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All I Want for Christmas is the Justification for Shell Jackpine

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Case Commented On: *Adam v Canada (Environment),* [2014] FC 1185

On December 9, 2014, the Federal Court rendered its decision in *Adam v. Canada (Environment)*. Chief Allan Adam, on his own behalf and on behalf of the Athabasca Chipewyan First Nation (ACFN), challenged two federal government decisions pursuant to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (*CEAA*) in relation to Shell Canada's proposed Jackpine oil sands mine expansion project. The first was the Governor in Council's (GiC) determination pursuant to section 52(4) that the project's anticipated significant adverse environmental effects are "justified in the circumstances." The second was the Minister's "Decision Statement" pursuant to section 54, which contains the conditions subject to which the project may proceed. In a decision that reads somewhat tersely but that also covers a lot of ground, primarily Aboriginal consultation and division of powers issues, Justice Tremblay-Lamer dismissed the ACFN's challenge. This post – the first of what will likely be a series – focuses on the first challenged decision: the GiC's determination that the project's significant adverse environmental effects are justified.

As I noted when the Joint Review Panel (JRP) report for Shell Jackpine was first released back in the summer of 2013, this was the first time that a JRP concluded that an oil sands project was likely to result in significant adverse environmental effects:

> *[9] The Panel finds that the Project would likely have significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity. There is also a lack of proposed mitigation measures that have been proven to be effective. The Panel also concludes that the Project, in combination with other existing, approved, and planned projects, would likely have significant adverse cumulative environmental effects on wetlands; traditional plant potential areas; old-growth forests; wetland-reliant species at risk and migratory birds; old-growth forest reliant species at risk and migratory birds; caribou; biodiversity; and Aboriginal traditional land use (TLU), rights, and culture. Further, there is a lack of proposed mitigation measures that have proven to be effective with respect to identified significant adverse cumulative environmental effects.*

The effect of all of this was that before the project could proceed, the GiC (*i.e.* the federal cabinet) had to determine that these effects were "justified in the circumstances" pursuant to section 52. This the GiC did, or at least purported to do. As I noted here, the GiC never actually provided any justification. Rather, and in contrast to the detailed justification provided for the Lower Churchill Hydroelectric project (a project also found likely to result in significant adverse environmental effects), the Shell Jackpine 'Decision Statement' simply stated 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."

The ACFN challenged this aspect of the GiC's decision from a consultation perspective, arguing that as a consequence the process lacked transparency (at para 28). The federal government responded that "the Minister's advice to Cabinet and the reasons for Cabinet's decision are confidential; the ACFN had no right to disclosure" (at para 34). The Federal Court agreed with the government:

> [79] …The applicant was not entitled to disclosure of the Minister's advice to Cabinet: as they acknowledge, the Minister properly asserted privilege (*Canada Evidence Act*, RSC 1985, c C-5, s 39(2)). Furthermore, the duty to consult is determined by the actions that Canada took during the consultation process, not by what the Governor in Council may have considered.
>
> [80] This Court could draw an adverse inference if the Crown selectively disclosed only those documents that favoured its position (*Babcock v Canada (AG)*, 2002 SCC 57 (CanLII) at para 36, [2002] 3 SCR 3), which cannot be said of the present case. No adverse inference can stem from the Crown's exercise of privilege.
>
> [81] *Nor did the Crown have to justify to the ACFN the Cabinet's decisions on the Project* (*Babcock* at paras 21–27). *The applicant cites no authority in support of their purported right to such justification*. The duty to consult obliged the Crown to justify its rejection of the ACFN's position but not to disclose the explanation that it gave to the Cabinet for recommending approval of the Project (*West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII) at para 148, 333 DLR (4th) 31) (emphasis added).

I haven't seen the pleadings so it's hard to know where things went sideways here, but it appears that there was some confusion between the confidential deliberations of Cabinet, which are indeed privileged, and the "justification" (*i.e.* explanation) required by the Act. The authority for that latter proposition is the Federal Court of Appeal's very recent decision in *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189 (CanLII), another case involving a challenge to a *CEAA* justification decision (for the previously mentioned Lower Churchill hydroelectric project). As I noted here, the Court of Appeal held that a *CEAA* justification is reviewable in order to ensure that the government complied with the Act:

> [40] …the Court will only intervene with the [Governor in Council's] and Responsible Ministers' decisions…if it finds that: … 2) the GIC or Responsible Ministers' decisions *were taken without regard for the purpose of the CEAA*; or 3) the GIC or Responsible Ministers' decisions *had no reasonable basis in fact*; which is tantamount to an absence of good faith.

Without any reasons or explanation, it is not possible to determine whether the GiC had regard for the *CEAA*'s purposes, the duties imposed on it pursuant to section 4 (to "exercise [it's] powers in a manner that protects the environment and human health and applies the precautionary principle"), or that the decision had a reasonable basis in fact.

Even the federal government seemed to appreciate the implications of the *Innu of Ekuanitshit* decision for this part of *CEAA*, as evidenced from the circumstances surrounding the release of its response – soon thereafter – to another project recently deemed likely to result in significant adverse environmental effects, the Site C dam. Although the Decision Statement for that project is as sparse with respect to justification as was the one for Shell Jackpine, the same day that it was released the Minister of Environment also released a "statement outlining the [GiC's] determination" that Site C's environmental effects are justified in the circumstances:

> The Site C project, which has been proposed by BC Hydro and Power Authority, underwent a thorough independent federal-provincial review by an independent panel. This process included extensive, meaningful and respectful consultations with the public and Aboriginal groups. The environmental assessment process provided the scientific and technical expertise and the effective engagement of the public and Aboriginal groups to enable an informed decision by both governments.
>
> The proposed Site C project is an important one for British Columbia and for Canada *as it will support jobs and economic growth while providing clean, renewable energy over the next 100 years.* The Site C Clean Energy Project will translate into about 10,000 direct person-years of employment from now until 2024 and when indirect and induced jobs are added in, that figure climbs to 29,000 person-years of employment.
>
> *This decision will benefit future generations. Over the life of the project, Site C is expected to help mitigate the growth in greenhouse gas emissions in Canada by preventing the discharge of between 34 to 76 megatonnes of CO^2 equivalent.*
>
> In the Decision Statement that I released today, there are over 80 legally binding conditions that must be fulfilled by the proponent, BC Hydro, throughout the life of the project in compliance with the *Canadian Environmental Assessment Act, 2012*. Failure to meet these conditions is a violation of federal law (emphasis added).

Several questions went through my mind when I first read this statement back in October. The first was whether similar explanations accompanied the Decision Statements for Shell Jackpine or Enbridge's Northern Gateway. I checked and couldn't find any. My second question was to consider whether such a statement, "outlining the GiC's determination," was sufficient for the purposes of verifying compliance with *CEAA*'s purposes and duties and for enabling the primary form of accountability intended here, which is to say political.

Obviously, the Site C "justification" is light on details. It doesn't speak to the majority of concerns raised by those opposed to it, *e.g.,* that it appears unnecessary from an energy perspective, that there are other less environmentally harmful alternatives potentially available, such as geothermal, and that it will have a significant impact on Aboriginal and Treaty rights in the area. But there is one thing that Site C undeniably has going for it from a *CEAA* perspective, something that the only other project to come with a real justification (Lower Churchill) also has going for it and which makes both projects entirely different from Shell Jackpine: the promise of positive environmental effects in the form of reduced greenhouse gas emissions. It is at least arguable that Site C's approval is consistent with taking "actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy" (*CEAA,* at para 4(1)(h)).

Shell Jackpine? Not so much. In my view, *CEAA* requires, and Canadians – especially the ACFN – deserve to know why or how this project is "justified in the circumstances," circumstances which include the destruction of "a large part of the ACFN's traditional lands" with harm that "is potentially irreversible or has not been mitigated through means of proven efficacy" (*Adam*, at para 71).