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Judicial Supervision of the National Energy Board (NEB): The Federal Court of Appeal Defers to the NEB on Key Decisions

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Case Commented On: *Forest Ethics Advocacy Association and Donna Sinclair v National Energy Board*, 2014 FCA 245; *City of Vancouver v National Energy Board, and TransMountain Pipeline ULC*, Order of the Federal Court of Appeal, Docket 14-A-55, per Justice Marc Nadon, October 16, 2014, denying leave to appeal the NEB's scoping decision, Hearing Order OH-001-2014, 23 July 2014.

The National Energy Board (NEB) has its plate full; so too does the Federal Court of Appeal which has been hearing both judicial review applications and leave to appeal applications in relation to a number of projects including the Northern Gateway Project (Enbridge), the Line B Reversal and Line 9 Capacity Expansion Project (Enbridge), and the TransMountain expansion Project (Kinder Morgan). Interested readers can obtain details of these projects as well as Board decisions on the NEB's website. I provided an assessment of the state of play in the Northern Gateway applications in a comment published in the Energy Regulation Quarterly.

The term "judicial supervision" in this post is designed to encompass both the idea of judicial review and appellate review of NEB decisions by way of appeal to the Federal Court of Appeal (FCA) (with leave). The normal route for obtaining judicial supervision of the NEB is by way of appeal (with leave) but one of the most significant recent decisions we have seen in this area, the *Forest Ethics and Sinclair case,* came before the Court on an application for judicial review. The case is important because it establishes, at least in the circumstances of that case, that the Board did not err in ruling that it did not have to consider the larger environmental effects of a pipeline project including the contribution to climate change made by the Alberta oil sands and facilities and activities upstream and downstream from the pipeline project.

This post aims to do three things. First it explains the different ways in which a party may seek judicial supervision of an NEB decision. Second, it examines the Forest Ethics and Sinclair decision and finally it offers some brief commentary on one important practical and philosophical difference between the way in which the Federal Court of Appeal treats leave applications and the way in which it treats judicial review applications – reasons.

The Different Routes to Judicial Supervision of Board Decisions

The judicial supervision of Board decisions is governed by the terms of the *National Energy Board Act*, RSC 1985, c N-7 (*NEBA*) and the *Federal Courts Act*, RSC 1985, c F-7. We can summarize the position as follows:

1. To begin with the basics, the NEB is a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*.

2. While judicial supervision of a "federal board, commission or other tribunal" ordinarily falls to the trial division of the Federal Court, in some cases Parliament has chosen to channel judicial supervision to the Court of Appeal rather than the trial division. This is the case for the NEB. Sections 18.5 and 28 of the *Federal Courts Act* provide as follows:

> 18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal … from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, *to the extent that it may be so appealed*, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act. (emphasis added)
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> 28(1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals: …
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> (*f*) the National Energy Board established by the *National Energy Board Act*;
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> (*g*) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board Act*…
>
> (3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

3. Section 22 of *NEBA* read together with s.18.5 of the *Federal Courts Act* establishes that most decisions of the NEB can only be reviewed by way of appeal to the FCA on a point of law or jurisdiction with leave. Section 22 provides as follows:

> 22(1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.
>
> (1.1) An application for leave to appeal must be made within thirty days after the release of the decision or order sought to be appealed from or within such further time as a judge of that Court under special circumstances allows.

> (2) No appeal lies after leave has been obtained under subsection (1) unless it is entered in the Federal Court of Appeal within sixty days from the making of the order granting leave to appeal.
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> (3) The Board is entitled to be heard by counsel or otherwise on the argument of an appeal.
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> (4) For greater certainty, for the purpose of this section, no report submitted by the Board under section 52 or 53 — or under section 29 or 30 of the *Canadian Environmental Assessment Act, 2012* — and no part of any such report, is a decision or order of the Board.

4. The Federal Court of Appeal typically does not provide reasons when it denies leave; although see *Friends of Rockwood Park Inc v Emera Inc*, 2007 FCA 300 offering cursory reasons: "we have not been persuaded that their proposed appeal raises an arguable question of law or jurisdiction".

5. Judicial review (but only direct to the FCA and not the Federal Court Trial Division: *Sweetgrass First Nation v AG Canada, National Energy Board and TransCanada Keystone Pipeline GP Ltd*, 2010 FC 535) may be available in a limited category of circumstances, principally because of the italicized language above in s.18.5 of the *Federal Courts Act* which suggests that an ordinary judicial review application may be available where an appeal is not. Such circumstances might include interlocutory applications and applications brought by persons who were not party to the decision before the Board. See for example *Federation of Saskatchewan Indian Nations v Alliance Pipelines Ltd*., 2003 FCA 238 and *Union of Nova Scotia Indians v Maritimes and Northeast Pipelines Management Ltd*, 1999 CanLII 7556. But beyond these exceptions there is no opportunity for judicial review: *Standing Buffalo Dakota First Nation v AG Canada*, 2008 FCA 222.

6. Parties sometimes commence both applications for judicial review and applications for leave to appeal in respect of the same matter: *Geophysical Service Incorporated v National Energy Board*, 2011 FCA 360.

7. Under the new procedure (post *Jobs, Growth and Long-term Prosperity Ac*t, SC 2012, c. 19, hereafter *Jobs, Growth*) for issuing a certificate of public convenience and necessity for a new pipeline, the Board issues the certificate on the direction of the federal cabinet. Section 54 of *NEBA* provides that the cabinet decision is amenable to judicial review (not the appeal with leave mechanism):

> 55(1) Judicial review by the Federal Court of Appeal with respect to any order made under subsection 54(1) is commenced by making an application for leave to the Court.
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> (2) The following rules govern an application under subsection (1):
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> > (*a*) the application must be filed in the Registry of the Federal Court of Appeal ("the Court") within 15 days after the day on which the order is published in the *Canada Gazette*;

(*b*) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice; and

(*c*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance.

It is worth emphasizing that the NEB also has an internal remedy which is an application to the Board to have it review its own decision under s.21 of *NEBA,* which provides that:

> 21(1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

In some cases a Court may take the view that a party should exhaust this local or domestic remedy before applying to the Court. Failure to do say may result in the Court exercising its discretion to refuse to grant the relief sought. The grounds on which a party may seek a review or rehearing are further developed in the Board's Rules of Practice and Procedure:

> 44(1) Any application for review or rehearing pursuant to subsection 21(1) of the Act shall be in writing, signed by the applicant or the applicant's authorized representative, filed with the Board and served on all parties to the original proceeding.
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> (2) An application for review or rehearing shall contain
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> (*a*) a concise statement of the facts;
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> (*b*) the grounds that the applicant considers sufficient, in the case of an application for review, to raise a doubt as to the correctness of the decision or order or, in the case of an application for rehearing, to establish the requirement for a rehearing, including
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> (i) any error of law or of jurisdiction,
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> (ii) changed circumstances or new facts that have arisen since the close of the original proceeding, or
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> (iii) facts that were not placed in evidence in the original proceeding and that were then not discoverable by reasonable diligence;
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> (*c*) the nature of the prejudice or damage that has resulted or will result from the decision or order; and
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> (*d*) the nature of the relief sought.

The *Forest Ethics and Sinclair Decision*

This is a decision on a judicial review application rather than an appeal under s.22 of *NEBA*. The application was in respect of three interlocutory decisions. First, the Board had ruled that it

would not consider the environmental and socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline. The applicants contended that this decision was unreasonable. Second, the Board assessed (and rejected) the standing of the applicants to participate in the proceeding on the basis of an Application to Participate Form. Third, the applicants, and specifically Ms. Sinclair, argued that the Board had denied Sinclair her freedom of expression under the *Charter* by denying her standing. The Court also considered whether the applicants were in a position to raise *Charter* questions before the Court if such questions had not been raised before the Board; it also considered whether Forest Ethics had standing before the Court on the judicial review application.

The Standing Questions

The procedure followed by the NEB in assessing standing

The *Jobs, Growth* version of *NEBA* (s.55.2) establishes two forms of participation rights in relation to an application for a certificate of public convenience and necessity: (1) participation as of right for any person whom the Board considers to be adversely affected, and (2) participation at the discretion of the Board if, in the Board's opinion, the proposed intervener has "relevant information or expertise". The Board's decisions on such matters are "conclusive". In order to assess applications to intervene the Board required potential interveners to complete an Application to Participate Form. The Board granted some parties full intervention rights, granted some the opportunity to submit a letter of concern and denied others, including Ms. Sinclair, any opportunity to participate further.

The choice of instrument that the Board uses to assess standing is a question of procedure. The standard of review for questions of procedure is (at para 70) "correctness with some deference to the Board's choice of procedure". The Court gave several reasons (at para 72) for emphasizing the deference owed to the Board in relation to its choices:

> … in it its process decision, the Board is entitled to a significant margin of appreciation in the circumstances of this case. Several factors support this:
>
> - The Board is master of its own procedure …
> - The Board has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, and how and to what extent. It also has considerable experience and expertise in ensuring that its hearings deal with the issues mandated by the Act in a timely and efficient way.
> - The Board's procedural choices – in particular, the choice here to design a form and require that it be completed – are entitled to deference …
> - The Board must follow the criteria set out in section 55.2 of the Act – whether "in [its] opinion" a person is "directly affected" by the granting or refusing of the application and whether the person has "relevant information or expertise." But these are broad terms that afford the Board a measure of latitude, and so in obtaining information from interested parties concerning these criteria, it should be also given a measure of latitude.
> - Finally…the Board's decisions are protected by a privative clause. (Authorities omitted)

The Court went on to say (at para 76) that "Board hearings are not an open-line radio show where anyone can dial in and participate. Nor are they a drop-in center for anyone to raise anything, no matter how remote it may be to the Board's task of regulating the construction and operation of oil and gas pipelines." Furthermore, by amending the Act in 2012 to create two categories of participation, Parliament was signaling that procedures need to be more focused and efficient and that, as such, the Board was justified in creating procedure that requires "rigorous demonstration" (at para 77) of the capacity to make a contribution to the Board's consideration of the matter at hand.

The decision to deny Ms. Sinclair standing

The Board's decision to deny Ms. Sinclair standing is (at para 79) "a mix of substance and procedure". While admitting a party to participate is ordinarily one of procedure (with a standard of review of correctness with deference to the Board's choices) it is evident that in making its decision the Board is also considering questions of materiality and relevance i.e. issues of substance (with a standard of review of reasonableness). However (at para 82): "Regardless of how we characterize the Board's decision, the Board deserves to be allowed a significant margin of appreciation … The Board engaged in a factual assessment, drawing upon its experience in conducting hearings of this sort and its appreciation of the type of parties that do and do not make useful contributions to its decisions. Matters such as these are within the ken of the Board, not this Court." The Court then offered detailed reasons for finding that the Board's decision to deny Ms. Sinclair standing was reasonable (see para 83).

The decision to deny Forest Ethics standing on the judicial review application

It appears from the Court of Appeal's judgement that although Forest Ethics was a co-applicant in attacking the Board's three interlocutory decisions it had had no prior involvement in the matters before the Board. It was indeed (at para 33) a classic "busybody":

> Forest Ethics asks this Court to review an administrative decision it had nothing to do with. It did not ask for any relief from the Board. It did not seek any status from the Board. It did not make any representations on any issue before the Board. In particular, it did not make any representations to the Board concerning the three interlocutory decisions.

As such, Forest Ethics was entitled neither to standing as of right nor as a public interest litigant in bringing this judicial review application.

The *Charter* Questions

While it followed from this last point that Forest Ethics could not raise a *Charter* challenge what about Ms. Sinclair? The Court held that while there would be some cases in which an applicant for judicial review would be able to raise a *Charter* challenge when the applicant had failed to do so before the administrative tribunal that was not this case. Instead this case was governed by the usual rule and good practice that requires that the tribunal in question be able to express its own expert and contextualized opinion as to the constitutional or *Charter* question that the applicant seeks to put at issue (at paras 37 – 59).

Upstream and downstream effects

The Court's reasons for supporting the conclusion of the Board and finding its decision on (ir)relevance of upstream and downstream effects to be reasonable are long (at para 69) but worth quoting given the importance of this issue in a number of different proceedings:

- The Board's main responsibilities under the *National Energy Board Act*, *supra* include regulating the construction and operation of inter-provincial oil and gas pipelines (see Part III of the Act).
- Nothing in the Act expressly requires the Board to consider larger, general issues such as climate change.
- The Board submitted, and I accept, that in a section 58 application such as this, the Board must consider issues similar to those required by subsection 52(2) of the Act.
- Subsection 52(2) of the Act empowers the Board to have regard to considerations that "to it" appear to be "directly related" to the pipeline and "relevant." The words "to it," the imprecise meaning of the words "directly," "related" and "relevant," the privative clause in section 23 of the Act, and the highly factual and policy nature of relevancy determinations, taken together, widen the margin of appreciation that this Court should afford the Board in its relevancy determination …
- Further, in applying subsection 52(2) of the Act, the Board could reasonably take the view that larger, more general issues such as climate change are more likely "directly related" to the environmental effects of facilities and activities upstream and downstream from the pipeline, not the pipeline itself.
- The Board does not regulate upstream and downstream facilities and activities. These facilities and activities require approvals from other regulators. If those facilities and activities are affecting climate change and in a manner that requires action, it is for those regulators to act or, more broadly, for Parliament to act.
- Subsection 52(2) of the Act contains a list of matters that Parliament considered to be relevant: see paragraphs 52(2)(*a*) through 52(2)(*d*). Each of these is relatively narrow in that it focuses on the pipeline, not upstream or downstream facilities and activities. Paragraph 52(2)(*e*) refers to "any public interest." It was for the Board to interpret that broad phrase. It was open to the Board to consider that the "public interest" somewhat takes its meaning from the preceding paragraphs in subsection 52(2) and the Board's overall mandate in Part III of the Act. Thus, it was open to the Board to consider that the "public interest" mainly relates to the pipeline project itself, not to upstream or downstream facilities and activities. (In this regard, pre-*Dunsmuir* authorities that engaged in correctness review of the meaning of "public interest" or quashed Board decisions for failing to take into account a factor the Court considered relevant are to be regarded with caution …)

- Parliament recently added subsection 52(2) and section 55.2 to the Act in order to empower the Board to regulate the scope of proceedings and parties before it more strictly and rigorously: *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, s. 83. The Board's decision is consistent with this objective. Consistency of a decision with statutory objectives is a badge or indicator of reasonableness ….
- The Board's task was a factually suffused one based on its appreciation of the evidence before it. This tends to widen the margin of appreciation this Court should afford the Board … In my view, the Board's decision was within that margin of appreciation. (Authorities omitted)

The Importance of Reasons

The great merit of this decision is that it articulates a clear set of reasons for concluding that the Board's decisions in relation to all three matters were either reasonable or correct (allowing deference to the Board's choice of procedures). Indeed, the Court may have set an excellent example for the Board in demonstrating the quality of reasons that might be expected of it in showing the reasonableness of its decisions. Ms. Sinclair might not like the result (and I myself would prefer the Board to take a more expansive view of the relevance of upstream and downstream effects under s.52 of *NEBA*), but at least she has got a set of reasons; those reasons help establish the legitimacy of the Board's process.

Contrast this with another recent Federal Court of Appeal decision, this time on the application for leave to appeal in *City of Vancouver v NEB and TransMountain*. In this case the City and other interveners in the TransMountain expansion application similarly sought to expand the Board's review of TransMountain's application to include both the upstream and downstream effects of this project. There are similar arguments before the Court in relation to Northern Gateway. In this case, however, the Court, per Justice Marc Nadon, summarily dismissed the application for leave to appeal, with costs and without giving reasons. I understand that this is consistent with current practice but the contrast between the two approaches is stark. The one approach fortifies the rule of law and the legitimacy of the Board's and the Court's process. The other approach seems to contradict the rule of law and undermine the legitimacy of the administrative process.

I am glad that the Federal Court of Appeal found a way to provide extensive reasons for declining to interfere with the Board's decision making process in relation to Line 9. I hope that the Court will find a way to do the same (whatever the result) in the other important decisions that it will face in relation Northern Gateway, TransMountain Expansion and ultimately Energy East.