

Date: 20080501

Docket: A-478-07

Citation: 2008 FCA 166

Present: EVANS J.A.

BETWEEN:

**MINISTER OF FISHERIES AND OCEANS,
MINISTER OF NATURAL RESOURCES, and the
ATTORNEY GENERAL OF CANADA**

Appellants

and

MININGWATCH CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 1, 2008.

REASONS FOR ORDER BY:

EVANS J.A.

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REASONS FOR ORDER

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[1] This is a motion by MiningWatch Canada, the respondent to an appeal (Court File A-478-07) by the Minister of Fisheries and Oceans, the Minister of Natural Resources and the Attorney General of Canada (“the Ministers”) from a decision of the Federal Court, *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955.

[2] In its motion MiningWatch requests two principal forms of relief: (i) an order precluding the Ministers from raising certain constitutional questions on the appeal unless they first serve a Notice of a Constitutional Question in accordance with section 57 of the *Federal Courts Act*, R.S.C. 1985,

c. F-7; and (ii) an order permitting MiningWatch an opportunity to adduce evidence of constitutional facts, if the Ministers serve a Notice.

[3] Subsection 57(1) provides as follows:

Constitutional questions

57. (1) If the constitutional validity, applicability or operability of an Act of Parliament ... is in question before the Federal Court of Appeal ... the Act ... shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

Questions constitutionnelles

57. (1) Les lois fédérales ... ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ... ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

[4] The respondent Ministers oppose the motion on the ground that their appeal does not seek to challenge the constitutionality of either the provision in dispute, or its applicability or operability to the facts of this case and, therefore, they say, section 57 does not apply. Rather, they submit that they rely upon the presumption that Parliament intends to legislate within its constitutional competence, in order to resolve an ambiguity in the statutory text. Accordingly, since they are not asking the Court to read down the disputed provision in order to avoid an unconstitutional application, section 57 does not apply and a Notice of a Constitutional Question is not required.

[5] The position taken by the Ministers is supported in a memorandum of fact and law filed by Red Chris Development Company Ltd. and BCMetals Corporation in the consolidated appeal (Court File A-479-07).

[6] The litigation underlying the appeal from which this motion arises is an application for judicial review by MiningWatch challenging decisions and other administrative action by the Minister of Fisheries and Oceans, and the Minister of Natural Resources, in connection with the environmental assessment of a proposed mining operation in northern British Columbia.

[7] In order to determine the relevant statutory duties of these Ministers, it is important to define the “project” in question: see *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, sections 18 and 21 (“CEAA”). Justice Martineau held that, for the purpose of section 21, the “project” was that defined by the proponents and, if it is on the Comprehensive Study List, the entire project is subject to a comprehensive study.

[8] The Ministers say that, in so concluding, the Applications Judge erred in law because “project” should be interpreted more narrowly and means the project as scoped by the “responsible authority”, and that this determines the extent of the environmental study required. They support this argument on several bases, including the presumption that Parliament intends to legislate in a manner that is consistent with the division of powers between the federal and provincial levels of government; in environmental matters, the two levels of government have shared responsibility.

[9] Hence, the Ministers submit, they are not using the constitutional division of powers to read down legislation in order to save it from the invalid scope that Parliament intended. Rather, the presumption that Parliament does not intend to legislate in areas outside its constitutional competence is advanced, with others, to resolve an interpretative ambiguity as to the meaning that

Parliament intended to give to the word “project”. A Notice of a Constitutional Question, the Ministers say, is not needed in such circumstances, because they are not impugning the constitutional validity of the application of the word “project” to facts to which Parliament intended it to apply.

[10] Having reviewed the materials submitted by the parties, including the memorandum of fact and law filed by the Ministers in support of their appeal, I am not persuaded that this is a situation in which a Notice is required. The Ministers are not asking that provisions of the *CEAA* be “judged to be invalid, inapplicable or inoperative” within the meaning of section 57. Rather, I understand the Ministers to be relying on the constitutional limits of Parliament’s powers as a reason for adopting a narrow rather than a broad interpretation of the ambiguous word “project” as used in sections 18 and 21 of the *CEAA*. The Ministers also rely on other arguments to support their view of Parliament’s intended meaning of “project” in this context, including previous jurisprudence (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] 3 F.C.R. 610, 2006 FCA 31), the fact that it enables a nexus to be maintained between federal powers and the type of assessment required, and the “absurd” consequences that would follow from the interpretation adopted by Justice Martineau.

[11] Whether these arguments are ultimately persuasive is, of course, for the panel hearing the appeal to decide. However, the fact that they are advanced in the Ministers’ written submissions indicates to me that the presumption of constitutional consistency is being employed here as an

interpretative tool, not as a remedy to reduce the constitutionally permitted scope of legislation which, properly interpreted, renders the proponents' definition determinative of the "project".

[12] Accordingly, I decline to order the Ministers not to strike the paragraphs in the Ministers' memorandum of fact and law setting out their arguments based on constitutional consistency. An order is not necessary to require the Ministers not to attack the constitutionality of either the legislation itself, or its application or operability in this case, unless they serve a section 57 Notice of a Constitutional Question.

[13] However, I appreciate that the jurisprudence relied by MiningWatch (in particular, the dissenting opinion of Justice Bastarache in *Barrie Public Utilities v. Canadian Cable Television Association*, [2003] 1 S.C.R. 476) may make it difficult in practice to discern the line between using constitutional consistency as an interpretative tool and to support a "reading down" remedy. Hence, it is open to the panel hearing the appeal to conclude that counsel is using the constitutional division of powers to read down the meaning of "project" so as to make it narrower than Parliament intended and that, in the absence of a section 57 Notice, the Court cannot entertain the argument. Counsel may, of course, avoid this possibility by serving a Notice, out of an abundance of caution, within 10 days from the date set down for the hearing of the appeal.

[14] Since I am not persuaded on the basis of this motion that a section 57 Notice is required, it is unnecessary to deal with MiningWatch's request for an opportunity to adduce evidence of constitutional facts. If relevant, this is a matter that may be raised at the hearing

[15] For these reasons, the motion will be dismissed with costs.

“John M. Evans”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-478-07

STYLE OF CAUSE: MINISTER OF FISHERIES AND OCEANS,
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Appellants
and
MININGWATCH CANADA
Respondent

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: EVANS J.A.

DATED: May 1, 2008

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