Federal Court  Cour fédérale

Date: 20200603

Docket: T-541-20

Citation: 2020 FC 663

Ottawa, Ontario, June 3, 2020

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

SIERRA CLUB CANADA FOUNDATION, WORLD WILDLIFE FUND CANADA AND ECOLOGY ACTION CENTRE

Applicants

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

I. Nature of the Proceedings

[1] The Applicants are three (3) environmental organizations. They have applied for judicial review of the *Report of the Regional Assessment Committee for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador*, dated February 29, 2020 [Report]. Concurrently, the Applicants have brought a motion seeking an interim order

from this Court under section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7. The interim order would prohibit the Respondent Minister from making a regulation based on the Report until this Court issues a decision on the underlying application for judicial review. In the alternative, if the Minister makes a regulation before this Court rules on the motion, the Applicants seek an interim order staying the effect of the regulation until this Court issues its decision on the underlying application for judicial review.

[2] The Respondents have brought a cross-motion asking the Court to strike out the Applicants' notice of application for judicial review on the grounds that the Report is not a reviewable decision.

[3] As the two (2) motions are linked, I have decided to dispose of them in one (1) set of reasons.

II. Background

[4] On April 15, 2019, the Respondent Minister appointed a five-member Committee [Committee] under the *Canada Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [CEAA 2012] then in force. The Committee was to conduct a regional assessment of the effects of existing and anticipated exploratory drilling in the eastern Newfoundland and Labrador offshore [Regional Assessment]. The Committee's mandate, terms of reference and the factors it was required to consider were set out in an agreement [Agreement] signed in March 2019 by the Respondent Minister, the Minister of Natural Resources Canada as well as Newfoundland and Labrador's Minister of Natural Resources and Minister for Intergovernmental and Indigenous

Affairs. The Agreement provided that it would remain valid if the CEAA 2012 were to be repealed and replaced by new legislation. In August 2019, the provisions of the CEAA 2012 were repealed, and the *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA] was enacted.

[5] The planning and conduct of the Regional Assessment involved the participation of several stakeholders, including governmental departments and agencies, Indigenous groups, industry and other groups and organizations. The Applicants applied for and received funding to facilitate their participation in the Regional Assessment process.

[6] On January 10, 2020, the Agreement was amended to allow the Committee an extra two (2) months to submit its final report. On January 23, 2020, as per the Agreement, the Committee made its draft report available for a 30-day public comment period. The draft report was then finalized, and the Committee submitted its final report to the four (4) ministers on February 29, 2020. The Report was made available to the public on March 4, 2020.

[7] In the Report, the Committee made recommendations on a variety of topics directed to various parties, including the Respondent Minister, the Canada-Newfoundland and Labrador Offshore Petroleum Board, other government departments and agencies and other organizations.

[8] On the same day the Committee made the Report available to the public, the Respondent Minister released the *Discussion Paper on a Ministerial Regulatory Proposal to Designate Offshore Exploratory Drilling East of Newfoundland and Labrador for Exclusion under the Impact Assessment Act* [Discussion Paper]. Based on the Minister’s authority under paragraph

112(1)(*a.2*) and section 112.1 of the IAA, the Discussion Paper proposed a regulation that would exempt exploratory oil and gas drilling projects from IAA assessment requirements in the study area of the Regional Assessment. Annex 1 of the Discussion Paper also proposed conditions that proponents would have to meet to move forward with their drilling projects in place of the usual need for an impact assessment under the IAA.

[9] On May 11, 2020, the Applicants filed a notice of application for judicial review in respect of the Committee's Report. In their application, the Applicants seek an order declaring that the Report is not a "regional assessment" within the meaning of the IAA because it does not comply with sections 102(1), 92 and/or 93, and 96 to 103 of the IAA and the requirements of the Agreement. They ask the Court to quash the Report and send it back to the Committee for a complete assessment that complies with the Agreement and the IAA. The Applicants also seek an order prohibiting the Respondent Minister from making a regulation based upon the Report, which would exempt from assessment under the IAA certain exploratory drilling activities in the offshore of the Atlantic Ocean east of Newfoundland and Labrador.

[10] In the interim, the Applicants filed a motion seeking to prohibit the Respondent Minister from making the proposed regulation until their judicial review application has been determined. In the alternative, if the proposed regulation comes into force before this Court rules on the motion, they seek an order staying the effect of that regulation. The Applicants requested that the motion be heard on an urgent basis because they expected that the proposed regulation would be finalized by the end of May 2020.

[11] On May 20, 2020, the Respondents filed a motion to strike the notice of application for judicial review on the basis that the Committee's Report is not a reviewable decision.

[12] The Respondents have since advised the Court that the proposed regulation is expected to be published by June 4, 2020.

III. Analysis

[13] In order to succeed on a motion for an interim injunction, the moving party must meet the requirements of the conjunctive tripartite test articulated by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at pages 348 to 349 [*RJR-MacDonald*]. The Applicants must demonstrate that: (1) there is a serious issue to be tried; (2) they will suffer irreparable harm if the interim relief is not granted; and (3) the balance of convenience favours the granting of the order.

A. *Serious Issue*

[14] The Applicants submit that their application for judicial review raises serious questions as to whether the Committee breached its terms of reference and its enabling statute such that the Committee's Report cannot serve as a "regional assessment" for the purposes of the IAA. In particular, they argue that the Committee failed to assess the risks and cumulative effects of exploratory drilling, a core element of its mandate.

[15] The Respondents' principal argument is that the Committee's Report is advisory in nature only and, as such, is not reviewable before this Court. On that basis, they seek to strike the application for judicial review.

[16] The Respondents submit that there is binding authority from the Federal Court of Appeal that reports of this nature are not reviewable because they have no legal consequences. In particular, they rely upon *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala*], *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Trans Mountain*] and *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 [*Taseko Mines*].

[17] In *Gitxaala*, the Federal Court of Appeal considered the report issued by a review panel, known as the Joint Review Panel, acting under the CEAA 2012 and the *National Energy Board Act*, RSC 1985, c N-7, as amended [NEBA]. The Joint Review Panel conducted an environmental assessment under the CEAA 2012, and it prepared a report under section 52 of the NEBA that presented recommendations to the Governor in Council. The Governor in Council accepted the Joint Review Panel's recommendation and issued an Order in Council directing the National Energy Board [NEB] to issue two (2) Certificates of Public Convenience and Necessity, on certain conditions, concerning the Northern Gateway Project. The parties sought judicial review of both the Report of the Joint Review Panel and the decision of the Governor in Council.

[18] After reviewing the legislative scheme in place, the Federal Court of Appeal found that, for the purposes of review, the only meaningful decision-maker was the Governor in Council. It noted that before the Governor in Council decides, others assemble information, analyze, assess

and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. It also noted that the environmental assessment under the CEAA 2012 played no role other than assisting in the development of recommendations submitted to the Governor in Council. It found that judicial review did not lie against the Report of the Joint Review Panel because, under the legislative scheme, no decision about legal or practical interests had been made. Any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not the Court. Therefore, the Court of Appeal dismissed the applications for judicial review of the Report of the Joint Review Panel (*Gitxaala* at paras 5, 120-123, 125, 342).

[19] In *Trans Mountain*, the NEB had issued a report recommending that the Governor in Council approve the proposed expansion of the Trans Mountain pipeline system. The NEB based its recommendation on its findings that the expansion of the pipeline was in Canada's public interest, and that the expansion was not likely to cause significant adverse environmental effects if certain environmental protection procedures, mitigation measures and conditions were implemented. The Governor in Council accepted the NEB's recommendation and issued an Order in Council directing the NEB to issue a Certificate of Public Convenience and Necessity approving the construction and operation of the expansion project, subject to the conditions recommended by the NEB. A number of applications for judicial review were filed against both the NEB's report and the Order in Council. Trans Mountain Pipeline ULC moved to strike the applications for judicial review challenging the NEB's report on the ground that the report was not amenable to judicial review.

[20] After referring to its conclusion in *Gitxaala* that judicial review did not lie against reports made pursuant to section 52 of the NEBA, the Federal Court of Appeal noted that all but one of the applicants who challenged the NEB's report also challenged the decision of the Governor in Council. The Court noted its own jurisprudence that motions to strike applications for judicial review are to be resorted to sparingly because such proceedings are designed to proceed without delay and in a summary way. Thus, justice is better served by allowing the Court to deal with all of the issues raised by an application at one time. The Court further noted that this rationale was particularly applicable in the case before it: even if the Court were to strike the applications challenging the NEB's report, the Court would then proceed to review the decision of the Governor in Council, and the applicants could continue to assert flaws in the NEB's report in that context. The Court found little utility would be achieved in deciding the motions to strike when the arguments in support of them would be considered later in the same reasons to determine the merits of the applications. The Federal Court of Appeal thus dismissed the motions to strike (*Trans Mountain* at paras 135-142).

[21] The Federal Court of Appeal rejected the argument made by one of the applicants that meaningful review had to come in the form of judicial review of the NEB's report, as the Governor in Council was not an adjudicative body. The Court noted, as it had in *Gitxaala*, that (1) the Governor in Council was required to consider any deficiency in the report submitted to it, and (2) the decision of the Governor in Council was then subject to review by the Court under section 55 of the NEBA. If the decision of the Governor in Council was based upon a materially flawed report, the decision could be set aside on that basis. The Federal Court of Appeal

concluded that the NEB's report was not justiciable, and it dismissed the applications for judicial review that challenged the report (*Trans Mountain* at paras 4, 201-202).

[22] The last case upon which the Respondents rely is *Taseko Mines*. There, Taseko Mines Limited was appealing a decision in which this Court had dismissed its application for judicial review against the final report issued by a Federal Review Panel [Panel] appointed under the former *Canadian Environmental Assessment Act*, SC 1992, c 37 and continued under the CEAA 2012. The Panel had found that the project in question was likely to cause significant adverse environmental effects.

[23] On what appears to have been the Court's own motion, the Federal Court of Appeal examined whether the Panel's final report was amenable to judicial review in light of the decisions in *Gitxaala* and *Trans Mountain*. The Federal Court of Appeal considered the argument raised by the parties that the legislative scheme at play was significantly different from the one in *Gitxaala* and *Trans Mountain*. The parties had argued that, in those two (2) cases, the Court had dealt with a complete code with an effective internal remedy provided by the regime. The Governor in Council could refer any of the Joint Review Panel's or the NEB's recommendations back to these authorities for reconsideration. The parties contrasted this with the legal framework at play in *Taseko Mines*, which did not allow for reconsideration. Instead, it merely allowed the Minister to ask the Federal Review Panel to clarify the conclusions and recommendations in its report. The Federal Court of Appeal rejected this argument, finding that the distinction between the two (2) schemes highlighted by the parties did not change the fact that the Final Report, in itself, affected no legal rights and carried no consequences. Whether or

not the Panel could be requested to review its conclusions and recommendations, the Final Report only served to assist the Minister or the Governor in Council in making their decisions. The Federal Court of Appeal concluded that the Final Report was not amenable to judicial review. It clarified, however, that this did not mean that the Final Report was immune from review. The Court reiterated that the Final Report could be reviewed in the course of the judicial review proceedings brought against the decisions of the Minister or the Governor in Council (*Taseko Mines* at paras 35-45).

[24] In the present case, the Respondents argue that the Committee's Report is of the same nature as that in *Taseko Mines*. The Applicants disagree. The Applicants submit that, in *Taseko Mines*, the Court was dealing with a "project-level assessment" under the former CEAA 2012, whereas the present case concerns a "regional assessment" under the IAA. Regional assessments under the IAA, in the Applicants' view, have independent legal and practical effects that project-level assessments do not. Unlike other reports that merely recommend a course of action for a single decision, regional assessments are "decisions or orders" in their own right. They affect legal rights, such as participatory rights accorded by the IAA and certain approvals under that statute, as well as the planning and management of cumulative effects in a region and the guidance of future regional development planning. The Applicants also note that *Taseko Mines* was not decided in the context of a motion to strike but only after a hearing on the merits.

[25] A motion to strike an application for judicial review should only be granted in those exceptional cases where the application is "so clearly improper as to be bereft of any chance of success" (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 at 600

(CA)). The test for striking an application has also been articulated as whether it is plain and obvious that the application is doomed to fail (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 65) or whether it is fatally flawed (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 91).

[26] The Respondents submit that "the presence of an authority which is directly contrary to the position on which an application is based can be such an exceptional circumstance, when no further development of the factual record is required" (*LJP Sales Agency Inc v Canada (National Revenue)*, 2007 FCA 114 at para 8). They argue that the decisions in *Gitxaala*, *Trans Mountain* and *Taseko Mines* are authorities that demonstrate that judicial review does not lie against the Committee's Report.

[27] In contrast, the Applicants argue that where the issue raised by a moving party as the basis for dismissing the application is "debatable", the circumstances do not warrant dismissal of the application at a preliminary stage (*Apotex Inc v Canada (Health)*, 2010 FC 1310 at paras 12-13).

[28] The Committee's Report, which consists of one hundred and ninety-six (196) pages, appears to be an advisory report that will inform potential decisions, such as the Respondent Minister's decision to exercise his authority under paragraph 112(1)(*a.2*) of the IAA. By itself, the Report does not appear to affect any legal rights, nor does it carry any legal consequences. Legal consequences would only follow if the proposed regulation is adopted. While I find the decisions in *Gitxaala*, *Trans Mountain* and *Taseko Mines* to be very persuasive, at this point in

the proceedings, I cannot conclude that the application for judicial review is "so clearly improper as to be bereft of any possibility of success". Nor can I conclude that the application can be considered one of those "exceptional cases" that warrant an early determination. The Applicants' argument regarding the distinctions to be made between the legal framework in this instance and those examined by the Federal Court of Appeal in *Gitxaala*, *Trans Mountain* and *Taseko Mines* raises a debatable issue that will require an analysis of both frameworks and the factual record. For this reason, I am of the view that the determination of whether the Committee's Report is amenable to judicial review should be left to the judge who will hear the application on its merits.

[29] Having reached this conclusion, I come back to the first prong of the test for granting interim injunctive relief. The Applicants need only show the seriousness of the legal claim on a preliminary investigation. The threshold is a low one that does not invite extensive review of the merits. If the proceeding is not frivolous or vexatious, the analysis should turn to the next prong of the test: irreparable harm (*RJR-MacDonald* at 337-338).

[30] The Respondents argue that the application for judicial review and the motion for interim relief are both premature because the Respondent Minister has yet to enact a regulation and because the Court lacks jurisdiction to restrain the Minister from making a regulation, which is a legislative function. In addition, if the regulation were already in place, it would benefit from a presumption of validity. While I agree with the principles raised by the Respondent, I note that the Applicants are also seeking a declaration that the Committee's Report is not a "regional assessment" under the IAA. They are asking the Court to send the Report back to the Committee

for a complete assessment that complies with the Agreement and the IAA. Leaving aside the issue of whether the Committee's Report is amenable to judicial review, given the low threshold the Applicants have to meet, I am satisfied that the first prong of the tripartite test has been met.

B. *Irreparable Harm*

[31] Under the second prong of the test, the Court must determine whether the Applicants have provided clear and convincing evidence demonstrating, on a balance of probabilities, that irreparable harm will result between now and the time the underlying application is determined. The Federal Court of Appeal has held that, to establish irreparable harm, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals, and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue*), 2012 FCA 255 at para 31; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16).

[32] The Applicants argue that irreparable harm will result unless interim relief is granted. If the proposed regulation comes into force, they claim that it will cause irreparable harm to the Applicants and to the public interest, as it will exempt exploratory drilling from further environmental review before the Court determines whether the basis for that exemption is flawed. The Applicants have participated heavily in the assessment of several projects in the Newfoundland offshore, all of which they claim will cease if the proposed regulation comes into force. They will lose their participatory rights and their legitimate expectation of contributing to the assessment of the hazards of drilling. The Applicants also submit that there are serious

environmental concerns that remain unaddressed in the Regional Assessment and the proposed regulation. The marine environment will be damaged as a result of the failure to address the irreparable harm to birds, corals, sponges, and sensitive protected areas. Oil spills have also been a recent, frequent and persistent problem in the area of the Regional Assessment – a significant spill has occurred every year since 2004.

[33] In my view, the Applicants have not met their burden to establish irreparable harm.

[34] First, the environmental harm alleged by the Applicants is not harm that would result from the Report or from the Respondent Minister enacting a regulation. Rather, they allege harm that may result from possible drilling activities.

[35] Second, under subsection 181(1) of the IAA, environmental assessments commenced by the Canadian Environmental Assessment Agency under the CEAA 2012 continue to be assessed under that Act. They would not be exempted by the proposed regulation. The Applicants argue that proponents of projects undergoing an assessment under the CEAA 2012 may withdraw their applications and apply again under the proposed regulation. Even so, at this point, that possibility remains speculation, which is not sufficient to establish irreparable harm.

[36] Third, with respect to new offshore exploratory drilling projects, a number of steps must occur before the alleged harms could arise. First, the proposed regulation must be adopted. Second, a project proponent will have to propose an offshore exploratory drilling project in the study area of the Regional Assessment. Third, the proposed project will have to meet the

conditions set out in the proposed regulation. Fourth, the proposed project will have to obtain all regulatory approvals necessary to begin. Finally, the project proponent will have to actually begin the exploratory drilling program. The alleged harms could only arise after all of these steps.

[37] Fourth, according to the Applicants' notice of application, if the Minister makes the proposed regulation despite this application and motion for interim relief, the Applicants will bring a further application for judicial review to challenge the regulation itself. They would presumably base this challenge on grounds similar to those raised in the application underlying these motions, namely that the Minister did not review or consider a "regional assessment" within the meaning of the IAA. I agree with the Respondents that if other remedies such as these are available, it cannot be said that the impacts from the Report or the enactment of the proposed regulation would be irreparable.

[38] As the Supreme Court of Canada held in *RJR-MacDonald*, irreparable harm is concerned with whether a refusal to grant relief could so adversely affect an applicant's interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application (*RJR-MacDonald* at 341). The Applicants have not convinced me that such harm would result. If the Applicants are concerned about the delay in having their application for judicial review determined, they can seek leave for an expedited hearing.

[39] Given that the Applicants have failed to persuade me that irreparable harm will result before the application for judicial review is determined on its merits, I need not consider the third prong of the conjunctive tripartite test.

IV. Conclusion

[40] To summarize, I find that this application is not one of those rare and exceptional cases that should be struck before it can be adjudicated on its merits. The Applicants have persuaded me that the issue of whether the Committee's Report is justiciable is debatable and should be heard on its merits. Therefore, the Respondents' motion to strike the application for judicial review is dismissed.

[41] Furthermore, while I am satisfied that the Applicants have established the first prong of the conjunctive tripartite test under *RJR-MacDonald*, they have failed to persuade me that irreparable harm will result from the Committee's Report until the application for judicial review is determined on its merits. Thus, the Applicants' motion for interim relief is dismissed.

[42] In view of these mixed results, each party shall bear its own costs.

ORDER in T-541-20

THIS COURT ORDERS that:

1. The Applicants' motion for an interim injunction is dismissed.

2. The Respondents' motion to strike the application for judicial review is dismissed.

3. Each party shall bear its own costs on these motions.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-20
STYLE OF CAUSE:	SIERRA CLUB CANADA FOUNDATION ET AL v MINISTER OF ENVIRONMENT AND CLIMATE CHANGE ET AL
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND HALIFAX, NOVA SCOTIA
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DATED:	JUNE 3, 2020

APPEARANCES:

James Gunvaldsen Klaassen Joshua Ginsberg	FOR THE APPLICANTS
Lori Ward Melissa Grant	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

James Gunvaldsen Klaassen & Joshua Ginsberg Ecojustice Halifax, Nova Scotia	FOR THE APPLICANTS
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENTS