Date: 20080327

Docket: T-460-08

Citation: 2008 FC 382

Ottawa, Ontario, March 27, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

IMPERIAL OIL RESOURCES VENTURES LIMITED

Applicant

and

MINISTER OF FISHERIES AND OCEANS,
ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for a stay of application or, alternatively, for an injunction prohibiting the Minister from revoking an authorization given under subsection 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "Authorization") to Imperial Oil allowing work to be done as part of the Kearl Oil Sands (KOS) Project. The applicant is also seeking an expedited hearing of the underlying application for judicial review attacking the same decision of the Minister.

I. Facts

[2] The course of events leading to the present motion can be briefly summarized. Imperial Oil wishes to construct the KOS Project, an oil sands mine, in a location approximately 70 kilometres north of Fort McMurray, Alberta, on the east side of the Athabasca River. This is a huge project, consisting of four open pit truck and shovel mines providing for an average of 24,750 tonnes per hour mining capacity, corresponding ore preparation and bitumen separation facilities, a cogeneration plant, a bitumen froth processing plant, a terminal to deliver the oil sands products to a pipeline system, and utilities and off-site facilities to support the mining and processing operations. The operations at the KOS Project are expected to continue until approximately 2060 and will be followed by final reclamation of the KOS Project site. The total project is designed to produce a maximum capacity of 55,000 cubic meters of partially deasphalted bitumen per day for a period of 50 years.

[3] The Project is subject primarily to regulation established by Alberta Environment pursuant to the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and by the Alberta Energy & Utilities Board pursuant to the *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7. It also falls within federal jurisdiction as a result of the need for Imperial Oil to obtain an authorization from the federal Minister of Fisheries and Oceans pursuant to subsection 35(2) of the *Fisheries Act*. Accordingly, the Project was subject to the environmental assessment processes of both the Governments of Alberta and Canada.

[4] A variation of the Project was first announced to the public in 1997 by Mobil Oil Canada, now ExxonMobil Canada. Beginning in 2002, Imperial entered into agreements with ExxonMobil Canada and other holders of oil sands leases to secure the rights to those leases that now underlie the KOS Project site. Work on the Environmental Impact Assessment ("EIA") began in 2003. On April 22, 2004, the Director of Environmental Assessment of Alberta issued the Final Terms of Reference of the EIA, after receiving input from numerous stakeholders, including the federal government.

[5] Imperial Oil submitted its EIA on July 12, 2005 to the provincial and federal authorities and filed its application with the Alberta Energy and Utilities Board to allow for construction and operation of the DOS Project. After receiving and reviewing the Project Application and all of the supplemental information provided by Imperial Oil, the Alberta Energy & Utilities Board determined that, pursuant to Alberta legislation, it would hold a public hearing to determine whether the KOS Project was in the public interest.

[6] On January 18, 2006, the Department of Fisheries and Oceans, after consulting with other federal departments and agencies, recommended to the Minister of Environment that the KOS Project be assessed under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (the *CEAA*). More specifically, it was to be referred to a review panel due to the potential for the proposed project to cause significant adverse environmental effects. On July 14, 2006, Canada entered into an agreement with the government of Alberta to conduct a joint review panel.

[7] Twenty parties filed submissions with the Panel, and a number of them also gave evidence and were cross-examined by the Panel during the 16 days of public hearings that took place in November 2006. The Panel issued its Joint Panel Report on February 27, 2007. With regard to its responsibilities under the *CEAA* and to its terms of reference, the Joint Panel concluded that the proposed Project was not likely to result in significant adverse environmental effects, provided that the proposed mitigation measures and the recommendations of the Joint Panel were implemented.

[8] Subsequent to the issuance of the Joint Panel Report, the Alberta Department of Environment and the Alberta Energy & Utilities Board issued the approvals required in connection with the KOS Project to Imperial Oil. On August 14, 2007, the Government of Canada issued a response to the Joint Panel Report, stating that it accepts all the conclusions and recommendations of the Joint Panel as presented in its Report.

[9] On March 29, 2007, an application for leave and judicial review was filed by various non-profit organizations concerned about the environmental effects of the KOS Project (File T-535-07). They submitted that the environmental assessment conducted by the Joint Panel did not comply with the mandatory steps in the *CEAA* and in the Panel's Terms of Reference. The hearing took place from January 15 to 17, 2008.

[10] Despite this challenge to the Joint Panel's Report, the Minister of Fisheries and Oceans issued Imperial Oil an authorization under subsection 35(2) of the *Fisheries Act* on February 8, 2008.

On the basis of that authorization, Imperial Oil immediately commenced its work on the Project.

[11] Madam Justice Tremblay-Lamer issued her Reasons and Order on March 5, 2008 (*Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302). She allowed the application for judicial review in part, and remitted the matter back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance. She refrained, however, from requiring the entire Panel review to be conducted a second time, as the error related solely to one of many issues that the Panel was mandated to consider.

[12] In a paragraph that is very much a bone of contention between the parties in the present Motion, Madam Justice Tremblay-Lamer wrote:

> [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 CEAA 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.

[13] On March 11, 2008, the Chief Executive Officer for Imperial Oil wrote to the Minister of Fisheries and Oceans, articulating concerns over the impact of the Judgment on the Project work

then underway, and on the Authorization issued on February 12, 2008, pursuant to subsection 35(2) of the *Fisheries Act*.

[14] On March 13, 2008, two of the Applicants in the judicial review of the Joint Panel's Report initiated a new judicial review application (File T-418-08). Imperial Oil is named as a Respondent, as is the Minister of Fisheries and Oceans. This new judicial review application is directed to the Authorization issued on February 12, 2008, pursuant to subsection 35(2) of the *Fisheries Act*. It seeks relief which included an Order quashing the Authorization, and interlocutory injunctive relief enjoining all or part of the KOS Project until the final resolution of the issues raised.

[15] On March 20, 2008, the Department of Fisheries and Oceans delivered a letter to Imperial Oil, stating their opinion that the Authorization had been rendered a nullity as a result of the decision of Madame Justice Tremblay-Lamer. On the same day, Imperial Oil filed Judicial Review Application T-460-08 which underlies the present motion for a stay of the Minister's decision to revoke the Authorization given on February 8, 2008.

[16] It is worth adding that, at the time of writing, there has been no appeal from the decision reached by my colleague Justice Tremblay-Lamer. At the hearing, counsel for the applicant mentioned that they may seek clarification of Madam Justice Tremblay-Lamer's ruling.

II. Analysis

[17] The test for issuing a stay of proceedings is well known, and has been set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The applicant must establish a) a serious issue to be tried, b) that it will suffer irreparable harm if the stay is not granted, and c) that the balance of convenience favours the applicant.

[18] In this case, I think it is beyond dispute that a serious issue to be tried has been established. Briefly stated, the arguments of the parties can be summarized in the following way. The applicant contends there is nothing in the *Fisheries Act* allowing the Minister to revoke the subsection 35(2) authorization or revisit his decision to grant the authorization. As to the argument that the authorization has been rendered a nullity as a legal consequence of the judgment of Madam Justice Tremblay-Lamer, the applicant further argues, first of all, that the Joint Panel's Report was not quashed or set aside, but was merely sent back for the Panel to better explain its recommendations with respect to the problem of greenhouse gas emissions and to provide a basis for its conclusion on this particular issue. In any event, counsel for the applicant submits that section 37 of the *CEAA* directs the Minister to take into account the Panel Report, not to rely solely on its rationale. While it was conceded that the result might be different if the Court had quashed the Report, it is argued that the authorization cannot fall merely because the reasoning of the Panel was found defective on one aspect of its findings.

[19] The respondents, on the other hand, take the view that the Minister has not revoked the Authorization, but that it has become void as a legal consequence of the decision made by Madam Justice Tremblay-Lamer. If one is to follow their argument, the regulatory regime put in place in the *CEAA* emphasizes that environmental assessment is a process in which environmental assessment precedes and informs regulatory decision making. Since there has been a material flaw in the environmental assessment process which, to use Madam Tremblay-Lamer's words, "short-circuits" this sequence, the Authorization is a nullity. In other words, the *CEAA* makes it clear that the Minister cannot proceed until a completed environmental assessment is over, one that meets all the requirements of the *CEAA*, and a report that as described in section 34 has been submitted to the Minister. Since the Court found a material error in the Panel's Report, it nullifies the Authorization as a condition precedent to the exercise of the authority has not been fulfilled. The responsible authority could not proceed because it could not make an informed decision.

[20] It would be inappropriate, at this stage, to go any further into the arguments presented by counsel from each side. They are better left to the judge who will be seized of the underlying Application for Judicial Review, who will be in a much better position to rule on this legal issue after having considered a full record and more comprehensive written and oral arguments. Suffice it to say that, for the purposes of this Motion for a stay of application, I am satisfied the applicant has a case which deserves to be heard by the Court.

[21] I am not convinced, however, that the applicant will suffer irreparable harm if the stay is not granted, especially if the Application for Judicial review is heard on an expedited basis. Indeed,

counsel for the applicant conceded that much during his oral submission by teleconference. In his affidavit, Mr. Christopher Douglas Allard, Senior Project Manager for the KOS Project, stated that if work is to be stopped, there will be a domino effect on the timeline set for the work to be completed by 2012. While this is no doubt true, I also note that there is some vagueness in that schedule. For example, the ditching work will continue through "the first quarter or half of 2008" (para. 40 of the affidavit). Dewatering would then commence, and Imperial Oil "believes" it must start in the summer of 2008, as there are many different factors that can impact the pace of dewatering (para. 41 of the affidavit). If the ditching stops and dewatering cannot occur as planned, "that may extend the Project out one or more years" (para. 44 of the affidavit).

[22] In light of these crude estimates, and in the absence of any cross-examination on the affidavits, it is difficult to assess with any degree of certainty the damage that would result from a long term stay. Imperial Oil also argued that if it wishes to commence operation of the KOS Project on schedule, it must order certain equipment, execute an engineering procurement and construction management contract and execute an earthworks construction contract. Many equipment items must be ordered 3 to 4 years prior to delivery, and the cost and availability of this equipment could change during this time. Moreover, the hundreds of engineers that have been mobilized for this project would likely be redeployed to other projects, and it would be impossible to say how many would be able to rejoin the KOS Project upon recommencement.

[23] These are no doubt costs to be taken into consideration, but the amount of which is difficult to assess. How much of these costs would Imperial Oil be able to recoup is also difficult to foresee.

What appears to be clear, however, is that a short term delay will most likely not be a major impediment in the overall schedule of the project. Moreover, Imperial Oil stands to loose a lot more if they were to do more work and expand further capital investment, only to see their Application for Judicial Review dismissed by the Court in a year or so.

[24] It is true that from a compensation standpoint, Imperial Oil has committed to a No Net Loss Plan under the subsection 35(2) authorization such that any fish habitat that is altered, disrupted or destroyed must be replaced on a ratio of 2 to 1. I am also mindful of the undertaking given by the applicant as to damages that may be caused as a result of the granting of a stay. But these are only some of the considerations that must be taken into account. Of far more significance, it seems to me, is the crucial importance to resolve all the uncertainties, legal and otherwise, before embarking upon such an important project. This can only be done when the issues will have been fully canvassed, and when all the interested parties will have had an opportunity to be heard.

[25] For all these reasons, the application for interim relief shall be denied. I will, on the other hand, make an order pursuant to Rule 373(3) of the *Federal Courts Rules*, SOR/98-106 for this case to receive an expedited hearing. I will also, pursuant to Rule 104 and 105 of the *Federal Courts Rules*, make an order to add as respondents the applicants in file no. T-418-08, Pembina Institute for Appropriate Development and Sierra Club of Canada, and to partially consolidate these two cases so that the critical issue raised in file no. T-418-08 can be addressed at the hearing of this case. This Order shall also be served on the other two applicants in file no. T-535-07, Prairie Acid Rain

Coalition and Toxics Watch Society of Alberta, so that they may apply to be added as respondent in this file.

[26] I conveyed my Order orally to the parties on March 24, 2008, and invited them to agree on a proposed timeline for all the steps to be completed in order to bring this matter to an expedited hearing. Counsel for the applicant and for the respondent, in consultation with counsel for the applicants in file no. T-535-07, have agreed on a schedule and on the questions to be addressed by the Court in the partially consolidated hearing of the applications in file no. T-460-08 and 418-08. The substance of their agreement is therefore incorporated in my Order.

[27] No costs have been sought, and none will be awarded.

ORDER

THIS COURT ORDERS that:

- The application for a stay is denied;
- The hearing of the Application for Judicial Review shall be expedited and will take place in Calgary on May 7 and 8, 2008, according to the following schedule:
    - On March 31, 2008: Affidavit of the applicant to be filed and served;
    - On April 3, 2008: Affidavit of the respondents to be filed and served;
    - By April 7, 2008: Cross-examinations on affidavits to be completed;
    - On April 9, 2008: Applicant's Application Record to be filed and served;
    - On April 14, 2008: Respondents' Application Record to be filed and served.
- The following parties are added as respondents: Pembina Institute for Appropriate Development, and Sierra Club of Canada.
- This Order shall be served on Prairie Acid Rain Coalition and Toxics Watch Society of Alberta, so that they may apply to be added as respondent in this file;
- Motions arising from disputes over the admissibility or relevance of evidence, if any, will be filed and served by the parties in the ordinary timeframes provided for Motions in the *Federal Courts Rules*, and will be returnable before the Court hearing the merits of the application.
- The issues to be determined by the Court in the Application for Judicial Review includes the following:
    - 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?

- The Application for Judicial Review that is the subject of file no. 418-08 is consolidated with this file, but only to the extent necessary to address the second of the three above mentioned questions. Nothing in this Order shall preclude Pembina Institute for Appropriate Development, Prairie Acid Rain Coalition, Sierra Club of Canada or Toxics Watch Society of Alberta from raising any remaining issue in T-418-08 at a later hearing, provided that they will be bound by its election to place before the Court the second issue as noted above.
- All parties shall bear their own costs and disbursements in this file.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-460-08
STYLE OF CAUSE:	Imperial Oil Resources Ventures Limited **v.** Minister of Fisheries and Oceans Attorney General of Canada

MOTION DEALT BY TELEPHONE CONFERENCE

PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 26, 2008
REASONS FOR ORDER AND ORDER BY:	de MONTIGNY J.
DATED:	March 27, 2008

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