motions for them to be struck out. This is an originating proceeding, yet the majority of affidavits I have examined are replete with hearsay evidence which is inadmissible on this kind of application. Some purport to be expert evidence and, subject to the deponents being accepted by the Court as expert, might be admissible if they pertain to anything this Court must decide. But as I have pointed out, the issue for the Court is whether the initiating department had any relevant factors before it in reaching the conclusions it reached, not whether this Court thinks that nuclear vessels create hazards unacceptable to Canadians or that public concern is such that a public review should be held. If the applicants persist with their flurry of paper they may have to pay the additional costs due to the proceedings being prolonged by cross-examination on futile affidavits, or by disputes over the admissibility of irrelevant or hearsay evidence.[FN4]

15 The respondents also had sought to have the principal application turned into an action because they understood that the applicants might be raising issues under the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act 1982* , Schedule B, *Canada Act 1982* , 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. It was suggested that this might cause the respondents to invoke section 1 of the Charter which would also in their view require the determination of difficult factual questions which could best be done on the basis of *viva voce* evidence. At the hearing before me the applicants confirmed that they do not intend to raise any Charter issue and this therefore removes another possible reason for converting the application into an action.

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16 I have therefore dismissed the application of the respondents to have the principal application proceeded with as an action.

Solicitors of record:

Robert Moore-Stewart , Victoria, for applicants.

Deputy Attorney General of Canada for respondents.

FN1 Most of these issues have been authoritatively determined by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 .

FN2 (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.) ; affd [1991] 1 F.C. 641 (C.A.) .

FN3 (1991), 6 C.E.L.R. (N.S.) 16 (F.C.T.D.) .

FN4 I would also draw the parties' attention to problems I described arising out of the use of experts' affidavits on motions in *Apple Computer, Inc. v. Minitronics of Canada Ltd.*, [1988] 2 F.C. 265 (T.D.) , at pp. 289-290.

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