

Date: 20080514

Docket: T-460-08

Citation: 2008 FC 598

Ottawa, Ontario, May 14, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

IMPERIAL OIL RESOURCES VENTURES LIMITED

Applicant

and

**MINISTER OF FISHERIES AND OCEANS,
ATTORNEY GENERAL OF CANADA,
PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT,
SIERRA CLUB OF CANADA, TOXICS WATCH SOCIETY
OF ALBERTA, and PRAIRIE ACID RAIN COALITION**

Respondents

REASONS FOR ORDER AND ORDER

[1] On February 27, 2007, the Joint Review Panel with respect to Imperial Oil's Kearl Oil Sands Project in north-west Alberta, acting under the authority of the *Canadian Environmental Report Act*, S.C. 1992, c. 37 (CEAA), recommended in a Report to the Minister of Fisheries and

Oceans, Canada, that the Project proceed. On August 14, 2007, the Governor in Council, pursuant to s. 37(1.1)(a) of *CEAA*, approved the Report. Based on the approval, on February 12, 2008, the Minister of Fisheries and Oceans granted an Authorization pursuant to s. 35(2) of the *Fisheries Act*, R.S.C., 1985, c. F-14, which effectively allowed Imperial Oil to commence the Project.

[2] However, unfortunately, the Authorization was granted, and relied upon by Imperial Oil, while a judicial review challenge to the Report in this Court was under reserve for decision by Justice Tremblay-Lamer in court file T-535-07. On March 5, 2008, Justice Tremblay-Lamer decided that the Joint Review Panel did not provide a rationale for its conclusion on green house gas emissions as it was required so to do, and, as a result, Justice Tremblay-Lamer ordered that “the matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion”.

[3] Justice Tremblay-Lamer’s order precipitated a delegate of the Minister of Fisheries and Oceans, in a faxed letter to Imperial Oil dated March 20, 2008, to state the opinion that the Authorization already granted is now a nullity, and based on this opinion, to further state that Imperial Oil is not authorized to proceed to develop the Project (see: Appendix A to these reasons). In the present Application, commenced on March 20, 2008, Imperial Oil challenges the Minister of Fisheries and Oceans’ opinion in order to allow it to proceed to develop the Project on the basis of the Authorization already granted. For the reasons which follow, I find that Imperial Oil has failed in this effort.

[4] As the first step in Imperial Oil's challenge in the present Application, it moved to obtain an injunction against the implementation of the opinion of the Minister of Fisheries and Oceans. At the time this step was taken, Pembina Institute for Appropriate Development and Sierra Club of Canada had already commenced T-418-08 against the Minister of Fisheries and Oceans and Imperial Oil, being a separate application to quash the Authorization. At the time of the hearing of the injunction motion, both matters were before Justice de Montigny who sought and obtained an agreement by all parties to deal with the key issues in both applications by the present consolidated judicial review.

The parties agreed that the following issues would be argued:

What is the effect of the Federal Court's judgment in T-535-07 on the validity of the authorization issued pursuant to section 35(2) of the *Fisheries Act* by Fisheries and Oceans Canada (DFO) to Imperial Oil Resources Ventures Limited on February 8, 2008? More specifically, is the Authorization rendered a nullity as a result of the operation of law?

If the Authorization is not rendered a nullity by the Judgment in T-535-07 and the operation of the law, should this Court determine to grant the relief claimed in Item 2(b) of the Relief claimed in the Notice of Application in T-418-08 and therefore quash the Authorization?

If the Authorization remains legally valid, does the DFO, or its Minister, have the legal authority to revoke or rescind the Authorization?

[5] The operation of *CEAA* is not in dispute and is detailed in the following paragraphs of the un-appealed decision of Justice Tremblay-Lamer:

14 The *CEAA* establishes a two-step decision-making process. The first step is an environmental assessment where potentially adverse environmental effects of a project are analysed (s. 5). The second step involves decision-making and follow-up where a federal authority decides, taking into consideration that assessment, if a particular project should be authorized and what follow-up measures,

if any, are required to verify the accuracy of the assessment and the effectiveness of mitigation measures (ss. 37 and 38).

[...]

20 Specifically, the general duties that a review panel is mandated to fulfill are four-fold (s. 34). First, it must ensure that the information required for an assessment is obtained and made available to the public (s. 34(a)). Second, the panel is required to hold hearings in a manner that offers the public an opportunity to participate in the assessment (s. 34(b)). Third, the panel is charged with fulfilling a reporting function whereby it must prepare a report setting out "the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program" as well as a summary of public comments received (s. 34(c)). Finally, it must submit that report to the Minister and the responsible authority (s. 34(d)).

[...]

78 The evidence shows that intensity-based targets place limits on the amount of greenhouse gas emissions per barrel of bitumen produced. The absolute amount of greenhouse gas pollution from oil sands development will continue to rise under intensity-based targets because of the planned increase in total production of bitumen. The Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance. Without this vital link, the clear and cogent articulation of the reasons behind the Panel's conclusion, the deference accorded to its expertise is not triggered.

79 While I agree that the Panel is not required to comment specifically on each and every detail of the Project, given the amount of greenhouse gases that will be emitted to the atmosphere and given the evidence presented that the intensity based targets will not address the problem of greenhouse gas emissions, it was incumbent upon the Panel to provide a justification for its recommendation on this particular issue. By its silence, the Panel short circuits the two step decision making process envisioned by the CEEA which calls for an *informed decision* by a responsible authority. For the decision to be informed it must be nourished by a robust understanding of

Project effects. Accordingly, given the absence of an explanation or rationale, I am of the view that the Panel erred in law by failing to provide reasoned basis for its conclusion as mandated by s. 34(c)(i) of the CEAA.

[Emphasis added]

[6] Given the operation of *CEAA*, and with respect to the first issue set by Justice de Montigny, I find that the primary effect of Justice Tremblay-Lamer's order is that, since the Report is incomplete it must be completed, and once completed it must be, yet again, placed before the Governor in Council for approval, and if approval is given, a new authorization must be provided by the Minister of Fisheries and Oceans to allow Imperial Oil to proceed with the Project. For this reason, the secondary effect of the decision is that the Authorization dated February 12, 2008, being issued by the Minister of Fisheries and Oceans on a fundamentally flawed Report which, thereby, could not lawfully receive the approval of the Governor in Council, was issued without jurisdiction (*Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483, [1998] F.C.J. No. 1746 (QL) (F.C.A.) at paras. 17-21). Therefore, I find that the Authorization is a nullity.

[7] In the present Application, Imperial Oil argues that, nevertheless, on judicial review I can exercise discretion not to act on the finding that the Authorization is made in error of law, which would have the effect of allowing work to proceed without seeking a further authorization. Given my finding that the Authorization was made without jurisdiction, and is, therefore, a nullity, in my opinion nothing exists upon which to exercise my discretion. As a result, I dismiss Imperial Oil's argument.

[8] Given my response to the first issue, the second issue becomes irrelevant. With respect to the third issue which questions whether the Minister of Fisheries and Oceans can revoke an authorization already granted, I do not find that the opinion of March 20, 2008, constitutes a revocation; it is an expression of opinion based on operation of law. As a result, I find that the third issue is also irrelevant.

[9] During the course of the hearing of the present Application, Counsel for Imperial Oil moved to have evidence added to the record to prove actions taken by the Joint Review Panel since the date of Justice Tremblay-Lamer's order. I dismiss this motion since I find that the evidence is irrelevant to the issues determined.

[10] During the course of the oral hearing of the present Application, Counsel for the Applicants in T-418-08 agreed that, if the present Application is dismissed, T-418-08 should be dismissed. Since a dismissal is the outcome in the present Application, the dismissal of T-418-08 will be accomplished by an order in that application.

[11] By Justice de Montigny's order of March 27, 2008, each party is to bear its own costs.

ORDER

THIS COURT ORDERS that

For the reasons provided, the present Application is dismissed.

"Douglas R. Campbell"

Judge

APPENDIX A:
Letter dated March 20, 2008, faxed to Imperial Oil:
Applicant's Application Record, p.356

**Fisheries and Oceans
Canada**

**Pêches et Océans
Canada**

Imperial Oil Limited
237 Fourth Avenue S.W.
Calgary, Alberta
Canada T2P 0H6
Attn: Stuart Nadeau

Dear Mr Nadeau,

We are writing further to the decision of the Honourable Madam Justice Tremblay-Lamer dated March 5, 2008 in the matter of *Pembina Institute for Appropriate Development, Prairie Acid Rain Coalition, Sierra Club of Canada, and Toxics Watch Society of Alberta v. Attorney General of Canada, Minister of Fisheries and Oceans and Oceans, Minister of the Environment, and Imperial Oil Resources Ventures Limited*, Federal Court Docket T-535-07, as well as Imperial Oil's correspondence to Minister Hearn, dated March 11, 2008.

Please be advised that the Department of Fisheries and Oceans is of the view that, as a result of the Honourable Madam Justice Tremblay-Lamer's decision, the Authorization for Works or Undertakings Affecting Fish Habitat and the Authorization to Destroy Fish by any means other than Fishing (ED-03-2806) which was issued by the Minister of Fisheries and Oceans and Oceans pursuant to subsection 35(2) of the *Fisheries Act* to Imperial Oil Resources Ventures Limited on February 12, 2008, is a nullity.

As a result, Imperial Oil is not authorized to proceed with any works or undertakings that will cause a harmful alteration, disruption or destruction of fish habitat or that destroys fish by any means other than fishing. A representative from DFO will be in touch with you to discuss next steps.

Sincerely,

Bob Lambe
Regional Director General

cc. Mr. T.J. Hearn, Chairman and CEO
David McBain, Director General, Habitat Management
Ginny Flood, National Director, Environmental Reports and Major Projects
Brian Makowecki, Regional Manager, Oil Sands Projects

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-460-08

STYLE OF CAUSE: IMPERIAL OIL RESOURCES VENTURES LIMITED
v. MINISTER OF FISHERIES AND OCEANS et al

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: MAY 7 and 8, 2008

**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: MAY 14, 2008

APPEARANCES:

Munaf Mohamed
Martin Ignasiak

FOR THE APPLICANT

Kirk Lambrecht

FOR THE RESPONDENT,
ATTORNEY GENERAL OF CANADA

Sean Nixon
Devon Page

FOR THE RESPONDENTS,
PEMBINA INSTITUTE, SIERRA CLUB,
TOXICS WATCH AND PRAIRIE ACID
RAIN

SOLICITORS OF RECORD:

Fraser Milner Casgrain LLP
Calgary, Alberta

FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada
Edmonton, Alberta

FOR THE RESPONDENT,
ATTORNEY GENERAL OF CANADA

Ecojustice Canada
Vancouver, British Columbia

FOR THE RESPONDENTS,
PEMBINA INSTITUTE, SIERRA CLUB,
TOXICS WATCH AND PRAIRIE ACID
RAIN