Date: 20080919

Docket: T-1380-08

Citation: 2008 FC 1061

Ottawa, Ontario, September 19, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ALBERTA WILDERNESS ASSOCIATION,
CANADIAN PARKS AND WILDERNESS SOCIETY,
THE PEACE PARKLANDS NATURALISTS, and
THE SOUTH PEACE ENVIRONMENT ASSOCIATION

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF ENVIRONMENT,
MINISTER OF FISHERIES AND OCEANS,
THE ALBERTA UTILITIES COMMISSION,
THE NATURAL RESOURCES CONSERVATION BOARD, and
GLACIER POWER LTD.

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicants are non-profit societies or established environmental groups whose objects are to protect the environment. They have brought a judicial review of a Joint Review Panel (JRP)

decision denying requests to adjourn a hearing scheduled for this Monday, September 22, 2008. Other parties to the adjournment request have not sought judicial review.

[2] This matter had originally come on for hearing in Edmonton where it was impossible to have the matter heard. The first order of business was the Applicant's request to have the judicial review expedited and heard today. All parties either consented (or, at least, did not oppose expedition) because of the looming commencement of the JRP hearings. The Court concluded that it would be in the best interests of all concerned that this matter be heard now.

I. Summary Background

[3] Glacier Power Ltd.(Glacier) has applied for approval to construct and operate a hydroelectric facility in the Peace River. The project had originally been turned down by a panel constituted under Alberta law.

[4] Glacier refiled its application and eventually, by agreement between the Natural Resources Conservation Board, the Alberta Utilities Commission and the Federal Minister of the Environment on April 10, 2008, this matter was to proceed before a Joint Review Panel.

[5] Prior to April 10, 2008, there had been procedural steps taken under the Alberta regime dealing with pre-hearing matters. The Applicants were involved and had been denied standing in those proceedings.

[6] After the Canadian Environmental Assessment Agency (CEAA) gave notice of the JRP process, the Applicants applied for funding for the hearing. Funding was granted on July 21, 2008, and the Applicants retained Klimek Law, a firm which had represented the group in earlier and other proceedings.

[7] The Applicants were advised on August 19, 2008 that the JRP's hearing would commence on September 22, 2008 in the Peace River at Fairview.

[8] The next day Klimek Law requested an adjournment because counsel was committed to other cases during the hearing timeframe. That request was denied on August 27, 2008. As indicated earlier, the Applicants were not the only participants requesting adjournment – others included a community group and BC Hydro.

[9] The JRP recognized that setting hearing dates resulted in calendar conflicts unless the hearing date is set many months in advance. Having recognized the problem, the JRP concluded that the inconvenience to these intervenors did not justify an adjournment. The Applicants had indicated that counsel could be available in November. The JRP concluded that it expected the Applicants to find alternate legal counsel.

[10] The Applicants asked the JRP for reconsideration but that request was denied.

II. Analysis and Conclusion

[11] What is at issue here is judicial review of an interlocutory decision of an expert tribunal in respect of the conduct of its proceedings. The effect of granting a judicial review is to stay the JRP hearing for some undetermined time.

[12] Courts are reluctant to interfere in interlocutory decisions of a tribunal but for "exceptional circumstances". Judicial review is usually made available when there is finality to the process. The judicial policy against intervention has a practical element – efficiency of judicial resources – as well as a principled one – respect for the role of a tribunal in controlling its own processes.

[13] In addition to this above hurdle of showing some exceptional circumstance justifying judicial intervention, the Applicants must overcome the "standard of review" applicable. Given the authority of an expert tribunal to control its processes and the highly discretionary nature of an adjournment decision, in accordance with *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of review is one of reasonableness overlaid with considerable deference.

[14] I do not find that there are any exceptional circumstances justifying judicial intervention. The Applicants have not actually established prejudice nor shown that no alternate counsel is or could be available. The complaint of prejudice and denial of natural justice presupposes a decision on the project's merits that is adverse to their interests. In this regard, the Applicants are premature. A rehearing of a five-day matter (assuming a negative merits decision overturned by the courts) is

not the type of prejudice or situation referred to in *Canada (Attorney General) v. Inuit Tapirisat of* Canada, [1980] 2 S.C.R. 735.

[15] Furthermore, there is nothing unreasonable about the JRP's conclusion that this matter should not be adjourned. The Panel addressed the issue of prejudice to the Applicant. There is no evidence that the Panel's expectation of appointment of alternate counsel could not be accomplished.

[16] The Panel was also aware of the prejudice which could be caused to Glacier and to the numerous other intervenors and participants, including a number of local native groups and other members of the public. The hearing date is set, other parties are prepared, and witnesses lined up. Disruption of the hearing for the benefit of one group affects all others.

[17] There is no assurance that what is convenient timing for the Applicant – a hearing some time in November – is convenient or practical to anyone else. An adjournment to one participant due to counsel's unavailability essentially means postponement of the hearing until all counsel are available.

[18] It is the Panel's obligation to wrestle with these conflicting demands and there is nothing unreasonable about its conclusion that the case should proceed as scheduled.

[19] Further, the Applicants relied on the CEAA Guidelines which referred to a 45-day notice before a hearing commenced as if this was a statutorily fixed timeframe. However, the Guidelines are not binding (even if Guidelines might be binding in other instances) where there is a joint review with provincial bodies.

[20] The decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, is not applicable to these facts. The guidelines in that case were mandatory and sanctioned by Order-in-Council. The Guidelines in this case are more discretionary.

[21] Moreover, a 30-day period before commencement of the hearing had been put forward since the JRP agreement in July 2008. There had been no objection by the Applicants and they cannot now raise an issue of "legitimate expectation".

[22] Even if the notice period should have been 45 days, it would be of little assistance since the Applicant's counsel is also unavailable during that longer period.

[23] Therefore, for these reasons, this judicial review is dismissed with costs.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1380-08
STYLE OF CAUSE:	ALBERTA WILDERNESS ASSOCIATION, CANADIAN PARKS AND WILDERNESS SOCIETY, THE PEACE PARKLANDS NATURALISTS, and THE SOUTH PEACE ENVIRONMENT ASSOCIATION and ATTORNEY GENERAL OF CANADA, MINISTER OF ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, THE ALBERTA UTILITIES COMMISSION, THE NATURAL RESOURCES CONSERVATION BOARD, and GLACIER POWER LTD.
PLACE OF HEARING:	Ottawa, Ontario (videoconference)
DATE OF HEARING:	September 19, 2008
REASONS FOR ORDER AND ORDER:	Phelan J.
DATED:	September 19, 2008

APPEARANCES:

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