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Are Regional (and other) Assessments pursuant to the *Impact Assessment Act* Justiciable? *Ecology Action Centre v Canada* (Part 1)

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Case Commented On: *Ecology Action Centre v Canada (Environment and Climate Change)*, 2021 FC 1367 (CanLII)

The applicants sought judicial review in Federal Court of the "Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador" (the Offshore Exploratory Regional Assessment), initiated as a "regional study" under the previous *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (*CEAA, 2012*) but converted into a "regional assessment" under the current *Impact Assessment Act*, SC 2019, c 28, s 1 (*IAA*) when the latter came into force in 2019. The Offshore Exploratory Regional Assessment and Report were prepared by a committee established by both the federal and provincial governments and submitted to the Minister of Environment and Climate Change Canada (the Minister). The applicants also sought judicial review of the subsequently promulgated *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)* (the *Offshore Exploratory Regulations*) pursuant to paragraph 112(1)(a.2) of the *IAA*, the effect of which was to exclude offshore exploratory drilling from undergoing *individual* impact assessments on a go-forward basis. Both applications were dismissed.

This post focuses on Justice Richard Bell's reliance on a line of Federal Court of Appeal decisions developed under the previous *CEAA, 2012* regime to conclude that a regional assessment under the *IAA* is not directly reviewable (i.e., is not "justiciable"). Rather, such assessments are to be reviewed indirectly when assessing the reasonableness of their acceptance by the Minister as a precondition to the exercise of the Minister's own authority (whether to approve a project or, as in this case, to make regulations). A subsequent post will consider whether Justice Bell's approach to reasonableness review of the Offshore Exploratory Regional Assessment is consistent with the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*]. It will also consider his begrudging application of *Vavilov* reasonableness review to the *Offshore Exploratory Regulations*, following the Federal Court of Appeal's recent decision in *Portnov v Canada (Attorney General)*, 2021 FCA 171 (CanLII) [*Portnov*].

Before exploring the administrative law issues at play, it is useful to briefly explain the difference between a project-specific impact assessment and a regional assessment. Like all of its predecessors, the *IAA* is primarily concerned with project-specific assessments: the majority of its provisions are dedicated to the assessment of "designated projects" on a case-by-case basis. During the expert review process and public consultations leading up to the *IAA*'s passage, however, a long-standing concern surfaced: that exclusive reliance on such a piece-meal approach to resource management was bound to be deficient, especially from the perspective of managing cumulative

impacts. Consequently, *CEAA, 2012*'s relatively bare provisions for regional studies were expanded in the *IAA*. The essence of these expanded provisions (*IAA* sections 92 – 103 and 112) are reasonably well captured in the following passage by Justice Bell:

> Regional assessments, while not defined in the *IAA*, permit the Government of Canada to study and examine issues beyond project-focused impact assessments for a specific designated project. They are intended to assist governmental decision-making by providing a more comprehensive analysis than a site-specific assessment. They are multi-faceted, covering vast areas and aimed broadly at understanding the effects of existing or future physical activities assessable under the *IAA*. Importantly, paragraph 112(1)(a.2) of the *IAA* empowers the Minister to make a regulation, after considering a regional assessment, that would exclude activities from the impact assessment process set out in the *IAA*. The exclusion occurs if the activity is proposed in an area for which a regional assessment has been carried out and the project meets the conditions set out in the relevant regulation. (at para 8)

This is what happened here. Subsequent to the submission of the Regional Assessment, the Minister promulgated regulations to exclude offshore exploratory drilling from the requirement for individual impact assessment.

Regional Assessments are Not Justiciable – At Least Not Directly

As noted above, Justice Bell relies on a series of Federal Court of Appeal decisions from the previous *CEAA, 2012* regime (*Gitxaala Nation v Canada*, 2016 FCA 187 (CanLII) [*Gitxaala*], *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 (CanLII) [*Trans Mountain*], *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 (CanLII) [*Taseko Mines*]) to conclude that regional assessments under the *IAA* are not justiciable:

> In each of the decisions rendered by the Federal Court of Appeal in *Gitxaala*, *Trans Mountain* and *Taseko Mines*, a party sought judicial review of a report prepared by a committee or panel under the *CEEA, 2012* or jointly under another statute. Those committees or panels produced a number of recommendations to assist the Governor in Council when making decisions. In all three appeals, the Federal Court of Appeal arrived at the same conclusion, that the reports affect no legal rights and carry no legal consequences. If follows they were not amenable to judicial review… (at para 29)

My colleagues Nigel Bankes and David Wright and I have already commented that this approach ignores established jurisprudence (see *e.g.* here) and is inconsistent with other decisions of the Federal Court and Federal Court of Appeal regarding similar kinds of recommendatory reports; see especially *Girouard v Canada (Attorney General)*, 2018 FC 865 (CanLII) (paras 165 – 171), affirmed 2019 FCA 148 (CanLII)). The issue may seem purely academic, as pursuant to the *Gitxaala* line of authority such reports are nevertheless *indirectly* reviewable in assessing the reasonableness of their *acceptance* by the Minister or the Governor in Council, but I still fail to see any benefit in adopting this convoluted approach, which also ignores the importance and true

nature of such assessments – not merely as "assistance" but rather as constraints on government decision-making.

It would be unfortunate, then, if this flawed approach were to be applied to the *IAA* without rigorous analysis as to its relevance and applicability. The new *IAA* differs in several respects from the *CEAA, 2012* regime. Indeed, in *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 259 (CanLII), one of several procedural cases that followed on the heels of the *Trans Mountain* litigation, Justice David Stratas appeared to accept that the *Gitxaala* line of jurisprudence was particular to the *CEAA, 2012* regime:

> The law that governs this matter was enacted in 2012. At that time, Parliament prioritized the construction of pipeline projects and economic development. In pursuit of those policies, it passed a law to streamline the environmental assessment and approval process for pipeline projects: see the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 which, among other things, reformed the *National Energy Board Act*. Under this law, Parliament gave the Governor in Council—and no one else—the power to consider a wide range of matters, including environmental, economic and technical factors and recommendations set out in a report prepared by the National Energy Board, and to decide whether, on balance, the pipeline project should be approved. As well, under this law, only the Governor in Council's decision can be challenged by way of judicial review, not the earlier report of the National Energy Board; as a result, case law under other legislative regimes suggesting the availability of immediate judicial review following an environmental assessment report does not apply. To further streamline the process, Parliament provided that judicial reviews can be brought only with leave given by a single judge of this Court. Finally, Parliament declined to create an appeal route from this Court's leave decision.
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> In 2019, Parliament passed a new law: *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, S.C. 2019, c. 28 (formerly Bill C-69). This new law changes the process for approving pipelines, placing greater priority on, among other things, environmental protection. But the 2012 law still applies to the Trans Mountain expansion project.
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> The policy choices expressed by Parliament in its 2012 law no doubt frustrate the appellants and others. But they should express their frustration at the ballot box or by other lawful and democratic means—not by relitigating points already decided. (at paras 13-14, 16)

At the risk of stating the obvious, it *is* the *IAA* that applies in this case. It was adopted following the 2015 federal election and drawing upon more than two years of expert advice and public consultation. The *IAA* entirely abandoned *CEAA, 2012*'s regime for federally regulated pipelines (the core of both the *Gitxaala* and *Trans Mountain* litigation) and rejected Senate recommendations to restrict the availability of judicial review (see *e.g.* proposed subsection 74.1(1), which described certain decisions as "final and conclusive") And while it is still the case

that the Minister or the Governor in Council (depending on the case) make ultimate decisions under the Act, taking into account the multi-year assessment processes prescribed by the statute, the various obligations imposed on the Government of Canada, the Agency and federal authorities in fulfilling their duties throughout that process (see *e.g.* subsection 6(2) and 6(3)), the importance of assessment reports and recommendations for not just the Minister or Governor in Council but also project proponents, Indigenous peoples and other stakeholders, "one can only conclude that the report and recommendation are essential to the [assessment] process" (*Girouard, FC, at* para 169) and therefore directly amenable to judicial review, as was the case for the vast majority of the past 30 years of Canadian environmental assessment law.

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