Ecojustice Submission to the Expert Panel on the Review of Environmental Assessment Processes
November 21, 2016, Calgary, Alberta

Decisions and Judicial Review

A. Introduction

This is the fourth in a series of Ecojustice submissions to the Expert Panel. This submission deals with decision making and judicial review in environmental assessment processes. A fifth and final submission to the Expert Panel will be made in Vancouver on December 12, 2016 dealing with the consideration of climate change issues in environmental assessments.

As in our previous submissions, we confirm that Ecojustice's overarching position is that environmental assessment processes in Canada are broken and require a significant re-visioning of the purposes and processes of environmental assessment. In particular, we must shift from environmental assessment for the purpose of mitigating adverse impacts of proposed projects to a sustainability assessment of policies, plans and projects that fosters the strongest feasible positive contributions to lasting wellbeing while avoiding significant adverse effects.[1] To that end, Ecojustice recommends to the Expert Panel the proceedings of the Federal Environmental Assessment Reform Summit and the various writings of Robert Gibson and others.[2]

B. Decision Making

The *Canadian Environmental Assessment Act, 2012*[3] ("*CEAA 2012*") shifted the responsibility for determining if a project would have significant adverse environmental effects from the responsible authority to the Minister of the Environment.[4] In the case of projects under the authority of the National Energy Board ("NEB"), that responsibility was shifted from the NEB, as a responsible authority, to the Governor in Council.[5]

Under the former *Canadian Environmental Assessment Act*[6] ("*CEAA 1992*"), the responsible authority determined if significant adverse environmental effects were justified in the circumstances.[7] Under *CEAA 2012*, the responsibility for determining if significant adverse environmental effects are "justified in the circumstances" shifted from the responsible authority to the Governor in Council in all circumstances.[8]

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[1] Robert B. Gibson, Meinhard Doelle & A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 J Envtl L & Prac 252 at 255.
[2] Anna Johnston, ed, *Federal Environmental Assessment Reform Summit: Proceedings* (Vancouver: West Coast Environmental Law, August 2016); Gibson, *supra* note 1; Robert B Gibson et al, *Sustainability Assessment: Criteria and Processes*, (Routledge, 2005).
[3] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*]
[4] *Ibid*, s 27, 36, 47, 51, 52(1).
[5] *Ibid*, s 31(1)(a).
[6] *Canadian Environmental Assessment Act*, SC 1992, c. 37 [*CEAA 1992*].
[7] *CEAA 1992*, *supra* note 6, s 37(1)(a).
[8] *CEAA 2012*, *supra* note 3, s 31(1)(a), 52(2).

The environmental assessment process for the Northern Gateway project highlighted the flaws resulting from this shift:

(a) the ultimate approval decisions were made by the Governor in Council, a body totally divorced from the environmental assessment process;

(b) the approval decisions were based on a factually and legally flawed joint review panel report, and there was no mechanism by which to alert the Governor in Council to those flaws prior to the Governor in Council rendering its decisions;

(c) the Governor in Council claimed Cabinet confidence over all documents, if any, that were before the Governor in Council when they made their decision;

(d) the Governor in Council provided no reasons for their decision other than a list of recitals, followed by conclusions; and

(e) there was no articulation of how the Governor in Council reached the conclusion that the significant adverse environmental effects were justified in the circumstances or the trade-offs that the Governor in Council considered.

The Expert Panel has asked: What would a fair, transparent and trustworthy decision making process look like?[9]

Environmental assessment has been characterized as a two-step process in which an expert body evaluates the evidence of the potential adverse environmental effects of a project and a political decision maker evaluates whether that level of impact is acceptable in light of broad policy considerations.[10]

The assessment of environmental effects should be conducted by an unbiased, independent authority at arm's length from departmental mandates and partisan political interests.[11] Consolidating the conduct of environmental assessment processes within a single independent authority ensures the consistent application of procedures and policies, allows for the development of knowledge and expertise within the authority, and frees the authority from departmental influence. For example, the shift of responsibility for environmental assessment from an independent review panel to the NEB in *CEAA 2012* was particularly problematic given the NEB's lack of experience in conducting environmental assessments and the NEB's conflicting mandates of both regulating the energy industry and promoting energy development and trade. Responsible authorities, such as the NEB, can and should provide required subject-area expertise to an independent assessment authority, but should not be conducting the assessments themselves.

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[9] Expert Panel, "Presentations to the Panel", online at http://eareview-examenee.ca/participate/presentations-to-the-panel/presentations-to-the-panel-guide/.
[10] *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, at para 14 [*Pembina Institute*]; *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463, at para 281 [*Greenpeace Canada*]; *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186, at para 52 [*Ontario Power*].
[11] Gibson, *supra* note 1, at 273.

Under *CEAA 2012*, critical decisions are made by decision makers who have not been directly involved in the environmental assessment process, and who may have only received a final report from the process or who may not even received or read the report. Decision makers who are directly involved in the environmental assessment of the project effects are better able to understand and test the evidence before them and to identify the critical issues and positions of the various parties. Some have argued that credible decision making is most likely achieved by impartial decision makers who have been closely engaged in the environmental assessment deliberations.[12]

On the other hand, the second stage of the environmental assessment process has been described by the courts as a policy-laden decision best left to politically-accountable decision makers. However, such powers should be time limited and require a fully transparent and public justification for such decisions.

Regardless of the locus of the decision making power, there are some fundamental requirements for a credible and transparent decision making process:

(a) decisions must be based on explicit, clearly articulated sustainability-based criteria that are identified at the start of the assessment process, and supported by persuasive evidence presented during the process;[13]

(b) decision making must be transparent and open. All documents and information considered by the decision maker must be publicly available;

(c) the decision maker must articulate fulsome reasons for the decision that provide justification, transparency and intelligibility with respect to the decision made, including identification of the trade-offs considered;[14] and

(d) any override of the recommendations of the independent authority by the political decision maker must be time limited, transparent and justified with fulsome reasons.

C. Judicial Review

CEAA 2012 and the 2012 amendments to the *National Energy Board Act*[15] ("*NEB Act*") reflect the dangers of carving out a specific environmental assessment regime for NEB regulated projects for the sole purpose of expediting the approval of pipeline projects. In particular, the 2012 amendments undermined the opportunity for judicial review of processes and decisions made in the assessment process.

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[12] *Ibid*, at 266.
[13] *Ibid*.
[14] *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 13 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 9; *Via Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25, [2000] FCJ No 1685, at para 22.
[15] *National Energy Board Act*, RSC 1985, c N-7 [*NEB Act*].

Sections 29 to 31 of *CEAA 2012* set out that the NEB's environmental assessment report was "final and conclusive" and set out a process for the Governor in Council to require reconsideration of the report. These changes were mirrored in sections 52 to 54 of the *NEB Act*. The *NEB Act* also set out a 15-day limitation period for application for leave to judicially review the Governor in Council decision, half of the normal limitation period for an application for judicial review. These provisions were clearly intended to thwart the judicial review of the environmental assessment of pipeline projects and undermined the credibility of the process.

In *Gitxaala Nation v Her Majesty the Queen*, 2016 FCA 187 ("*Gitxaala Nation*"), the Federal Court of Appeal interpreted these provisions as precluding judicial review of the environmental assessment report, concluding that "the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation."[16]

In addition to undermining the rule of law, this conclusion reversed 20 years of jurisprudence which required a legally prepared environmental assessment report as a precondition to final decision making.[17]

If *Gitxaala Nation* is followed in subsequent environmental assessments, the Governor in Council could proceed to render a decision based on a legally flawed environmental assessment report. Further, this would require that parties who have identified legal errors in the environmental assessment report "lie in the weeds" and only raise their concerns after the Governor in Council has made its decision.

Further, judicial review processes are costly and time consuming, resulting in a long period of uncertainty for both project proponents and interveners. All parties may be better served by a quasi-judicial appeal body to hear appeals of procedural and substantive decisions of the independent authority.[18] A quasi-judicial appeal body would develop experience and expertise in the consistent interpretation of environmental assessment principles and statutory requirements, resulting in a body of consistently interpreted decisions.

We recommend that a revised assessment process include:

(a) the establishment of a quasi-judicial appeal board to hear appeals of procedural matters, interlocutory decisions and recommendations made by the authority conducting the assessment;

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[16] *Gitxaala Nation v Her Majesty the Queen*, 2016 FCA 187, at para 124.
[17] See for example, *Pembina Institute*, *supra* note 10 at paras 14, 73, 79; *Greenpeace Canada*, *supra* note 10, at para 281; *Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans) (CA)*, [1999] 1 FC 483, [1998] FCJ No 1746, at paras 15-19; *Imperial Oil Resources Ventures Ltd v Canada (Minister of Fisheries and Oceans)*, 2008 FC 598, [2008] FCJ No 749, at para 6; *Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189, [2014] FCJ No 867, at para 39; *Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520, [2012] FCJ No 1603, at paras 1, 17.
[18] Gibson, *supra* note 1, at 267.

(b) explicit statutory provisions allowing for appeal of procedural matters, interlocutory decisions and recommendations to the appeal board;

(c) an explicit statutory provision allowing for an appeal to the appeal board of the environmental assessment report on the grounds that it has not been prepared in accordance with the statutory requirements; and

(d) an explicit statutory provision allowing for an application to the Federal Court for judicial review of a decision by the political decision maker, particularly where the decision maker has failed to provide reasons for the decision, within the normal limitation periods established in the *Federal Courts Act*.