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The Northern Gateway Joint Review Panel and the Governor in Council

By Nigel Bankes

Decisions commented on:

(1) An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada's commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada's national economic interest, January 9, 2012,;
(2) *National Energy Board Act*, RSC 1985, c N-7, s 52;
(3) *Canadian Environmental Assessment Act*, SC 1992, c 37, s 37.

On January 9, 2012, the day before the hearings by a Joint Review Panel (JRP) were due to open for the proposed Northern Gateway pipeline (NGP), the federal Minister of Natural Resources, Joe Oliver took the extraordinary step of issuing an Open Letter to Canadians. He followed this up with a series of media appearances. In his letter Minister Oliver made four main points. First, Canada needs to diversify its export markets for many products including oil. Second, "environmental and other radical groups" seek to block this opportunity and any underlying projects. Third, these "radicals" will "hijack our regulatory system," stack public hearings, "kill good projects," exploit any opportunity they can to delay project reviews. These radicals have access to foreign money to implement their goals. The delays that ensue are unacceptable. Fourth, Canada needs a fair and independent process to assess projects based on science and the facts - but the current system is out of balance and "is broken."

Oliver's letter was broadly covered in the media. The letter was injudicious, inappropriate and unhelpful. If the system really is as broken as Minister Oliver suggests then it his job to fix it. Not by *ex cathedra* pronouncements such as the open letter but by a reasoned approach to the development of public policy. Relevant elements in that process might include a white paper identifying the problem and a set of options for resolving the problem. This might, if necessary, be followed by the introduction of a bill in parliament to amend the *National Energy Board Act* and other relevant legislation.

Minister Oliver's comments also led to a lot of media interest in the relationship between the JRP and the government in terms of decision making responsibility for the Northern Gateway project. Questions were raised such as: Who makes the final decision? Is it the Board (meaning the National Energy Board (NEB)) or Cabinet?

The purpose of this blog is simply to set out, as clearly as possible, the legal understanding of these relationships. There are of course other perspectives on these issues: political, economic, personal and psychological. For example, put yourself in the position of a JRP panel member. What would you think if the Minister responsible for the Board announced that: (1) the current system is broken, and (2) the NGP is clearly and obviously in the national interest (aka public

convenience and necessity) the day before you had to open the hearings in one of the most affected communities? And more importantly, imagine the challenge facing that panel in convincing the community that the fix was not already in and that the job of the panel was to conduct a careful, independent and impartial review of the project.

What is a JRP?

Section 40 of *Canadian Environmental Assessment Act (CEAA)* provides the Minister responsible for *CEAA* (the Minister of the Environment - at the relevant time, Jim Prentice) may enter into an agreement with, *inter alia*, another federal authority such as the NEB that has environmental assessment responsibilities in order to provide for a joint review of a project. That is what happened in this case. The agreement is available here. Once appointed, a panel will discharge its responsibilities under both *NEBA* and *CEAA*. If necessary, appointees to the panel will be named as temporary members of the NEB. Hans Matthews is a temporary Board member in this case.

Since the JRP serves two statutory authorities the easiest and the only way to understand the legal relationship between the JRP and the government (the executive branch, cabinet, more formally the Governor in Council) is to ask what those two statutes tell us about that relationship.

The National Energy Board Act

Enbridge's application to the NEB is an application for a certificate of public convenience and necessity under section 52 of *NEBA*. That section reads as follows:

> 52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:
> (*a*) the availability of oil, gas or any other commodity to the pipeline;
> (*b*) the existence of markets, actual or potential;
> (*c*) the economic feasibility of the pipeline;
> (*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and
> (*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

There are two possible scenarios. First, the NEB may reach the conclusion that the proponent (Enbridge) has not satisfied the Board that the project is in the public convenience and necessity (or, more simply, in the public interest). If that is the case, that will be the end of the matter (unless Enbridge asks the Board to reconsider its decision). In this scenario, the Governor in Council (GiC) has no authority to issue a CPCN - it can do so only on the recommendation of the NEB. The only alternative for the Harper government at that point is to introduce legislation into parliament to have it issue a statutory CPCN notwithstanding *NEBA*. Parliament is sovereign and it can do this and it is hard to identify any possible Charter challenge; it is somewhat easier to envisage a challenge based on section 35 of the *Constitution Act, 1982* which protects existing aboriginal and treaty rights. It is extremely rare to issue a CPCN in this way. The only example

I know of is the *Northern Pipeline Act*, RSC 1985, c N-26, s 21 which issued a CPCN for the Foothills Pipeline - much of which has never been built.

Second, the NEB may find that the project is in the public interest and propose a draft CPCN. That CPCN does not become effective and valid until approved by the GiC.

In sum, if the NEB says "no" that is the end of the road (barring only new legislation); if the NEB says "yes," the project still requires GiC approval.

Canadian Environmental Assessment Act

The principal responsibility of a *CEAA* panel is to provide an opinion as to whether the proposed project will cause significant adverse environmental effects. If the panel concludes that there will be no significant adverse environmental effects and the responsible authority concurs (as one would expect them to), then that will be the end of the matter and the project will be permitted. However, if the panel concludes that the project will have significant adverse environmental effects that cannot be mitigated the responsible authority (RA) may still allow the project to proceed if "it can be justified in the circumstances." There are multiple RAs for the NGP including the NEB and the Department of Fisheries and Oceans (see JRP Agreement, preamble) but where, as here, the environmental assessment is carried out by a review panel the RAs can only respond with the approval of the GiC (*CEAA*, s 37 (1.1)) and any subsequent authorizations, permits etc. must be in conformity with the GiC's approval.

In sum, there is a significant difference between the *CEAA* rules and the NEB rules. Under *NEBA* the Board can, in effect, reject a project; a *CEAA* panel has no authority to reject a project. Indeed, even if the panel concludes that a project will have significant adverse environmental effects the GiC and relevant RAs can still authorize the project – but if, and only if, the NEB has recommended in favour of issuing a CPCN. If the panel were to conclude (perhaps more consistently) that: (1) the project will have significant adverse environmental effects which cannot be mitigated, *and* (2) that the project is not in the public interest (i.e. does not satisfy public convenience and necessity under *NEBA*) then the GiC still has no authority to allow the project to proceed. In that scenario the only way ahead is by parliamentary authorization of the project.

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