

Federal Court



Cour fédérale

Date: 20150828

Docket: T-2300-14

Citation: 2015 FC 1027

Ottawa, Ontario, August 28, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**PEACE VALLEY LANDOWNER
ASSOCIATION**

Applicant

and

**ATTORNEY GENERAL OF CANADA AND
THE MINISTER OF THE ENVIRONMENT,
AND BRITISH COLUMBIA HYDRO AND
POWER AUTHORITY**

Respondents

JUDGMENT AND REASONS

[1] This application for judicial review is based upon the decision of the Governor in Counsel [GIC] that the significant adverse environmental effects the Minister of the Environment [the Minister] determined would likely result from the construction of the Site C Clean Energy Project [the Project] on the Peace River in British Columbia were “justified in the circumstances”. The GIC is authorized under section 52(4) of the *Canadian Environmental*

Assessment Act 2012 (SC 2012, c 19, s 52) [CEAA 2012], to make such a determination after the Minister decides that a project will likely cause significant adverse environmental effects under section 52(1) of the CEAA 2012.

[2] A contemporaneous challenge to the GIC's decision on judicial review was brought by the Doig River First Nation and other First Nations, in Court Action T-2292-14, which was heard consecutively by me and is the subject of a separate decision to be issued by the Court.

I. Background

[3] The Project is a proposed dam and hydroelectric generating station on the Peace River, near Fort St. John, British Columbia, and would flood the Peace River Valley, inundating an area 83 km long and creating a reservoir with a surface area of approximately 9,330 hectares.

[4] The Project is expected to generate up to 1,100 megawatts of capacity, at an average of 5,100 gigawatts hours of electricity per year for more than 100 years. It had an estimated cost of 7.9 billion dollars at the time of its environmental assessment and an estimated eight year construction period. It was suggested in oral argument that this estimated cost has increased in the interim, to approximately 9 billion dollars, and could continue to increase.

[5] The Applicant, Peace Valley Landowner Association [PVLA], is a society whose membership is comprised of landowners who will be affected by the Project, either directly or indirectly.

[6] On May 18, 2011, British Columbia Hydro and Power Authority [BC Hydro] submitted a Project Description Report for the Project to the British Columbia Environmental Assessment Office [EAO] and the Canadian Environmental Assessment Agency [the Agency], initiating the environmental assessment processes of both entities.

[7] On September 30, 2011, the EAO and the Agency announced they would conduct a cooperative environmental assessment [EA], which would include a Joint Review Panel [the JRP or the Panel]. A draft agreement for the process, and draft terms of reference, were released that same day. The Terms of Reference listed thirteen factors the Panel must consider in its assessment. Of particular note are paragraphs 2.2 and 3.14; the first provides the list of factors to be considered, and the second provides the Panel's mandate with respect to information related to the justifiability of any significant adverse effects the project may cause.

[8] Prior to constituting the JRP, the Agency and EAO oversaw the production of the Environmental Impact Statement Guidelines [EIS Guidelines], which set out the scope of the factors listed in the Terms of Reference and information to be submitted by BC Hydro in the form of an environmental impact statement [EIS].

[9] The first draft of the EIS Guidelines was produced by BC Hydro and was subject to review by a Working Group who oversaw amendments. On September 7, 2012, the Minister and the Executive Director of the EAO determined the EIS Guidelines were adequate and issued them to BC Hydro. They were incorporated into the Terms of Reference, pursuant to paragraph 2.8.

[10] On January 25, 2013, BC Hydro submitted the EIS to the Agency and the EAO, which was then subject to review by the Working Group, government agencies, and the public. Each comment received was responded to, and twenty nine technical memos were written to address common themes within those comments.

[11] In June and July of 2013, the Agency and EAO directed BC Hydro to amend the EIS on the basis of the comments and responses received, and on August 1, 2014, it was determined to be satisfactory and ready for review by the Panel.

[12] Between September and November of 2013, the JRP requested information from BC Hydro three times, along with follow-up requests. On November 7, 2013, the Panel decided that the amended EIS, along with the additional information received, was sufficient to proceed to public hearing.

[13] Public hearings were held over 26 days in December of 2013 and January of 2014. During this period, sessions on December 9 and 10, as well as January 23, addressed the topics "Need, Purpose and Alternatives".

[14] After the public hearings were completed, on May 1, 2014, the JRP produced the Panel Report to the Minister and Executive Director of the EAO.

[15] On May 9, 2014, BC hydro informed the JRP of an error in Chapter 15, Tables 16 and 18: the JRP had failed to include low liquid natural gas [LNG] load in the load forecast (which

was their stated intention), which affected the Energy Load Resource Balance of the Project. In response, on June 10, 2014, the JRP issued an errata to rectify the issue and stated that they would modify the tables to include the omitted information, but that they stated “conclusions remain as noted,” without further explanation.

[16] On September 8, 2014, a memo was sent to the Minister, which, once signed and dated by her, constituted her decision under section 52 of the CEAA 2012. The Minister signed the memo and concurred with the statement that significant adverse environmental effects were likely to occur if the project proceeded.

[17] The GIC released the impugned Order-in-Council 2014-1105 on October 14, 2014, which set out its decision that the potential significant adverse environmental effects likely to ensue, should the Project be built, were “justified in the circumstances”.

[18] The Minister also issued a decision statement under the CEAA 2012 on October 14, 2014, (re-issued with some minor corrections on November 25, 2014), allowing the Project to proceed.

[19] The Order in Council reads as follows:

Whereas BC Hydro has proposed the development of the Site C Clean Energy Project (the “Project”), near Fort St. John, British Columbia;

Whereas, after having considered the Report of the Joint Review Panel – Site C Clean Energy Project and taking into account the implementation of mitigation measures that the Minister of the Environment considered appropriate, the Minister has decided that

the Project is likely to cause significant adverse environmental effects;

Whereas, after having made this decision, the Minister has, in accordance with subsection 52(2) of the Canadian Environmental Assessment Act, 2012 (the “Act”), referred to the Governor in Council for its consideration and decision the matter of whether those effects are justified in the circumstances;

Whereas the Government of Canada has undertaken a reasonable and responsive consultation process with Aboriginal groups potentially affected by the project;

Whereas the consultation process has provided the opportunity for dialogue and for the exchange of information to ensure that the concerns and interests of the Aboriginal groups have been considered in the decision-making process;

Whereas the consultation process has included opportunities for the Aboriginal groups to review and comment on conditions for inclusion in a decision statement to be issued by the Minister under the Act that could mitigate environmental effects and potential impacts on the Aboriginal groups;

Whereas the Minister will consider the views and information provided by the Aboriginal groups when the Minister determines the conditions to be imposed on the proponent in the decision statement;

Whereas the consultation process undertaken is consistent with the honour of the Crown;

And whereas the concerns and interests of Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subsection 52(4) of the Canadian Environmental Assessment Act, 2012, decides that the significant adverse environmental effects that Site C Clean Energy project proposed by BC Hydro in British Columbia is likely to cause are justified in the circumstances.

A. *Position of the Parties*

[20] The PVLA takes the position that if the Project is likely to cause significant adverse environmental effects, as determined by both the JRP and the Minister, then in order for the GIC to decide that those effects are justified, the justification must be based on an unambiguous need for power and that the timing for that need was at the time of the decision. In the PVLA's view, the "need" speaks to a current need and there was no justification to support such a need at the relevant time.

[21] Moreover, the PVLA argues that the GIC's reasons for justification, which are limited to the one page Order in Council, with no other frame of reference, appear to address only the consultation process with Aboriginal Groups and their societal interests, without addressing the economic value of the Project, or including a cumulative effects analysis, as required.

[22] The Respondents take a different view of the justification for the GIC's Order in Council. They argue that the JRP, which was available to the GIC and the Minister, who was part of the GIC (Cabinet), reflected and considered the overall questions of costs, need for and benefits of the Project, highlighting long term benefits to the public for future generations.

[23] As well, the Respondents state that the JRP, and therefore the GIC, did consider other, reasonable alternatives for meeting the public's energy needs, albeit with little detail.

[24] Finally, the Respondents also say that the penultimate paragraph of the GIC's Order in Council demonstrates that economic considerations were taken into account:

And whereas the concerns and interests of the Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest.

[Emphasis added]

[25] The parties agreed that extensive public consultation with interested parties, including Aboriginal groups and the PVLA, took place during the process leading up to the JRP being issued.

II. Issue

[26] Was the GIC's decision, that the significant adverse environmental effects likely to be caused by the Project were nevertheless justified, a reasonable one?

III. Standard of Review

[27] The Applicant has not made a clear statement as to the applicable standard of review to be applied in approaching the issue, but does state that while the GIC is owed considerable deference in their decision-making, their discretion conferred by the CEAA 2012 "must be exercised consistently with the purposes and policies underlying its grant."

[28] The Respondent Attorney General of Canada [the AG for Canada] submits that the Applicant, in framing the sole issue on the Application, has accepted that the standard of review to be applied in the case at bar is reasonableness. Further, this standard should incorporate a high

degree of deference for the GIC's decision, as it is a highly discretionary and policy-laden decision that requires consideration of a wide array of environmental, social, economic and political factors.

[29] The AG for Canada further submits that the Federal Court of Appeal established in *Council of the Innu of Ekuanitshit v Canada (Attorney General) et al*, 2014 FCA 189 at paras 35-44 [*Innu*] that a reviewing court must show significant deference in reviewing a GIC or Ministerial decision under CEAA 2012, in considering sections 52(1) and 52(4). That decision held that a reviewing court must only intervene if:

- the statutory process was not properly followed before the statutory decisions at issue were made;
- the Governor in Council or Responsible Minister's decisions were taken without regard for the purpose of the statute; or
- the Governor in Council or Responsible Minister's decisions had no reasonable basis in fact; which is tantamount to an absence of good faith.

[30] The Respondent BC Hydro submits that the appropriate standard of review to be applied is reasonableness, as the issue to be determined involves an accusation of failure to take into account relevant factors. BC Hydro further submits that as the decision maker is made up of elected officials who must make a highly discretionary, policy-based and fact-driven decision, the Court should be cautious to interfere (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 74).

[31] While it was agreed in oral argument by the parties that the standard of review should be reasonableness, that is for the Court to decide. In my view, the appropriate standard of review to be applied is reasonableness. The consultation process and adequacy of consultation is a question

of mixed fact and law, reviewable on a standard of reasonableness. The GIC's decision is one that attracts considerable deference. While the privacy and arguably lack of transparency surrounding the GIC's decision is not ideal, the level of deference owed to the Federal Cabinet in allowing the GIC such seclusion, while they balance the many interests involved in such a polycentric decision, attracts a review based on the reasonableness of the decision (*Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29 at para 55; *Baker v Canada (Citizenship & Immigration)*, [1999] 2 SCR 817 at para 53).

IV. Analysis

[32] It is not disputed that under the CEEA 2012, the Project could not be carried out unless the Minister issued a decision statement that the Project:

- a) is not likely to cause significant adverse environmental effects; or
- b) that the significant adverse environmental effects that it is likely to cause are justified in the circumstances.

[33] The Minister must first have considered the report and recommendations of the JRP. Here, the Minister decided under subsection 51(1) that there would be significant adverse environmental effects referred to in subsection 5(1) and 5(2) of the CEEA 2012.

[34] The JRP determined that the significant adverse effects of the Project are not justified.

The Panel determined:

- a) justification must rest on an unambiguous need for the power, but that that need had not been established;
- b) justification must also rest on analysis showing that financial costs are sufficiently attractive to make tolerable the substantial environmental, social and other costs, but that the financial costs of the Project had not been sufficiently established.

A. *Applicant's Attacks on the Reasonableness of the GIC Decision*

[35] The Applicant argues that the Terms of Reference for the environmental assessment required assessment of evidence that could support justification of the Project, based on need and economic factors. The Terms of Reference state at section 2.2:

2.2 The Joint Review Panel must include in its assessment of the Project, consideration of the following factors:

- The purpose of the Project;
- The need for the Project;
- Alternatives to the Project;
- The environmental, economic, social, health and heritage effects of the Project, including the cumulative effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out; ...
- The significance of the environmental, economic, social, health and heritage effects; ...

[36] Moreover, the Terms of Reference also incorporate the EIS Guidelines into the formal scope of assessment, stating at section 2.8:

2.8 The scope of factors to be considered in the environmental assessment are those outlined in the EIS Guidelines as finalized by the federal Minister of the Environment and the Executive Director of the EAO. The scope of the factors, once finalized as part of the EIS Guidelines, will be appended to this Terms of Reference.

[37] The EIS Guidelines state, *inter alia*:

- a) “The “need for” establishes the fundamental justification or rationale for the Project” (EIS Guidelines, s. 4.1.1)
- b) “The EIS will provide the fundamental rationale for proceeding with the development at this time...” (EIS Guidelines, s. 4.1.1)
- c) “The EIS will include a section describing the predicted environmental, economic and social benefits of the project. This information will be considered in assessing the justifiability of the significant adverse environmental effects, if necessary.” (EIS Guidelines, s. 5)

[38] Under the “Project Benefits”, section 5, the EIS Guidelines further required assessment of the:

- a) value of the electricity;
- b) capital construction cost and operating cost estimates
- c) impacts on government revenue (EIS Guidelines s. 5).

[39] The EIS Guidelines also set the requirements for an “analysis of technically and economically feasible alternatives to the Project” (EIS Guidelines, s. 4.2).

[40] The Applicant argues that the framework established for conducting the environmental assessment made it clear that a justification of the significant adverse environmental effects the JRP and the Minister concluded would likely ensue, if the Project were approved, would need to involve consideration of whether or not an unambiguous need for power and sufficient financial benefits had been established. This analysis should have also considered the substantial environmental, social, heritage, health, and other costs associated with the Project. Further, consideration of the cumulative effects of projects on the Peace River should have factored into that analysis.

[41] The Applicant concedes that the GIC's decision does give reasons for its decision, and while minimal, they signal where the GIC's attention was focused. However, it is the Applicant's position that the GIC turned its gaze to adequacy of consultation with affected Aboriginal groups only, and that the reasons do not evidence any attention to the requirement of economic value of the Project, or to society's need for the Project's hydroelectric capacity.

[42] Cabinet has claimed privilege over the record before them in reaching their conclusion, which complicates a meaningful review of the basis for the reasons for the decision. However, the Applicant argues that privilege does not shield Cabinet from judicial review. Cabinet could have chosen to submit redacted versions of the record before them, but decided not to. The Court is asked to therefore draw an adverse inference from this omission.

[43] As stated above, the Applicant takes the position that the reasons provided in the Order in Council suggest that Aboriginal concerns were the only topic considered by Cabinet, which renders the decision unreasonable, for having ignored significant economic and social considerations.

[44] The Applicant emphasizes that the Panel stated an unambiguous need and economic benefit from the Project must be established in order to justify its approval. Throughout the JRP Report, it is repeatedly stated that such justification has not been established. To even reach the point of assessing the costs of the Project, it must be determined that the energy it would produce is needed. If it cannot be established clearly that the energy is needed, the Applicant argues the

Project cannot reasonably be justified. As submitted in oral argument, it does not matter if a project is cheap if it is not needed.

[45] The Applicant asserts that the need for the Project actually establishes its fundamental justification or rationale and the GIC's decision did not indicate that this was considered.

[46] With respect to the timing of need for the Project, the Report clearly reaches a different conclusion than BC Hydro in estimating when electricity produced by the Project will be needed in British Columbia. The Report estimates that it will be needed in 2028, while BC Hydro estimated it will be needed in 2024. The Applicant stresses that the need estimates of 2024 and 2028 only point to when even a portion of the energy produced may be needed.

[47] While a difference of only four years might not seem significant, the Applicant highlights that so long as the Project is producing excess energy, it will be selling that energy at an operating loss (approximately 35% of its cost of production), the costs of which will be passed on to the people of British Columbia. Therefore it would appear that the Project will be operating at a significant cost to the public for a long time past when that need comes into effect.

[48] The Applicant further argues that the four years difference could give BC Hydro time to explore other opportunities that might become available. While the Project might appear to be the cheapest option for hydro on a standard analysis now, that might not be the case in four years, after developments could have been made in alternative methods.

[49] The Applicant also states that it was not open to Cabinet, based on the CEAA 2012 or the Terms of Reference, which incorporated the EIS Guidelines, not to address the unambiguous need for power. Their decision, which failed to address this integral factor, is contrary to the purpose of the CEAA 2012 and is therefore unreasonable.

[50] Again, the Applicant further argues that the GIC must exercise its discretion in a manner that is in accordance with the purpose of the CEAA 2012. The stated purposes of the CEAA 2012 emphasize sustainable development and the protection of the environment.

[51] The Project has been determined by the Panel, as well as the Minister, to cause significant adverse environmental effects, some of which could not be mitigated. The decision under review attests to the Minister's familiarity with the JRP Report and its findings, but does not make it clear that the GIC was familiar with the Report and its findings. Considering the potential for significant immitigable effects, it is important for the GIC to have turned their mind to the JRP findings.

[52] Throughout its Report, the JRP highlighted that the need for the Project could not be solidly established and there was insufficient information available to determine if alternatives to the Project were viable. The Applicant's position is that BC Hydro has failed to pursue adequate research into geothermal energy over the last thirty years. This has left them without information to make an informed determination as to whether it would be a viable alternative to a project like the one in question. Estimates based on the small amount of available information have shown

that geothermal has the potential to produce almost as much energy as the project would if properly extracted and with significantly lower environmental costs.

[53] The Applicant also emphasizes that other alternatives were not adequately explored to make a truly informed decision as to the justification of the Project.

[54] The Applicant finally suggests that concerns over low supply of electricity carries a higher degree of analytic effort in BC Hydro's submissions than demand management does. This could skew one to be more concerned over the possibility of brown outs or other effects of a hydro shortage, than focusing on managing demand.

[55] In conclusion, given a purposive construction of the reasons provided for the justification decision of the GIC, the Applicant states that decision cannot be seen to be reasonable or transparent.

B. Problems with the Applicant's Position

[56] The Respondents highlighted portions of the JRP Report which address costs, the need for and benefits of the Project, long-term benefits for future generations, and alternatives considered. While it is clear in the Report that the JRP noted several issues with questionable estimates surrounding the Project, many of those issues are inherent in forecasting a large infrastructure project. Further, the Report also recognizes numerous positives on the "balance sheet" it was tasked to create.

[57] The JRP acknowledged that there is inevitably going to be an increased demand for power in the future that cannot be met by current generating methods. It further acknowledged that in the long-run, the Project presents the most cost-effective and inexpensive option to produce power for the province. The Report also highlighted that alternatives to the Project had indeed been considered and were not preferable.

[58] Accordingly, while the Report does identify issues with the Project, it also highlights benefits. The task of the JRP was to create a balance sheet, so that an informed decision could be made on whether or not to proceed. The JRP was appointed to conduct the environmental assessment of the Project, to gather information, make recommendations and report to the Minister.

[59] In *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 [*Pembina Institute*], the Federal Court observed the Panel's inquiry is "science and fact-based" and distinguishable from the "political determination made by the final decision-maker" who must take into account "a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on Project related environmental impacts." The Court stated:

72 While I agree that the Panel is not to engage in policy recommendation, nevertheless, it is tasked with conducting a science and fact-based assessment of the potential adverse environmental effects of a proposed project. In the absence of this fact-based approach, the political determinations made by final decision-makers are left to occur in a vacuum.

74 Should the Panel determine that the proposed mitigation measures are incapable of reducing the potential adverse environmental effects of a project to insignificance, it has a duty to say so as well. The assessment of the environmental effects of a

project and of the proposed mitigation measures occur outside the realm of government policy debate, which by its very nature must take into account a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on project related environmental impacts. In contrast, the responsible authority is authorized, pursuant to s. 37(1)(a)(ii), to permit the project to be carried out in whole or in part even where the project is likely to cause significant adverse environmental effects if those effects "can be justified in the circumstances". Therefore, it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval.

[60] While the Respondents acknowledge that the Applicant is correct in stating that need is an integral consideration in whether or not to proceed with the Project, it is clear that need was considered and established on the Record. There are some discrepancies between BC Hydro and the JRP's forecasts as to when that need begins, but the difference of four years is not significant in the life of the Project. Further, forecasting need is inherently uncertain and the methods employed by BC Hydro were confirmed to be sound in such an uncertain task. The JRP was not expected to find certainty in an outcome; it was to predict the likeliest one (*Pembina Institute*, at para 61; *Greenpeace Canada et al v Canada (Attorney General) et al*, 2014 FC 463 at paras 234-236).

[61] Although lacking in detail, the GIC's decision demonstrates that economic considerations were taken into account in concluding that the significant adverse environmental effects likely to be caused by the Project were justified in the circumstances. As stated above, the penultimate paragraph of the GIC's impugned decision states:

And whereas the concerns and interests of Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest; ...

[Emphasis added]

[62] A balancing of interests necessarily involves weighing competing interests of the parties. While the Applicant insists the GIC focused solely on the adequacy of Aboriginal consultation, the penultimate paragraph of the impugned decision produced above states otherwise. The “social, economic, policy and broader public interest” were considered in deciding that the significant adverse environmental effects are justified.

[63] There is a presumption that the Minister considered the JRP and all relevant information in making his recommendations to the GIC. It is only reasonable that the JRP Report before the Minister and all other relevant information considered by the Minister can be imputed to have been considered by the GIC (*Woolaston v Canada (Manpower and Immigration)*, [1973] SCR 102; *Leo Pharma Inc v Canada (Attorney General)*, 2007 FC 306 at para 41; most recently articulated in *Thamotharampillai v Canada (Citizenship & Immigration)*, 2011 FC 438 at para 14).

[64] Moreover, I do not consider the Order in Council to be exhaustive in indicating what was considered by the GIC. The entire Record should be reviewed to determine if the decision was unreasonable, and should be read together in the context of the evidence and the process to serve the purpose of showing whether the result falls within a range of reasonable, possible outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 15, 18). In addition, the press release issued by the Minister, after the Order in Council was released, on the same day, October 14, 2014, can be accepted and acknowledged as an indication of the considerations of the GIC. Despite having been released

after the decision was made, this contemporaneous release at the very least is informative and indicative of the consideration of economic issues and concerns, as excerpts below show:

OTTAWA, ON – October 14, 2014 – The Honourable Leona Aglukkaq, Minister of the Environment, Minister of the Canadian Northern Economic Development Agency and Minister for the Arctic Council, today issued the following statement outlining the Governor in Council's determination that the environmental effects of the proposed Site C Clean Energy Project are justified in the circumstances.

“The Site C project, which has been proposed by BC Hydro and Power Authority, underwent a thorough independent federal-provincial review by an independent panel. This process included extensive, meaningful and respectful consultations with the public and Aboriginal groups. The environmental assessment process provided the scientific and technical expertise and the effective engagement of the public and Aboriginal groups to enable an informed decision by both governments.”

“The proposed Site C project is an important one for British Columbia and for Canada as it will support jobs and economic growth while providing clean, renewable energy over the next 100 years. The Site C Clean Energy Project will translate into about 10,000 direct person-years of employment from now until 2024 and when indirect and induced jobs are added in, that figure climbs to 29,000 person-years of employment.”

“This decision will benefit future generations. Over the life of the project, Site C is expected to help mitigate the growth in greenhouse gas emissions in Canada by preventing the discharge of between 34 to 76 megatonnes of CO² equivalent.”

“In the Decision Statement that I released today, there are over 80 legally binding conditions that must be fulfilled by the proponent, BC Hydro, throughout the life of the project in compliance with the *Canadian Environmental Assessment Act, 2012*. Failure to meet these conditions is a violation of federal law.”

“Our Government is committed to making environmental assessment decisions based on the best available scientific evidence, and balancing economic and environmental considerations.”

[65] As also stated by Justice Sewell in the related case of *Peace Valley Landowner Association v Minister of Environment et al*, 2015 BCSC 1129 at paras 118-120:

[118] Finally, PVLA submits that the Ministers' decision to issue the Certificate was unreasonable in light of the "nature and significance" of the Panel's overall findings and recommendations with respect to the economic effects of the Project.

[119] In each of the Economic Recommendations the Panel communicated its concern that the information about future needs, costs and alternatives to the Project was insufficient. However the question of whether the economic uncertainties addressed in sections 14 and 15 of the Report were sufficiently serious to preclude issuance of the Certificate was a policy consideration for the Ministers to assess.

[120] Given all of the above circumstances I cannot conclude that the Ministers' decision was unreasonable. As I have already stated, the Economic Recommendations related to the political decision to proceed with the Project in preference to other available options rather than any adverse environmental consequences of the Project. This decision is one to which the Court should give very considerable deference.

[66] While the reasons provided by the GIC could have been better articulated and more transparent, they are within the reasonable boundaries and requirements for GIC reasons. In *Innu*, above, more substantial reasons were provided, giving insight into the mindset of the GIC in making its decision, but this was a voluntary disclosure on their part. Simply given that more substantial reasons may have been provided in making a similar decision in the past does not translate into a requirement for those reasons in all cases. In the words of Justice David Stratas of the Federal Court of Appeal "a handful of well-chosen words can suffice" (*Vancouver International Airport Authority and YVR Project Management Ltd v Public Service Alliance of Canada*, 2010 FCA 158 at para 17(b)).

[67] The task of the GIC is a heavy one. It is charged with making a highly polycentric decision and deserves deference in this regard. As Justice James Russell states:

237 In short, Parliament has designed a decision-making process under the CEAA that is, when it functions properly, both evidence-based and democratically accountable.

242 The key substantive point with respect to the decision-making structure of the CEAA is, in my view, that it is the role of s. 37 decision-makers to decide what is an acceptable level of environmental impact or risk. This decision-making component of the Act is not its only important feature, but the language of s. 37, the structure of the Act, and more than two decades' experience with its implementation make it undeniable that it is an important feature (see *Pembina Institute*, above, at para 15 applying *Oldman River*, above, at para 103). We cannot simply read it out of the Act, and the courts and those charged with its implementation must seek to maintain the integrity of the decision-making structure that Parliament has put in place.

Greenpeace Canada et al v Canada (Attorney General) et al, 2014 FC 463 at paras 237, 242

[68] The GIC must consider a wide range of considerations and information put before it. As a body comprised of elected officials, it is accountable to the electorate: the public itself. The GIC's decisions should be given a high degree of deference. There is no basis to find that the GIC's justification decision was either taken without regard for the purpose of the CEAA 2012, or that economic considerations were not taken into account, or that the decision was not reasonable on the facts.

[69] The GIC's decision here was within the bounds of possible acceptable outcomes and no basis has been provided to the Court to interfere with the decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed;
2. Given the significant public interest and legitimate concerns of the PVLA, in light of the significant adverse environmental impact of the Project, I would have each party bear its own costs.

"Michael D. Manson"

Judge

ANNEX A

Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52)

Environmental effects

5. (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

- (a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:
- (i) fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,
 - (ii) aquatic species as defined in subsection 2(1) of the Species at Risk Act,
 - (iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and
 - (iv) any other component of the environment that is set out in Schedule 2;
- (b) a change that may be caused to the environment that would occur
- (i) on federal lands,
 - (ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or
 - (iii) outside Canada; and
- (c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on
- (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes, or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Exercise of power or performance of duty or function by federal authority

(2) However, if the carrying out of the physical

Effets environnementaux

5. (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :

- a) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :
- (i) les poissons et leur habitat, au sens du paragraphe 2(1) de la Loi sur les pêches,
 - (ii) les espèces aquatiques au sens du paragraphe 2(1) de la Loi sur les espèces en péril,
 - (iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la Loi de 1994 sur la convention concernant les oiseaux migrateurs,
 - (iv) toute autre composante de l'environnement mentionnée à l'annexe 2;
- b) les changements qui risquent d'être causés à l'environnement, selon le cas :
- (i) sur le territoire domaniale,
 - (ii) dans une province autre que celle dans laquelle la mesure est prise, l'activité est exercée ou le projet désigné ou le projet est réalisé,
 - (iii) à l'étranger;
- c) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :
- (i) en matière sanitaire et socio-économique,
 - (ii) sur le patrimoine naturel et le patrimoine culturel,
 - (iii) sur l'usage courant de terres et de ressources à des fins traditionnelles,
 - (iv) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

Exercice d'attributions par une autorité fédérale

(2) Toutefois, si l'exercice de l'activité ou la réalisation du projet désigné ou du projet exige

activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

(b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on

- (i) health and socio-economic conditions,
- (ii) physical and cultural heritage, or
- (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Decisions of decision maker

52. (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project

(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and

(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

Referral if significant adverse environmental effects

(2) If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must

l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi, les effets environnementaux comprennent en outre :

a) les changements — autres que ceux visés aux alinéas (1)a) et b) — qui risquent d'être causés à l'environnement et qui sont directement liés ou nécessairement accessoires aux attributions que l'autorité fédérale doit exercer pour permettre l'exercice en tout ou en partie de l'activité ou la réalisation en tout ou en partie du projet désigné ou du projet;

b) les répercussions — autres que celles visées à l'alinéa (1)c) — des changements visés à l'alinéa a), selon le cas :

- (i) sur les plans sanitaire et socio-économique,
- (ii) sur le patrimoine naturel et le patrimoine culturel,
- (iii) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

Décisions du décideur

52. (1) Pour l'application des articles 27, 36, 47 et 51, le décideur visé à ces articles décide si, compte tenu de l'application des mesures d'atténuation qu'il estime indiquées, la réalisation du projet désigné est susceptible :

a) d'une part, d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants;

b) d'autre part, d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants.

Renvoi en cas d'effets environnementaux négatifs importants

(2) S'il décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux visés aux paragraphes 5(1) ou (2) qui sont négatifs et importants, le décideur renvoie au gouverneur en conseil la question de savoir si ces effets sont

refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

Referral through Minister

(3) If the decision maker is a responsible authority referred to in any of paragraphs 15(a) to (c), the referral to the Governor in Council is made through the Minister responsible before Parliament for the responsible authority.

Governor in Council's decision

(4) When a matter has been referred to the Governor in Council, the Governor in Council may decide

- (a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or
- (b) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.

justifiable dans les circonstances.

Renvoi par l'entremise du ministre

(3) Si le décideur est une autorité responsable visée à l'un des alinéas 15a) à c), le renvoi se fait par l'entremise du ministre responsable de l'autorité devant le Parlement.

Décision du gouverneur en conseil

(4) Saisi d'une question au titre du paragraphe (2), le gouverneur en conseil peut décider :

- a) soit que les effets environnementaux négatifs importants sont justifiables dans les circonstances;
- b) soit que ceux-ci ne sont pas justifiables dans les circonstances.

Fisheries Act (R.S.C., 1985, c. F-14)

Serious harm to fish

35. (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.

Exception

(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;

Domages sérieux aux poissons

35. (1) Il est interdit d'exploiter un ouvrage ou une entreprise ou d'exercer une activité entraînant des dommages sérieux à tout poisson visé par une pêche commerciale, récréative ou autochtone, ou à tout poisson dont dépend une telle pêche.

Exception

(2) Il est permis d'exploiter un ouvrage ou une entreprise ou d'exercer une activité sans contrevenir au paragraphe (1) dans les cas suivants :

b) l'exploitation de l'ouvrage ou de l'entreprise ou l'exercice de l'activité est autorisé par le ministre et est conforme aux conditions que celui-ci établit;

Navigation Protection Act (R.S.C., 1985, c. N-22)

Approval

6. (1) An owner may construct, place, alter, repair, rebuild, remove or decommission a work in, on, over, under, through or across any navigable water that is listed in the schedule that the Minister has determined under section 5 is likely to substantially interfere with navigation only if the Minister has issued an approval for the work, which may be issued only if an application for the approval is submitted and the application is accompanied by the applicable fee.

Permitted works

9. (1) An owner may construct, place, alter, repair, rebuild, remove or decommission a work in, on, over, under, through or across any navigable water that is listed in the schedule that the Minister has determined under section 5 is not likely to substantially interfere with navigation only if the construction, placement, alteration, repair, rebuilding, removal or decommissioning is in accordance with the requirements under this Act.

Approbation

6. (1) Le propriétaire peut, avec l'approbation du ministre seulement, construire, mettre en place, modifier, réparer, reconstruire, enlever ou déclasser, dans des eaux navigables mentionnées à l'annexe ou sur, sous, au-dessus ou à travers celles-ci, un ouvrage qui, selon la décision du ministre prise au titre de l'article 5, risque de gêner sérieusement la navigation; l'approbation ne peut toutefois être délivrée que si la demande est accompagnée des droits applicables.

Ouvrages permis

9. (1) Le propriétaire peut construire, mettre en place, modifier, réparer, reconstruire, enlever ou déclasser, dans des eaux navigables mentionnées à l'annexe ou sur, sous, au-dessus ou à travers celles-ci, un ouvrage qui, selon la décision du ministre prise au titre de l'article 5, ne risque pas de gêner sérieusement la navigation, s'il le fait conformément aux exigences prévues sous le régime de la présente loi.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2300-14

STYLE OF CAUSE: PEACE VALLEY LANDOWNER ASSOCIATION v
ATTORNEY GENERAL OF CANADA AND THE
MINISTER OF THE ENVIRONMENT, AND BRITISH
COLUMBIA HYDRO AND POWER AUTHORITY

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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