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To Be (Justified) or Not To Be: That is (Still) the Question

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A couple of weeks ago, the federal Minister of the Environment, Leona Aglukkaq, released another highly anticipated "decision statement" pursuant to section 54 of the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*), this time regarding Taseko's New Prosperity Mine project. Most readers will know that this was Taseko's second attempt to secure federal approval for its proposed mine and that the federal review panel that conducted the second environmental assessment (EA) concluded that, like the original Prosperity project, it too was likely to result in significant adverse environmental effects (SAEEs) (for more on the panel's report, see my previous post here). As with Shell's Jackpine Oil Sands Mine expansion project and Enbridge's Northern Gateway Pipeline project, this meant that New Prosperity could only proceed if the Governor in Council (GiC) (which is to say, Cabinet) concluded that these SAEEs were "justified in the circumstances" (section 53). Unlike Jackpine (and probably Northern Gateway), however, the GiC has apparently concluded that New Prosperity's SAEEs are *not* justified. I use the term "apparently" here because, as in Jackpine, there is no explanation or rationale contained in the decision statement as to how or why the GiC reached this result.

In a previous post on Jackpine, I suggested that the failure to provide reasons as to why a project's SAEEs are justified in the circumstances was contrary to basic principles of environmental law – and EA law in particular – and that it undermined the process of political accountability that this aspect of *CEAA, 2012* (a holdover from the original *CEAA, 1992*) was intended to create. Following the release of the New Prosperity decision statement, or perhaps more precisely following an entertaining but ultimately futile round of speculation as to what might explain these different results in the Twitterverse (more on this later), I resolved to look further into the issue.

I began my journey with the Hansard: those official reports of debates in Parliament that Ruth Sullivan tells me can be useful when interpreting statutes (Sullivan, *Statutory Interpretation*, Essentials of Canadian Law (Concord: Irwin Law, 1997) at 199). Although I won't pretend to have reviewed all of it (recalling that the relevant debates come not from the recent (2012) omnibus budget legislation, of which there is scant substantive discussion by design, but rather from *CEAA, 1992*, of which there are approximately two years' worth), what I did find essentially confirmed my previous post.

The debate on March 16, 1992, is especially illuminating. On that day, Parliamentarians were discussing an amendment proposed by the opposition Liberals that would have explicitly tied the justification provision, which was described as an "immense loophole," to the goal of sustainable development (i.e. "…justified in the circumstances *because the project contributes to the goal of sustainable development*"). Although the amendment was ultimately defeated, the Progressive Conservative government's response is revealing. According to the Hon. Mr. Lee Clark, then Parliamentary Secretary to the Minister of the Environment, the same result is essentially achieved if one considers the purpose section of the Act, which then (and now) included encouraging federal authorities "to take actions that promote sustainable development" (*CEAA, 2012*, section 4). Although Mr. Clark admitted to no formal legal training, he was more or less correct when he stated "that which follows in the bill as direct result is governed by the purposes of the bill" (Commons Debates, p 8301). Indeed, the then-Minister of Environment apparently committed "to ensuring that decisions under this clause are made within the principles of sustainable development" (*ibid*).

Opposition concerns would also be addressed by the addition of a provision that gave the Minister the power to issue guidance as to when a project would be "justified in the circumstances." That's right, there was then – as there is now – authority in the *CEAA* regime to provide some clarity and certainty to the justification exercise. For *CEAA, 2012*, the relevant provision is section 86:

> **86.** (1) For the purposes of this Act, the Minister may
> (*a*) issue guidelines and codes of practice respecting the application of this Act and, without limiting the generality of the foregoing, *establish criteria to determine* whether a designated project…is likely to cause significant adverse environmental effects or *whether such effects are justified in the circumstances*;…
>
> (Emphasis added).

For the government of the day, "to go further than that… to establish the direct legal connection [between justification and sustainable development] would be to give the courts more of a role in the definition of the term "sustainable development" than we would think is advisable." (Commons Debates, p 8302). Here, then, is the core of the matter. Giving judges a direct and relatively objective benchmark against which to test justification decisions would push accountability into the courts, whereas the government preferred political accountability. For Mr. Clark, it was "clear that politicians, elected representatives, are in the best position to accept this responsibility today, rather than to pass the buck, the responsibility, on to the courts. In doing so, we are accepting a system whereby we are giving that responsibility to those who are accountable." (*ibid*).

So what does all of this mean? At the very least, pressure ought to now be put on Ms. Aglukkaq to exercise her authority pursuant to section 86 and establish the criteria for determining when a project's SAEEs are (or are not) going to be considered justified in the circumstances. All sides, and perhaps especially industry, would benefit from knowing the test against which projects will be judged at the outset.

In the meantime, I note that the Athabasca Chipewyan First Nation, in their legal challenge to Jackpine, have raised the justification issue, and specifically the government's failure to provide any reasons or explanation. The ACFN's approach is entirely consistent with both the above

analysis and my previous post. While it is clear that Parliament ultimately chose against an overtly substantive judicial role in the review of justification decisions, it does not follow that there is no role for the judiciary whatsoever. Questions of statutory interpretation remain, including whether this part of *CEAA, 2012*, requires some form of reasons or explanation and the role, if any, of sustainable development (and the other purpose provisions) in framing that exercise. These are questions of law with respect to which the Minister should be accorded no deference (see *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40).

As I have previously stated and in light also of the Hansard, the current Minister's interpretation – that no reasons are required – seems untenable. I am reinforced in my view when I consider that previously mentioned round of speculation on Twitter with respect to Jackpine and New Prosperity. One commentator suggested that staunch Aboriginal opposition was the deciding factor (which doesn't totally square with the Jackpine outcome), while another suggested that New Prosperity was essentially a pawn to be sacrificed in the larger pipeline war being waged in British Columbia. The Prime Minister, for his part, expressed concern for "the long-term destruction of (the local water system)," but Jackpine will be far more destructive on that front (resulting in the loss of approximately 8500 ha of wetlands). The only real distinguishing factor, it seems, is that Jackpine is an oil sands project, of which the federal government is a staunch supporter.

What this speculation suggests is that the issue here may be even more basic than enabling political accountability or securing adherence to *CEAA*'s environmental aspirations. Rather, it may be about ensuring that the legislation is not being misused or applied in an arbitrary and capricious manner, much as was the case in the foundational *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC). In that case, the citation of which appears to be on the rise in the environmental law context generally (see here and here), the defendant Minister revoked Mr. Roncarelli's liquor license because of the latter's use of his restaurant's profits to bail out Quebec's then much prosecuted Jehovah's Witnesses. The Supreme Court of Canada made clear that:

> [140] In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

If *CEAA, 2012* is the kind of "public regulation" to which the above quotation applies, and in my view it clearly is, it follows that Cabinet must provide some reasons or explanation for its decisions. Bearing in mind also the very significant private interest at stake in such decisions, it is arguable that the failure to provide any reasons violates proponents' procedural rights as well, something Taseko may wish to consider in its own legal challenge (the merits of which otherwise seem dubious, but that is a subject for a future post).