Just a bump on the road to socio-ecological ruin: Federal Court finds error in Kearl oil sands project environmental assessment
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Pembina Institute for Appropriate Development v. Canada (Attorney General), 2008 FC 302
http://decisions.fct-cf.gc.ca/en/2008/2008fc302/2008fc302.html

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In late 2006, media attention in Alberta was directed to the Regional Municipality of Wood Buffalo, home to the Alberta oil sands and boom town Fort McMurray as the modern rendition of the 1800s frontier gold rush. Apparently, the Municipality was about to cook the goose that had laid the golden egg.

The Municipality had intervened in the joint federal-provincial regulatory application process charged with the dual responsibility of deciding whether to approve Imperial Oil's Kearl oil sands project license application (Energy Resources Conservation Board) and to provide a recommendation to federal authorities (Department of Fisheries and Oceans) on the project's likely environmental effects. The Municipality's specific objective was to request a delay in the approval of the Kearl application until such time that the Alberta government addressed the municipal infrastructure and services deficit that has resulted from the oil sands rush in the Fort McMurray area.

The joint panel denied the Municipality's request, opting to continue alongside the Energy Resources Conservation Board's (ERCB) discouraging trend of approving new oil sands projects alongside strong *recommendations* that the Alberta government address the adverse socio-ecological implications such projects are causing in the region. The ERCB consistently refuses to either deny an energy project license application on account of socio-ecological concerns associated with the project or, for that matter, even condition its approval with terms to address such concerns. The ERCB upholds this stance on the argument that such concerns fall within the realm of government policy and are, accordingly, outside the ERCB's legal jurisdiction set by its governing legislation. Aside from perhaps the energy industry and the ERCB itself, few would agree that the ERCB operates apart from government policy. The ERCB's position in this regard is so contrary to public opinion in Alberta, it is laughable. Unfortunately, the Alberta Court of Appeal's failure or refusal to address the matter has silenced legal challenges.

The Kearl application, however, provided opponents with the additional prospect of challenging the federal environmental assessment component. So accordingly, a judicial review application was launched in the Federal Court of Canada by several environmental non-governmental organizations to challenge the joint panel's recommendation that the Kearl oil sands project would not likely result in significant adverse environmental effects after taking into account proposed mitigation measures.

In a judicial review, the success of the applicant hinges on what standard of review the court chooses to apply on the decision in question. Where the court decides on a deferential "reasonableness" standard, the prospects of a successful review drop considerably as the court will not second guess the regulatory decision and rarely finds a reviewable error in how the regulatory decision-maker assessed the evidence placed before it. In contrast, where the court decides on the intrusive "correctness" standard to review a regulatory decision, the court will decide the matter in question for itself and not defer to the regulator's decision at all.

In her decision on the Kearl project, Madam Justice Tremblay-Lamer of the Federal Court chose to be deferential towards the joint panel's assessment of evidence in relation to cumulative effects management, water, and endangered species. In denying this aspect of the applicants' case, the Court held they were simply challenging the quality or thoroughness of the evidence in front of the joint panel. Referring to an earlier Federal Court of Appeal judgment concerning environmental impact assessment, the Court quoted that ". . . [r]easonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law" (at para. 22, citing *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016, at para. 10).

The applicants were successful in regard to emissions however, wherein the Court applied the "correctness" standard and granted judicial review on partial grounds. The Court agreed with the applicants that the joint panel erred in law by failing to meet one of the duties imposed upon it by section 34 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Specifically, the joint panel failed to provide a rationale to support its conclusion that the adverse environmental effects of increased greenhouse gas emissions resulting from the operation of the Kearl project would either be insignificant or mitigated by proposed intensity-based measures. In the words of Justice Tremblay-Lamer: "The Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance" (at para. 78). The Court accordingly provided a *mandamus* order that the joint panel provide a rationale for this conclusion.

While this decision is a partial victory for those opposed to the status quo in the oil sands region, there are many reasons to reserve celebration. We must not lose sight of the fact that the environmental non-governmental organizations and municipalities that oppose energy projects in Alberta, including these monstrosities in the oil sands region, are not simply asking for a better information gathering process or a more thorough assessment of the socio-ecological effects. They are demanding a new worldview with respect appropriate land use in Alberta. Environmental assessment litigation will never deliver on this demand since, at best, it requires the decision-maker(s) to simply go back and provide a more thorough assessment. Requiring the joint panel to provide a rationale to support its conclusion is not the same thing as stating no rationale is possible and that the project cannot eventually proceed.

In addition, at issue here with respect to emissions was the effectiveness of intensity-based mitigation measures. Imperial Oil argued the joint panel could not comment on such measures without sliding into government policy. Unfortunately the Court agreed that the joint panel could not engage in policy. Fortunately for the applicants *in this case*, the Court disagreed with Imperial Oil that the assessment of environmental effects is a policy issue. Keeping the distinction between law and policy intact, however, allows for the possibility that the Federal Court of Appeal, should the decision be appealed, will reverse the Trial Division decision by agreeing with Imperial Oil that the effectiveness of intensity-based emissions measures is within the realm of government policy and outside the legal jurisdiction of the joint panel.

The law/policy dualism that permeates judicial and regulatory decision-making with respect to energy projects and their socio-ecological impacts allows the judiciary and regulators such as the ERCB to avoid addressing the concerns of those affected by these projects by simply categorizing them as policy matters. Concern over the proliferation of energy projects in Alberta, and the oil sands region in particular, has morphed into opposition. Even those that would seemingly benefit from the development of new energy projects, such as local municipalities, now increasingly oppose them. The decision on the Kearl project changes nothing in regard to the dim prospect of law resolving a fundamental dispute over appropriate land use in Alberta.