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Shell Jackpine Mine Expansion Project: The Mysterious Case of the Missing Justification

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Last Friday (December 6, 2013), the federal Minister of the Environment, Leona Aglukkaq, released the long-awaited decision statement for Shell's Jackpine Mine Expansion project. As I wrote here, the joint review panel concluded – for the first time in the oil sands context – that the project was likely to result in numerous significant adverse environmental effects. This conclusion triggered the application of subsection 52(2) of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 (*CEAA, 2012*), pursuant to which the Governor in Council (GiC) must determine whether the project is nevertheless "justified in the circumstances." This the GiC did. Or at least, we are *told* that it did.

The Oxford Canadian Dictionary (2nd ed, 2006) defines "justify" as follows:

> **1** *Show* the justice or rightness of (a person, act, etc.) **2** *demonstrate* the correctness of (an assertion etc.) **3** *provide adequate grounds for* (conduct, a claim, etc.) **4** (esp. in passive) (of circumstances) be *a good reason or excuse* for…
>
> (Emphasis added)

But there is no such justification. Rather, and in marked contrast to the detailed justification found in the government's response to the Lower Churchill Hydroelectric project report (2011), the Shell Jackpine Decision Statement simply states that "[in] accordance with paragraph 52(4)(a) of *CEAA 2012* the Governor in Council decided that the significant adverse environmental effects that the Designated Project is likely to cause, are justified in the circumstances."

I am not suggesting that an oil sands project like Shell's could never be "justified in the circumstances" under *CEAA, 2012*. I am not even suggesting, as others have, that a project ought to pass some kind of sustainability test in order for it to be so considered. I am instead making two related and relatively uncontroversial observations.

The first is that the *total* absence of any explanation or reasons fundamentally undermines the process of *political* accountability that this element of *CEAA, 2012* (a holdover from *CEAA, 1992*) was intended to facilitate (see *Pembina Institute for Appropriate Development v Canada*

(Attorney General), 2008 FC 302 (CanLII) at para 72). Without such reasons or explanation, Canadians can only guess as to "the wider public policy factors" (*Pembina* at para 74) taken into account by the GiC in ultimately granting project approval. And while such "filling in the blanks" may not seem terribly difficult in this context – the Alberta Energy Regulator (AER) provided several reasons why, in its view, the project was nevertheless in the "public interest" (see Shell Jackpine JRP Report, at para 18), such an approach overlooks the unique character of environmental law and EA law in particular and, perhaps most concretely, renders *CEAA, 2012* meaningless.

For better or for worse and in contrast to other areas of law (*e.g.* contracts, property, and torts), modern environmental law does not consist of hard rules or substantive limits but rather is focused primarily on the *process* of decision-making. As noted by American law professor Dan Tarlock in his authoritative article nearly ten years ago:

> There is a reason that no Restatement (First) of Environmental Law exists or is in process. The candidate suite of principles such as advance environmental impact assessment, polluter pays, precaution, and sustainable development are useful starting points but they can only serve as guideposts to structure a dynamic, but inevitably *ad hoc*, decision-making process.
>
> (A. Dan Tarlock, "Is There a There There in Environmental Law?" (2004) 19 J Land Use & Envtl L 213 at 219)

Although subject to criticism, the procedural focus of environmental law is not contested; nor is the underlying premise that structuring decision-making processes in certain ways (*e.g.* Tarlock's "guideposts," above) tends to lead to better substantive outcomes. Indeed, such has been the understanding of EA law in Canada since at least the Supreme Court of Canada's decision in *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3. It is also reflected in section 4 of *CEAA, 2012*:

> **4.** (1) The purposes of this Act are …
>
> (*b*) to ensure that designated projects…*are considered in a careful and precautionary manner* to avoid significant adverse environmental effects;…
>
> (2) The *Government of Canada*… in the administration of this Act, must exercise [its] powers in a manner that protects the environment and human health and applies the precautionary principle.

Simply put, environmental law is more concerned with how a decision was *actually* arrived at, and specifically whether it was made in accordance with the applicable (*e.g.* legislated) "guideposts," rather than the ultimate result. Returning to Shell Jackpine, while Canadians might be able to guess *which* policy factors were considered, they have no way of knowing *how* they were considered in light of the government's obligations pursuant to section 4 to ensure that projects "are considered in a careful and precautionary manner" and that the government exercises its powers "in a manner that protects the environment and human health and applies the precautionary principles."

This, then, is my second observation. In addition to undermining political accountability, the absence of any reasons or explanation as to why the Shell Jackpine project is "justified in the

circumstances" undermines *legal* accountability by making it impossible to determine whether the GiC actually complied with its obligations under the Act. Such a result is clearly untenable (see *Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190 at para 48). I should add that Canadian courts' willingness to accept "after-the-fact rationalizations of administrative decisions" (as recently blogged about by University of Montreal Professor Paul Daly here) has a similar potential to undermine the purpose and effectiveness of environmental laws, but a detailed discussion of that issue will have to await a future post.

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