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BC Supreme Court upholds yet another decision of the BC Environmental Assessment Office

In a recent case where a decision of the BC Environmental Assessment Office ("EAO") was challenged, the BC Supreme Court has found in favour of the EAO and granted it considerable discretion in carrying out its functions under the BC *Environmental Assessment Act* (the "Act") and regulations. In *David Suzuki Foundation v British Columbia (Ministry of Environment),* 2013 BCSC 874, the BC Supreme Court dismissed the judicial review petition of two environmental groups, which sought, among other things, a declaration that an environmental assessment was required for a number of hydroelectric projects.

This case involved a proposal to construct 10 run-of-river hydroelectric power plants on tributary creeks to the Holmes River over an approximately 40 km distance. Each plant would have a generating capacity of less than 15 megawatts and would thus fall well below the 50 megawatt threshold at which an environmental assessment is required for hydroelectric projects under the *Reviewable Projects Regulation* (the "Regulation"). The EAO confirmed in a letter to the proponent that assessments were not necessary for each plant.

The David Suzuki Foundation and the Watershed Watch Salmon Society (the "Petitioners") argued that the plants had been treated as a single project by the proponent, and the EAO's decision to

treat them separately amounted to "project splitting" – a tactic that has been criticized by the Supreme Court of Canada in *Mining Watch Canada v Canada (Fisheries and Oceans),* 2010 SCC 2. However, the Court found that the proposed plants were not comparable to the facts or relevant legislation in the Mining Watch decision, which dealt with the federal environmental assessment agency's decision to reduce the scope of an assessment.

The Petitioners also argued that the EAO's confirmation that no assessment was needed was unreasonable because it failed to properly place the proposed individual plants within the context of the Act and Regulation, asserting that each of the plants must be considered a facility making up parts of a larger and reviewable project. This argument was based on the definitions of "project", "facility" and "hydroelectric power plant" in the Act and Regulation, and on the fact that the threshold criteria for hydroelectric power plants in the Regulation refers to a "new facility"; this interpretation, the Petitioners argued, is in line with the broad purposes of the Act. To this end, the proponent argued that although there was evidence all 10 plants need to be built for the development to be economical, there was no evidence that the plants could not operate separately – the plants are not "individual parts of an operation that needs the others in order to function" (para. 39). The Court, upon analyzing the language in the Act and Regulation, considered the terms "facility" and "project" and concluded that the decision provided to the proponent by the EAO clearly falls within a range of reasonable interpretations of the Act.

The Court went on to note that even if it found the EAO's decision to be unreasonable, it would have discretion to decline to grant a remedy under the *Judicial Review Procedure Act* and common law. In discussing this point, the Court noted that a balancing of interests favoured the proponent, who had invested considerable time and money into the proposed plants. In this regard, the Court stated as follows:

> [52] Although construction of the power plants has still not begun, Mr. Peterson deposes that Holmes Hydro has already spent approximately $2 million in developing its proposal. He said the additional costs of environmental assessment at this stage would be approximately $500,000, not including the cost of re-applying for water licenses and land tenure, and the project would be unlikely to proceed if faced with those additional costs. I emphasize here that Holmes Hydro relied on the EAO's advice that no assessment was required and followed the procedures requested or directed by other government agencies.
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> [53] In the circumstances, I find that the balance of convenience clearly favours Holmes Hydro and I would not grant the relief requested

This decision by the BC Supreme Court is one of a series of cases where courts have upheld the BC provincial environmental assessment process, never ultimately overturning an EAO decision. These decisions include the following:

- *Friends of Davie Bay v Province of British Columbia,* 2012 BCCA 293: the BC Court of Appeal gave deference to the EAO in interpreting the Act and confirmed that the production capacity of a mine project refers only to its intended capacity – not to its future potential capacity. The Court also confirmed that the standard of review that applies to EAO decisions about whether an environmental assessment is triggered is reasonableness.
- *Halalt First Nation v British Columbia,* 2012 BCCA 472: the BC Court of Appeal overturned a Chambers Judge's decision regarding the EAO's duty to consult and accommodate a First Nation with respect to a well project, finding that the duty had been met. The Court of Appeal made clear, among other things, that modifications to project design can be sufficient accommodation of aboriginal interests, that accommodation did not require the payment of compensation and that the duty to consult does not extend to potential future activities not included in the proposal under review.

- *Upper Nicola Indian Band v British Columbia (Environment),* 2011 BCSC 388: the BC Supreme Court found that the EAO's consultation of First Nations in connection with the environmental assessment of proposed transmission line from the interior of BC to the Lower Mainland and confirmed that past or ongoing impacts from past decisions or projects are not part of the duty to consult.
- *Nlaka'pamux Nation Tribal Council v Griffin,* 2011 BCCA 78: although the BC Court of Appeal granted a declaration that the EAO's procedural order should have formally included a tribal council, the Court did not find it appropriate to quash the order in all the circumstances of the case.
- *R.K. Heli-Ski Panorama Inc. v Glassman,* 2007 BCCA 9: a heli-skiing company sought judicial review of an environmental assessment certificate issued in respect of a proposed ski resort, alleging that the company had not been given a meaningful opportunity to be heard in the environmental assessment process. The BC Court of Appeal found that this right had been afforded to the company through the environmental assessment process and upheld the certificate.
- *Do RAV Right Coalition v British Columbia (Environmental Assessment Office),* 2006 BCCA: a citizens' group sought judicial review of an environmental assessment certificate in respect of the Canada Line construction project. The group argued that the consultation engaged in by the EAO regarding the method of construction was inadequate and failed to meet both the statutory and procedural fairness requirements. The BC Court of Appeal upheld the certificate, finding that the consultation opportunities were clearly adequate. The Supreme Court of Canada declined leave to the citizens' group to appeal the decision.
- *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74: the Supreme Court of Canada ruled that the aboriginal consultation undertaken by the EAO with respect to a mining project fulfilled the duty to consult and accommodate.

This line of cases is impressive and is evidence that the BC environmental assessment process is both robust and highly defensible. While major projects undergoing environmental assessment often receive significant attention, and at times may face threats of litigation, it is important to assess the risks of any such litigation against this line of cases.

by Robin Junger[1] and Brittnee Russell[2]

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a cautionary note