Federal Court

Cour fédérale

Date: 20130315

Docket: T-1820-11

Ottawa, Ontario, March 15, 2013

PRESENT: Madam Prothonotary Aronovitch

BETWEEN:

MARTEN FALLS FIRST NATION, WEBEQUIE FIRST NATION, NIBINAMIK FIRST NATION, NESKANTAGA FIRST NATION, EABAMETOONG FIRST NATION, GINOOGAMING FIRST NATION, LONG LAKE #58 FIRST NATION, CONSTANCE LAKE FIRST NATION and AROLAND FIRST NATION

Applicants

and

THE ATTORNEY GENERAL OF CANADA AND CLIFFS NATURAL RESOURCES INC

Respondents

ORDER

UPON these motions made by the respondent Attorney General of Canada (AGC or Canada) and the respondent Cliffs Natural Resources Inc. (Cliffs), to strike out the

expert affidavits of Justina Ray, Robert Gibson and Neil Hutchinson, and in the alternative specific paragraphs of each affidavit as set out in Cliffs' Notice of Motion;

AND UPON reading the Motion Records of Canada, Cliffs, the applicants, (First Nations), and hearing the submissions of counsel for Canada, Cliffs and the First Nations applicants;

ENDORSEMENT

Cliffs is in the early stages of planning a mining project for chromite at a proposed location in northern Ontario. The project is currently undergoing a coordinated environmental assessment under both the federal *Canadian Environmental Assessment Act* (*CEAA*) and the *Ontario Environmental Assessment Act*. The proposed location of the mine is located within the traditional territory of the applicants and they expect to be impacted by the project.

A Comprehensive Study was commenced by the Canadian Environmental Assessment Agency (Agency) on September 22, 2011. Section 25 of the *CEAA* provides the Agency with the discretion to recommend that the Minister refer the environmental assessment to a Review Panel; this can be done at any time during the process.

The applicants advocated for a Joint Review Panel as the best way to go forward with an assessment. At the commencement of the Comprehensive Study, no recommendation for a Review Panel was made. The applicants characterize the decision as an announcement that a Comprehensive Study process and not a Review Panel would be used to assess the project. That decision is the subject of the judicial review.

The First Nations applicants challenges the decision under review on two grounds: The first, is that the decision is contrary to the Crown's constitutional duty to consult and accommodate the First Nations both in the process selected, and in how the process was selected. The second ground is that the Agency committed various errors of administrative law including, having failed to take relevant considerations into account, and made an unreasonable decision.

The grounds for striking

The applicants have submitted 11 affidavits in support of their application for judicial review, including the three expert witness' affidavits of Dr. Justina Ray (Ray), Professor Robert Gibson (Gibson), and Dr. Neil Hutchinson (Hutchinson). The AGC argues that these affidavits are inadmissible because they were not before the original decision maker and because they are directed to the merits, or the "ultimate issue" for determination in this judicial review.

The AGC and Cliffs also challenge the expert evidence on the failure of the evidence to meet the criteria of admissibility in *R v Mohan*, [1994] 2 SCR, [1994] SCJ No. 36 (QL) (*Mohan*), in particular the criteria of necessity.

The respondents also argue that the experts are improperly acting as advocates. Cliffs maintains that much of the evidence is advocacy dressed up as expert opinion, and contains impermissible legal argument. Cliffs argues that Ray, in particular, lacks independence in that she did not disclose the fact that she was involved in providing submissions to the Agency regarding the decision that is the subject of this judicial review, thereby failing to comply with the *Code of Conduct for Expert Witnesses (Code of Conduct).*

Rule 52.5 of the *Federal Courts Rules*, (the *Rules*) was recently amended to require that any objections to a proposed expert witness should be brought as early as possible in the proceeding. Cliffs maintains that in this case, an early ruling on the admissibility of these lengthy affidavits will serve judicial economy, particularly because the scope of the affidavits according to Cliffs, far exceeds the relatively narrow issues in the judicial review. Cliffs argues that it would be prejudicial to the respondent to be required to respond substantively to what it characterizes as clearly inadmissible evidence and essentially argues that the recent amendment to the *Rules* may be relied on by the Court to strike expert affidavits at this stage of the judicial review.

The test for striking

A summary of the general principals to be gleaned from the jurisprudence is helpful at the outset. In essence, the Court's overriding concern is for judicial economy, and efficiency that will allow applications to be brought to hearing in summary fashion. These are paramount considerations, and motions to strike affidavits, or for early rulings on admissibility, are entertained and granted only in the clearest of cases. Such motions have to be brought in exceptional cases because "the procedural impacts of the nature of a motion to strike are to delay unduly and, more than not, needlessly, a decision on the merits." *Gravel v Telus Communications Inc*, 2011 FCA 14, [2011] FCJ No 53 (QL) (*Gravel).*

In *Assn. of Universities and Colleges of Canada v Canadian Copyright Licensing Agency,* 2012 FCA 22 at para 11, (*Universities)*, the Federal Court of Appeal explains its reluctance to provide advance admissibility rulings on judicial reviews which are meant to be heard and determined in summary fashion and without delay. "*As a result, the Court will only exercise its discretion to provide an advance admissibility ruling where it is clearly warranted. Those embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive.*"

Bearing in mind the concern for efficiency and economy, evidence that is clearly inadmissible and will prejudice the orderly conduct of the proceeding may be struck where the Court is satisfied that dealing with the admissibility at an early stage would permit the hearing on the merits to proceed in a timely and orderly fashion. *Canada (AG) v Quadrini*, 2010 FCA 47, [2010] FCJ No 194 (*Quadrini)*; *Armstrong v Canada (Attorney General)*, 2005 FC 1013, [2005] FCJ No 1270 (*Armstrong*), (*Universities*).

To summarize, evidence that is clearly inadmissible may be struck out and dealt with in advance of hearing where it is efficient to do so. Although demonstrated prejudice in leaving the matter for the hearing judge will justify striking evidence, it may not be required in cases where the evidence is clearly inadmissible, will prejudice the orderly conduct of the proceeding and may therefore be struck out on that basis. (*Universities, Quadrini*).

I find that the test for striking out affidavits, in whole or in part, at this stage of a judicial review, has not been met in this case, as the impugned evidence is not clearly inadmissible on any of the grounds relied upon by the respondents. In my view the affidavits are relevant and necessary, for the adjudication of the issues raised in the underlying application. The respondents' objections to the qualifications, or independence of the three experts do not warrant striking at this juncture, they go to the weight to be given to the evidence, a matter for determination by the hearing judge on a full record.

The extrinsic evidence argument

As a general rule, a judicial review is confined to the material before the decision maker lest the proceeding be transformed into a *de novo* hearing. Canada takes the view that the impugned affidavits do not fall within any of the recognized exceptions to admitting new evidence on judicial review, as the affidavits are directed at the merits of the decision, and not to a procedural fairness or jurisdictional issue. It is conceded that new evidence on occasion may be admissible for the purpose of providing 'general background information', but this typically involves general information about the procedural and administrative context, which would have been within the knowledge of both parties.

It is worthwhile at this point to revisit the two principal grounds for review of the impugned decision. The first, is that the Crown is in breach of its constitutional duty to consult and accommodate, first in the selection of the process, and second, in that the selected process which will be the only means of consulting and accommodating the applicants on the project, will be inadequate for that purpose.

The second ground for review subsumes the various errors of administrative law that were committed by the Agency.

The applicants maintain that the evidence falls under a recognized exception to general rule, as it provides information regarding the Crown's constitutional duty to consult with aboriginal peoples. The applicants cite the following cases for this exception: *Liidlii Kue First Nation v Canada (Attorney General)*, 2000 CanLii 15881 (*Liidlii*); *Yellowknives Dene First Nation v Canada (Attorney General)*, 2010 FC 1139 (*Yellowknives Dene),* and *Lax Kw'Alaams Indian Band v Minister of Forests*, 2004 BCSC 420 (*Lax Kw' Alaams*) where extrinsic evidence relating to the duty to consult was admitted on the basis that an alleged breach of the duty to consult and accommodate is *akin*, in the evidentiary sense, to an alleged breach of procedural fairness.

The test for the duty to consult is set out in *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511. (*Haida*). The first question for the Court is as to the existence of the duty which arises when the Crown is aware or should be aware of proven or

asserted aboriginal or treaty rights, and contemplates action that would adversely impact those rights. The second question is the scope of the duty which depends on the nature and strength of the rights asserted and the extent of the potential impact of the proposed activity on those rights. The third questions is the fulfillment of the duty taking into account the scope of the duties.

The three disputed affidavits are extensive and were provided to the Court in their entirety for review. The below brief summaries are to allow the reader to appreciate the applicants' argument that these affidavits are directed to the duty to consult and therefore come within the exception noted in the jurisprudence in that regard.

> Ray is an expert on wildlife ecology, conservation biology, and landscape ecology. She comments on the potential impacts of the project on wildlife and as well on proceedural needs for an assessment.
>
> Hutchinson is an expert on the impact of mining on water quality, and water management in aquatic ecosystems in northern environment generally. He speaks to how these impacts can be understood and addressed.
>
> Gibson is an expert on environmental assessment and planning. His affidavit comments on the unique and challenging circumstances of this case and their implication for conducting an effective environmental assessment, taking into consideration factors like the remoteness of the area and aboriginal considerations.

The applicants say that Ray and Hutchinson's affidavits relate to the scope of the duty to consult, by discussing some potential impacts of the project, and to the fullfillment of the duty by discussing how the procedure was chosen and its adequacy in assessing the potential impacts of the project. Gibson's affidavit relates to the fulfillment of the duty by looking at the available options for assessment procedures to effectively understand and address the potential impacts of the project, the applicants' allegation being that the option selected by the Agency is incapable of fulfilling the Crown's duty to consult and accommodate.

The cases relied upon by the AGC wherein the courts have struck out expert evidence are not of assistance, as they do not raise issues regarding the duty to consult and may be distinguished on that basis. *Assoc. des crabiers acadiens inc v Canada (Attorney General),* 2005 FC 1309, *Ecology Action Centre Society v Canada (Attorney General),* 2002 FCT 1309.

While the sufficiency of the consultation, and of the identification of the impacts on the applicants is directly at issue, this is not a case where there was no opportunity for the applicants to make submissions to the Agency. Some of the information has already been sent to the Agency, though in abbreviated form, by way of correspondence from Ray. However, the applicants' allegations are that the potential impacts were not adequately identified and indeed can not be identified. I take the point that the exchanges between the parties and what has transpired by way of consultation has to be viewed and understood through the prism, and by reference to evidence that broadly shows why the duty arose, and the scope of the duty in the circumstances. To the extent that this evidence relates to the existence and scope of the duty, the likely impacts on the applicants, and on their ability to meaningfully participate in the

assessment process that was chosen, it is, in my view, relevant, necessary, and comes squarely within the exception recognized in the jurisprudence. *Liidlii* at para 32, endorsed in *Yellowknives Dene* at para 60.

In any case, Canada has failed to meet its burden of showing that the evidence is clearly inadmissible.

<u>Other challenges to the expert evidence</u>

There are a number of other challenges to the evidence. I will address the following specifically, starting with Canada's contention that the impugned affidavits are not "necessary" because the Court does not require expert evidence to understand the issues.

I disagree, as the evidence, of necessity, is of a technical and scientific nature and likely to be outside the experience or knowledge of a judge. Scientific and technical knowledge will be of aid to the Court in assessing the impact of the project on water management and wildlife (Hutchinson and Ray). The adequacy of the consultation procedure chosen in managing the environmental impacts are also in my view beyond the knowledge, and skill of a layperson. (Gibson). The issue in any case is obviated by my finding that the evidence is relevant, and necessary for the adjudication of the issues raised by the judicial review.

As to the objection that this evidence impermissibly speaks to the "ultimate issue" or reasonableness of the decision, I agree with the applicants that the respondents in their representations conflate the grounds for the review and essentially subsume all of the issues under the issue of reasonableness in an administrative law sense, minimizing or ignoring the degree to which the duty to consult is a separate ground.

As pointed out by the applicants, expert evidence on the ultimate issue of a case can be admissible (*Halford v Seed Hawk Inc*, 2001 FCT 1154 at para 15-16). I am mindful that the relevance and the necessity requirements regarding expert evidence are interpreted more strictly if the expert is providing an opinion regarding the 'ultimate issue' (*Mohan* at para 25). These affidavits however, are not being proferred as evidence going to the merits of the administrative law challenge or to the reasonableness of the decision.

The applicants maintain that this evidence is directed to the constitutional ground alone, and is adduced solely to flesh out and inform the elements of the duty to consult as applicable in the circumstances. That is, to show what interests the First Nations have in the area , the impacts of the project and what consultation might entail, in their terms. To the extent that some of this evidence may seem to address the reasonableness of the decision on the merits, the applicants say that they will not be relying on it for that purpose, and have confidence, as do I, in the ability of the hearing judge to make the distinction.

<u>The impartiality of Dr Ray</u>

Cliffs impugnes the Ray evidence on a number of grounds but most notably on the basis that Ray had previously made submissions to the Agency and the Ontario Ministry of the Environment

regarding the appropriate review track for the chronite project and therefore does not possess the independence required of an expert under the *Code of Conduct.*

Section 3(k) of the *Code of Conduct* requires the expert in their report to disclose "particulars of any aspect of the expert's relatoinship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court." *Federal Court Rules* 52.2(2) does state that if an expert fails to comply with the *Code of Conduct*, the Court *may* exclude some or all of the expert's affidavit. In my view that is a discretion best exercised by the hearing judge.

I note that the Rule 52.5(2) only requires objections to expert evidence to be 'raised' and 'filed' in writing in 'a document' at the earliest possible opportunity, presumably to put the other party on notice thereby avoiding surprise and delay. I do not interpret the *Rule* to require a motion to be brought so that the objection is decided at this early stage of a judicial review.

The new *Rules* are not to be read as giving an impetus to unnecessary motions especially in the context of what is meant to be a summary process. Nor do they have the effect of lowering the threshold to be met in a motion to strike evidence, namely, that such motions are to be brought in the clearest of cases, where evidence is clearly inadmissible, or where prejudice can be demonstrated.

As to other challenges to the independence of the experts, the threshold for excluding the expert evidence for lacking independence is high. *Carmen Alfano Family Trust (Trustee of) v Piersanti*, 2012 ONCA 297. Certainly, it is not met in this case in respect of any of the impugned evidence. Where issues are arguable, as they are here, the jurisprudence invariably supports an approach whereby challenges to the qualification, independence, or objectivity of experts, and therefore the weight to be assigned to the evidence, is left to the discretion of the hearing judge.

In any case, the respondents have put their objections on record, they are free to raise and canvass the issues on cross-examination, and to respond to the evidence as they see it. Moreover, they are not prejudiced in that they preserve their right to object to the evidence on the merits.

I need not go in detail into any of the other grounds for striking, as none of the objections meet the required threshold to strike. Nor is it apropriate to eviscerate the affidavits to excice portions that may be objectionable, for example, as including or constituting legal argument. That is not a ground for striking, and in any case, the Court will be well able to assess the weight to be given to any such evidence.

These motions have had the effect of unnecessarily delaying this proceeding and the below timetable is set to ensure the expeditious hearing of this application and puts the onus on all parties to adhere strictly to the below timetable.

THIS COURT ORDERS that:

1. The motions are denied in their entirety without prejudice to the right of the respondents to object to the evidence at the hearing on the merits.

2. As agreed to by the parties, costs of the motion fixed in the amount of $1,500 shall be paid by each of the respondents to the applicants, for a total of $3,000.

3. The respondents shall serve and file their affidavits by **April 12, 2013**.

4. Cross-examinations are to be completed by **May 10, 2013**.

5. The applicants' records shall be served and filed by **June 7, 2013**.

6. The respondents' records shall be served and filed by **July 8, 2013**.

7. The applicants shall confer with the respondents and file an amended Requisition for Hearing by **March 22, 2013**, for a hearing of the judicial reivew as soon as practicable after **July 8, 2013**.

"R. Aronovitch"

Prothonotary