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Martin Z.P. Olszynski*

Environmental Assessment as Planning
and Disclosure Tool: *Greenpeace
Canada v. Canada* (A.G.)

In Greenpeace Canada v. Canada (2014), the applicants successfully challenged the adequacy of the environmental assessment report prepared in relation to a proposed nuclear power plant. In assessing that report, the Federal Court described environmental assessment as an “evidence-based and democratically accountable” decision-making process. In this comment I suggest that this characterization represents the most significant—if perhaps also long overdue—development in Canadian environmental assessment law since the Supreme Court’s landmark decision in Friends of the Oldman River Society v. Canada. I also discuss some of the implications of this characterization, including the extent to which environmental effects must be considered and the proper approach to judicial review in this context.

Dans Greenpeace Canada c. Canada (2014), les demanderessees ont contesté avec succès le caractère suffisant du rapport d’évaluation environnementale concernant un projet de nouvelle centrale nucléaire. En évaluant ce rapport, la Cour fédérale écrit « lorsqu’il [le processus décisionnel aux termes de la LCEE] se déroule correctement, les décisions sont prises en fonction des éléments de preuve et répondent aux impératifs d’un système démocratique. » Dans son commentaire, l’auteur avance que cette caractérisation représente le plus important développement—tout en rappelant qu’il est sans doute attendu depuis trop longtemps—en droit canadien sur l’évaluation environnementale depuis l’arrêt de la Cour suprême dans Friends of the Oldman River Society c. Canada. Il traite également des implications de cette caractérisation, notamment de l’importance qui doit être accordée aux effets environnementaux et de la façon adéquate d’aborder le contrôle judiciaire dans ce contexte.

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Introduction

- I. *A primer on CEEA 1992*
- II. *The decision*
 1. *The facts*
 2. *The issues*
 3. *The applicable standard of review*
 4. *The arguments*
 5. *Russell J's analysis*
- III. *Discussion*
 1. *An evidence-based and democratically accountable decision-making process*
 2. *Failure to assess environmental effects "short-circuits" the CEEA regime*
 3. *Judicial review*
 - a. *The rebuttable presumption*
 - b. *A green shade of reasonableness review?*

Conclusion

Introduction

In *Greenpeace Canada v. Canada (A.G.)*,¹ the Federal Court allowed Greenpeace Canada's application for judicial review regarding the Joint Review Panel report for the Darlington New Nuclear project proposed by Ontario Power Generation (OPG).² In a relatively lengthy decision (431 paragraphs), Russell J. held that the environmental assessment conducted by the Panel failed to comply with the *Canadian Environmental Assessment Act* (as it then was).³ Specifically, there were gaps in the Panel's treatment of hazardous substances emissions and spent nuclear fuel, and a failure to consider the effects of a severe "common cause" accident, such as the

1. *Greenpeace Canada v Canada (AG)*, 2014 FC 463, 87 CELR (3d) 173 [*Greenpeace*]. Readers may be interested to know that all of the respondents—the Canadian Nuclear Safety Commission, Ontario Power Generation and the Attorney General of Canada—have since filed Notices of Appeal of this decision: John Spears, "OPG appeals court decision on new reactors" *The Toronto Star* (20 June 2014), online: <www.thestar.com>.

2. Canadian Environmental Assessment Agency, *Darlington New Nuclear Power Plant Project Joint Review Panel Environmental Assessment Report*, (Ottawa: CEEA, August 2011), online: <www.ceaa-acee.gc.ca> [*Darlington Panel Report*].

3. *Canadian Environmental Assessment Act*, SC 1992, c 37 [CEAA 1992], as repealed by *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52.

combined earthquake and tsunami that caused the Fukushima nuclear disaster.

As noted by the media, while the decision was of limited effect on a project that at the time had already been indefinitely postponed by the province, it was “a symbolic blow to an industry coping with the public and political fallout from Japan’s 2011 Fukushima meltdown.”⁴ In this comment, I suggest that *Greenpeace* also represents a significant development in Canadian environmental assessment law and jurisprudence. As further discussed below, Russell J.’s characterization of the environmental assessment process as one that is “evidence-based and democratically accountable”⁵ is the most important—if also long overdue—judicial insight in this area since the Supreme Court of Canada’s landmark decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*.⁶ As Russell J. himself recognized, this characterization has implications for several other aspects of the environmental assessment process, including the extent to which environmental effects must be considered and the proper approach to judicial review in this context. These, in turn, are directly relevant to several major resource projects currently making their way through either the regulatory process or the

4. Ian Macleod, “Court decision sidetracks future nuclear reactors for Ontario” *Ottawa Citizen* (14 May 2014), online: <www.ottawacitizen.com>.

5. *Greenpeace*, *supra* note 1 at para 237.

6. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Friends of the Oldman River*]. It is hard to overstate the impact of this decision, which was released at a time when Parliament was actually considering a constitutional amendment to give the provinces primary jurisdiction over the environment. The Supreme Court of Canada not only affirmed the federal government’s constitutional authority to consider the environmental effects of projects with respect to which it exercises a power or function (in that case, the Oldman River Dam that required approval under federal navigable waters protection), but also recognized environmental assessment as an integral component of sound governmental decision-making. *Friends of the Oldman River* has been the subject of numerous articles and commentary and continues to play an important role in Canadian environmental law scholarship to this day, see, e.g., Steven A Kennett, “Federal Environmental Jurisdiction after *Oldman*,” Case Comment, (1993) 38:1 McGill LJ 180; Jean Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003) 28:2 Queen’s LJ 411; Jerry V DeMarco, “Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law” (2004) 15:1 J Envtl L & Prac 1; Arlene Kwasniak, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward” (2009) 20:1 J Envtl L & Prac 1; Marie-Ann Bowden & Martin ZP Olszynski, “Old Puzzle, New Pieces: *Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment” (2011) 89:2 Can Bar Rev 445.

courts, including Taseko's proposed New Prosperity mine⁷ and Enbridge's Northern Gateway pipeline.⁸

I. *A primer on CEAA 1992*

Before considering Russell J.'s decision and its implications, a quick overview of the federal environmental assessment regime under *CEAA 1992* is appropriate. As further discussed in Part III, while this legislation has since been repealed and replaced by the *Canadian Environmental Assessment Act, 2012*⁹ and while there are certainly some significant differences between the two regimes, the provisions central to Russell J.'s analysis have been carried over largely unchanged.¹⁰ Thus, while written in the context of *CEAA 1992*, *Greenpeace* will be relevant to the interpretation of *CEAA 2012* as well.

Unlike the original federal environmental assessment regime, the *Environmental Assessment and Review Procedures Guidelines Order*,¹¹ which applied to both physical works and policies, *CEAA 1992* applied only to "projects" as defined in section 2:

- (a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or
- (b) any proposed physical activity not relating to a physical work that is

7. Canadian Environmental Assessment Agency, *Report of the Federal Review Panel: New Prosperity Gold-Copper Mine Project*, (Ottawa: CEAA, October 2013), online: <www.ceaa-acee.gc.ca> [*New Prosperity Panel Report*]. The New Prosperity Panel concluded that the project is likely to result in significant adverse environmental effects and the federal government subsequently determined that these effects were not justified in the circumstances. Taseko, the company proponent, has filed judicial review applications challenging both the report and the government's decision.

8. Canadian Environmental Assessment Agency, *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol 1 (Ottawa: CEAA, 2013), Canadian Environmental Assessment Agency, *Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol 2 (Ottawa: CEAA, 2013), online: <www.ceaa-acee.gc.ca> [*Northern Gateway Panel Report*]. Like the New Prosperity Panel, the Northern Gateway Panel concluded that the project was likely to result in significant adverse environmental effects but recommended that these were justified in the circumstances. There are currently several judicial review applications challenging both the report and the government's response, most of which have been filed by environmental or First Nations groups.

9. *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 [*CEAA 2012*], repealing *CEAA 1992*, *supra* note 3.

10. In this part, I have identified in the footnotes the *CEAA 2012* equivalent to the *CEAA 1992* provision being discussed.

11. *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [*EARPGO*]. This was the regime considered by the Supreme Court of Canada in *Friends of the Oldman River*, *supra* note 6.

prescribed...pursuant to regulations made under paragraph 59(b)¹²

The starting point under *CEAA 1992* was section 5, which set out the circumstances under which an environmental assessment would be required. Where the federal government was (a) the proponent, (b) a financier, (c) a landowner, or (d) a regulator, the relevant department or agency, referred to as a “responsible authority” under the act, had to ensure that an environmental assessment was completed before exercising the power or function that triggered the assessment in the first place.¹³ The last category, pursuant to which the vast majority of environmental assessments were triggered, came to be known as the “Law List Trigger,” so called after the regulation that listed the various federal regulatory approvals and permits that required an environmental assessment.¹⁴

The next step was to determine the kind of assessment that the project would be subjected to.¹⁵ The presumptive track was a “screening”¹⁶ unless the proposed project was described on the *Comprehensive Study List Regulations*,¹⁷ in which case a comprehensive study—generally understood as a more rigorous assessment—would be required. Where a responsible authority was of the view that public concern warranted an independent panel review, they could also refer the project to the Minister of the Environment who would then appoint such a panel.¹⁸ More often than

12. Section 2 of *CEAA 2012*, *supra* note 9, refers to “designated project[s],” defined as “one or more physical activities that (a) are carried out in Canada or on federal lands; (b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and (c) are linked to the same federal authority as specified in those regulations or that order.” This definition forms part of one of the most significant differences between *CEAA 1992* and *CEAA 2012*, which is the move away from a “trigger” approach to a “project list,” as further explained in the next note.

13. For *CEAA 1992*, *supra* note 3, see ss 5, 11(2). For *CEAA 2012*, *supra* note 9, see ss 7, 8. Thus, under *CEAA 1992*, environmental assessment was primarily triggered by the exercise of a federal power (s 5) with only a residual discretionary power to assess projects that did not require federal action but nevertheless were likely to have an effect on federal areas of jurisdiction (see s 48). Under *CEAA 2012*, the triggering event is inclusion of a “designated project” on the *Regulations Designating Physical Activities*, SOR/2012-147 [*Regulations Designating Physical Activities*]. The manner in which projects make their way onto this list is entirely discretionary, and they may or may not require any other involvement (e.g., permit, funding) by the federal government.

14. *Law List Regulations*, SOR/94-636 [*Law List Regulations*].

15. *Miningwatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 [*Miningwatch Canada*].

16. *CEAA 1992*, *supra* note 3, s 18. These were the least demanding form of EA, although they were still considered actual environmental assessments. *CEAA 2012*, *supra* note 9 also refers to “screenings,” but these are no longer assessments but rather true screenings intended to inform the decision as to whether a proper environmental assessment will actually be required; see s 10.

17. *Comprehensive Study List Regulations*, SOR/94-638 [CSL]. While the manner in which projects find their way to the *Regulations Designating Physical Activities* under *CEAA 2012* (*supra* notes 13, 9) is largely discretionary, most projects on the CSL were brought over to that regulation.

18. For *CEAA 1992*, *supra* note 3, see s 25(b). For *CEAA 2012*, *supra* note 9, see s 38.

not, such panels were struck in conjunction with any other federal (e.g., the Canadian Nuclear Safety Commission in *Greenpeace*) or provincial authority (e.g., Alberta's Energy Resources Conservation Board, now the Alberta Energy Regulator) that also had a responsibility for assessing the environmental effects of the proposed project. Such panels were then referred to as joint review panels.

Irrespective of track, all environmental assessments under *CEAA 1992* had to include a consideration of the following factors:

- 16.(1)...(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public that are received in accordance with this Act and the regulations;
- (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
- (e) any other matter...that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.¹⁹

A review panel's specific obligations were set out in section 34:

A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,

- (a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;
- (b) hold hearings in a manner that offers the public an opportunity to participate in the assessment;
- (c) prepare a report setting out
 - (i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and
 - (ii) a summary of any comments received from the public; and
- (d) submit the report to the Minister and the responsible authority.²⁰

19. For *CEAA 2012*, *supra* note 9, see s 19.

20. *Ibid.*, s 43(1).

If a panel concluded that the proposed project was not likely to result in significant adverse environmental effects, the responsible authority could go ahead and exercise the federal power that triggered the application of the Act in the first place. On the other hand, if a panel concluded that significant adverse environmental effects were likely then a responsible authority could only proceed if the Governor in Council determined that such effects were “justified in the circumstances.”²¹

II. *The decision*

1. *The facts*

In the fall of 2006 and under direction from the Ontario Minister of Energy, OPG applied to the Canadian Nuclear Safety Commission (CNSC) for a site preparation license for several new reactors at its existing Darlington nuclear plant in Bowmanville, Ontario. OPG’s application for this license, as well as for authorizations under the federal *Fisheries Act*²² and the *Navigable Waters Protection Act*²³ triggered the application of *CEAA 1992* by virtue of the above-noted *Law List Regulations*. The project was referred to a joint review panel in 2008 and a three-member panel was appointed in 2009. Following 284 information requests and seventeen days of hearings in the spring of 2011, the Panel submitted its final report to the Minister in August of that year, concluding that the project was not likely to result in significant adverse environmental effects. The applicants challenged the adequacy of the environmental assessment and the *Darlington Panel Report* shortly thereafter.

2. *The issues*

The application for judicial review raised issues regarding the *CEAA 1992*, the *Nuclear Safety and Control Act*²⁴ and procedural fairness. This comment is concerned only with those issues relevant to the *CEAA 1992*, which Russell J. summarized as follows:

- (a) Did the Panel fail to comply with the requirements of the *CEAA* in conducting the EA by:
 - i. Failing to conduct an environmental assessment of a “project” as defined in the Act;
 - ii. Failing to consider the “environmental effects” of the Project as required by s. 16 of the Act;

21. *CEAA 1992*, *supra* note 3, s 37. For *CEAA 2012*, *supra* note 9, see ss 52, 53.

22. *Fisheries Act*, RSC 1985, c F-14.

23. *Navigable Waters Protection Act*, RSC 1985, c N-22, now the *Navigation Protection Act*, RSC 1985, c N-22.

24. *Nuclear Safety and Control Act*, SC 1997, c 9.

- iii. Failing to assess the need for, and alternatives to, the Project as required by the Act and the Panel's Terms of Reference;
- iv. Failing to fulfill its information gathering, public consultation and reporting duties under s. 34 of the *CEAA*; or
- v. Unlawfully delegating its duties under the Act?²⁵

3. *The applicable standard of review*

Russell J. began his analysis with the rule from *Dunsmuir v. New Brunswick*²⁶ that where the jurisprudence has already established the appropriate standard there is no need to engage a full standard of review analysis. With respect to *CEAA 1992*, the jurisprudence had been more or less settled for over a decade that questions of law are reviewable on the correctness standard, whereas the reasonableness standard applies to a panel's weighing of evidence and substantive conclusions based thereon.²⁷ In Russell J.'s view, however, this case law was "inconsistent with new developments in the common law principles of judicial review," such that he was required to undertake anew the standard of review analysis.²⁸

The "new development" that appears to have influenced Russell J. most here was the Supreme Court's recent re-affirmation of the principle (and associated presumption) that "an administrative decision-maker interpreting its home statute or a closely related statute is entitled to deference."²⁹ Although he acknowledged that "questions of law could arise under the *CEAA* or its successor legislation in relation to which...the presumption of reasonableness review would be rebutted" in his view no such questions arose here.³⁰ Although there was "an element of statutory interpretation involved in answering [the] issues, each is also a question of mixed fact and law that engages the expertise and judgment of the Panel."³¹ As such, the applicable standard was reasonableness.³²

4. *The arguments*

Russell J. summarized the applicants' primary arguments:

As identified in the Report, the Panel itself found that key information about the proposed Project was absent from the EA documentation. For

25. *Greenpeace*, *supra* note 1 at para 19.

26. *Dunsmuir v New Brunswick*, 2008 SCC 38, [2008] 1 SCR 190 [*Dunsmuir*].

27. *Greenpeace*, *supra* note 1 at para 25.

28. *Ibid* at para 20; see also *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48, [2013] 2 SCR 559.

29. *Greenpeace*, *supra* note 1 at para 27, citing *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 21-22, [2013] 3 SCR 895.

30. *Greenpeace*, *supra* note 1 at para 28.

31. *Ibid*.

32. *Ibid* at para 30, citing *Grand Riverkeeper, Labrador Inc v Canada (AG)*, 2012 FC 1520 at para 62, 2009 CarswellNat 4999 (WL Can).

example, the Panel found that no specific nuclear reactor technology, site design layout, cooling water option, used nuclear fuel storage option, or radioactive waste management option has been selected. Thus, at the present time, federal decision-makers still do not know: (a) the particulars of the specific project to be implemented at the Darlington site; (b) the full range of site-specific or cumulative environmental effects; or (c) whether there are feasible mitigation measures over the project's full lifecycle. These and other fundamental gaps are attributable to the fact that what the Panel had before it was not a "project," but merely a *plan for future planning, assessment, and decision-making*.³³

The reason that so many project components remained unspecified was that OPG, with the Panel's blessing, had prepared its environmental impact statement based on a "plant parameter envelope" (PPE) or "bounding scenario" approach. As described by OPG, "this approach involves identifying the salient design elements of the Project and, for each of those elements, applying the 'limiting value' (the value with the greatest potential to result in an adverse environmental effect) based on the design options being considered."³⁴

The respondents' primary argument was that such an approach was consistent with the requirement, pursuant to section 11 of the *CEAA 1992*, to conduct the assessment "as early as practicable in the planning process and before irrevocable decisions are made,"³⁵ and further that it was supported by the case law.³⁶ With respect to the allegation of unlawful delegation, what the applicants described as "a plan for future planning, assessment, and decision-making,"³⁷ the respondents relied especially on the Federal Court of Appeal's decision in *Alberta Wilderness Assn. v. Express Pipelines Ltd.*:

Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages...and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the

33. *Greenpeace, supra* note 1 at para 127 [emphasis added]. For the full list of alleged gaps and deficiencies, see also *ibid* at paras 218-220.

34. *Ibid* at para 5.

35. *Ibid* at para 66.

36. *Ibid* at paras 69-74.

37. *Ibid* at para 125.

statute specifically envisages the possibility of “follow up” programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.³⁸

5. *Russell J.’s analysis*

Having set out the parties’ arguments, Russell J. then undertook a thorough review of the statutory regime, jurisprudence and associated principles.³⁹ Here, Russell J. appeared most influenced by the Federal Court of Appeal’s decision in *Express Pipelines*, but also by the judgment of Justice Tremblay-Lamer in *Pembina Institute for Appropriate Development v. Canada (A.G.)*,⁴⁰ wherein the precautionary principle and the concept of adaptive management were described as “guiding tenets” in CEAA’s application and interpretation.⁴¹ The Court in *Pembina Institute* described these concepts as essentially off-setting one another, building on an earlier Federal Court of Appeal decision—*Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*:⁴²

Evans J.A. stated that “[t]he concept of “adaptive management” responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge” and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle. Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.⁴³

Bearing in mind these and other principles, Russell J. concluded that there was nothing that precluded the adoption of the PPE approach per se.⁴⁴ First, the theory behind the PPE approach was logical: “if the maximum effect [of] each component can be adequately mitigated, then the lesser impacts of the other alternative technology options can also be adequately

38. *Alberta Wilderness Assn v Express Pipelines Ltd* (1996), 137 DLR (4th) 177 (FCA) at para 14 [*Express Pipelines*]. The respondents also invoked the concept of adaptive management (see *Greenpeace*, *supra* note 1 at para 83); this aspect of the decision is further discussed in Part IV.

39. *Greenpeace*, *supra* note 1 at paras 108-123, 186-200.

40. *Pembina Institute for Appropriate Development v Canada (AG)*, 2008 FC 302, 35 CELR (3d) 254 [*Pembina Institute*].

41. *Ibid* at para 33.

42. *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 at para 24, 1 CELR (3d) 20 [*CPAWS*].

43. *Greenpeace*, *supra* note 1 at para 190, citing Evans JA in *CPAWS*, *supra* note 42 at para 24.

44. *Greenpeace*, *supra* note 1 at para 181.

mitigated.”⁴⁵ Second, the Panel concluded that it allowed the assessment of “the potential environmental impact of all of the potential reactor designs and configurations put forward by OPG” and the applicants had failed in Russell J.’s view to establish that this conclusion was unreasonable.⁴⁶ Finally, it was also consistent with the jurisprudence: “the issue is not whether a project is at the concept stage or at a more specific design stage, but whether a project is at a stage when its environmental impact can be fully considered.”⁴⁷

Russell J. did, however, find inadequacies with the Panel’s treatment of three specific issues under this approach:

- The alleged failure of the Panel to insist on a bounding scenario analysis for hazardous substance emissions, in particular liquid effluent and stormwater runoff to the surface water environment, and for the sources, types and quantities of non-radioactive wastes to be generated by the project;
- The Panel’s treatment of the issue of radioactive waste management; and
- The Panel’s conclusion that an analysis of the effects of a severe common cause accident at the facility was not required at this stage, but should be carried out prior to construction.⁴⁸

In assessing these matters, Russell J. accepted the applicants’ argument—unchallenged by the respondents and supported by *Pembina Institute* in particular—that the environmental assessment process is fundamentally different from future licensing or regulatory processes⁴⁹ and that there is therefore a limit to the extent to which the consideration of environmental effects and their mitigation can be left, or delegated, to those later processes:

Under the CEAA, the ultimate decision-maker for projects referred to review panels is the Governor in Council (in practical terms, the federal Cabinet), which decides whether the responsible authorities will be permitted to take steps to enable the project to move forward. Parliament chose to allocate this decision to elected officials who are accountable to Parliament itself and, ultimately, to the electorate....

The most important role for a review panel is to provide an evidentiary basis for decisions that must be taken by Cabinet and responsible authorities. The jurisprudence establishes that gathering, disclosing,

45. *Ibid* at para 182.

46. *Ibid* at paras 182-184.

47. *Ibid* at para 184.

48. *Ibid* at para 228.

49. *Ibid* at para 230.

and holding hearings to assemble and assess this evidentiary foundation is an independent duty of a review panel, and failure to discharge it undermines the ability of the Cabinet and responsible authorities to discharge their own duties under the Act [citing *Pembina Institute* at paras 72-74]....

In short, *Parliament has designed a decision-making process under the CEAA that is, when it functions properly, both evidence-based and democratically accountable*. The CNSC, in considering future licensing decisions, will be in a fundamentally different position from the Panel that has conducted the EA. The CNSC will be the final authority making the decision, not merely an expert panel. Although the CNSC approaches this role with considerable expertise, it does not have the same democratic legitimacy and responsibility as the federal Cabinet.⁵⁰

With respect to OPG's PPE approach, which even the Panel acknowledged was a departure from typical practice, this meant that it "was incumbent on the Panel to ensure the methodology was fully carried out,"⁵¹ bearing in mind also the challenges that such an approach poses for public participation: "The less specific the information provided...the more difficult it may be for interested parties to challenge assumptions, test the scientific evidence, identify gaps in the analysis, and ensure their interests are fully considered."⁵²

Applying this standard to hazardous substance emissions and on-site chemical inventories, Russell J. concluded that the environmental assessment came up short. He noted Environment Canada's submissions to the Panel that, notwithstanding several information requests to OPG, the remaining gaps prevented the department from assessing effects with respect to effluent and storm water management.⁵³ The Panel itself noted that "OPG did not undertake a detailed assessment of the effects of liquid effluent and storm water runoff to the surface water environment" but that it "committed to managing liquid effluent releases in compliance with applicable regulatory requirements and to applying best management practices for storm water."⁵⁴ On this basis, the Panel concluded that the project was not likely to result in significant adverse environmental effects. Russell J. held that while such a conclusion may be reasonable, it did not comply with *CEAA 1992*:

To repeat what is stated above, because of its unique role in the statutory

50. *Ibid* at paras 232-237 [emphasis added].

51. *Ibid* at para 247.

52. *Ibid* at paras 247, 249.

53. *Ibid* at paras 257-259.

54. *Ibid* at paras 264-265.

scheme, a review panel is required to do more than consider the evidence and reach a reasonable conclusion. *It must provide sufficient analysis and justification to allow the s. 37 decision-makers to do the same, based on a broader range of scientific and public policy considerations. One could say that the element of “justification, transparency and intelligibility within the decision-making process” (Dunsmuir, above, at para 47; Khosa, above, at para 59) takes on a heightened importance in this context.*

In this case, there are references to commitments by OPG to comply with unspecified legal and regulatory requirements or applicable quality standards, and to apply good management practices. There are references to instruments that may or may not contain relevant standards or thresholds based on the information before the Court (e.g., the *Ontario Stormwater Management Planning and Design Manual* (March 2003)). And there are references to thresholds or standards in statutory instruments (e.g., *Fisheries Act*, *Canadian Environmental Protection Act*) without specific information about how these are relevant to or will bound or control the Project’s effects....

In essence, the Panel takes a short-cut by skipping over the assessment of effects, and proceeding directly to consider mitigation, which relates to their significance or their likelihood. This is contrary to the approach the Panel says it has adopted (see EA Report at p. 39), and makes it questionable whether the Panel has considered the Project’s effects at all in this regard.⁵⁵

This is not to suggest that future regulatory processes “have no role to play in managing and mitigating a project’s environmental effects.”⁵⁶ For Russell J., a conceptual distinction can be made between two kinds of situations where a panel, despite some uncertainty, might conclude that significant adverse environmental effects are unlikely:

- (a) Reliance upon *an established standard or practice* and the likelihood that the relevant regulatory structures will ensure compliance with it; or
- (b) Confidence in *the ability of regulatory structures* to manage the effects of the Project over time.⁵⁷

The latter approach is problematic in that it “may short-circuit the two-stage process whereby an expert body evaluates the evidence regarding a project’s likely effects, and political decision-makers evaluate whether that

55. *Ibid* at paras 272-275 [emphasis added; citations omitted].

56. *Ibid* at para 241.

57. *Ibid* at para 280 [emphasis added].

level of impact is acceptable in light of policy considerations, including 'society's chosen level of protection against risk.'"⁵⁸

Turning next to the issue of spent nuclear fuel, there does not appear to have been any real dispute between the parties that the Panel's treatment of this issue was cursory. Rather, OPG's position was that this was something that Canada had mandated the Nuclear Waste Management Organization (NWMO) to study. Russell J. disagreed:

In my view, the record confirms that the issue of the long-term management and disposal of the spent nuclear fuel to be generated by the Project has not received adequate consideration. The separate federal approvals process for any potential NWMO facility, which has not yet begun...will presumably ensure that such a facility is not constructed if it does not ensure safety and environmental protection. But a decision about the creation of that waste is an aspect of the Project that should be placed before the s. 37 decision-makers with the benefit of a proper record regarding how it will be managed over the long-term, and what is known and not known in that regard.⁵⁹

According to Russell J., the management and storage of spent nuclear fuel was not a "separate issue."⁶⁰ Rather, the environmental assessment "is the only occasion...on which political decision-makers at the federal level will be asked to decide whether that waste should be generated in the first place."⁶¹ Nor was there anything in the Terms of Reference that suggested that this issue was not to be addressed.⁶²

Finally, with respect to a severe "common cause" accident, the problem was not that OPG failed to assess the risks of accidents associated with its new build but rather that it failed to assess these risks in conjunction with the existing Darlington plant.⁶³ The Panel itself recognized this gap and recommended that OPG "evaluate the cumulative effect of a common-cause severe accident involving all of the nuclear reactors in the site study area" prior to construction.⁶⁴ For Russell J., however, that was insufficient:

In my view, the one conclusion that is not supported by the language of the statute is the Panel's conclusion that the analysis had to be conducted, but could be deferred until later. Rather, in my view, it had to be conducted as part of the EA so that it could be considered by those

58. *Ibid* at para 281.

59. *Ibid* at para 297.

60. *Ibid* at para 312.

61. *Ibid*.

62. *Ibid* at para 313.

63. *Ibid* at para 327.

64. See *Darlington Panel Report*, *supra* note 2, Recommendation # 63 at 133.

with political decision-making power in relation to the Project.⁶⁵

In light of these three deficiencies, and as was the case in *Pembina Institute*, the Court remitted the Report to the JRP for further consideration, pending which the relevant government agencies have no jurisdiction to approve the project.

III. *Discussion*

As noted at the outset, although the *Greenpeace* decision was written in the context of the now repealed *CEAA 1992*, all of the provisions relevant to Russell J.'s analysis—the factors to be considered in an environmental assessment, a panel's duties, and the political nature of decision-making—were carried over to *CEAA 2012* relatively unchanged.⁶⁶ Consequently, Russell J.'s characterization of the environmental assessment process as one that is evidence based and democratically accountable and the implications of that characterization for the assessment of environmental effects and the correct approach to judicial review in this context are as applicable to *CEAA 2012* as they were to *CEAA 1992*.

1. *An evidence-based and democratically accountable decision-making process*

In one of the most cited passages from the Supreme Court of Canada's *Friends of the Oldman River* decision, La Forest J. described environmental assessment as follows:

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making...

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development In short, environmental impact assessment is simply descriptive of a

65. *Greenpeace*, *supra* note 1 at para 334.

66. See *supra* notes 19-21. The only major difference in these provisions is that *CEAA 2012*, *supra* note 9 restricts the definition of "environmental effects" to those that fall under Parliament's legislative authority (s 5). This definition informs the factors that an environmental assessment must consider pursuant to s 19 of *CEAA 2012*, but does not have any bearing on Russell J's analysis that environmental effects must actually be considered.

process of decision-making.⁶⁷

The most significant, if also long overdue, development coming out of *Greenpeace* is Russell J.'s recognition that environmental assessment is an information-gathering tool not just for governments but also—and just as importantly—for the public, which relies on such assessments to form its own views about the desirability (or not) of certain projects and which can then hold governments accountable for decisions that it does or does not agree with.

This aspect of the environmental assessment process is clear from the statutory scheme. As noted by the Court in *Pembina Institute*, there is no substantive legal barrier in either *CEAA 1992* or *CEAA 2012* to prevent the federal government from granting approvals to projects that are likely to result in significant adverse environmental effects.⁶⁸ This is consistent with legislation (both versions) the purpose of which is to ensure that projects are “considered in a careful and precautionary manner” and “to encourage federal authorities to take actions that promote sustainable development,” without actually requiring that they meet any substantive standard.⁶⁹ The only barrier for projects considered likely to result in significant adverse environmental effects is a procedural one: cabinet must conclude that such effects are “justified in the circumstances.”⁷⁰

In other words—assuming that the process has been adequately followed—there is no legal remedy available to members of the public who may oppose such projects. Democratic accountability, on the other hand, is supported in several ways, including the establishment of the Canadian Environmental Assessment Registry, the purpose of which is to facilitate “public access to records relating to environmental assessments and providing notice in a timely manner of those assessments,” and which “must be operated in a manner that ensures convenient public access to it.”⁷¹ Indeed, under *CEAA 2012* it is the Minister’s opinion that an

67. *Friends of the Oldman River*, *supra* note 6 at 71. See, e.g., *MiningWatch Canada*, *supra* note 15; *Pembina Institute*, *supra* note 40, *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)*, [1998] 4 FC 340 (TD); *Manitoba’s Future Forest Alliance v Canada (Minister of The Environment)*, (1999) 30 CELR (NS) 1 (FCTD); *Western Copper Corp v Yukon Water Board*, 2011 YKSC 16, 57 CELR (3d) 46; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2000 BCSC 1001, 34 CELR (NS) 209, *aff’d* 2002 BCCA 59, 211 DLR (4th) 89.

68. *Pembina Institute*, *supra* note 40 at para 27.

69. *CEAA 2012*, *supra* note 9, see ss 4(b), (h) [emphasis added]; see also *CEAA 1992*, *supra* note 3, ss 4(a), (b).

70. For *CEAA 1992*, *supra* note 3, see s 37; for *CEAA 2012*, *supra* note 9, see s 52. The Federal Court of Appeal recently described what judicial review of such a justification entails; see *Council of the Innu of Ekuanitshit v Canada (AG)*, 2014 FCA 189 at para 40, 376 DLR (4th) 348.

71. *CEAA 2012*, *supra* note 9, s 78; see also ss 79-82; *CEAA 1992*, *supra* note 3, ss 55-55.6.

assessment by a review panel “is in the public interest,” a determination that must include a consideration of any “public concerns related to the significant adverse environmental effects that the designated project may cause,” that triggers such panels in the first place.⁷²

Of course, these provisions also enable and reflect the value placed on public participation in the environmental assessment itself but that does not detract from their role in supporting democratic accountability, Parliament’s preference for which is also reflected in the *Hansard*. On 16 March 1992, for example, parliamentarians discussed an opposition amendment that would have inserted a substantive standard into the *CEAA* by explicitly restricting the availability of the “justified in the circumstances” provision to projects consistent with sustainable development (i.e., “justified in the circumstances because the project contributes to the goal of sustainable development”).⁷³ The amendment was defeated. According to the Hon. Lee Clark, then Parliamentary Secretary to the Minister of the Environment, this would “give the courts more of a role...than we would think is advisable.”⁷⁴ For Clark, it was “clear that politicians, elected representatives, are in the best position to accept this responsibility today, rather than to pass the buck, the responsibility, on to the courts.”⁷⁵ This is precisely the conclusion reached by Russell J.: “Parliament chose to allocate this decision [about whether projects can proceed] to elected officials who are accountable to Parliament itself and, ultimately, to the electorate.”⁷⁶

Political accountability was also explicitly contemplated during the passage of what is widely accepted as the progenitor of all environmental assessment laws, including *CEAA*⁷⁷—the United States’ *National Environmental Policy Act*.⁷⁸ *NEPA* has long been understood as having two primary aims: “to force agencies to consider the environmental effects of their actions and to provide a means to involve and inform the public in federal agency decision-making.”⁷⁹ As the Supreme Court of the United

72. *CEAA 2012*, *supra* note 9, ss 38(1), (2).

73. *House of Commons Debates*, 34th Parl, 3rd Sess, vol 7 (16 March 1992) at 8291 (Hon Chas L Caccia).

74. *House of Commons Debates*, 34th Parl, 3rd Sess, vol 7 (16 March 1992) at 8302 (Hon Lee Clark).

75. *Ibid.*

76. *Greenpeace*, *supra* note 1 at para 232.

77. Ted Schrecker, “The Canadian Environmental Assessment Act: Tremulous Step Forward, or Retreat into Smoke and Mirrors?” (1991) 5 CELR (NS) 192.

78. *National Environmental Policy Act*, 42 USC § 4321 [*NEPA*].

79. Courtney A Schultz, “History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law” (2012) 27:1 J Envtl L & Litig 125 at 126 citing Robertson, *infra* note 80.

States put it in *Robertson v. Methow Valley Citizens Council*, “NEPA merely prohibits uninformed—rather than unwise—agency action.”⁸⁰ According to Bradley Karkkainen,

The logic and legislative history of this scheme suggest that NEPA’s authors expected the resulting public scrutiny to act as an independent constraint on agency discretion. For example, Senator Henry M. “Scoop” Jackson (D-WA), NEPA’s principal sponsor in the Senate, argued that *public disclosure would lead to political accountability that would compel agency managers to curb their most environmentally destructive practices.*⁸¹

In fact, the potential for political accountability is an integral component of most environmental laws. Under the *Species at Risk Act*, for example, a scientific body makes public recommendations with respect to the listing of species but the ultimate decision lies with Cabinet, with the important caveat that it must provide reasons where its decision is inconsistent with those recommendations.⁸² Comparing this “constrained discretion” approach with endangered species legislation where there is no such requirement, Stewart Elgie has observed a statistically higher listing rate under *SARA*.⁸³ This is consistent with Evans J.A.’s observation in *CPAWS*, there with respect to the *Canada National Parks Act*, that “the political accountability of ministers to the public, both through Parliament and more directly, tends to be more effective when a minister’s action engages with *competing public interests* than when it primarily concerns the interests of an individual.”⁸⁴

Environmental laws are primarily concerned with matters of public interest: air, land, water and the development of natural resources. And while Canadian scholarship has long recognized this aspect of the environmental

80. *Robertson v Methow Valley Citizens Council*, 490 US 332 (9th Cir 1989) [*Roberston*]. The full quote is at 350-351:

The sweeping policy goals announced in...*NEPA* are thus realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences, and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency’s substantive decision, it is now well settled that *NEPA* itself does not mandate particular results, but simply prescribes the necessary process....Other statutes may impose substantive environmental obligations on federal agencies, but *NEPA* merely prohibits uninformed—rather than unwise—agency action [emphasis added, citations omitted].

81. Bradley C Karkkainen, “Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance” (2002) 102:4 Colum L Rev 903 at 912 [emphasis added].

82. *Species at Risk Act*, SC 2002, c 29, s 27 [*SARA*].

83. Stewart Elgie, “Statutory Structure and Species Survival: How Constraints on Cabinet Discretion Affect Endangered Species Listing Outcomes” (2008) 19:1 J Env’t L & Prac 1.

84. *CPAWS*, *supra* note 42 at para 75 [emphasis added].

assessment process, until *Greenpeace* it was virtually ignored by courts.⁸⁵ Post-*Greenpeace*, then, environmental assessment under *CEAA* should be understood as both a planning and disclosure tool, characterized by the objective and transparent gathering of information (“evidence-based”) followed by political decision-making (“democratically accountable”).

2. *Failure to assess environmental effects “short-circuits” the CEAA regime*

If the evidence-based, democratically accountable nature of the environmental assessment process is the most important insight into the *CEAA* regime since *Friends of the Oldman River*, the most important practical consequence may be that panels must do the work of assessing potential environmental effects and their mitigation.

At the level of statutory interpretation, Meinhard Doelle has rightly observed that *Greenpeace* is about “the tension between the requirement in section 11(1) of *CEAA 1992* to ensure that an EA is conducted as ‘early as practicable’...and the obligations of the Panel to ensure that the 16(1) and (2) factors are given meaningful consideration,”⁸⁶ a tension also reflected in environmental assessment theory.⁸⁷ On a pragmatic level, however, this tension appears to be between two competing interests, the proponent’s (usually a private party) and the public’s. Proponents, perhaps understandably, would prefer to minimize the costs of environmental assessment in the context of a process whose end result is uncertain, especially where major and contentious projects such as Darlington, New

85. See, e.g., Schrecker, *supra* note 77, Bowden & Olszynski, *supra* note 6 at 480-484. The author was not able to locate a single case that recognized—let alone discussed—this aspect of environmental assessment prior to *Greenpeace*. The closest decision is *Pembina Institute*, *supra* note 40, which recognized that there was a difference between a panel’s duties and the government’s ultimate decision (at para 74):

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...it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval.

86. Meinhard Doelle, “Federal Court Ruling on Darlington Nuclear Project” (27 May 2014), *Marine and Environmental Law News* (blog), online: <<https://blogs.dal.ca/melaw/2014/05/27/federal-court-ruling-on-darlington-project/>>.

87. See, e.g., Robert Gibson et al, “Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options” (2010) 20:3 *J Envtl L & Prac* 175 at 179 (arguing in favor of strategic or regional environmental assessments because project-based assessments “are usually too narrowly mandated and come too late in decision-making to be generally effective vehicles for examining strategic concerns and options”).

Prosperity and Northern Gateway are concerned.⁸⁸ These proponents generally appear much more willing to do additional studies once they have the regulatory certainty of government approval.⁸⁹ The public interest at stake is the public's ability to participate meaningfully in the process, which Russell J. recognized is hindered where information is missing or not sufficiently detailed.⁹⁰

In true Solomonic fashion, Russell J. resolved the statutory "tension" by finding the PPE approach permissible under the Act while at the same time requiring that it be "fully carried out."⁹¹ For Russell J., this obligation was not met where information on potential environmental effects was missing and the Panel appeared to rely instead on proponent commitments to manage effects in compliance with applicable but often unspecified regulatory requirements.

In addition to enabling public participation and democratic accountability (and virtually guaranteeing that few proponents will adopt an "envelope" approach going forward), this finding speaks to one of the greatest misconceptions of Canadian environmental law, one that was reflected during *CEAA 1992's* brief parliamentary review. I am referring to the notion that environmental assessment is somehow superfluous; that there already exists a vast, detailed and protective environmental

88. The fact that environmental assessment can be costly is widely understood: see, e.g., House of Commons, Standing Committee on Environment and Sustainable Development, *Statutory Review of the Canadian Environmental Assessment Act: Protecting The Environment, Managing Our Resources: Report of the Standing Committee on Environment and Sustainable Development* (March 2012) at 3-4 (Chair: Mark Warawa):

Because of the time, amount, and the human resources required to move something through the CEAA process, [some] companies simply say that they decided not to do something because it just wasn't worth entering the approvals process. Time and money are important. So they just move on or leave things until they absolutely have to change something and it becomes precipitous (quoting Mark Wittrup, Saskatchewan's Assistant Deputy Minister, Environmental Protection and Audit Division, Ministry of Environment).

89. See, e.g., Enbridge's Northern Gateway site, wherein the company states that it "will continue to work hard towards meeting the [209] conditions set out by the National Energy Board (Enbridge, "NEB Conditions," online: <www.gatewayfacts.ca/NEB-conditions/>), many of which call for additional studies and plans.

90. *Greenpeace*, *supra* note 1 at paras 116, 247.

91. *Ibid* at para 247.

law regime in Canada that project proponents must comply with.⁹² The reality is that most environmental laws contain no generally applicable substantive standard; rather, the legislation prohibits certain impacts in one breath while granting departments a discretionary power to authorize such impacts, often on an ad hoc basis, in the next.⁹³

Section 35 of the *Fisheries Act*, arguably still one of Canada's most important federal environmental laws, is a perfect example.⁹⁴ In its current form, section 35(1) prohibits works, undertakings, and activities that result in the death of fish that are part of, or support, a commercial, recreational or Aboriginal fishery, as well as those that result in the permanent alteration

92. The following line of questions from Robert Sopuck, the Conservative Party member for Dauphin—Swan River, is illustrative: "I'd like to explore the distinction between environmental process and actual environmental results on the ground. By results, I mean the chemistry and biology of the environment itself. Ms. Schwartz, presumably any project that's planned these days takes into account all the applicable statutes and regulations, like the Fisheries Act, SARA, the Migratory Birds Convention Act, and the various provincial regulations. It goes without saying that those standards are built into the project design, right?" Sopuck went on to suggest, "*regardless of the CEAA process, a project will be built with the highest environmental standards of the day.*" In terms of environmental results, what is the value added of the CEAA process in terms of results?" To this, Terry Toner, Director of Environmental Services for Nova Scotia Power Incorporated and the Chair of the Canadian Electrical Association's stewardship task group, responded that "[i]n many cases, as a project proceeds, *there is some optionality that is part of what is brought forward, and often the process can inform ... As a result of that, the process adds a lot of value*": House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence* (1 November 2011) (Chair: Mark Warawa) [emphasis added]. This "optionality" speaks to the discretionary nature of most Canadian environmental laws; see *infra* note 93.

93. See e.g., David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 231 (observing that "[d]iscretion is one of the defining characteristics of Canadian environmental law" pervading "almost every law, regulation and policy"); Bruce Pardy, "In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1 JSDLP 29 at 34-35 (observing that some environmental statutes, such as Ontario's *Environmental Protection Act*, RSO 1990, c E 19, "include provisions that appear to be substantive rules of wide application," but which upon closer inspection allow "government administrators to make inexact policy decisions that no one can predict ahead of time" and are marked by discretion).

94. The *Fisheries Act*, *supra* note 22 was recently amended as part of the 2012 omnibus budget bills, formerly known as Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012 (assented to 29 June 2012), SC 2012, c 19 and Bill C-45, *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012 (assented to 14 December 2012), SC 2012, c 19. Most of the changes in those bills were viewed negatively by various commentators: see, e.g., Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012) 24:1 J Envtl L & Prac 1; David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) (describing recent federal changes as "environmental rollbacks" at 150-151). However, commentators have since noted that DFO, through its Fisheries and Oceans Canada, "Fisheries Protection Policy Statement", (Ottawa: DFO, October 2012), online: <www.dfo-mpo.gc.ca/pnw-ppe/pol/index-eng.html>, "does not view [the amended regime] as being significantly different from [the previous one]"; Janice Walton, Blakes, Cassels & Graydon, "Fisheries Act Changes Effective November 25, 2013," online: <www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1832#page=1>.

to, or destruction of, their habitat.⁹⁵ Subsection 35(2), however, goes on to list a series of ways in which such works, etc. may be authorized, including ministerial authorization. Nowhere in the legislative scheme is there any clear limit on the amount of harm that the Minister may authorize; even the recently introduced section 6 factors (which, consistent with the discussion in the previous section, include the public interest) do not appear to dictate any particular outcome.⁹⁶

Nor, as noted by Russell J. in a remarkable portion of his decision where he directly addressed the primary case law relied upon by the respondents,⁹⁷ do such schemes entail the qualification or quantification of impacts in what is by comparison a relatively bright-line test, which is to say significant versus non-significant effects under *CEAA*:

On the facts of this case, it is in my view not possible to know that the potential effects in question “*can and will be mitigated*” to below the level of significance (which the Court [in *Express Pipelines*] identified at paragraph 10 as the “principal criterion” set by the statute) without having some sense of what level of effect would be significant, which is a decision for the s. 37 decision-makers. Where there is no available standard or set of standards that can serve as a proxy for significance (and the Panel has not pointed to one in this case with respect to hazardous substance releases), in my view, those decision-makers must be provided with information about the actual expected effects and the degree to which they will be mitigated. In some cases (as in *West Vancouver*), this analysis will be more qualitative, whereas other circumstances will permit and call for a more quantitative approach, as I would argue is the case here. In any case, where an effect is potentially significant, simply stating that an unknown level of effect will be mitigated to another unknown level is not sufficient to permit the s. 37 decision-makers to discharge their responsibilities.⁹⁸

Russell J. also accepted the applicants’ argument that there are important *procedural* differences between the *CEAA* regime and other regulatory processes.⁹⁹ Returning again to section 35 of the *Fisheries Act*, there is no formal role for public participation in the authorization process.

95. *Fisheries Act*, *supra* note 22, s 35.

96. *Ibid*, s 6(1): “Before [issuing a subsection 35(2) authorization] the Minister shall consider the following factors: (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries; (b) fisheries management objectives; (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and (d) the public interest.” In fact, the public interest has long been a primary factor in the implementation of the *Fisheries Act*: see *Comeau’s Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 37.

97. *Greenpeace*, *supra* note 1 at paras 338-357.

98. *Ibid* at para 355.

99. *Ibid* at para 230.

Moreover, because the department does not maintain a public registry, mere knowledge of any authorizations issued can only be gained through access to information requests.¹⁰⁰ Thus, even though DFO and Environment Canada are represented by ministers that are accountable to Parliament, democratic accountability is exceedingly difficult where there is little or no public knowledge of the ministers' decisions in the first place.

This reasoning applies equally to panel recommendations for further studies, an approach that, as noted above, finds some support in *Express Pipelines*. The problem with future studies is that these may reveal a likelihood of significant adverse environmental effects *after* the political decisions in relation to a project have been made. In addition to the *Darlington Panel Report*, this issue is directly relevant to the Northern Gateway Project and Panel Report. In a recent letter to the Prime Minister,¹⁰¹ over 300 scientists alleged that:

Northern Gateway omitted specified mitigation plans for numerous environmental damages or accidents. This omission produced fundamental uncertainties about the environmental impacts of Northern Gateway's proposal (associated with the behaviour of bitumen in saltwater, adequate dispersion modeling, etc.). The panel recognized these fundamental uncertainties, but sought to remedy them by demanding the future submission of plans....*Since these uncertainties are primarily a product of omitted mitigation plans, such plans should have been required and evaluated before the [Panel] report was issued.*¹⁰²

In *Greenpeace*, Russell J. rightfully observed that the *Express Pipelines* decision is a brief one that was delivered orally from the bench, such that care was required "to avoid reading in principles that were not intended."¹⁰³ Although Russell J. was satisfied of the consistency of his decision with

100. The author recently requested all section 35 authorizations issued by DFO (including supporting material) from 1 September 2013 until May 2014. At the time of writing this comment, a letter from the department's access to information office indicated that the request would take 720 days (2 years) to process. Letter on file with author.

101. "Northern Gateway pipeline report 'flawed,' 300 scholars tell PM," *CBC News* (5 June, 2014), online: <www.cbc.ca/news/>.

102. Whether or not the foregoing is an accurate characterization of the Panel's conclusions and recommendations will no doubt be determined in the litigation already commenced with respect to that report. It is worth noting, however, that the letter's characterization of the environmental assessment process as one intended to offer "guidance, both to concerned Canadians in forming their opinions on the project and to the federal government in its official decision" (at 3) could have been written by Russell J himself. See letter from Kai MA Chan et al to Stephen Harper, Prime Minister (26 May 2014), online:

<chanslab.ires.ubc.ca/files/2014/05/JRP-Letter-to-Federal-Govt_May28_all-signaturesKCASET.pdf> [emphasis added].

103. *Greenpeace*, *supra* note 1 at para 351.

that case largely on the basis of his approach to judicial review,¹⁰⁴ some additional comments on the topic of future studies are merited here.

The Federal Court of Appeal in *Express Pipelines* held that a “panel’s exercise is predictive and it is not surprising that the statute specifically envisages the possibility of ‘follow-up’ programmes.”¹⁰⁵ To suggest that the presence of “follow-up programmes” supports putting off the assessment of environmental effects, however, is to fundamentally misconceive what such programs do and their place in the legislative scheme. As defined in the Act, “follow-up programs” are for “(a) verifying the accuracy of the environmental assessment of a designated project; and (b) determining the effectiveness of any mitigation measures.”¹⁰⁶ At the risk of stating the obvious, there can be no verification without an initial assessment. Nor can a follow-up program be designed for mitigation measures that have yet to be specified.¹⁰⁷

Finally, Russell J.’s concerns about short-circuiting have implications for what the previous *CEAA* regime¹⁰⁸ recognized as a special kind of follow-up program: adaptive management, reliance upon which has become ubiquitous in the context of major resource projects in Canada. Described in *Greenpeace* as a “counterbalance [to the precautionary principle] to ensure that socially and economically desirable projects can come to fruition,”¹⁰⁹ a more useful definition is the one used by the Canadian Environmental Assessment Agency: “a planned and systematic process for continuously improving environmental management practices by learning about their outcomes.”¹¹⁰ The problem is that, as practiced in Canada (and the United States and Australia for that matter), adaptive management is rarely planned or systemic and serves primarily to excuse an insufficient understanding of environmental effects, their mitigation,

104. *Ibid* at para 357.

105. *Express Pipelines*, *supra* note 38 at para 14.

106. See s 2 of *CEAA 2012*, *supra* note 9. See also *CEAA 1992*, *supra* note 3, s 2.

107. Bearing in mind also that “follow up program[s]” are among the factors to be considered in the course of an environmental assessment: for *CEAA 1992*, *supra* note 3, see s 16(2)(c); for *CEAA 2012*, *supra* note 9, see s 19(1)(e).

108. *CEAA 1992*, *supra* note 3, s 38(5): “The results of follow-up programs may be used for implementing adaptive management measures or for improving the quality of future environmental assessments.” This singular reference to adaptive management in *CEAA 1992* was not carried over to *CEAA 2012*.

109. *Greenpeace*, *supra* note 1 at para 104.

110. Canadian Environmental Assessment Agency, “Adaptive Management Measures under the Canadian Environmental Assessment Act,” Operational Policy Statement (Ottawa: CEAA, 13 September 2013), online: <www.ceaa-acee.gc.ca/default.asp?lang=En&n=50139251-1>.

or both.¹¹¹ This not only makes learning and improvement impossible but, as noted by the New Prosperity Review Panel roughly six months before *Greenpeace*, such an approach also has the potential to “short-circuit” *CEAA*’s two-step decision making process:

[The proponent] declined to provide some materials requested by the Panel and by other participants.... To deal with the resulting uncertainties, the Panel considered various risk management strategies, including adaptive management in some circumstances. However, when the Panel concluded the potential adverse environmental effects were potentially “significant,” it did not agree that deferring decisions on the approach to manage the risk to subsequent regulatory processes is appropriate. It is necessary at the environmental assessment stage for the Panel to determine if a significant adverse effect is likely and to consider if and how the risk can be managed to acceptable levels.¹¹²

Although none of the deficiencies in *Greenpeace* turned on this issue, Russell J.’s analysis, combined with that of the New Prosperity Review Panel, suggests that future proponents relying on adaptive management should have much more detailed plans prepared than has historically been the case.

3. *Judicial review*

a. *The rebuttable presumption*

As noted in the introduction, Russell J. held that the issues before him, which included questions of law that were previously reviewed on a correctness standard, were reviewable on the reasonableness standard pursuant to the rebuttable presumption established in *Dunsmuir*. In my view, the roster-like and non-permanent membership of *CEAA* panels is an important consideration that may well be sufficient to rebut the presumption given

111. In Canada, see Arlene J Kwasniak, “Use and Abuse of Adaptive Management in Environmental Assessment Law and Practice: A Canadian Example and General Lessons” (2010) 12:4 *J Environmental Assessment Policy & Management* 425; Martin ZP Olszynski, “Adaptive Management in Canadian Environmental Assessment Law: Exploring Uses and Limitations” (2010) 21 *J Envtl L & Prac* 1. With respect to the US experience, see JB Ruhl & Robert L Fischman, “Adaptive Management in the Courts” (2010) 95:2 *Minn L Rev* 424 at 441:

[A]gencies in practice have employed what we call ‘a/m-lite,’ a stripped down version of adaptive management that almost always neglects to develop testable hypotheses as the basis for management actions... in its most extreme form, [it] is open-ended contingency planning or ‘on-the-fly’ management that promises some loosely described response to whatever circumstances arise.

For Australia, see most recently Jessica Lee, “Theory to Practice: Adaptive Management of the Groundwater Impacts of Australian Mining Projects” (2014) 31 *Environmental Planning LJ* 251 at 251: “Despite its proliferation, there remains little consideration of what adaptive management means, how it is faring in practice and what legal mechanisms are required for its effective implementation.”

112. *New Prosperity Panel Report*, *supra* note 7 at 22 [emphasis added].

the potential for inconsistent and potentially conflicting, but otherwise reasonable, interpretations of the Act, a position that finds some support in the Federal Court of Appeal's recent decision in *Canada v. Kitselas First Nation*.¹¹³

Several such inconsistent interpretations have arguably already arisen, as in the case of the new standing rules under *CEAA 2012*. Through the combined operation of subsections 2(2) and 43(1)(c), only those persons deemed by a panel to be "interested parties," which is to say persons who are either "directly affected by the carrying out of the designated project" or have "relevant information or expertise" are to be granted the full suite of participatory rights.¹¹⁴ According to the Shell Jackpine Panel, these provisions allow "a review panel to conduct an appropriately focused project review."¹¹⁵ The New Prosperity Review Panel, on the other hand, relied on the Supreme Court of Canada's then-recent decision in *Canada v. Downtown Eastside Sex Workers United Against Violence Society*,¹¹⁶ to adopt a "liberal and generous approach" to the standing requirements.¹¹⁷ The practical difference was not that significant in these instances, both panels granting standing to the vast majority of parties seeking it, but the potential for divergent approaches is clearly there.

Another example is section 5 of *CEAA 2012*, which represents an attempt to restrict the consideration of environmental effects to those that fall within Parliament's legislative jurisdiction.¹¹⁸ As with standing, here again the Shell Jackpine Panel took a minimalist approach, simply

113. *Canada v. Kitselas First Nation*, 2014 FCA 150 at para 34, 2014 CarswellNat 1858 (WL Can). Admittedly, the nature of the legal issues in that case were of a higher, constitutional order; but the following statement seems equally applicable to the *CEAA* context, as further set out below: "Inconsistency... would be unseemly and give rise to significant practical consequences."

114. *CEAA 2012*, *supra* note 9, s 2(2), 43(1)(c).

115. Letter from Joint Review Panel to Osler, Hoskin and Harcourt LLP and to Individuals and Groups—Regarding Interested Parties Participation in the Hearing and Presentation of New Evidence (17 October 2012), online: <www.ceaa-acee.gc.ca/050/documents/p59540/82626E.pdf>.

116. *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

117. *New Prosperity Panel Report*, *supra* note 7 at 275-276:

Generally, "directly affected" refers to a personal interest that is distinct from the general public interest in a matter. In the private law situation, a direct interest may arise from holding property or other legal right that may be affected by a decision.... In public law cases, the Court calls for a "liberal and generous" or "flexible" approach, guided by the purposes that underlie the traditional limitations on standing designed to protect the efficient use of the court's resources. When assessing whether a person is "directly affected" by a designated project the Panel regards the situation to be closer to the public law situation because of the purposes of the Act.

118. *CEAA 2012*, *supra* note 9, s 5(1), (2).

declaring certain effects as falling within section 5,¹¹⁹ while the New Prosperity Review Panel considered the issue very closely, observing that “[t]here are many linkages between and among environmental changes, including changes that are environmental effects defined under *CEAA 2012* and those that are not,” and which therefore require careful consideration and categorization.¹²⁰

While it may be the case that there are compelling reasons to favour different, regional approaches to the federal environmental assessment regime, at the very least this is a case that needs to be made.

b. *A green shade of reasonableness review?*

Last but not least, Russell J.’s approach to reasonableness review merits some discussion. While there are several important passages throughout the decision, the following is fairly representative of the whole:

To repeat what is stated above, because of its unique role in the statutory scheme, a review panel is required to do more than consider the evidence and reach a reasonable conclusion. It must provide sufficient analysis and justification to allow the s. 37 decision-makers to do the same, based on a broader range of scientific and public policy considerations. One could say that the element of “justification, transparency and intelligibility within the decision-making process” takes on a heightened importance in this context.¹²¹

In my view, this is precisely the kind of approach that Justice Binnie had in mind when he stated in *Khosa* that “[r]easonableness is a single standard that takes its colour from the context.”¹²² In the environmental assessment context, this means striking a balance between panels’ expertise, which clearly commands deference, and their role in a democratically accountable decision-making process.

That panels’ conclusions are entitled to deference is well established. Probably the clearest articulation of what their expertise requires in terms of deference can be found in Tremblay-Lamer J.’s decision in *Pembina Institute*:

I am fully aware of the level of expertise possessed by the Panel. The record shows that they had ample material before them...and thus any articulated conclusions drawn from the evidence should be accorded a high measure of deference. However, this deference to expertise is only

119. Canadian Environmental Assessment Agency, *Report of the Joint Review Panel Shell Canada Energy Jackpine Mine Expansion Project*, (Ottawa: CEAA, 9 July 2013) at paras 38-39.

120. *New Prosperity Panel Report*, *supra* note 7 at 21.

121. *Greenpeace*, *supra* note 1 at para 272 [citations omitted].

122. *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339.

triggered when those conclusions are articulated. Instructively, in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*,... at para. 62, Iacobucci J. cited with approval the following excerpt from Kerans, R. P., *Standards of Review Employed by Appellate Courts*, p. 17 which dealt with deference to “expertise”:

Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. *If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions.* If they cannot, they are not very expert.... That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated.¹²³

Thus, deference to expertise is not unlimited—it requires “the cogent articulation of the rationale basis for conclusions reached.”¹²⁴ Were it otherwise, there would arguably be no need for panel reports to be made public, or panel reports at all for that matter. Rather, environmental assessment legislation embodies the idea that science must not only be done, but must also be seen to be done.¹²⁵

123. *Pembina Institute*, *supra* note 40 at para 75 [emphasis in original; citations omitted].

124. *Ibid.*

125. This brings us to another widely-quoted but also misunderstood passage with respect to judicial review in the environmental assessment context: Strayer J’s admonition in *Vancouver Island Peace Society v Canada*, [1992] 3 FC 42 (TD) that courts are not to become “an academy of science” (at para 12) (see, e.g., *Greenpeace*, *supra* note 1 at para 23). What all of the case law neglects to mention is the very specific (if not peculiar) procedural context in which this phrase was written. The case involved the application of the *EARPGO* (*supra* note 11) to visiting nuclear powered naval vessels. The federal government applied to have the Society’s judicial review converted into an action because, in its view, there would be “many difficult issues of fact to be determined as to whether there are ‘significant’ ‘potentially adverse environmental effects’” (at para 3), implying that it was “the responsibility of the Court to sit on appeal from the factual determinations of the ‘initiating department’” (at para 5). It is this role that Strayer J rightfully rejected in this case, which becomes clear when one considers the relevant passage in its entirety:

For these reasons I am unsympathetic to the [Government’s] arguments...that there are difficult technical factual determinations to be made which will require pleadings and a trial and the cross-examination *viva voce* of experts and others. It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected.... [These] are not the roles conferred upon it in the exercise of judicial review under section 18 of the *Federal Court Act*.

While “academy of science” is obviously a strong turn of phrase, it is equally clear that Strayer J was reacting to an extreme proposition and that this decision should not be understood as precluding substantive inquiry into the EA process; as noted by the Federal Court of Appeal in *Inverhuron & District Ratepayers Assn v Canada (Minister of the Environment)*, 2001 FCA 203, 39 CELR (NS) 161, to do so “would risk turning the right to judicial review...into a hollow one.” As for institutional capacity, one need only consider the federal courts’ intellectual property jurisprudence, and that surrounding Canada’s patented medicine regime in particular (under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133) to see that federal judges are perfectly capable of digesting complex scientific evidence.

Even this limitation, however, does not capture the full story. A given panel may well be able to explain why it has confidence in a subsequent regulator's ability to manage environmental effects (e.g., it has a good reputation based on a solid track record), which might even be sufficient for ensuring "sound decision-making," but if it fails to actually assess a project's effects the report would still be deficient.¹²⁶ The issue here is not one of expertise but rather of accountability. Panels set the stage for democratic accountability, a stage that will differ dramatically depending on whether a panel concludes that a project is or is not likely to result in significant adverse environmental effects.¹²⁷

Finally, expertise and accountability are inter-related. While a finding that a project is not likely to result in significant adverse environmental effects is obviously the most politically useful, even where the news is bad (i.e., such effects are likely) the mere fact of the process appears to have *some* political value. With respect to Northern Gateway, for example, which has been deemed likely to result in significant adverse environmental effects, the Prime Minister and then Minister of Natural Resources Joe Oliver have been reported as saying that they will "make a decision only after considering the recommendations of the 'fact-based' and 'scientific' review panel."¹²⁸ Mr. Oliver also released a statement where he described the panel's report as "a rigorous, open and comprehensive science-based assessment."¹²⁹

In this context, the role of a reviewing court should be to ensure the integrity of a process that government predictably and—where it has been adequately followed—justifiably relies on to gain support for its political decisions. Russell J.'s approach to reasonableness review in *Greenpeace* appears to have done just that.

Conclusion

Over two decades ago, the Supreme Court's landmark decision in *Friends of the Oldman River*¹³⁰ entrenched environmental assessment as a planning tool and as an integral part of sound decision-making. There

126. *Greenpeace*, *supra* note 1 at para 280.

127. Tremblay-Lamer J appears to have recognized this in *Pembina Institute*, *supra* note 40 at para 74 [emphasis added], when she wrote: "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."

128. Shawn McCarthy, Gloria Galloway & Brent Jang, "Panel's approval for Northern Gateway sets stage for PM's pipeline battle," *The Globe and Mail* (23 December 2013), online: <www.theglobeandmail.com>.

129. "Northern Gateway pipeline recommended for federal approval, with conditions," *CBC News* (19 December 2013), online: <www.cbc.ca/news/>.

130. *Friends of the Oldman River*, *supra* note 6.

have been several developments since that time but *Greenpeace* is the first decision to explicitly recognize and give meaning to the public role in the environmental assessment process. The first such rôle is during the environmental assessment itself, which Russell J. rightly held requires that environmental effects be sufficiently assessed so as to make meaningful public participation possible.¹³¹ The second role is at the end of the process, at which time not only political decision makers but also the public will form their views about the desirability (or not) of a given project. This role also requires that panels actually consider the potential adverse environmental effects of a project and whether these are likely to be significant. In this context, the role of a reviewing court is to ensure the integrity of the environmental assessment process, which in turn serves the process of democratic accountability that the *CEAA* was intended to create.

131. For a good overview of the theories underlying public participation in the environmental assessment process itself, see Shaun Fluker, "The Right to Public Participation in Resources and Environmental Decision-Making in Alberta" (2015) 52:3 *Alta L Rev* 567.