

## "JUSTIFICATION" UNDER CEEA 2012

By Stanley D. Berger, B.C.L., LL.B., Certified Environmental Specialist

What justifies federal cabinet approval of an 1100 megawatt hydro-electric project which 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? Must the Cabinet provide more than a one-page Order-in-Council, with a passing reference to the consideration of "social, economic, policy and broader public interests", when the Minister of the Environment and the Joint Review Panel ("The Panel") had both concluded that the project would cause significant adverse environmental effects, some of which could not be mitigated and the Panel concluded that these adverse effects were not justified? When the Terms of Reference for the environmental assessment to be performed by the Panel and the Environmental Impact Statement Guidelines include a requirement for Panel consideration of the need for the Project and alternatives to it, can Cabinet justify the project on the basis of future long-term need? Should the Court draw an adverse inference from Cabinet's claim of privilege over the record before them in reaching their conclusion?

At the end of August of this year in *Peace Valley Landowner Association (PVLVA) v. Canada (Attorney General)* 2015 FC 1027, the Federal Court of Canada concluded that while the reasons provided by Cabinet in the Order-in-Council could have been better articulated and more transparent, they were within the reasonable boundaries and requirements for Governor-in-Council reasons. The Court dismissed an application for judicial review of the Cabinet's decision that the project was justified despite significant adverse environmental effects and the Panel's opposite conclusion. The PVLVA had argued that the Order-in-Council had not indicated that there had been any consideration of the need for the Project, the fundamental justification for Cabinet's decision that the project should proceed. The Association further argued that B.C. Hydro had failed to pursue adequate research into geothermal energy and was therefore left without an adequate information base upon which to make a determination as to whether it would be a viable alternative to the project. B.C. Hydro was also accused of focusing its analytic efforts on the supply side at the expense of demand management.

The Court, in rejecting these arguments, noted that the Order-in-Council was not the sole source for measuring whether Cabinet's justification was reasonable. There was a presumption that the Minister considered the Panel and all relevant information in making her recommendations to Cabinet. It was only reasonable that the Panel report before the Minister and all other relevant information considered by the Minister was imputed to have been considered by the Cabinet. (at par.63)

"(at 64)...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 (CanLII) 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, ..."

The Court then quotes extensively from the press release. The press release summarizes the consultation process and stresses the importance of the project to both the Province of British Columbia and Canada, specifically in creating 10,000 direct person-years of employment, climbing to 29,000 person-years when indirect and induced jobs are considered. The announcement further points out that the project will provide clean renewable energy over the next 100 years, mitigating the growth of greenhouse gas emissions in Canada by preventing the discharge of between 34-76 megatonnes of CO2 equivalent. Finally, Minister Aglukkaq states in her announcement that there are over 80 legally binding conditions which B.C. Hydro must meet throughout the life of the project.



Stanley D. Berger

Partner

t: 416.864.7626  
sberger@foglers.com



Albert M. Engel

Partner

t: 416.864.7602  
aengel@foglers.com



Tom Brett

Partner

t: 416.941.8861  
tbrett@foglers.com



Yadira Flores

Associate

t: 416.365.3744  
yflores@foglers.com

With respect to the contradictory findings made by the Panel with respect to the justification of the project, the Court observed that the Cabinet's decision trumps the Panel's opinion:

"[59] In *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 (CanLII) [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."

This decision demonstrates that those wishing to challenge Cabinet decisions approving of projects with significant adverse environmental impacts, some of which may not be determined by a Joint Review Panel to be justifiable, face an uphill battle.

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