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Imperial Oil Resources Ventures Ltd., Re

Imperial Oil Resources Ventures Limited; Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project); Fort McMurray Area

Alberta Energy and Utilities Board

J.R. Nichol Chair, L. Cooke Member, T. McGee Member

Judgment: February 27, 2007

Docket: 2007-013

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Counsel: None given

Subject: Natural Resources; Public; Environmental

Natural resources --- Oil and gas — Statutory regulation — Miscellaneous.

Cases considered:

Albian Sands Energy Inc., Re (2006), 2006 CarswellAlta 1911 (Alta. E.U.B.) — considered

Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works) (2006), 2006 NLTD 119, 2006 CarswellNfld 218, 779 A.P.R. 257, 258 Nfld. & P.E.I.R. 257, [2006] 4 C.N.L.R. 94 (N.L. T.D.) — considered

Suncor Energy Inc., Re (2006), 2006 CarswellAlta 1927 (Alta. E.U.B.) — referred to

TrueNorth Energy Corp., Re (2002), 2002 CarswellAlta 2007 (Alta. E.U.B.) — considered

Statutes considered:

Administrative Procedures and Jurisdiction Act, S.A. 2000, c. A-3

Generally — referred to

s. 12 — considered

s. 12(2) — referred to

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s. 12(4) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — referred to

s. 5 — referred to

s. 25 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 35 — referred to

Energy Resources Conservation Act, R.S.A. 2000, c. E-10

Generally — referred to

s. 22 — referred to

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Generally — referred to

Fisheries Act, R.S.C. 1985, c. F-14

Generally — referred to

s. 35(2) — referred to

Hydro and Electric Energy Act, R.S.A. 2000, c. H-16

Generally — referred to

s. 11 — pursuant to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 2(1) "band" — referred to

Oil Sands Conservation Act, R.S.A. 2000, c. O-7

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Generally — referred to

s. 10 — pursuant to

s. 11 — pursuant to

Societies Act, R.S.A. 2000, c. S-14

Generally — referred to

Species at Risk Act, S.C. 2002, c. 29

Generally — referred to

Water Act, R.S.A. 2000, c. W-3

Generally — referred to

Treaties considered:

Treaty No. 8, 1899

Generally — referred to

Regulations considered:

Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c. A-3

Designation of Constitutional Decision Makers Regulation, Alta. Reg. 69/2006

Generally — referred to

s. 3 — referred to

Sched. 2 — referred to

Climate Change and Emissions Management Act, S.A. 2003, c. C-16.7

Specified Gas Emitters Regulation, Alta. Reg. 139/2007

Generally — referred to

Oil Sands Conservation Act, R.S.A. 2000, c. O-7

Oil Sands Conservation Regulation, Alta. Reg. 76/1988

s. 3 — pursuant to

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s. 24 — pursuant to

s. 26 — pursuant to

s. 48 — pursuant to

Decision of the Board:

1 Decision and Recommendations to Canada and Alberta

1 Having regard for its responsibilities under the *Energy Resources Conservation Act (ERCA)*, the *Canadian Environmental Assessment Act (CEAA)*, the *Oil Sands Conservation Act (OSCA)*, and the *Hydro and Electric Energy Act (HEEA)*, the Canadian Environmental Assessment Agency and the Alberta Energy and Utilities Board (EUB/Board) joint review panel (the Joint Panel) has carefully considered all the evidence pertaining to the applications of Imperial Oil Resources Ventures Limited (Imperial Oil). The Joint Panel finds that Imperial Oil's Kearl Oil Sands (KOS) Project is in the public interest for the reasons set out in the report. Under its authority as the EUB, the Joint Panel is prepared to approve Application No. 1408771, subject to the approval of the Lieutenant Governor in Council. The Joint Panel also approves Application No. 1414891.

2 The Joint Panel's approval is subject to the conditions listed in Appendix 2. The Joint Panel also expects that Imperial Oil will adhere to all commitments it made during the consultation process, in the applications, and at the hearing to the extent that those commitments do not conflict with the terms of the approval or licence affecting the project or any law, regulation, or similar requirement that Imperial Oil is bound to observe.

3 With regard to its responsibilities under the *CEAA* and its terms of reference, the Joint Panel assessed the environmental effects of the project and their significance, including those caused by possible accidents and malfunctions, and the cumulative environmental effects that the project could cause when combined with the effects from other works, projects, or activities, taking into account measures to mitigate these effects. The purpose and need for the project, the feasible alternatives, and the need for a follow-up program were also reviewed, as well as the capacity of renewable resources to meet the needs of current and future generations. The Joint Panel concludes that the KOS Project is not likely to cause significant adverse environmental effects, provided that the proposed mitigation measures and the recommendations of the Joint Panel are implemented.

4 The Joint Panel recommends to Canada that

1) Environment Canada (EC) and Alberta Environment (AENV) work together to assess the need for a mine fleet emissions technology review and regulation development process (Section 13.7);

2) Fisheries and Oceans Canada (DFO), AENV, the oil sands industry, and all other affected stakeholders dedicate the resources, staff, and funding to ensure that Phase II of the Water Management Framework for the Athabasca River is completed in a comprehensive manner and on time (Section 14.1.9);

3) Phase II of the Water Management Framework be implemented by January 1, 2011, in keeping with the stated commitments of the Governments of Alberta and Canada (Section 14.1.9);

4) DFO and AENV incorporate an ecological base flow (EBF) into the final Water Management Framework for the Athabasca River (Section 14.1.9);

5) Canada raise the issue of integrating all regional monitoring systems with the appropriate multistakeholder forums, having regard for existing priorities and resources; AENV should determine how integration could best be accomplished

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during the hearing the DKFN attempted to file a further written submission that included a Notice of Question of Constitutional Law (NQCL) as contemplated under Section 12 of the *Administrative Procedures and Jurisdiction Act (APJA)*. Secretariat staff advised the DKFN that leave of the Joint Panel was required to file any additional written submissions because the deadline for filing had passed. The DKFN did not request leave to file new material and therefore the Joint Panel is not aware of nor has it considered any question of constitutional law from the DKFN.

4 Clearwater Band and Wbfn — Notice of Question of Constitutional Law

4.1 Preliminary Matter — Sufficiency of the Notice Given to Alberta and Canada

4.1.1 Introduction

39 The WBMLA filed an NQCL as part of its written submission. A group comprising the Clearwater River Paul Cree Band #175 (Clearwater Band), the Wood Buffalo First Nation, the Wood Buffalo First Nation Elders Society, and John Malcolm (collectively the WBFN) also filed a written submission that included an NQCL. As discussed elsewhere in this report, the WBMLA subsequently withdrew from the proceeding and the Joint Panel agreed to its request that the panel not make any decisions on the positions originally advanced by it. As a result, only the Clearwater Band and the WBFN have requested that the Joint Panel rule on the NQCL filed with their submission.

40 Counsel for Alberta made an application to the Joint Panel for a ruling that the NQCL did not meet the requirements of the *APJA* and that the Joint Panel did not have jurisdiction to consider the constitutional question raised by the Clearwater Band and the WBFN.

4.1.2 Views of Alberta

41 Alberta stated that the Clearwater Band and the WBFN failed to meet the notice requirements set out in Section 12 of the *APJA*. That provision requires a person to give 14 days' notice of intention to raise a question of constitutional law, including notice to the Attorney General of Canada and the Minister of Justice and Attorney General of Alberta. Subsection 12(2) states that until the notice requirement is met, the decision maker must not begin the determination of the question of constitutional law. Subsection 12(4) states that the notice must be in the form and contain the information provided for in the regulations. The form of notice is provided in Schedule 2 of the *Designation of Constitutional Decision Makers Regulation*, AR 69/2006.

42 Alberta's motion stated that the NQCL filed by the Clearwater Band and the WBFN did not clearly disclose the aboriginal or treaty rights the parties wanted the Joint Panel to consider, the materials or documents that would be relied upon by those parties, or a list of witnesses and the substance of their testimony. These are matters that are included under the heading "Details of Argument," which appears at the foot of the prescribed form of an NQCL. Although Alberta's motion alleged a number of defects in the NQCL, in its argument it stated that the most serious defect was the failure of the Clearwater Band or the WBFN to provide a list of witnesses and the substance of their proposed testimony. Alberta acknowledged that a list of 100 or more individual names was attached to the submission that accompanied the NQCL; however, it argued that it was not fair or reasonable to hold that such a list satisfied the requirement under the regulation.

43 Alberta argued that strict compliance with the notice requirements was essential to ensure that the Crown was able to properly prepare for a constitutional argument and that a failure to meet the requirements precluded the Joint Panel from considering the constitutional issues raised in an NQCL. Alberta cited a number of legal authorities in support of its position that the Crown was entitled to require strict compliance with the notice requirements.

4.1.3 Views of Canada

44 Canada adopted Alberta's argument regarding the failure of the Clearwater Band and WBFN to provide an NQCL that met the requirements of Section 12 of the *APJA*. Canada also stated that the environmental assessment process, which the Joint

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Panel was engaged in, was different from the issues to be addressed when an NQCL was filed that asserted rights under Section 35 of the *Constitution Act, 1982*. Canada further stated that in this proceeding the Joint Panel was not required to address a question of aboriginal rights under the Constitution of Canada.

4.1.4 Views of the Clearwater Band and WBFN

45 The Clearwater Band and WBFN stated that the NQCL filed with their written submission satisfied the requirements under Section 12 of the *APJA*. They also stated that given Alberta's failure to raise the question of the adequacy of the notice at an early stage of the proceeding, for example after the Joint Panel had issued a letter seeking comments on the process for dealing with constitutional questions, it would not be fair for Alberta to later raise the question of the adequacy of the notice.

4.1.5 Views of Imperial Oil

46 Imperial Oil stated that it shared the views of Alberta and Canada on the law in relation to the constitutional question. Imperial Oil emphasized that it had reached an agreement with the Clearwater Band and WBFN, and that any issues concerning consultation related to the question of the Crown's duty, if any, to consult and not to Imperial Oil's consultation efforts.

4.1.6 Views of the Joint Panel

47 The Joint Panel has carefully considered the submissions of the parties on whether the NQCL filed by the Clearwater Band and WBFN complies sufficiently with the requirements under the *APJA*, so as to give the Joint Panel authority to consider the question of constitutional law raised in the notice. Alberta argued that strict compliance with the notice requirements is mandatory and that a failure to meet any of the requirements results in the Joint Panel losing jurisdiction to determine the constitutional question. Alberta cited a number of authorities for its position; however, the Joint Panel notes that none of the decisions specifically addressed the notice that must be given under Section 12 of the *APJA*. The Joint Panel understands that the reason for the requirement to provide notice to the Crown is to ensure that the Crown has a full opportunity to understand the questions raised in the NQCL and to respond appropriately.

48 The Joint Panel notes that a form of NQCL was filed by the Clearwater Band and WBFN. No party suggested that there was a failure to give *any* notice of the question of constitutional law; rather, the Joint Panel considers the question to be the adequacy of the notice that was given by the Clearwater Band and WBFN. Section 3 of the *Designation of Constitutional Decision Makers Regulation* states that the notice for the purpose of Section 12(1) of the *APJA* is set out in Schedule 2. The following appears at the foot of the Schedule 2 form of notice:

Details of Argument

Details are to include:

- The grounds to be argued and reasonable particulars of the proposed argument, including a concise statement of the constitutional principles to be argued, references to any statutory provision or rule on which reliance will be placed and any cases or authorities to be relied upon.
- The law in question, the right or freedom alleged to be infringed or denied or the aboriginal or treaty rights to be determined, as the case may be.
- The material and documents that will be filed with the decision-maker.
- List of witnesses intended to be called to give evidence before the decision-maker and the substance of their proposed testimony.

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49 The Clearwater Band and WBFN filed a common written submission and a common NQCL. The NQCL states:

We intend to raise the following questions of constitutional law under section 35 of the *Constitution Act, 1982* related to our application for standing. Attached is our written argument. We are seeking to have standing in a hearing with respect to Application No. 1418771, 1414891 (Imperial Oil Sands (Kearl) Project).

50 The words "meaningful consultation, costs & legal counsel" are inserted in handwriting after the word "standing". The written argument that included the NQCL is 337 pages long. It is partly handwritten and partly typewritten, with handwritten annotations. It has an "Authorities" section that includes Treaty No. 8, EUB decision reports, court decisions, excerpts from legal texts, the *Constitution Act, 1982*, and the *Designation of Constitutional Decision Makers Regulation*.

51 Representatives for the Clearwater Band and WBFN emphasized that those groups' participation in the proceeding was undertaken without the assistance of legal counsel. That does not excuse the groups from complying with the notice requirements under the *APJA*, but the Joint Panel believes that it may take into consideration that the parties are not represented by legal counsel when it considers the adequacy of the NQCL that was given.

52 The Joint Panel has considered the NQCL and the written submission filed with the NQCL and has determined that in this case the NQCL contains sufficient information to satisfy the notice requirements under Section 12 of the *APJA*. The NQCL indicates that the constitutional question relates to Section 35 of the *Constitution Act, 1982*, and that the parties are seeking meaningful consultation. The parties' written submission refers a number of times to the duty to consult and the lack of meaningful consultation in connection with the proposed development. The law in question and the material and documents to be relied upon by the parties are not only referred to in the written submission, but are attached to the written submission. Although the material filed does not specify the witnesses who will appear to address the question of constitutional law, it does contain a list of individuals affiliated with the Clearwater Band and WBFN. Bearing in mind the purpose for requiring a party to provide an NQCL to government, it is the Joint Panel's view that the NQCL and written submission of the Clearwater Band and WBFN provided sufficient notice to Canada and Alberta of those parties' intentions to raise the questions relating to aboriginal and treaty rights so as to allow Canada and Alberta to respond appropriately.

53 The Joint Panel notes that Alberta did not raise the question of the sufficiency of the NQCL until immediately before the hearing commenced, despite having an opportunity to raise the issue at an earlier date. Canada did not raise the question until after Alberta made its application. Although this is not determinative of the question of the sufficiency of the notice, it does indicate to the Joint Panel that any defects in the NQCL were not so fundamental to cause Alberta or Canada to raise question of the sufficiency of the notice earlier in the proceeding. Given all of the foregoing, the Joint Panel has determined that it has jurisdiction under the *APJA* to consider the substantive question of constitutional law raised by the Clearwater Band and WBFN.

4.2 Duty to Consult

4.2.1 Views of the Clearwater Band

54 The Clearwater Band stated that its members were legitimate descendants of the signatories to Treaty No. 8 and that its members' traditional hunter/gatherer lifestyle was protected by the treaty. The Clearwater Band stated that the federal and provincial governments had not consulted with it regarding its members' loss of access to their lands or traditional rights. It asked the Joint Panel to recommend to Alberta and Canada that they honour their obligations under Treaty No. 8 before any further development proceeded within the Clearwater Band's traditional lands. It also asked the Joint Panel to make specific recommendations to both Alberta and Canada that they each consult with the Clearwater Band as a requirement before any further oil sands development took place.

4.2.2 Views of the WBFN

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55 The WBFN stated that it was a community of aboriginal peoples with communal rights recognized in Section 35 of the *Constitution Act, 1982*. It also stated that it had a right of consultation that was grounded in the honour of the Crown to treat the aboriginal people of Canada with respect, dignity, and fairness. The WBFN asserted that it was not necessary for there to be a treaty relationship between the Crown and the aboriginal people, but that a duty of consultation arose when there was a potential threat to an aboriginal right. The WBFN urged the Joint Panel to recognize it as a Band and to recommend that Canada and Alberta also recognize the WBFN and take certain actions to improve the circumstances of its members. The WBFN stated that it believed it could improve things for its communities if it were provided an opportunity to be consulted with in a meaningful manner. It concluded its argument by stating that even though the issues and treaty settlements were not concluded, the Crown still had a duty to consult with the WBFN in a meaningful manner.

4.2.3 Views of Alberta

56 Alberta stated that if the Joint Panel decided that the NQCL provided by the Clearwater Band and WBFN satisfied the notice requirements under the *APJA*, the Joint Panel should decide that those parties were not owed a duty of consultation by government. Alberta stated that the ruling of the joint panel reproduced in *Albian Sands Energy Inc.: Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine*[2006 CarswellAlta 1911 (Alta. E.U.B.)] applied equally to the positions the Clearwater Band and WBFN brought forward in this proceeding. Alberta argued that neither group was an Indian Band, a recognized First Nation, or any other entity capable of possessing aboriginal or treaty rights that would give rise to a duty of consultation. Alberta also stated that to the extent that individual members of either group were members of a First Nation recognized under the *Indian Act*, the rights they may exercise that give rise to a duty of consultation were collective rights that only a First Nation — not an individual — was entitled to assert. Alberta urged the Joint Panel to find that the Clearwater Band and WBFN did not have aboriginal and treaty rights that gave rise to a duty of the Crown to consult with those groups.

4.2.4 Views of Canada

57 Canada stated that if the Joint Panel decided the NQCL provided by the Clearwater Band and WBFN satisfied the notice requirements under the *APJA*, the Joint Panel did not need to address the questions of constitutional law raised in the notice because those questions were not incidental to the Joint Panel's mandate in the context of the legislative regime and the Joint Panel Agreement. However, Canada also stated that if the Joint Panel's view was that it should address the NQCL, the evidence did not support the existence of aboriginal rights so as to bring upon the Crown a duty to consult with the Clearwater Band and WBFN. Canada referred to the registry of citizens of the WBFN that was entered as evidence in the hearing and the evidence of Ms. Susan Weston, of the Department of Indian Affairs and Northern Development. Canada noted that a number of individuals named in the registry or in the list of stakeholders attached as a schedule to the Clearwater Band and WBFN submission were affiliated with a recognized Indian Band. Canada also referred to court decisions as having established the principle that aboriginal and treaty rights were communal rights possessed by aboriginal collectivities and not, in the circumstances of this proceeding, rights that can be raised by individuals.

58 Canada further stated that if the Joint Panel was of the view that the Crown was required to consult with the Clearwater Band or WBFN, the Crown's consultation obligations in these circumstances were satisfied by notice of the project having been given to those groups and the opportunity they were given to participate in the proceeding.

4.2.5 Views of the Joint Panel

59 On the question of the aboriginal and treaty rights asserted by the Clearwater Band, the Joint Panel heard and considered evidence that was the same or substantially similar to the evidence heard by the joint panel whose ruling appears in *Decision 2006-128*. Based on the evidence in this proceeding, the Joint Panel has determined that the Clearwater Band is not a recognized entity or distinct community of individuals with treaty or aboriginal rights that give rise to a duty of government to consult with it. The Clearwater Band is not a "Band" as defined in the *Indian Act*. Many of the individuals who identify