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Greenpeace v Canada: Symbolic Blow to the Nuclear Industry, Game-changer for Everyone Else?

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Case commented on: *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 (CanLII)

In this lengthy (431 paragraphs) decision, the Federal Court allowed in part Greenpeace *et al*'s application for judicial review regarding the Joint Review Panel report (the Report) for the Darlington New Nuclear project proposed by Ontario Power Generation (OPG). Justice Russell held that the environmental assessment (EA) conducted by the Joint Review Panel (JRP) failed to comply with the *Canadian Environmental Assessment Act*, SC 1992 c 37 (as it then was). Specifically, there were gaps in the treatment of hazardous substances emissions and spent nuclear fuel, and a failure to consider the effects of a severe "common cause" accident. As noted by the media, while the decision is of limited effect on a project already indefinitely postponed by the province, "it is a symbolic blow to an industry coping with the public and political fallout from Japan's 2011 Fukushima meltdown." As further discussed below, the decision is also likely to have implications for EA in Canada generally and several other projects currently making their way through either the regulatory process or the courts, including Taseko's New Prosperity mine, Enbridge's Northern Gateway pipeline and Kinder Morgan's Trans Mountain pipeline.

Background

In the fall of 2006 and under direction from the Ontario Minister of Energy, OPG 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. OPG's 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* (since replaced with the *Canadian Environmental Assessment Act, 2012*, SC 2012 c 19). The project was referred to a joint review panel in 2008 and a three-member panel was appointed in 2009. Following 284 information requests (IRs) and seventeen days of hearings in the spring of 2011, the JRP 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 EA and JRP Report shortly thereafter.

Justice Russell summarized the applicants' argument as follows:

> [127] As identified in the Report, the [JRP] itself found that key information about the proposed Project was absent from the EA documentation. For example, the Panel found that no specific nuclear reactor technology, site design layout, cooling water option, used nuclear fuel storage option, or radioactive waste management option has been selected. Thus, at the present time, federal decision-makers still do not know: (a) the particulars of the specific project to be implemented at the Darlington site; (b) the full range of site-specific or cumulative environmental effects; or (c) whether there are feasible mitigation measures over the project's full lifecycle. These and other fundamental gaps are attributable to the fact that what the [JRP] had before it was not a "project", but merely a plan for future planning, assessment, and decision-making. (See paras 218 – 220 for the full list of alleged gaps and deficiencies)

The reason that so many project components remained unspecified was that OPG, with the JRP's blessing, had prepared its environmental impact statement based on a "plant parameter envelope" (PPE) or "bounding scenario" approach. As described by OPG, "this approach involves identifying the salient design elements of the Project and, for each of those elements, applying the "limiting value" (the value with the greatest potential to result in an adverse environmental effect) based on the design options being considered" (at para 5). The respondents argued that such an approach was consistent with the requirement, pursuant to section 11 of the *CEAA*, to conduct the assessment as early as practicable in the planning process and before irrevocable decisions are made (at para 66), and further that it was supported by the case law (at para 72).

Decision

After a thorough review of the statutory regime and associated jurisprudence, Justice Russell concluded that there was nothing that precluded the adoption of the PPE approach *per se* (at para 181). However, he did find inadequacies with the JRP's treatment of three specific issues (at para 228):

- The failure of the Panel to insist on a bounding scenario analysis for hazardous substance emissions, in particular liquid effluent and stormwater runoff to the surface water environment, and for the sources, types and quantities of non-radioactive wastes to be generated by the project;
- The Panel's treatment of the issue of radioactive waste management; and
- The Panel's conclusion that an analysis of the effects of a severe common cause accident at the facility was not required at this stage, but should be carried out prior to construction.

In assessing these matters, Justice Russell accepted the applicants' argument – unchallenged by the respondents – that the EA process under *CEAA* is fundamentally different from future licensing or regulatory processes (at para 230) and that there is therefore a limit to the extent to which the consideration of environmental effects and their mitigation can be left to those later processes. Justice Russell described this as a matter of improper delegation:

> [232] Under the *CEAA*, the ultimate decision-maker for projects referred to review panels is the Governor in Council (in practical terms, the federal Cabinet), which decides whether the responsible authorities will be permitted to take steps to enable the project to move forward. *Parliament chose to allocate this decision*

> *to elected officials who are accountable to Parliament itself and, ultimately, to the electorate…*
>
> [235] The most important role for a review panel is to provide an evidentiary basis for decisions that must be taken by Cabinet and responsible authorities. The jurisprudence establishes that gathering, disclosing, and holding hearings to assemble and assess this evidentiary foundation is an independent duty of a review panel, and failure to discharge it undermines the ability of the Cabinet and responsible authorities to discharge their own duties under the Act [citing *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 (CanLII) at paras 72 – 74]…
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> [237] In short, *Parliament has designed a decision-making process under the CEAA that is, when it functions properly, both evidence-based and democratically accountable*. The CNSC, in considering future licensing decisions, will be in a fundamentally different position from the Panel that has conducted the EA. The CNSC will be the final authority making the decision, not merely an expert panel. Although the CNSC approaches this role with considerable expertise, *it does not have the same democratic legitimacy and responsibility as the federal Cabinet*.
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> (Emphasis added)

With respect to OPG's PPE approach, which the JRP acknowledged was a departure from typical EA practices, this meant that it "was incumbent on the Panel to ensure the methodology was fully carried out" (at para 247), bearing in mind also the challenges that such an approach poses for public participation: "The less specific the information provided... the more difficult it may be for interested parties to challenge assumptions, test the scientific evidence, identify gaps in the analysis, and ensure their interests are fully considered" (at paras 247, 249).

Applying this standard to hazardous substance emissions and on-site chemical inventories, Justice Russell concluded that the EA came up short. He noted EC's submissions to the JRP that, notwithstanding several IRs to OPG, the remaining gaps prevented EC from assessing effects with respect to effluent and storm water management (at paras 257 – 259). The JRP 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 it "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 the project was not likely to result in significant adverse environmental effects (at paras 264, 265).

In a passage that is sure to interest administrative law scholars and practitioners (discussed further below), Justice Russell held that while such a conclusion may be reasonable, it did not comply with *CEAA*:

> [272] To repeat what is stated above, because of its unique role in the statutory scheme, a review panel is required to do more than consider the evidence and reach a reasonable conclusion. *It must provide sufficient analysis and justification to allow the s. 37 decision-makers to do the same, based on a broader range of scientific and public policy considerations*. *One could say that the element of "justification, transparency and intelligibility within the decision-making*

> *process"* (*Dunsmuir*, above, at para 47; *Khosa*, above, at para 59) *takes on a heightened importance in this context*.
>
> [273] In this case, there are references to commitments by OPG to comply with unspecified legal and regulatory requirements or applicable quality standards, and to apply good management practices. There are references to instruments that may or may not contain relevant standards or thresholds based on the information before the Court (e.g. the *Ontario Stormwater Management Planning and Design Manual* (March 2003)). And there are references to thresholds or standards in statutory instruments (e.g. *Fisheries Act*, *Canadian Environmental Protection Act*) without specific information about how these are relevant to or will bound or control the Project's effects…
>
> [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 (see EA Report at p. 39), and makes it questionable whether the Panel has considered the Project's effects at all in this regard.
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> (Emphasis added)

This is not to suggest that future regulatory processes "have no role to play in managing and mitigating a project's environmental effects" (at para 241). For Justice Russell, a conceptual distinction can be made between two kinds of situations where a panel, despite some uncertainty, might conclude that significant adverse environmental effects are unlikely (at para 280):

(a) Reliance upon an established standard or practice and the likelihood that the relevant regulatory structures will ensure compliance with it; or
(b) Confidence in the ability of regulatory structures to manage the effects of the Project over time.

The latter approach is problematic in that it "may short-circuit the two-stage process whereby an expert body evaluates the evidence regarding a project's likely effects, and political decision-makers evaluate whether that level of impact is acceptable in light of policy considerations, including "society's chosen level of protection against risk"" (at para 281, referring to the Government of Canada's policy on the application of the precautionary principle and adopted by the Darlington JRP).

Turning next to the issue of spent nuclear fuel, there does not appear to have been any real dispute between the parties that the JRP's treatment of this issue was cursory. Rather, OPG's position was that this was something that Canada had mandated the Nuclear Waste Management Organization (NWMO) to study. Justice Russell disagreed:

> [297] In my view, the record confirms that the issue of the long-term management and disposal of the spent nuclear fuel to be generated by the Project has not received adequate consideration. The separate federal approvals process for any potential NWMO facility, which has not yet begun…will presumably ensure that such a facility is not constructed if it does not ensure safety and environmental protection. *But a decision about the creation of that waste is an aspect of the Project that should be placed before the s. 37 decision-makers* with the benefit of

> a proper record regarding how it will be managed over the long-term, *and what is known and not known in that regard*.
>
> (Emphasis added)

According to Justice Russell, the management and storage of spent nuclear fuel was not a "separate issue" (at para 312). Rather, the EA "is the only occasion…on which political decision-makers at the federal level will be asked to decide whether that waste should be generated in the first place" (*ibid*). Nor was there anything in the Terms of Reference that suggested that this issue was not to be addressed (at para 313).

Finally, with respect to a severe "common cause" accident, the problem was not that OPG failed to assess the risks of accidents associated with its new build (at para 327) but rather that it failed to assess these risks in conjunction with the existing Darlington plant. The JRP itself recognized this gap and recommended that OPG "evaluate the cumulative effect of a common-cause severe accident involving all of the nuclear reactors in the site study area" prior to construction (Recommendation # 63). For Justice Russell, however, that was insufficient:

> [334] In my view, the one conclusion that is not supported by the language of the statute is the Panel's conclusion that the analysis had to be conducted, but could be deferred until later. Rather, in my view, it had to be conducted as part of the EA so that it could be considered by those with political decision-making power in relation to the Project.

In light of these three deficiencies, and as was the case in *Pembina Institute* cited above, the Court remitted the Report to the JRP for further consideration, pending which the relevant government agencies have no jurisdiction to approve the project.

Discussion

Justice Russell's thorough treatment of the federal EA regime means that the decision is likely to have implications for the federal EA regime going forward. This is so because notwithstanding the fact that *Greenpeace* dealt with the prior *CEAA* regime and *CEAA 2012* is in many ways different, the provisions dealing with a panel's duties and political decision-making are effectively unchanged. These implications, as well as Justice Russell's somewhat unprecedented (but in my view correct) approach to judicial review in this context, are further discussed below.

Failure to Assess Environmental Effects "Short-Circuits" the *CEAA* Regime

Perhaps the most important take-away message from *Greenpeace* is that, generally speaking, Panels must do the work of actually assessing potential environmental effects and their mitigation. This is a necessary consequence of *CEAA*'s two-step decision-making process, which Justice Russell describes as "evidence-based and democratically accountable" (at para 237). Democratic accountability is hindered where the evidence with respect to potential adverse environmental effects is missing, inadequate or postponed to some future regulatory proceeding. This finding, supported by prior jurisprudence and the 2008 *Pembina Institute* decision in particular, is likely to cause problems for both Taseko's proposed New Prosperity mine and Enbridge's proposed Northern Gateway pipeline.

I have previously written about Taseko's New Prosperity project here and here. Briefly, the second federal panel that reviewed Taseko's revised project concluded – like the first one – that the project is likely to result in significant adverse environmental effects. In the first of my posts, I suggested that this result was at least partially its own undoing, and its refusal to provide sufficient information to the panel in particular. Like OPG, Taseko was of the view that such "details" could be dealt with at the regulatory phase (see e.g. its final written submissions to the panel at p 8 – 11), an approach that the New Prosperity panel ultimately rejected (see New Prosperity Report at p 22). In its December 2013 application for judicial review, Taseko argues, *inter alia*, that the panel erred in law when it did so. *Greenpeace* suggests that this aspect of Taseko's challenge is unlikely to succeed.

Greenpeace also lends support to the recent letter to the Prime Minister, signed by 300 scientists, which urges him to reject the Northern Gateway Joint Review Panel report. Amongst five major flaws, the signatories to the letter allege inappropriate reliance on yet-to-be-developed mitigation measures:

> …Northern Gateway omitted specified mitigation plans for numerous environmental damages or accidents. This omission produced fundamental uncertainties about the environmental impacts of Northern Gateway's proposal (associated with the behaviour of bitumen in saltwater, adequate dispersion modeling, etc…). The panel recognized these fundamental uncertainties, but sought to remedy them by demanding the future submission of plans… Since these uncertainties are primarily a product of omitted mitigation plans, such plans should have been required and evaluated before the JRP report was issued.

Whether or not the foregoing is an accurate characterization of the JRP's conclusions and recommendations (a quick glance of the NEB's 209 conditions does suggest that these scientists may well be onto something), the letter's characterization of the EA process as one intended to offer "guidance, both to concerned Canadians in forming their opinions on the project and to the federal government in its official decision" (at page 3) could have been written by Justice Russell himself.

What is Separate?

A related aspect of *Greenpeace* worth discussing is the Court's approach to the management of spent nuclear fuel. As noted above, Justice Russell concluded that this was not a separate issue, and that the "creation of nuclear waste" was "an aspect of the Project that should be placed before [Cabinet]" (at para 297).

Such *dicta* could prove useful to those, such as the City of Vancouver in the context of the National Energy Board's Trans Mountain pipeline application, arguing that the EAs for major pipelines (including Northern Gateway) should assess the climate change implications of the increased oil production enabled by the construction of such pipelines (in its application, Trans Mountain states that the pipeline is in response to requests for increased capacity "in support of growing oil production"). Although the matter is not free from doubt, the statutory language on this front certainly is broad (see *CEAA, 2012* para 5(1)(a): "…a change that *may* be caused…"). It also seems plain that panels cannot arbitrarily decide to exclude certain environmental effects, nor is deference to government policy or other initiatives appropriate (e.g. the NWMO in *Greenpeace*, or Alberta's intensity-based approach to greenhouse gas emissions in *Pembina Institute*).

Assessing the climate change effects of increased oil production would not amount to "a trial of modern society's reliance on hydrocarbons," as the NEB's outgoing chief recently stated in an interview with the Financial Post, and which he described as a policy question belonging "to the world of policy-making and politics, in which we are not involved at all." With respect to its obligations under *CEAA, 2012* at least (recognizing that the NEB is dealing with a dual mandate here, the other coming from s 52 of the *National Energy Board Act*, RSC 1985 c N-7, which does actually require the NEB to reach a conclusion with respect to the public interest), it would be the exact opposite. Although complex, it would entail an evidence-based analysis of whether Trans Mountain or Northern Gateway may contribute to an increase in oil production and, if so, the greenhouse gas emissions associated with that. Importantly, the final Environmental Impact Statement for Keystone XL determined that this was not likely to be the case for that particular pipeline.

A Green Shade of ~~Reasonableness~~ Review?

There has been much action at the Supreme Court lately with respect to judicial review, most of it dealing with the thorny (in my view) issue of the appropriate standard of review to be applied to questions of law when it is a member of the executive (e.g. a Minister), rather than an adjudicative body, that is interpreting a statute. In *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, the Supreme Court confirmed that the *Dunsmuir* framework, and the subsequent presumption of deference on questions of law falling within a decision-maker's "home statute", applies to administrative decision-makers generally (at paras 53 and 54). The issue didn't come up in *Greenpeace*, dealing as it does with a tribunal, although there is an interesting discussion to be had as to whether the roster-like (*i.e.* non-permanent) membership of *CEAA* panels is sufficient to rebut the presumption of deference given the potential for inconsistent and potentially conflicting, but otherwise reasonable, interpretations of the legislation by different panels.

In the final part of this post, however, I want to briefly discuss Justice Russell's approach to reasonableness review. For convenience, the relevant passage is as follows:

> [272] To repeat what is stated above, because of its unique role in the statutory scheme, a review panel is required to do more than consider the evidence and reach a reasonable conclusion. *It must provide sufficient analysis and justification to allow the s. 37 decision-makers to do the same, based on a broader range of scientific and public policy considerations*. One could say that the element of "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, above, at para 47; [*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII)] at para 59) *takes on a heightened importance* in this context.
>
> (Emphasis added)

In my view, this is precisely the kind of analysis that Justice Binnie had in mind when he stated, at para 59 of *Khosa*, that "[r]easonableness is a single standard that takes its colour from the context." In the EA context, judicial review is not available on the merits of government-decision making – as Justice Russell observed that is a matter of democratic accountability. In this context, judicial review should function in the service of democratic accountability by ensuring the integrity of the decision-making process, a process that government predictably and

– where it has been adequate – justifiably relies on to gain support for its political decisions. In the context of Northern Gateway, for example, the Prime Minister and then Minister of Natural Resources Joe Oliver were reported as saying that they will "make a decision only after considering the recommendations of the 'fact-based' and 'scientific' review panel." Mr. Oliver also released a statement where he described the JRP report as "a rigorous, open and comprehensive science-based assessment." In this context, the role of a reviewing court should be to ensure that the EAs do in fact meet these standards, failing which there can be no democratic accountability.

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