May 30, 2017

Can Federal Legislative Jurisdiction Support a Broad, Sustainability-Based Impact Assessment?

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Report Commented On: Expert Panel on the Review of Federal Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*

This is the fourth in a series of ABlawg posts to consider the report of the Expert Panel on the Review of Federal Environmental Assessment Processes. Professor Arlene Kwasniak wrote the first post, wherein she summarized the main contours of the Expert Panel's recommendations; Professor Shaun Fluker and Drew Yewchuk (JD 2017) tackled the ever-present challenges of discretion, transparency and accountability; and Professor Sharon Mascher recently discussed the Expert Panel's recommendations with respect to triggering. In this post, I tackle an area of lingering doubt in the Panel's report, namely the federal government's jurisdiction to make project-related decisions following a broad, sustainability-based impact assessment. In my view and as further set out below, this doubt is misplaced. My analysis is admittedly somewhat novel but doesn't break entirely new ground – a similar analysis was put forward in the commentary following the Supreme Court of Canada's landmark decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)* 1992 CanLII 110 (SCC). Fundamental to my approach is the distinction between legislating with respect to a subject on the one hand, and subsequent decision-making pursuant to such legislation on the other.

The Expert Panel Report

In many respects, the Expert Panel's recommendations represent a significant break with current and past environmental assessment practice. Rather than the proponent-led, government-reviewed environmental assessment process pursuant to the current *Canadian Environmental Assessment Act, 2012*, SC 2012 c 19 s 52 (*CEAA 2012*), the Expert Panel has recommended that an independent, quasi-judicial tribunal shepherd projects through a more comprehensive "Impact Assessment" (IA). IA would involve three distinct phases (planning, assessment and decision-making) as opposed to the current two (assessment and decision-making) and would consider environmental, economic, social, cultural and health impacts. These impacts would be assessed with a view towards not merely avoiding or mitigating significant adverse environmental effects, as is the current practice, but rather a project's overall contributions to sustainability.

In other respects, however, the Expert Panel's recommendations could be described as *CEAA 2012-plus*. Like *CEAA 2012*, the basis for this new regime would also be a project list. Indeed, when one considers all of the machinery and steps involved, the proposed regime appears almost as geared towards major resource projects as the current one. One important difference is the Expert Panel's recommendations for strategic and regional assessments (at 76-83), which merits its own post. Another difference, according to the Expert Panel, is that its proposed list would be

better designed to "include only projects that are likely to adversely impact matters of federal interest in a way that is consequential for present and future generations," the Panel being of the view that the current project list may in some cases be overly broad (at 56). There would also be mechanisms for capturing projects not on the project list (at 57). Ultimately, the Expert Panel suggests that its proposed approach would likely trigger several hundred IAs per year, in contrast to the several thousand per year under *CEAA 2012* and the roughly sixty ongoing environmental assessments under the current Act (at footnote 27).

For the purposes of this post, the two most important recommendations are those dealing with the applicability of the proposed regime (i.e., when should IA apply?) and decision-making. With respect to the former, the Expert Panel put it this way:

> The Panel places great importance on the fact that federal IA must respect Canada's Constitution. It thus cannot apply to every project or every decision that may affect the environment. Federal IAs should only be conducted on a project, plan or policy that has clear links to matters of federal interest. These federal interests include, at a minimum, federal lands, federal funding and federal government as proponent, as well as:
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> - Species at risk;
> - Fish;
> - Marine plants;
> - Migratory birds;
> - Indigenous Peoples and lands;
> - Greenhouse gas emissions of national significance;
> - Watershed or airshed effects crossing provincial or national boundaries;
> - Navigation and shipping;
> - Aeronautics;
> - Activities crossing provincial or national boundaries and works related to those activities; or
> - Activities related to nuclear energy

For those familiar with the history of Canada's environmental assessment regimes, the foregoing could be described as a hybrid between the original *Canadian Environmental Assessment Act* SC 1992 c. 37 (*CEAA*) section 5 "triggers," especially the federal government as proponent, landowner, or financier (*CEAA* subsections 5(1)(a) – (c)), and *CEAA 2012*'s subsection 5(1) definition of federal environmental effects. Two points are worth noting here. First, the Expert Panel's list is broader than *CEAA 2012*'s current list. Second, it stands in as a substitute for the original *CEAA*'s *Law List Regulation* SOR/94-636, which listed a series of regulatory decisions (e.g. permits, authorizations, regulatory amendments) that triggered environmental assessment under that regime. This substitution is important because it recognizes that the current panoply of federal regulations (and their associated regimes) is neither static nor comprehensive of federal jurisdiction with respect to the environment. It also recognizes that environmental assessment legislation can be its own form of regulation (used here in the sense of a verb, not as subordinate legislation) pursuant to those various heads of power, rather than merely an adjunct to existing legislation and regulations. This reality was made plain by the disconnect between *CEAA 2012*'s reference to fish and fish habitat (subsection 5(1)(a)(i)) and the 2012 changes to the *Fisheries Act*, RSC 1985 c. F-14 that reduced a part of that legislation's scope to only those fish that are part of, or support, a commercial, recreational, or Aboriginal fishery.

With respect to decision-making, the key paragraph from the Panel's report appears to be the following:

> The Panel recommendation to focus IA on the five pillars of sustainability may present challenges for a federal decision on a project. There is broad federal authority to gather relevant information on all five pillars; however, the same breadth of authority does not also apply to imposing legally binding conditions of approval on a project. The ability to set conditions on a project depends on constitutional authority, and for many matters relevant to IA and sustainability, the federal government's constitutional authority is limited. This means that full implementation of a sustainability model for federal IA will benefit from, if not require, co-ordination among jurisdictions.

As further set out below, it is my view that limitations on federal authority in this context have tended to be overstated. At their core, such arguments are actually political – or at least policy-based – in nature, rather than constitutional.

Federal Environmental Decision-Making

I have actually been considering the limits on federal environmental decision-making for some time. Back in the fall of 2016, I volunteered to write a chapter for Professor Al Lucas and Justice William Tilleman's forthcoming book, *Litigating Canada's Environment: Leading Canadian Environmental Cases by the Lawyers Involved* (2017). Because I was counsel in the legal services unit at Fisheries and Oceans Canada at the time, I chose to write about *Miningwatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 (CanLII) (also known as "*Red Chris*", after the mine that was at the center of this litigation).

I think most Canadian environmental law scholars and practitioners would agree that *Red Chris* is the Supreme Court of Canada's last word on the constitutional limits on federal environmental assessment and yet the decision itself is extremely vague in this respect, vagueness that has undoubtedly served to sustain the ongoing uncertainty with respect to such limits. Consequently, I wrote my chapter as a fictional re-hearing of the case wherein an intervenor has requested the Supreme Court to clarify the constitutional and administrative law aspects of its primary ruling (that *CEAA* applied to projects as proposed by proponents and not "as scoped" by federal authorities, which scoping often – but not uniformly – reflected perceived limits on federal environmental jurisdiction). What follows is a brief overview of the analysis contained therein – interested readers can access the actual chapter here.

Key to understanding *Red Chris*' implications for the debate over the constitutional limits of federal environmental assessment is to understand that it reversed nearly a decade of Federal Court and Federal Court of Appeal jurisprudence with respect to the proper interpretation of the *CEAA*. Prior to *Red Chris*, the Federal Court of Appeal had held that when interpreting *CEAA*, and more specifically when determining what kind of environmental assessment applied (a basic "screening" or the more rigorous "comprehensive study" track), it was the project "as scoped" by a federal authority that governed, rather than the entire project as proposed by the proponent. According to Rothstein JA (as he then was) in *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 (CanLII) (*"True North*"), such scoping was necessary to respect constitutional limits:

> The purpose of the [*Comprehensive Study List Regulations*] appears to be that when a listed project is scoped under subsection 15(1), a comprehensive study, rather than a screening, will be required in respect of that project . . . In this case, the oil sands undertaking is subject to provincial jurisdiction. The [*Comprehensive Study List Regulations*] do not purport to sweep under a federal environmental assessment undertakings that are not subject to federal jurisdiction. Nor are the Regulations engaged because of some narrow ground of federal jurisdiction, in this case, subsection 35(2) of the *Fisheries Act*. See *Friends of the Oldman River Society v Canada (Minister of Transport),* [alluding to Saskatchewan's argument in that case that federal environmental assessment could become a "constitutional Trojan horse"]…
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> The appellants may not be satisfied with a province conducting an environmental assessment, but the subject of the environment is not one within the exclusive legislative authority of the Parliament of Canada. Constitutional limitations must be respected and that is what has occurred in this case. (at paras 24-26)

In *Red Chris*, however, Justice Rothstein (now sitting as a judge of the Supreme Court) held that *CEAA* did *not* permit federal authorities to first "scope" projects down to certain components for the purposes of determining what environmental assessment track applies. Rather, it was the entire "project as proposed by the proponent" that determined whether a screening or the more rigorous comprehensive study track applied. While acknowledging that the proponent and government respondents relied heavily on *True North*, as well as the earlier *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, 1999 CanLII 9379 (FCA), Justice Rothstein did not engage in an analysis of the reasons underpinning those decisions but rather merely held that "to the extent" that they were "inconsistent" with the analysis in *Red Chris*, the latter now governs (*Red Chris* at para 26).

Quite clearly, the Supreme Court of Canada was not troubled by the prospect of a project being comprehensively assessed by the federal government, even where such assessment was triggered as a result of its regulatory authority over only a part of that project (*e.g.* a *Fisheries Act* subsection 35(2) authorization for impacts to fish habitat). The question that remained unanswered, however, was whether there are limits on what the federal government can do with such an assessment when making project-related decisions.

In *Friends of the Oldman River Society*, Justice La Forest held that where an environmental assessment pursuant to the then *Environmental Assessment and Review Process Guidelines Order* SOR/84-467 was triggered on the basis that it affected an area of federal jurisdiction, the federal government could only consider those other impacts that also fell within federal jurisdiction (at 72). Whether this limitation was constitutional in nature or rooted in Justice La Forest's interpretation of that specific regime is unclear, but in any event it was criticized in the commentary that followed. According to Mark Warkentin:

> Since [environmental assessment] is just a decision-making process, provincial concerns can and indeed should be relevant. For example, any federal politician knows the importance of considering the impact of federal decisions on the provinces. But there is no danger of the federal government overstepping its bounds, since whatever it decides

> must be grounded in federal powers. (Mark Warkentin, Friends of the Oldman River Society v Canada (Minister of Transport) (1992) 26 UBC L Rev 313 at para 50)

As further set out in my chapter, I largely agree with this approach – in large part because the imposition of such a limitation does not appear to be workable in practice. Fundamental to the analysis is a re-affirmation of the distinction, also made in *Friends of the Oldman River Society*, between legislating on a topic on the one hand, and decision-making pursuant to that legislation on the other (at p 69). So long as the "pith and substance" of the legislation falls within the scope of a federal head of power, and the factors considered by the decision-maker are relevant, or rationally connected, to his or her decision, then decision-making pursuant to that legislation will be constitutional. Another key aspect is recognizing that the federal government has long taken into account seemingly local considerations – especially economic ones – when deciding about whether or not to approve projects, which makes the imposition of restrictions on environmental considerations difficult to maintain.

This post may be cited as: Martin Olszynski "Can Federal Legislative Jurisdiction Support a Broad, Sustainability-Based Impact Assessment?" (30 May, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/05/Blog_MO_EAReview.pdf

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