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Ontario Power Generation Inc. v Greenpeace Canada: Form over Substance Leads to a "Low Threshold" for Federal Environmental Assessment

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Case Commented On: *Ontario Power Generation Inc. v Greenpeace Canada et al*, 2015 FCA 186

In this decision, a majority of the Federal Court of Appeal (Justices Trudel and Ryer) overturned a ruling of the Federal Court (Justice Russell) finding that the environmental assessment of Ontario Power Generation's (OPG) Darlington New Nuclear project conducted by a Joint Review Panel failed to comply with the *Canadian Environmental Assessment Act*, SC 1992 c 37 (since replaced with the *Canadian Environmental Assessment Act, 2012* SC 2012 c 19). Justice Russell found gaps in the Panel's assessment (specifically with respect to hazardous substances emissions, spent nuclear fuel, and a failure to consider the effects of a severe 'common cause' accident) that in his view were unreasonable in light of the purpose and scheme of the Act. The majority of the Federal Court of Appeal, on the other hand, endorsed a more formal approach to judicial review in this context, holding that reasonableness was a "low threshold" (at para 151) such that a panel need only give "some consideration" to a project's environmental effects (at para 130) to be reasonable; it is only where a panel "gives no consideration at all" that its assessment will be deemed unreasonable (at para 130). Justice Rennie dissented, agreeing with Justice Russell with respect to hazardous substances emissions (at paras 48 – 50) and endorsing the latter's characterization of *CEAA* as a two-step decision-making process that is intended to be evidence-based and democratically accountable (at para 52). Because of its potential to seriously undermine the effectiveness of the federal environmental assessment regime, this post focuses on the majority's approach to reasonableness review in this context. Both of us previously commented on Justice Russell's decision in separate blog posts (see here and here), and one of us wrote up a full case comment on it (forthcoming in the *Dalhousie Law Journal*).

Background

Briefly, in the fall of 2006 Ontario Power Generation applied to the Canadian Nuclear Safety Commission (CNSC) for a site preparation license for several new reactors at its existing Darlington nuclear plant in Bowmanville, Ontario. Application for this license, as well as for authorizations under the federal *Fisheries Act,* RSC 1985 c F-14 and the *Navigable Waters Protection Act,* RSC 1985 c N-22 (now the *Navigation Protection Act*), triggered the application of the then *CEAA*. The project was referred to a joint review panel in 2008. Following 284 information requests (IRs) and seventeen days of hearings in the spring of 2011, the panel submitted its final report to the Minister in August of that same year, concluding that the project was not likely to result in significant adverse environmental effects. The applicants challenged the adequacy of the environmental assessment shortly thereafter.

For the purposes of this post, the relevant part of Justice Russell's decision is that dealing with the Panel's treatment of hazardous substance emissions. After reviewing the record, Justice

Russell noted Environment Canada's complaint that notwithstanding several information requests, remaining gaps in OPG's submission prevented that department from assessing the project's effects with respect to effluent and storm water management (at paras 257 – 259). The Panel itself noted that "OPG did not undertake a detailed assessment of the effects of liquid effluent and storm water runoff to the surface water environment" but that OPG "committed to managing liquid effluent releases in compliance with applicable regulatory requirements and to applying best management practices for storm water" and on this basis concluded that significant adverse environmental effects were not likely to result (at paras 264 – 265). According to Justice Russell, such an approach was not consistent with the legislation:

> [275] *In essence, the Panel takes a short-cut by skipping over the assessment of effects, and proceeding directly to consider mitigation, which relates to their significance or their likelihood.* This is contrary to the approach the Panel says it has adopted…and makes it questionable whether the Panel has considered the Project's effects at all in this regard.

Also for the purposes of this post, the relevant section of *CEAA, 1992* is section 16, which set out the required considerations for every kind of environmental assessment under the Act:

> 16.(1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
> (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
> (b) the significance of the effects referred to in paragraph (a); …

The Majority's Approach to Reasonableness Review

There was no dispute that Justice Russell chose the appropriate standard of review, *i.e.* reasonableness (at para 122). The issue was whether he applied it correctly. Before considering his approach, however, the majority first engages in what Professor Paul Daly has criticized as post-decision 'judicial supplementation': after-the-fact reformulations of administrative decisions that makes them more consistent with courts' preferred rationale for a given result (see Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52(3) Alberta Law Review at 20 – 21 (forthcoming)). According to the majority, although the Panel

> …made no specific finding that it had complied with the consideration requirements in paragraphs 16(1)*(a)* and *(b)* of the Act…it is our view that…the Panel must be taken to have implicitly satisfied itself that it was in compliance with those statutory requirements. In applying the reasonableness standard to this question, we must…determine whether the Panel's implicit conclusion that it had complied with the consideration requirements is reasonable." [citing the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53, which Professor Daly criticizes in his piece] [emphasis added].

The majority then cites two decisions from fifteen years ago as determinative of the appropriate approach to reasonableness review in this context. In the first, *Friends of the West Country Assn. v Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263, Justice Rothstein (as he then

was) stated at paragraph 26: "The use of the word 'shall' in subsection 16(1) indicates that some consideration of each factor is mandatory" (emphasis added by the majority in *Greenpeace*). The second decision was by Justice Pelletier (as he then was) in *Inverhuron & District Ratepayers' Assn. v Canada (Minister of the Environment)*, [2000] F.C.J. No. 682 (QL) at paragraph 71:

> It is worth noting again that the function of the Court in judicial review is not to act as an "academy of science" or a "legislative upper chamber". In dealing with any of the statutory criteria, the range of factual possibilities is practically unlimited. No matter how many scenarios are considered, it is possible to conceive of one which has not been. The nature of science is such that reasonable people can disagree about relevance and significance. In disposing of these issues, the Court's function is not to assure comprehensiveness but to assess, in a formal rather than substantive sense, whether there has been some consideration of those factors in which the Act requires the comprehensive study to address. If there has been some consideration, it is irrelevant that there could have been further and better consideration (emphasis added by the majority).

According to the majority, this means that "the type or level of consideration that the Panel was required to give to those effects was simply…'some consideration.' It follows…that a failure of the Panel to consider…environmental effects can only be established if it is demonstrated that the Panel gave no consideration at all to those environmental effects." (at para 130, emphasis added).

Applying this "low threshold" (at para 151), and acknowledging that "[c]learly, the consideration by the Panel of the environmental effects of [hazardous substances emissions] was not undertaken to the same depth or extent as were other environmental effects" (at para 153), the majority concluded "that this lesser degree of consideration nonetheless constitutes 'some consideration' of the environmental effects" (ibid).

Discussion

In our view, the majority's approach in *Greenpeace* (and in the cases on which it relies) places the bar far too low in terms of judicial supervision of the environmental assessment process required by *CEAA* (both the prior and current regime). While we would agree that in some cases the range of factual possibilities might be practically unlimited, it does not follow that reliance on a *single* factual possibility or scenario is sufficient. The goalpost in each case should be whether the assessment is reasonable in light of the particulars of the project being assessed and the kind of environmental effects that it can reasonably be expected to cause, something that the judiciary is perfectly capable of assessing (as further discussed below). The majority's 'some or none' approach, on the other hand, champions "formal rather than substantive" review for fear of becoming an academy of science (*Inverhuron*, at para 71) – something we thought Canadian courts had abandoned long ago.

In our view, the fear of becoming an academy of science is misplaced. There are numerous cases, in the environmental assessment context specifically but also environmental law more generally, where courts have efficiently and effectively engaged in a more substantive review of science-based decisions without becoming academies of science. With respect to environmental assessment, the Federal Court's decision in *Pembina Institute v Canada* 2008 FC 302 (CanLII) readily comes to mind. In the course of reviewing a panel's treatment of the greenhouse gas emissions of an oil sands project, Justice Tremblay-Lamer was puzzled by the panel's reliance,

without justification or explanation, on intensity-based emissions caps as mitigation measures in light of the fact that under such an approach total emissions can actually continue to rise. In the course of her reasons, she noted that while panels are owed deference, this deference is not unlimited: "deference to expertise is only triggered when those conclusions are articulated" (at para 75, citing *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 S.C.R. 748 at para 62). With respect to environmental law more generally, one can refer to any number of cases under the *Species at Risk Act,* SC 2002, c 29 [*SARA*]. For example, in *Adams v Environment*, 2011 FC 962, the court reviewed the Minister's decision not to recommend an emergency protection order for woodland caribou and found that her conclusion, that western populations could be replaced by eastern populations, "came 'out of the blue'" (at para 67). Under the *Greenpeace* majority's formal approach, such unsubstantiated conclusions on critical issues would constitute 'some consideration' and would therefore risk flying under the reasonableness radar. It is hard for us to accept that Parliament intended such a result.

In addition, while concerns about becoming an "academy of science" have been cited a number of times, few courts (if any) have reflected on the very specific – if not peculiar – procedural context in which this phrase was written. *Vancouver Island Peace Society v Canada* [1992] 3 F.C. 425 involved the application of *CEAA's* predecessor, the *Environmental Assessment and Review Procedures Guidelines Order (*(*EARPGO*), to visiting naval vessels that were either nuclear-powered or which carried nuclear weapons. The government applied to have the judicial review application converted into an action because, in its view, there would be "many difficult issues of fact to be determined as to whether there are 'significant' 'potentially adverse environmental effects'..." (at para 3). In other words, the government assumed that it was "the responsibility of the Court to sit on appeal from the factual determinations of the 'initiating department'" (at para 5). It is this role, and specifically with respect to findings of fact including gauging public concern, that Justice Strayer rightfully rejected in this case, which becomes clear when one considers the relevant passage in its entirety:

> [14] For these reasons I am unsympathetic to the arguments…that there are difficult technical factual determinations to be made which will require pleadings and a trial and the cross-examination *viva voce* of experts and others. It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the *Federal Court Act* [emphasis added].

Although "academy of science" is obviously a strong turn of phrase, it is equally clear that Justice Strayer was reacting to an extreme proposition and that his decision should not be understood as precluding all substantive inquiry into the EA process; as noted by the Federal Court of Appeal in *Inverhuron & District Ratepayers Ass. v. Canada (Minister of The Environment)*, 2001 FCA 203 (CanLII), to do so "would risk turning the right to judicial review…into a hollow one." For Justice Sexton in that case, this meant ensuring that the Minister had "a reasonable basis for arriving at her decision" (citing *Athabasca Chipewyan First Nation v British Columbia Hydro & Power Authority*, 2001 FCA 62 (CanLII)).

That being said, we readily acknowledge that the case law is mixed in terms of what this means or requires. Consequently, we conclude by strongly urging a return to first principles. Many of these are set out in the *Greenpeace* case comment referred to at the outset of this post, including the fundamental role for political accountability envisioned by environmental assessment legislation in nudging governments towards more environmentally-sustainable decision making. A return to first principles might also include the explicit application of the purposive approach to the interpretation and application of the Act, something that to our knowledge is relatively rare in the *CEAA* jurisprudence. Justice Rennie's dissent exhibits some elements of such an analysis (at para 51) but stops short. With respect to section 16 specifically, this would include recognizing not only the cost and time of environmental assessment (as many courts have), but also that all of this would be for naught if only 'some consideration' of environmental effects is required, an outcome that seems particularly egregious in the context of panel reviews, which as the courts in *Pembina Institute* (at para 17) and *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 (at para 14) noted represent the highest intended level of intensity, or rigor, of environmental review under the legislation.

We agree entirely that it is not the role of the courts to substitute their own views about the significance (or not) of projects' environmental effects (see *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*, [2001] 2 FCR 461 at para 78, referring to whether projects should be authorized or not) but in *Greenpeace* the pendulum has swung much too far the other way. On this point, we can do no better than to cite some of the leading authorities in administrative law with respect to deference more generally:

> [W]hile reviewing courts should normally show a measure of deference to a specialist agency's interpretation of its enabling statute, it is appropriate to scrutinize more closely those decisions that seem contrary to the interests of those intended beneficiaries of the legislation or to that aspect of the public interest that the legislation was enacted to protect. Examples include…the protection offered by various statutory programs to members of the pubic in their capacities as…breathers of air and drinkers of water.
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> G. Van Harten, D. Mullan, G. Heckman and J. Promislow, *Administrative Law: Cases, Texts and Materials* 7th ed, (Toronto: Emond, 2015) at 27.

Failure to assess the readily foreseeable environmental effects of a project, such as the hazardous substance emissions of a nuclear plant, is a clear example of a decision contrary to the interests of *CEAA*'s intended beneficiaries, *i.e.* the Canadian public. As noted by Justice Russell, it renders both public accountability and public participation more difficult (at paras 237 and 249, respectively). If anything, it furthers the interests of government agencies and proponents, whose poor track record of taking environmental considerations into account was the impetus for environmental assessment legislation in the first place.