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Another Favourite Supreme Court of Canada Case: The Northern Gas Pipeline Saga

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Case/Matter Commented On: Berger Inquiry; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, 1976 CanLII 2; Joint Review Panel for the Mackenzie Gas Project (2009)

Processes for reviewing and analyzing proposals for large diameter pipelines to move natural gas from the Canadian Arctic to Southern North American markets have been significant for the development of Canadian environmental law. This includes regulatory review processes and judicial review cases that arose out of the pipeline review proceedings. Milestone decisions were taken on critical procedural matters including community hearings to receive traditional knowledge, intervenor funding, and decision maker impartiality. The story spans more than 35 years and involves two separate sets of pipeline proposals (see Thomas Berger, *Northern Frontier, Northern Homeland, The Report of the Mackenzie Valley Pipeline Inquiry*, (Ottawa: Minister of Supply and Services Canada, 1977) (Berger Report)).

The first set of these pipeline plans, which included two competing proposals – one following a Yukon-Alaska Highway route and the other a Mackenzie Valley route – was advanced in the early 1970s. Approval then, as now, was required by the National Energy Board. The first proposal announced, the Mackenzie Valley pipeline, created sufficient public controversy that a Commission of Inquiry, under Commissioner Justice Thomas Berger was established by the federal government. Justice Berger's mandate was to study the environmental, social and economic impact regionally of the project, to hold hearings and to report to the responsible federal minister.

Hearings took place from 1974-1976. The Inquiry's procedure, rulings and final report produced a number of Canadian environmental law firsts. One was the structured, yet open, procedure adopted. Formal hearings involving the applicant Canadian Arctic Gas Pipeline Limited, an expert panel funded by the applicant, Aboriginal and environmental intervenors, and a competing pipeline company, were held in Yellowknife and some other communities. But significantly, dozens of informal hearings were held in small communities. Justice Berger was determined to hear from the people and he did. It was a preview of the significance that traditional Aboriginal knowledge was to have in subsequent regulatory proceedings. Intervenors in the formal hearings received funding from the Inquiry to participate. The Commissioner was adamant that though "public interest groups do not represent the public . . . it is in the public interest that they should be heard." After hearing representation from the parties, he ruled that groups seeking funding had to meet the following criteria (Berger Report, Vol 2, Appendix, 225-226):

1. There should be a clearly ascertainable interest that ought to be represented at the Inquiry.

2. It should be established that separate and adequate representation of that interest would make a necessary and substantial contribution to the Inquiry.

3. Those seeking funds should have an established record of concern for, and should have demonstrated their own commitment to, the interest they sought to represent.

4. It should be shown that those seeking funds did not have sufficient financial resources to enable them adequately to represent that interest, and that they would require funds to do so.

5. Those seeking funds had to have a clearly delineated proposal as to the use they intended to make of the funds, and had to be sufficiently well-organized to account for the funds.

These funding criteria have become the gold standard for guiding participant funding decisions.

Justice Berger recommended that the pipeline should not proceed until Aboriginal land claims were settled in the region. It was precisely the argument made by the Aboriginal intervenors. This recommendation and its supporting evidence provided an important basis for Northern land claims negotiations that proceeded over the next 25 years. The Inquiry also witnessed considerable collaboration between the Aboriginal and environmental intervenors – a preview of the complex issues that have emerged around environmental law and the broadly similar, but not always consistent objectives of First Nations and environmental groups.

Justice Berger stated that for environmental protection, the multiple use concept was insufficient. Land preservation was necessary to protect wilderness, wildlife species and critical habitat. He recognized basic ecological values. Thus, he ruled out Northern Yukon and Mackenzie Delta pipeline routes, and recommended establishment of a wilderness park in Northern Yukon. He did not use the term "precaution" in his reporting letter to the Minister. But the idea of a precautionary principle, now common currency in Canadian environmental law, comes through clearly. A similar precautionary approach was taken by the environmental coalition in the Inquiry. They argued that the proposed pipeline's buried chilled gas technology (to prevent discontinuous permafrost melting) amounted to experimenting on the North and should not be permitted.

Ultimately, the National Energy Board (NEB) approved both the Canadian Arctic Gas and the competing Foothills Pipeline (Yukon) projects (National Energy Board, Northern Pipelines Decision, Reasons for Decision, June 1977), but not before two major events occurred.

First, the NEB environmental intervenors raised a bias allegation against the NEB chair (who chaired the hearing panel) which they fought all the way to the Supreme Court of Canada (see *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369). The Chair had been appointed six months prior to the NEB receiving the Canadian Arctic Gas application. He had been President of the Canada Development Corporation, a member of the Pipeline Consortium, and had participated in planning and routing decisions. In a decision that has become the leading Canadian case on bias by administrative decision makers, the Supreme Court ruled that participation by the NEB chair created a "reasonable apprehension of bias." This voided the NEB process. The resulting delay, along with deteriorating national economic conditions, ensured that the pipelines did not proceed.

Fast forward to the early 2000s. A new Mackenzie Valley gas pipeline proposal emerged. In many ways it was remarkably similar to its 1970s predecessor. An NEB application for this 16 billion dollar project was filed by the project consortium in 2004. Hearings that included 15 Arctic communities began in 2006 and led to approval, subject to 264 specific conditions concerning environment, engineering and other matters, in 2010 (Joint Review Panel for the Mackenzie Gas Project, *Foundation for a Sustainable Northern Future: Report of the Joint Review Panel for the Mackenzie Gas Project* (Canada: Minister of Environment, 2009)).

Along the way, a unique cooperative regulatory assessment process based on a "Cooperation Plan" among ten federal, territorial and First Nation agencies that had some type of regulatory or consultative process, was carried out. This involved a joint federal-territorial-First Nation Environmental Review Panel and separate National Energy Board hearings. An NEB panel member, who also sat on the Joint Review Panel, provided a critical link.

There were several First Nation judicial review applications, including a challenge to the Cooperation Plan. This action, based on constitutional Aboriginal consultation rights, confirmed procedural rights of the Dene Tha' First Nation, and contributed to the considerable overall length of the process. The litigation was ultimately settled. But it underlines the significance of the duty to consult (see Kirk Lambrecht, *Aboriginal Consultations, Environmental Assessment and Regulatory Review in Canada* (Regina: University of Regina Press, 2013)), particularly in relation to large linear projects affecting the environment, as well as Aboriginal rights.

The regulatory process introduced innovative cooperative arrangements. But the result was a replay of the 1970s in the sense that the late 2000s recession, coupled with rapid development of shale gas in both Canada and the United States resulted in the project not proceeding.

Thus the 35 year northern gas pipeline saga has shaped Canadian environmental and related Aboriginal law in a number of ways. Procedural fairness and Aboriginal consultation principles were advanced. Perhaps most important, basic values, including early articulations of sustainability, precaution and ecological integrity, values that underpin much of modern Canadian environmental law, were affirmed.