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Northern Gateway: Federal Court of Appeal Applies Wrong CEAA Provisions and Unwittingly Affirms Regressiveness of 2012 Budget Bills

By: Martin Olszynski

Case Commented On: *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII)

On June 20, 2016, the Federal Court of Appeal released its much anticipated decision in the Northern Gateway legal saga (for a list of previous ABlawg posts, going as far back as 2012, see here). The Court quashed the Governor-in-Council (*i.e.* Cabinet) Order directing the National Energy Board (the Board) to issue a certificate of public convenience and necessity to Northern Gateway on the basis that the federal government did not fulfill its duty to consult. My colleague Sharon Mascher is preparing a blog post on that part of the decision. In this post, I focus on the Court's approach to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 and its dismissal, in essentially a single paragraph (para 125), of all of the substantive challenges to the Joint Review Panel's report. As further discussed below, the Court appears to have applied the wrong provisions of the *CEAA, 2012*, with considerable implications for both the substantive challenges to the JRP report as well as Cabinet's determination that Northern Gateway's significant adverse environmental effects are "justified in the circumstances" (*CEAA, 2012* subs 52(4)). It is nevertheless important to consider the Court's approach because the provisions that it did apply are applicable to Kinder Morgan's TransMountain Pipeline review and TransCanada's Energy East project.

The Court's Approach to *CEAA, 2012* Sections 29 – 31

The Court set out its analysis and understanding of the *CEAA, 2012* regime, and its interplay with the relevant provisions of the *National Energy Board Act*, RSC 1985, c N-7 at paras 92 – 127. With respect to *CEAA, 2012*, the Court focused on sections 29 – 31, which are the sections that would normally apply to the Board when it is the "responsible authority" (s 15) for a project listed on the *Regulations Designating Physical Activities*, SOR/2012-147 (in this case, a pipeline). As noted by the Court, these provisions require the Board, as part of its duties pursuant to the *NEB Act*, to submit to Cabinet an environmental assessment report. They also contemplate some potential back and forth between the Board and Cabinet in terms of the sufficiency of the former's environmental assessment report: Cabinet can ask the Board to reconsider any of its recommendations. Of particular importance to the Court here, subsections 29(3) and 30(5) state that except where sent back for reconsideration, the Board's environmental assessment reports are "final and conclusive". In light of these provisions, the Court concluded that there can be no direct legal challenge to the Joint Review Panel's report:

> [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, *any deficiency in the Report of the Joint Review Panel was to be*

> *considered only by the Governor in Council, not this Court.* It follows that these applications for judicial review should be dismissed. (Emphasis added)

This conclusion is problematic for several reasons, including the difficulty of vesting in Cabinet the authority to determine whether or not an environmental assessment report is adequate and conforms to legislative requirements when it was governments' poor track record of disclosing and considering environmental effects that was the impetus for such legislation in the first place (see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC) at paras 1 and 2). I also have concerns with the Court's approach to the "final and conclusive" language in sections 29 and 30, which I discuss further below. The biggest problem, however, is that these sections are not actually applicable to Northern Gateway.

Northern Gateway as a CEAA, 2012 s 38 Panel Review

Those following Northern Gateway through the regulatory process will recall that it was initially subject to JRP review under the original *Canadian Environmental Assessment Act* SC 1992, c 37. Bills C-38 and 45, the infamous budget bills of 2012, were brought into force after that review was already underway, such that the Minister of the Environment had to amend the original agreement establishing the JRP. Of particular importance is the following:

> **AND WHEREAS** pursuant to section 126 of the *Canadian Environmental Assessment Act, 2012*, the assessment by the joint review panel is continued under the process established under the *Canadian Environmental Assessment Act, 2012 as if it had been referred to a review panel under section 38* of the *Canadian Environmental Assessment Act, 2012* and the *Agreement is considered to have been entered into by the Federal Minister of the Environment and the Board under section 40 of that Act*… (Emphasis added)

Consequently and with respect, sections 29 – 31, which refer to the Board in its capacity as a responsible authority, have no application to the Northern Gateway application or litigation. Rather, Northern Gateway involves the relatively straightforward application of the panel review provisions of *CEAA, 2012*, provisions that are substantially unchanged from the original *CEAA* and that have been applied – and judicially reviewed – numerous times. The most important of these is section 43, which sets out a panel's duties and which, for what it's worth, does not include the "final and conclusive" language of those other provisions:

> **43** (1) A review panel must, in accordance with its terms of reference,
> (a) conduct an environmental assessment of the designated project;
> (b) ensure that the information that it uses when conducting the environmental assessment is made available to the public;
> (c) hold hearings in a manner that offers any interested party an opportunity to participate in the environmental assessment;
> (d) prepare a report with respect to the environmental assessment that sets out
> (i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, and
> (ii) a summary of any comments received from the public, including interested parties;
> (e) submit the report with respect to the environmental assessment to the Minister; and
> (f) on the Minister's request, clarify any of the conclusions and recommendations set out in its report with respect to the environmental assessment

Once submitted, the standard decision-making provisions of *CEAA, 2012* apply (sections 52 – 54). To reiterate, while I don't agree with the Court's wholly unprecedented analysis that under sections 29 – 31 environmental assessment plays "a much attenuated role" relative to other federal decision-making regimes (para 123), those sections simply don't apply. Instead, the Court should have reviewed the Northern Gateway JRP report as it has reviewed numerous panel reports previously, including *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 and *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186.

Reviewing the Governor in Council's (Cabinet's) Decision

As noted by the Court (at para 129), several of the parties sought to apply its recent decision in *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, which I blogged about here, as setting out the applicable legal framework for challenging Cabinet decision-making following a *CEAA* panel report (at para 40, citing para 76 of the trial judge's reasons), as well as the applicable approach to the standard of review, which the Court summarized as follows:

> [44] Therefore, in my view, the judge correctly found that deference was owed to the decisions made pursuant to [the relevant provisions under the old *CEAA*], but that *a reviewing court must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme*. (Emphasis added)

Because it focused on the wrong provisions of *CEAA, 2012* (an error that first appears in para 46 of the decision), the Court in Northern Gateway distinguished *Ekuanitshit* and chose not to follow it (at paras 132 – 140). In addition to what it erroneously thought were two very different legislative regimes, however, the Court also appears to be of the view that Cabinet approval of a massive hydroelectric dam found likely to result in significant adverse environmental effects (as in *Ekuanitshit*) is fundamentally different than the approval of a bitumen pipeline:

> [138] The standard of review of the decision of the Governor in Council in *Ekuanitshit* may make sense where this Court is reviewing a decision by the Governor in Council to approve a decision made by others based on an environmental assessment. The Governor in Council's decision is based largely on the environmental assessment. A broader range of policy and other diffuse considerations do not bear significantly in the decision…
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> [139] In the case at bar, however, the Governor in Council's decision—the Order in Council—is the product of its consideration of recommendations made to it in the report. The decision is not simply a consideration of an environmental assessment. And the recommendations made to the Governor in Council cover much more than matters disclosed by the environmental assessment—instead, a number of matters of a polycentric and diffuse kind.
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> [140] In conducting its assessment, the Governor in Council has to balance a broad variety of matters, most of which are more properly within the realm of the executive, such as economic, social, cultural, environmental and political matters.

> It will be recalled that under subsection 52(2), matters such as these must be included in the report that is reviewed by the Governor in Council.

With respect, most decisions to approve major resource projects and especially those found likely to result in significant adverse environmental effects will require a balancing of a "broad variety of matters," including social, economic, cultural, environmental and political matters (as the Federal Court recognized in *Pembina Institute*, above, at para 74). Were it otherwise, it is hard to conceive of a basis upon which Shell's proposed Jackpine oil sands mine expansion, which was also deemed likely to result in significant adverse environmental effects pursuant to *CEAA, 2012*, could ever have been granted approval (or "justified in the circumstances," using *CEAA, 2012* language). This reality does not lessen Cabinet's obligation to comply with the statutory requirements set out in *CEAA, 2012* (including its subsection 4(2) duty to exercise its powers "in a manner that protects the environment and human health and applies the precautionary principle") or the courts' supervisory jurisdiction. On the contrary, the polycentric nature of the exercise underscores the important role of both the Act and the courts in ensuring that environmental concerns are not ignored or marginalized in the face of traditionally predominant considerations (*e.g.* economic ones).

The foregoing is sufficient, in my view, to cast serious doubt on the cavalier manner in which the Court dismissed the substantive challenges to the Northern Gateway JRP report and Cabinet's response thereto. The obvious next question is: does it matter? While I would be the first to admit that the Federal Court of Appeal has set a low bar for the substantive review of federal environmental assessments reports, I have to assume that there is some difference between the Court's direct review of such reports and its review of Cabinet's assessment of such reports. The Court here accorded Cabinet "the widest margin of appreciation" (at para 155).

Privative Clauses and the Federal Regulatory Review

As noted at the outset, although not applicable in this case, *CEAA, 2012* sections 29 – 31 are applicable to the Board's review of the TransMountain and Energy East pipelines. It seems appropriate, therefore, to spend a bit more time on the Court's approach to these sections.

In administrative law, the "final and conclusive" wording that seemed to play such an important role in the Court's analysis is known as a "privative clause," and a relatively strong one at that. Privative clauses are the legislature's way of telling the courts to tread lightly (*i.e.* show deference). As a general rule, Canadian courts acknowledge such clauses and take them into account in establishing the applicable standard of review. Bearing in mind rule of law principles and the separation of powers, however, they have never been interpreted as ousting a reviewing court's jurisdiction. As the Supreme Court of Canada stated in the (still-current) authority on judicial review, *Dunsmuir v. New Brunswick*, 2008 SCC 9:

> [31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect…

Arguably Northern Gateway is not an example of complete ouster, as a report's adequacy is still reviewable indirectly through Cabinet's response to it, but the Court's analysis (three short paragraphs at 155 – 157) leaves me to wonder whether this is a distinction without a difference.

Finally, if the Court's approach to sections 29 – 31 is correct (which again, for the various reasons discussed above I doubt), it means that the previous Conservative government's 2012 omnibus budget bills were even worse than anyone thought. As noted above, leaving Cabinet to determine whether the Board's environmental assessments are sufficient runs counter to the basic logic behind the legislation and is bound to further undermine public confidence in those assessments. It also means that these provisions should be front and center during the federal government's upcoming review of environmental and regulatory processes.