Section de première instance de
la Cour fédérale du Canada

Federal Court of Canada
Trial Division

Date: 19980612

Docket: T-2354-97

BETWEEN:

ALBERTA WILDERNESS ASSOCIATION, CANADIAN NATURE FEDERATION, CANADIAN PARKS AND WILDERNESS SOCIETY, JASPER ENVIRONMENTAL ASSOCIATION, and PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT

Applicants

- and -

MINISTER OF FISHERIES AND OCEANS, and CARDINAL RIVER COALS LTD.

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, WAYNE ROAN ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE SMALLBOY CAMP, and TREATY 8 FIRST NATIONS OF ALBERTA

Intervenor

REASONS FOR ORDER

MCKEOWN, J.

[1] The applicants seek judicial review of a Report dated June 6, 1997, of the Joint Review Panel for the Cheviot Coal Project, Mountain Park area, Alberta (the "Review Panel") with respect to an environmental assessment. The Review Panel was formed pursuant to an agreement between Canada and Alberta for the operation of Alberta Energy and Utilities Board and Canadian Environmental Assessment Act Panel. The applicants seek various remedies including: a declaration that the environmental assessment report is invalid and should therefore be quashed; a declaration that the Review Panel erred in law and acted without jurisdiction; a direction that the assessment report be referred back to the Panel; a prohibition against the Minister of Fisheries and Oceans (the "Minister") from issuing authorizations until all applicable federal legislation has been complied with; the quashing of existing authorizations; and a requirement that all applicable federal legislation be complied with.

[2] Two sets of intervenors were granted intervenor status: Wayne Roan, on his own behalf and on behalf of the members of the Smallboy Camp ("Smallboy Camp") for aboriginal persons ("Indians") within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, and members of Treaty 6 made between the Crown in Right of Canada and the Nations included therein; and the Treaty 8 First Nations of Alberta who represent five tribal councils representative of 22 Treaty 8 Bands in Alberta.

[3] The issue is whether the applicants' failure to seek judicial review of the Federal

Response is fatal to this judicial review application. The many important issues raised by the applicants and the intervenors can only be reviewed if the failure to seek judicial review of the Federal Response is not fatal to this application.

The Facts

[4] The Cheviot Project is a proposal by Cardinal River Coal Ltd. ("CRC") to develop a number of coal leases owned since the 1950's by one of CRC's principals (plus a few small leases owned privately) as a replacement mine for CRC's existing Luscar Mine, which has been in operation adjacent to Jasper National Park since 1969, and whose reserves are rapidly depleting.

[5] The Cheviot Project is located in an area of the Eastern Slopes of the Rocky Mountains known as the Alberta Coal Branch. This area has been subject to exploration for and development of coal since the early years of this century. Indeed, the Cheviot Project will encompass an area previously exploited for coal, from 1910 until the 1950's, centered on the former townsite of Mountain Park.

[6] The Cheviot Project will include the construction, operation and decommissioning of the mine as well as the upgrade of an access road, the upgrade of a railway line, the installation of a new transmission line and a sub-station to supply electrical power.

[7] Pursuant to the Alberta *Coal Policy*, CRC submitted a preliminary disclosure to the

Alberta Government in respect of the Cheviot Project and received approval in principle to proceed to the next stage of the regulatory process in December 1995.

[8] Pursuant to the Alberta *Environmental Protection and Enhancement Act*, R.S.A. 1992, c. E-13.3, as amended, an environmental impact assessment ("EIA") report was completed in February 1996. In March 1996, CRC submitted the EIA report to both the Alberta Energy and Utilities Board and the Alberta Department of Environmental Protection as part of the project application pursuant to the *Coal Conservation Act*, R.S.A. 1980, c. C-14, as amended. The project application consists of ten volumes plus two additional volumes prepared by Canadian National Railways in relation to the restoration of the railway line.

[9] In March 1996, CRC advised the Department of Fisheries and Oceans of its intention to apply for an authorization under ss. 35(2) of the *Fisheries Act*, R.S.C. 1985, c.F-14. An application dated May 23, 1996, for the ss. 35(2) authorization was received by the Department of Fisheries and Oceans on May 27, 1996. The relevant provisions of the *Fisheries Act* state:

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.	**35.** (1) Il est interdit d'exploiter des ouvrages ou des entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.
(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.	(2) Le paragraphe (1) ne s'applique pas aux personnes qui détériorent, détruisent ou perturbent l'habitat du poisson avec des moyens ou dans des circonstances autorisés par le ministre ou conformes aux règlements pris par le gouverneur en conseil en application de la présente loi.

[10] Prior to issuing a *Fisheries Act* ss. 35(2) authorization, para. 5(1)(d) of the *Canadian*

Environmental Assessment Act, R.S.C. 1992, c. C-15.2, as amended (the "CEAA") requires that an environmental assessment be conducted. The Minister, pursuant to ss. 11(1) of the CEAA, became the responsible authority for the project and, in the course of conducting an environmental assessment of the project, received specialist or expert knowledge or information from Environment Canada, Canada Heritage (Parks Canada), Natural Resources Canada, and the Departments of Health and of Indian Affairs and Northern Development, in accordance with ss. 12(3) of the CEAA.

[11] Pursuant to s. 21 of the CEAA, a comprehensive study was commenced but, before it was completed, the Minister determined that potentially significant adverse environmental effects would likely result from the project and that public concern existed. The project was then referred by the Minister to the Minister of Environment for further referral to a review panel pursuant to para. 21(b) of the CEAA.

[12] Section 29 of the CEAA states that where a project is to be referred to a review panel, the Minister of Environment shall refer the environmental assessment of the project to the review panel. Where another jurisdiction also has a responsibility or an authority to conduct an environmental assessment of the environmental effects of the project, ss. 12(4) and 40(2) of the CEAA allow the Minister of Environment to enter into an agreement or arrangement respecting the joint establishment of a review panel, as well as the manner in which a joint review panel's environmental assessment of the project is to be conducted.

[13] The Province of Alberta, under the auspices of the Alberta Energy and Utilities Board (the "AEUB"), is a jurisdiction defined in ss. 40(1) of the CEAA. The AEUB possesses the authority, pursuant to provincial legislation, to conduct an environmental assessment of the Cheviot Coal Mine Project. As a result, on October 24, 1996, an agreement was entered into between Canada and Alberta for the operation of the AEUB-CEAA Joint Review Panel ("Joint Review Panel") and the conduct of the environmental assessment hearings. The agreement set out the Joint Review Panel's terms of reference and which include the factors to be considered for the review.

[14] As required by para. 41(a) of the CEAA and the Joint Panel Agreement, the members of the Joint Review Panel were appointed by both the federal and provincial governments. Two members were appointed by the provincial government, and one by the federal government. The Joint Review Panel hearings were held in public during January, February and April of 1997. Numerous intervenors made written and oral submissions to the Joint Review Panel. Following the extensive hearings, the Joint Review Panel issued its 161-page report (plus appendices) dated June 6, 1997, and it was released to the public on June 17, 1997. The report included the decisions of the Alberta Energy and Utilities Board to approve the Cheviot Coal Mine Project, as well as a recommendation to the federal government to provide regulatory approval for the project by issuing a *Fisheries Act* authorization. The report also contained other recommendations, rationale, conclusions, and statements relating to numerous ares of federal jurisdiction and interest.

[15] Pursuant to ss. 37(1.1) of the CEAA, once the report of the Joint Review Panel is submitted, the responsible authority is obliged to take into consideration and respond, with the approval of the Governor in Council, to the Joint Review Panel Report. After the Federal Response is issued, para. 37(1.1)(c) states that the responsible authority "shall take a course of action under [ss. 37(1)] that is in conformity with the approval of the Governor in Council...".

[16] A copy of the report was delivered to the applicants other than the Jasper Environmental Association and the Canadian Nature Federation (the "CNF") by courier on June 17, 1997. A copy of the panel report was mailed on June 16, 1997, to the mailing address of the Jasper Environmental Association. A copy of the panel report was not sent to the CNF as it had not appeared at the hearings of the Joint Review Panel.

[17] Commencing July 24, 1997, the applicants sent a number of letters to members of the federal government, outlining concerns with the panel report and urging the government not to approve the project.

[18] On October 2, 1997, the Minister, being the responsible authority referred to in para. 37(1.1)(c), with the approval of the Governor in Council, published the "Federal Government Response to the Environmental Assessment Report of the AEUB-CEAA Joint Review Panel on the Cheviot Coal Project" (the "Federal Response"). The Federal Response outlines the Government of Canada's reply to the Joint Review Panel Report recommendations contained therein and identifies how the Government of Canada intends to address those recommendations.

[19] On October 31, 1997, some 29 days after the publication of the Federal Response and some 136 days after receiving the Panel Report, the applicants filed the present application for judicial review in which they primarily request relief against the Joint Review Panel in respect of the Panel's Report. The responsible authority, the Minister of Fisheries and Oceans, has not yet taken a course of action described in ss. 37(1) of the CEAA.

[20] The Minister and CRC, by separate notices of motion filed November 18 and November 26, 1997, applied to strike out the applicants' originating notice of motion on the ground, *inter alia*, that it had been filed out of time with respect of the Joint Review Panel Report. By way of a cross-motion filed November 27, 1997, the applicants applied for an extension of the 30-day limit.

[21] The motions by the Minister and CRC were dismissed by Mr. Justice Hugessen on December 2, 1997. He issued Reasons for Order that same day. I do not consider it necessary, therefore, to deal with the applicants' cross-motion for an extension of time. In his Reasons, Justice Hugessen questioned whether the Panel report could be considered a "decision or order" subject to judicial review pursuant to s. 18.1 of the *Federal Court Act*. He stated:

> 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 pre-requisite to its exercise.
>
> Thus, the fact is that the application was made more than 30 days after the Panel Report, but prior to any decision by the Minister, does not make it "so clearly improper as to be bereft of any possibility of success".

Analysis

[22] The applicants have never applied for judicial review of the Federal Response. The Respondents, Cardinal River Coals Ltd. and the Minister, both submit that the failure of the applicant to challenge the Federal Response is fatal to this judicial review application.

[23] I am in agreement with Justice Hugessen that the Report of the Joint Panel is not a "decision or order" within the meaning of ss. 18.1(2) of the *Federal Court Act*. He stated:

> Rather I think that 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*.

Since there is no decision to review, I do not have to resolve the issue of the standard of review I should apply to the Joint Panel Report.

[24] The kind of authorization referred to by Hugessen, J. is "prescribed" in the Law List Regulations for purposes of CEAA. By virtue of ss. 11(1) of CEAA, the Minister became the "responsible authority" for the Cheviot Project within the meaning of ss. 2(1) of CEAA.

[25] The Minister took the position that the Cheviot Project was the type of project described in the Comprehensive Study List Regulations. However, rather than requiring only a comprehensive study report to be prepared pursuant to para. 21(a) of CEAA, the Minister exercised his discretion under para. 21(b) of CEAA to refer the project to the Environment Minister for further referral to public review by a review panel. The Minister's referral to the Environment Minister also suggests that the public review be conducted jointly in the spirit of

the harmonization agreement and in light of the intended public hearings by the AEUB.

[26] The Joint Review Panel issued its report on June 6, 1997. As required by the Panel Agreement, the Panel Report contains recommendations to the Minister as responsible authority under CEAA. Once it issued its report and communicated it to the Minister, the role of the Joint Review Panel under CEAA came to an end, subject only to clarifying its report as might be requested by the Governor in Council: CEAA, para. 37(1.1)(b).

[27] Neither CEAA nor the Panel Agreement conferred any power on the Joint Review Panel to make final conclusions with respect to the environmental effects of the Cheviot Project, the significance of those effects or whether any significant effects can be justified. Indeed, nothing in CEAA or the Panel Agreement authorized the Joint Review Panel even to make recommendations about the justification for any effects determined to be significant.

[28] I will now set out ss. 37(1) and 37(1.1) of CEAA which, in my view, show that the Minister, as responsible authority, will make the final conclusions on these questions:

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

37. (1) Sous réserve du paragraphe (1.1), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou si le ministre, à la suite du rapport d'étude approfondie, lui demande de prendre une décision aux termes de l'alinéa 23a), prend l'une des décisions suivantes:
(a) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circonstances, exercer ses attributions afin de

(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.

permettre la mise en oeuvre totale ou partielle du projet et veiller à l'application de ces mesures d'atténuation;

(b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux qui ne sont pas justifiables dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient permettre la mise en oeuvre du projet en tout ou en partie.

(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).

(1.1) Une fois pris en compte le rapport du médiateur ou de la commission, l'autorité responsable est tenue d'y donner suite avec l'agrément du gouverneur en conseil, qui peut demander des précisions sur l'une ou l'autre de ses conclusions; l'autorité responsable prend alors la décision visée au titre du paragraphe (1) conformément à l'agrément.

[29] In making his determination, the Minister was not constrained by the Panel Report. He was free to consider the entire record of the evidence before the Joint Review Panel, and was equally free to come to conclusions different from those reached by the Panel.

[30] The Minister has responded to the report pursuant to para. 37(1.1)(a) of CEAA, which is the Federal Response dated October 1, 1997 and released to the public on October 2, 1997. The Federal Response was approved by the Governor in Council. This application was only commenced October 31, 1997. Subsection 11(2) of CEAA says the responsible authority is

not to allow the project to proceed in whole or in part "unless [the responsible authority] takes a course of action pursuant to paragraph ... 37(1)(a)". The responsible authority is now in a position to take a course of action as provided in para. 37(1)(a).

[31] It is clear from para. 37(1)(a) that the critical decision or determination which the Minister must make is whether the environmental effects of the project are insignificant or significant and, if the latter, whether they are justifiable. The Federal Response indicates that the Minister accepts the Joint Review Panel's recommendation to issue authorization pursuant to the *Fisheries Act* subject to appropriate conditions to implement identified and mitigative measures. They can only mean the Minister is to decide the environmental effects of the project are either insignificant or significant but justifiable, and can issue the permits under para. 37(1)(a) in conformity with the Federal Response as approved by the Governor in Council.

[32] The Minister can then proceed with the *Fisheries Act* authorization under ss.35(2).

[33] While prohibition does not require that there be a decision or an order actually in existence as a prerequisite to its exercise, it is necessary, in my view, that the matter to be prohibited should not have been superseded by another step which is contemplated in the process. Since the Federal Response has not been challenged, I am not in a position to determine whether the matters complained about under CEAA have been remedied. The Joint Panel Report is no longer the governing document upon which the Minister is going to rely

and in any event, as stated earlier, he is obliged under para. 37(1.1)(c) to take a course of action in conformity with the Federal Response as approved by the Governor in Council. Because para. 37(1.1)(c) is a mandatory provision, the Minister has no discretion to make a determination concerning his jurisdiction to take a course of action under ss. 37(1) of CEAA. Thus, in the absence of a question of law going to the Minister's jurisdiction, prohibition is not available to prevent the Minister from issuing any para. 37(1)(a) *Fisheries Act* authorization.

[34] If I were to issue a prohibition against the Joint Panel Report, this would require the resumption of further hearings by the Joint Panel, with the result that the new recommendations might very well be exactly what is included in the existing Federal Response. The applicants might then seek judicial review of the Federal Response. Prohibition is an equitable remedy and is an inappropriate remedy to be exercised when a further step has been taken in the process.

[35] The Federal Response was drafted as a result of the reports from several federal departments coming forward with information additional to that which the Joint Panel Report had included. As I stated earlier, I do not take any position as to whether the Federal Response cures the errors in the original Joint Panel Report as alleged by the applicants. The Federal Response is broader than the Joint Panel Report.

[36] Since the Federal Response has remained unchallenged in any court of competent

jurisdiction, it stands as a barrier to the relief claimed by the applicants against the Minister.

Accordingly, the application for judicial review is dismissed.

JUDGE

O T T A W A, Ontario

June 12, 1998.