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Federal Court of Appeal Reviews CEAA "Justification" Determination for Lower Churchill Falls

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Case Commented On: *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189 (CanLII)

At least three times in the course of the past year, an environmental assessment (EA) panel convened under the *Canadian Environmental Assessment Act 2012*, SC 2012, c 19 (*CEAA, 2012*) has concluded that a project is likely to result in significant adverse environmental effects: Shell's Jackpine Mine Expansion, Taseko's New Prosperity Mine, and Enbridge's Northern Gateway Pipeline. In the case of both Jackpine and Northern Gateway, the federal Cabinet determined that these effects were "justified in the circumstances," but not so for New Prosperity. In none of these instances, however, did the relevant "Decision Statement" pursuant to section 54 of *CEAA, 2012* contain any explanation or reasons for Cabinet's decision. The Federal Court of Appeal's recent decision in *Council of the Innu* suggests that this approach is wrong.

This litigation involved the Lower Churchill Hydroelectric Project proposed by Nalcor in Newfoundland. This project was reviewed under the previous *CEAA* regime but the relevant provisions are virtually unchanged. Like the three EAs referred to above, the panel concluded that the project was likely to result in significant adverse environmental effects. Unlike the three projects referred to above, however, the government did provide a detailed explanation for its determination that the significant adverse environmental effects were justified in the circumstances. The Council challenged this determination (the Council also challenged the sufficiency of Aboriginal consultation; this post focuses only on the justification issue).

The Council's primary argument was that the project as proposed and assessed involved two plants, a larger Gull Island plant and a smaller Muskrat Falls plant, but that at the time of Cabinet's decision-making a construction date for the Gull Island plant had yet to be confirmed, such that it was unreasonable for Cabinet to rely on the benefits of both plants when making its decision about justification. The Federal Court of Appeal ultimately disagreed (at para 58), but not without first setting out a framework for reviewing a "justified in the circumstances" determination. Beginning with the standard of review, the Court endorsed the trial judge's approach:

> [40] ...the Court will only intervene with the [Governor in Council's] and Responsible Ministers' decisions under subsections 37(1.1) and 37(1) if it finds

> that: 1) the *CEAA* statutory process was not properly followed before the section 37 decisions were made; 2) the GIC or Responsible Ministers' decisions *were taken without regard for the purpose of the CEAA*; or 3) the GIC or Responsible Ministers' decisions *had no reasonable basis in fact*; which is tantamount to an absence of good faith.

The vast majority of *CEAA* litigation has focused on the first criterion, with applicants alleging various deficiencies with the EA process. In fact, to the best of my knowledge the *Council of Innu* decision is the first to challenge the legality of the GiC's decision directly. And while the parameters of review here (the second and third criteria above) are deferential to be sure, it is equally clear that they require *something* by way of explanation. Otherwise, it is simply impossible to carry out what the Court of Appeal stated was its duty (at para 44): "a reviewing court must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme" (essentially the same approach I argued for here).

Turning to the GiC order with respect to Lower Churchill, the Court noted (at para 53) that Cabinet "determined, after consulting the Joint Review Panel Report as well as several government studies, that [translation] 'the significant energy, economic, socio-economic and environmental benefits outweigh the negative environmental impacts of the Project identified in the Panel's Report.'" The Court then addressed the Council's argument with respect to the Gull Island Plant in a passage that suggests that, notwithstanding its subjective and policy-laden nature, the justification determination must be able to withstand at least some scrutiny:

> [54] I share the appellant's view that the abandonment of the Gull Island plant, if this were proven to be true, would raise serious questions about the validity of the environmental assessment and the impugned decisions. The Project authorized by the Governor in Council and responsible authorities following the balancing exercise imposed by section 37 of the CEAA included the Muskrat Falls plant as well as the Gull Island plant… If Nalcor were to forego construction of the larger of the two plants assessed (Gull Island), or if there was an unreasonable delay in its construction, the balancing exercise carried out for one of the Report's findings would be necessarily compromised.

As noted above, the Court of Appeal ultimately concluded that the Council failed to prove that the Gull Island plant had been abandoned or that it had been unreasonably delayed (at para 57), but the above framework and its application to this case leave little doubt that the federal government's current practice with respect to justification is insufficient.

Nor would it seem sufficient for the government to simply rely on the justification occasionally provided by panels as in the case of Jackpine, which was a joint review panel with the Alberta Energy Regulator and which concluded that that project was in the public interest, or Northern Gateway. As a starting point and consistent with the Federal Court's recent decision in *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 (CanLII), such panels lack democratic legitimacy. Another reason, and something that I have noted before, is that there often exists a yawning gap between panel recommendations and the conditions that the

government ultimately imposes on proponents (see *e.g.* the recommendations with respect to a Traditional Land Use (TLU) management framework under the Lower Athabasca Regional Plan in the context of Shell's Jackpine project). Practically, this means that there is often a real difference between the "balance" reached by panels and that struck by the government.