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No. 52 Fall 1995

The Newsletter of the Canadian Institute of Resources Law

The *Environmental Management Framework Agreement*: Reforming Federalism in Post-Referendum Canada

*by Steven A. Kennett**

Introduction

If an agenda for change to Canada's federal system takes shape in the aftermath of the Quebec referendum, it may well focus on the administration of federal and provincial powers rather than their constitutional underpinnings. The recent experience with constitutional stalemate, combined with political and fiscal factors, has pushed federal-provincial administrative agreements towards centre stage in Canada's seemingly interminable national unity drama.

Advocates of this approach see decentralization through intergovernmental administrative agreements as a way of squaring the constitutional circle: responding to Quebec's aspirations for greater autonomy without conceding special status or appearing to ignore the rest of the country. Opponents, in contrast, characterize this agenda as a provincial feeding frenzy at the expense of the federal government, good public policy and, ultimately, the ties that hold Canada together.

Environmental management is poised to become an important battleground for these conflicting views of federalism. On October 24, 1995, Canada's environment ministers agreed to release the second draft of the *Environmental Management Framework Agreement* and ten of its eleven schedules (collectively referred to as the EMFA). This agreement is intended to coordinate, rationalize, harmonize and, some would say, significantly decentralize environmental protection in Canada. In addition to proposing a radically new approach to jurisdictional issues in environmental management, the EMFA may serve as a template for renewed federalism and a microcosm of the broader debate about Canada's future.

The Environmental Harmonization Agenda

The EMFA's origins lie in a perception within government and industry[1] that regulatory duplication, inconsistent standards and reporting requirements, and overlapping approval processes are common problems in the environmental area. Environmental jurisdiction therefore became a focal point for a diverse set of policy issues.

According to the Canadian Council of Ministers of the Environment (CCME), these issues include: "concerns over the competitiveness of Canadian industry, serious reductions in government expenditures at all levels, and increased public concern about the public debt issue and government inefficiency."[2] Harmonization is intended to clarify roles and responsibilities with a view to improving accountability and allowing each level of government to better focus its environmental activities.[3] The EMFA's comprehensive approach to environmental management is also seen as a step forward from the current pattern of largely uncoordinated bilateral agreements and informal arrangements among governments.[4] The goal of reallocating responsibilities

Résumé

Le 24 octobre 1995, les ministres de l'Environnement du Canada ont publié le projet d'*Entente-Cadre Relative à la Gestion de l'Environnement* qui sera soumis aux commentaires du public. Cette entente non seulement propose une façon radicalement nouvelle d'aborder les questions de compétence en matière de gestion de l'environnement, mais peut aussi servir de modèle pour renouveler le fédéralisme et de microcosme du débat plus général sur l'avenir du Canada. Cet article décrit brièvement l'arrière-plan de cette entente et examine cinq questions importantes soulevées par l'entente, à savoir le rôle du gouvernement fédéral en matière de protection de l'environnement, l'effet sur les normes environnementales, la responsibilité, l'examen et le contrôle, et les ressources fiscales.

between the two levels of government is to be accomplished through administrative agreement, thereby avoiding the quagmire of constitutional reform.

Chronology of Harmonization

The harmonization initiative was endorsed at the conceptual level by the Council of Ministers of the Environment in November 1993.[5] Progress in the first 18 months was rapid. A partial draft of the EMFA, consisting of general provisions and four schedules (Monitoring, Environmental Assessment (EA), International Agreements and Compliance), was released following the ministerial meeting in November, 1994. At that meeting, ministers approved progress to date and directed officials to finalize the draft sections and scope out the remaining seven schedules by May 1995. A public consultation process was also initiated to complement the work of the National Advisory Group, which had been established to provide stakeholder input.

Intensive efforts resulted in completion of a revised draft, including the remaining seven schedules, for discussion at the ministerial meeting in May 1995. At this point in time, however, rapid progress came to a halt. Federal Environment Minister Sheila Copps expressed reservations about the initiative's overall direction and stated that provisions in the EA schedule would result in a loss of national perspective.

The federal government's apparent policy reversal on the EMFA caused considerable consternation among provincial representatives, but work on the agreement continued. Later in the summer, however, the federal government requested that the draft EMFA not be released and decided to put the entire harmonization process on hold.

As of November, 1995, the ultimate fate of the harmonization initiative is still uncertain. The ministerial meeting in October failed to resolve all outstanding issues, but the most recent draft EMFA, not including the EA schedule, was released for public review. This draft indicates the direction of harmonization to date.

The Draft EMFA

The October 1995 draft of the EMFA consists of the Framework Agreement and ten schedules. The Framework Agreement contains a preamble, definitions, objectives and principles, followed by a statement of federal and provincial interests in environmental matters. These interests are to be used in determining the roles and responsibilities set out in schedules and subagreements. In addition, a process for developing national environmental policies is briefly sketched out.

The Framework Agreement also includes a list of schedules, along with criteria to guide their development and implementation. Dispute resolution and fiscal matters are briefly addressed. General provisions affirm that the EMFA is not intended to alter the division of powers or aboriginal rights under the Constitution. Other topics covered include environmental standards, consistency of other agreements, and the interpretation and administration of the EMFA.

The EMFA adopts a functional approach to the detailed allocation of governmental roles. Environmental management functions are divided among the schedules, eleven of which are specified in the Framework Agreement. These functions are: monitoring; environmental assessment; compliance; international agreements; guidelines, objectives and standards; policy and legislation; environmental education and communications; environmental emergency response; research and development; state of the environment reporting; and pollution prevention.

The schedules follow a relatively uniform format. The scope of each schedule is stated, followed by definitions, objectives and principles. The division of roles between federal and provincial governments is set out next. Implementation and the development of national policies and programs (where appropriate) are then addressed. A variety of other provisions are also included, depending on the subject matter of the particular schedule. Finally, many of the schedules have appendices presenting the division of roles in tabular form, listing legislation, regulations and agreements that are affected by the schedule, and describing decision-making processes.

Principal Issues

The scope and complexity of the EMFA give rise, not surprisingly, to a broad range of issues. The most important of these are clear from the public consultations[6] and detailed commentary by environmentalists[7] on the partial draft EMFA released in December 1994. These areas of controversy provide a road map for the EMFA debate and highlight themes that resonate throughout other policy areas where federal-provincial administrative agreements are a possible instrument of reform. Five of these themes are briefly reviewed below.

(1) The Federal Role

Although the EMFA addresses the environmental management responsibilities of both levels of government, it is the resultant federal role that will generate the most controversy. The objective is clearly to redefine federal priorities, focusing on areas where the federal government has exclusive authority or which require a national perspective, while ceding responsibilities in other areas to the provinces. The first draft EMFA, however, was criticized as a wholesale federal abandonment of substantial areas of environmental regulation.[8]

Determining exactly what the post-EMFA federal role will entail is not a simple matter. The statement of federal interests in the Framework Agreement refers to national and transboundary environmental measures, conducting Canada's international environmental relations, environmental matters relating to federal lands, works and undertakings, the special relationship with Aboriginal people, technical and scientific leadership, working with provinces to protect "nationally significant ecosystems",[9] support of provincial programs, resolution of interjurisdictional environmental matters, and public participation.[10] This list covers most areas where one would expect a distinctive federal contribution to environmental protection.

The specific roles allocated to the federal government are set out in the schedules, a detailed examination of which is required to determine exactly how functions are to be divided. This issue is further complicated by the designation of certain roles as "national", defined as signifying an interest shared by both levels of government or one where shared decision-making is required or desired by the lead government.[11] In general, the federal roles reflect the interests noted

above, while delegating significant responsibilities for on the ground implementation of environmental functions to the provinces.

The EMFA is part of a broader debate about the appropriate federal role in environmental protection. This debate will also be fuelled by the House of Commons Standing Committee Report on the *Canadian Environmental Protection Act* (CEPA) – at once an indictment of inaction in the administration of the federal government's "flagship" environmental statute and a call for significantly increased federal environmental presence.[12] The federal government's response to the CEPA report and to public comments on the draft EMFA will be an important test of its willingness and ability to exercise environmental jurisdiction, its vision for federal-provincial relations in this area, and the extent to which it is prepared to match "green" rhetoric with action.

(2) Standards

The EMFA raises important questions about the relationship between quasi-constitutional and procedural aspects of administrative reform and substantive policy standards. Canada's constitutional division of powers is generally non-prescriptive in policy terms, enumerating and allocating powers without requiring that they be exercised in a particular way. The EMFA is quasi-constitutional in this sense. It specifies functional areas of responsibility but leaves substantive policies on any particular matter to be determined by the responsible government or, in some cases, through an intergovernmental process.

Critics have argued, however, that the EMFA will result in a lowering of environmental standards in Canada.[13] According to this analysis, the EMFA will precipitate a lowest common denominator approach to environmental regulation or, worse still, a "race to the bottom" as provinces seek to attract investment by reducing regulatory requirements, thereby creating "pollution havens".[14] Furthermore, it is argued, the federal government's authority to establish minimum national standards will be eroded, and the ability of provinces to raise standards will be constrained.[15]

An evaluation of the merits of this critique is beyond the scope of this article. It is noteworthy, however, that the Framework Agreement specifically states that measures and policies implemented in accordance with the agreement "will not prevent a Party from introducing more stringent environmental measures to reflect special circumstances or to protect environments or environmental values located within its jurisdiction."[16] Standards are also addressed in Schedule V, which establishes a national consensus-based process to develop guidelines and codes of practice.

On its face, the EMFA does not directly lower standards. Its indirect effects by way of the resulting incentive structure are difficult to predict, particularly since it is impossible to control for other significant fiscal and political influences that will come into play regardless of the EMFA. The substantive regulatory impact of the EMFA hinges on whether greater provincial autonomy will permit creative innovation leading to improved effectiveness and efficiency in environmental standards, or a progressive lowering of standards as provinces compete for economic development and succumb to pressure from powerful local interests.

Underlying the concern with standards, however, is a more general issue that is central to the administrative reform of federalism. The argument has been advanced that there is a federal responsibility to "ensure a minimum level of environmental quality for all Canadians."[17] This vision of federalism raises two important questions.

The first concerns the rationale for national standards: to what extent should standards imposed by the federal government restrict provincial governments' freedom to adjust their environmental policies in response to their own view of the public interest? On the one hand, provincial governments are democratically elected to legislate within their areas of constitutional competence. On the other, they may be less able to resist economic pressures for lower environmental standards and, in certain policy areas, the presence of economies of scale or the risk of beggar-your-neighbour policies suggests the need for a consistent national approach.

The second question concerns the constitutional and political limitations on the federal government: to what extent, and in what areas, does it have the power to guarantee minimum national standards? Several options are available. Where the federal government has exclusive jurisdiction or where functional concurrency exists, national standards can be set by direct regulation or by exerting leverage to bring provincial law and policy into line.[18] In areas of provincial jurisdiction, the federal spending power, in the form of conditional grants, has been used to set national standards. Finally, national standards might emerge from agreement among the provinces and the federal government. All of these options are possible under the EMFA, although extensive use of the spending power seems unlikely in the current fiscal climate.

The EMFA thus provides a case study regarding the rationale for national standards and the federal government's ability to implement them. Treatment of these issues in the environmental context could have implications for other policy areas where the appropriateness of national standards is being debated.

(3) Accountability

The realignment of federal and provincial roles through administrative agreement raises two concerns relating to accountability, both of which have surfaced in the EMFA debate. First, it is argued that the negotiation and implementation of federal-provincial agreements and the role of intergovernmental bodies, in this case the CCME, can remove important decision making from public scrutiny and political accountability.[19] Second, the delegation of certain functions to the provinces, notably in the areas of monitoring and enforcement, has been pointed to as eroding the federal government's accountability for its own environmental legislation.[20]

Accountability is addressed directly in the compliance schedule, where the principle is established that "the Parties will remain ultimately accountable for the enforcement of their own legislation, and will retain responsibility for compliance".[21] In addition, an annual national compliance report is to be prepared for the purpose of ensuring accountability and transparency.[22] Evaluation of compliance may be achieved using a national body of federal and provincial representatives, an indepen-

dent environmental auditor or commissioner, a national task force or parliamentary committee, or an independent audit by each jurisdiction.[23] Although the effectiveness of these measures remains to be seen, they affirm the importance of accountability in the vital areas of compliance and enforcement.

More generally, the EMFA has the potential to increase accountability by setting out more clearly the respective roles and responsibilities of each level of government. In place of the current situation of overlapping activity and largely uncoordinated bilateral agreements, the EMFA should clarify lines of accountability. Whether this promise is fulfilled will depend on the transparency of implementation, the effectiveness of public scrutiny, and the willingness of governments to live up to their obligations under the EMFA.

(4) Review and Monitoring

Reform of the scale envisaged in the EMFA inevitably leads to a degree of uncertainty regarding implementation and to the risk of unintended consequences. Furthermore, those who are suspicious of a hidden agenda are reluctant to take assurances regarding preservation of standards and accountability at face value. One response is to build in mechanisms for review and monitoring.[24]

The EMFA addresses these issues in a cursory manner. The Framework Agreement states simply that "the Parties will complete a comprehensive review of this Agreement including its effectiveness in achieving the Objectives" five years after it comes into force.[25] There is no indication of how this review will be conducted, what information will be made available, and how the public will be involved. Brief reference is also made to a Committee of the Parties that could provide a regular review of the operations of the Agreement.[26] Each schedule also provides for a review by the Parties after five years.

If significant reforms are to be accomplished through administrative arrangements, effective and transparent processes should be established to monitor the implementation of federal-provincial agreements. A periodic public review process with a degree of independence is desirable. The EMFA provisions do not rule out this approach, but they could be significantly strengthened to ensure that the review is not merely a self-serving exercise. For example, the accountability mechanisms proposed in the compliance schedule could be applied to review the operation of the EMFA as a whole.

(5) Fiscal Resources

Fiscal issues are clearly a driving force behind the administrative reform of federalism. Reducing duplication and overlap is promoted as a way of doing as much or more with fewer resources. The fiscal implications of administrative reform are also significant, since resource transfers both between and within governments will be required.

Fiscal concerns with the EMFA centre on whether it will result in overall savings and a redeployment of resources, or merely the down-loading of responsibilities on provincial governments that lack the resources and will to carry them out. This issue is particularly important given the significant disparities in fiscal capacity and technical expertise among the provinces. Critics argued that the first draft EMFA adopted a "one size fits all" approach, which threatened environmental quality in provinces with less developed environmental protection regimes.[27]

On this issue, the latest draft provides few answers. The Framework Agreement simply states that: "Where a function is transferred from one Party to another, appropriate resource arrangements may be made."[28] Each schedule also provides that "appropriate resource arrangements may be made" before it comes into force.

In many areas of federalism amenable to administrative reform, the federal government's presence has to a significant extent been based on its fiscal muscle. Given the apparent convergence of the deficit reduction and decentralization agendas, it remains to be seen whether the reallocation of responsibilities envisaged by agreements such as the EMFA will be matched by a transfer of resources or will result in significant net savings due to increased administrative efficiency. Where this is not the case and provincial governments are either unable or unwilling to fill the gap with their own resources, the level of government activity will decline.

Conclusion

If decentralization, rationalization and elimination of overlap and duplication are indeed the new watchwords of Canadian federalism, the EMFA appears to be on the forefront of change. Long-standing provincial sensitivities regarding the federal role in environmental and natural resource management and the intensive intergovernmental effort already devoted to the CCME harmonization initiative suggest that the EMFA may provide the federal government and the provinces with a high-profile opportunity to move quickly on the reform of federalism by administrative means.

Opposition will be fierce from environmental groups who see the EMFA as a cover for deregulation, federal abandonment, and the lowering of environmental standards. This critique will find support among those who look to the federal government as the guarantor of both substantive policies and a centralist vision of Canada.

The EMFA is thus worthy of close attention. Its immediate relevance is as a blueprint for a new federal-provincial division of responsibilities in the area of environmental management. The EMFA also has broader significance as a sophisticated example of what may be the new model for reforming Canadian federalism. As such, it fits within a broader strategic response to post-referendum politics, ongoing fiscal restraint (particularly at the federal level), and increasing provincial assertiveness in areas of overlapping jurisdiction.

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Notes

1. This perception is not generally shared within the environmentalist community, which sees regulatory gaps and a lack of adequate enforcement as the principal problem areas in Canadian environmental management. See, Shelley Kaufman, Paul Muldoon and Mark S. Winfield, *The Draft Environmental Management Framework Agreement and Schedules: A Commentary and Analysis* (March 1995) at p.50. This collection of papers is available from the Canadian Institute For Environmental Law and Policy and the Canadian Environmental Law Association, environmental advocacy groups based in Toronto.
2. CCME, *Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles* (undated), p.1.

3. Gerry Fitzsimmons, "Harmonization Initiative of the Canadian Council of Ministers of the Environment" (Paper presented to the 1995 IPAC National Forum) August 11, 1995, pp.6-7. Mr. Fitzsimmons is Director, Special Projects at the CCME Secretariat and is responsible for CCME work on the EMFA.
4. *Ibid.*
5. This description is based on, Fitzsimmons, *ibid*, at pp.8-17.
6. A discussion of outstanding issues is found in Fitzsimmons, *ibid* at pp.17-19. This paper also includes an Appendix summarizing major issues raised by the public, stakeholder groups and governments during consultations on the first draft EMFA.
7. For a detailed critique of the harmonization initiative and the first draft of the EMFA from an environmentalist perspective, see Kaufman, Muldoon and Winfield, *supra*, note 1.
8. Kaufman, Muldoon and Winfield, *supra*, note 1 at pp.50-51.
9. The Framework Agreement indicates in art. 1.1 that this term is to be defined.
10. Framework Agreement, art. 4.2.
11. Framework Agreement, art. 1.1.
12. House of Commons Standing Committee on Environment and Sustainable Development, *It's About Our Health! Towards Pollution Prevention* (Ottawa: June, 1995).
13. Kaufman, Muldoon and Winfield, *supra*, note 1 at pp.53-55.
14. *Ibid.*
15. *Ibid.*
16. Framework Agreement, art. 9.3.
17. Kaufman, Muldoon and Winfield, *supra*, note 1 at p.54.
18. Leverage can be exerted by dangling the carrot of suspending federal regulation, as illustrated by equivalency agreements under CEPA, or by delegating functions or establishing joint processes contingent on certain criteria, as provided for in the *Canadian Environmental Assessment Act.*
19. Franklin S. Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection" in Steven A. Kennett, ed., *Law and Process in Environmental Management* (Calgary, CIRL, 1993) p.254.
20. Kaufman, Muldoon, and Winfield, *supra*, note 1 at pp.52, 54.
21. Schedule III, art. 4.1.
22. *Ibid.*, art. 9.1.
23. *Ibid.*, art. 9.4.
24. See, Kaufman, Muldoon and Winfield, *supra*, note 1 at pp.54, 57.
25. Framework Agreement, art. 9.13.
26. *Ibid.*, art. 9.6 and annotation.
27. Kaufman, Muldoon and Winfield, *supra*, note 1 at p.52.
28. Framework Agreement, art. 8.1.

Environmental Assessment in Alberta Meets the Rule of Law

*by Steven A. Kennett**

Résumé

Comme la plupart des lois canadiennes sur l'évaluatuon environnementale, la loi albertaine *Environmental Protection and Enhancement Act* (EPEA) octroie des pouvoirs administratifs discrétionnaires étendus. Il importe donc d'examiner la portée des contraintes juridiques établies pour guider l'exercice de ces pouvoirs discrétionnaires. Cette question a été soulevée directement dans un jugement récent infirmant, au motif qu'elle n'était manifestement pas raisonnable, une décision du Directeur des évaluations environnementales de ne pas exiger un rapport d'évaluation environnementale en vertu de l'EPEA. Cet article décrit les faits et le raisonnement suivi par le juge dans la cause de la Limestone Valley, et examine sa portée pour l'évaluation environnementale.

Introduction

Alberta's environmental assessment (EA) regime for non-energy[1] projects is a multi-stage process. The *Environmental Protection and Enhancement Act*[2] (EPEA) provides for an initial review, a screening report, and a more comprehensive environmental impact assessment report (EIA report).[3] When the *Natural Resources Conservation Board Act*[4] (NRCB Act) applies to a project, public hearings may also be held. The procedure for determining how far a given project should progress through this process is central to the operation of EA.

The EIA report is the most detailed stage of review under EPEA. An EIA report is mandatory for certain classes of activities specified by regulation.[5] For non-mandatory activities, however, statutory decision makers have considerable discretion to determine whether this level of EA scrutiny is required.[6] The extent to which legal constraints guide the exercise of this discretion is therefore an important issue for the EA regime.

This issue was raised directly in the Limestone Valley case,[7] decided by Madam Justice C.L. Kenny of the Court of Queen's Bench on October 27, 1995. The case involved an application for judicial review of decisions by the Director of Environmental Assessment (the Director) and the Minister of Environmental Protection (the Minister) not to order an EIA report. Madam Justice Kenny's finding that the Director's decision was patently unreasonable illustrates the substantive content of the rule of law as applied to the administration of EA in Alberta.

The Facts

The case concerns a proposal by BHB Canmore Ltd. (BHB) to construct a resort in the Bow Valley near the town of Canmore. The resort plan includes an 18-hole golf course, a clubhouse, a parking lot, maintenance facilities, a 150-unit recreational vehicle park, and a 100-person lodge. The site is bordered by the Canmore Flats, Wind Valley and Bow Flats Natural Areas[8]

The site's proximity to Wind Valley is significant from ecological and regulatory perspectives. Wind Valley was part of the proposed Three Sisters development, a residential and recreational project reviewed by the NRCB in 1992. The NRCB approved much of the Three Sisters project, but refused to allow development in Wind Valley, stating that:

Wind Valley is an exceptionally fertile and diverse area and is rich in species of animals and plants. It is of particular importance for large carnivorous species such as grizzly bear, wolverine and black bear and also includes critical habitat for bighorn sheep and elk. The Wind Valley is an important route for movement of all these species between Banff, the Bow Valley and the north, and Kananaskis Country and the south.[9]

The NRCB also recognized the significant cumulative effects of development in the Canmore area and recommended better coordination of planning and development controls.[10] Since the proposed Limestone Valley site was directly north of the mouth of Wind Valley, the NRCB conclusions in the Three Sisters review were of obvious

relevance in assessing its environmental impacts.

The EA process began in January 1991, when BHB was ordered to prepare an EIA report pursuant to s. 8 of the *Land Surface Conservation and Reclamation Act*[11] (LSCRA). One consequence of this order was to trigger NRCB jurisdiction. By March, 1993, a draft report had been submitted to the Director. The Canadian Parks and Wilderness Society (CPAWS) and the Bow Valley Naturalists (BVN) provided comments, identifying impacts on the north-south wildlife corridor and cumulative effects as significant concerns.

In December 1993, the Director informed BHB that the EIA report was incomplete and more information was required. This EIA report, however, was never completed. Instead, BHB presented a new proposal which, as Madam Justice Kenny noted, had a different name but the same location and basic components as the original project.[12]

A significant change in the legal regime occurred on September 1, 1993, when the LSCRA was replaced by EPEA. Now under the EPEA EA process, the "new" proposal went through the initial review and a screening report was prepared. Again, both CPAWS and BVN provided comments, reiterating their concerns regarding the wildlife corridor and cumulative effects. On February 1, 1995, the Director informed BHB that the screening stage had been completed and no EIA report would be required. When the Minister refused requests by CPAWS and BVN to exercise his discretion and order an EIA report, they filed the application for judicial review.

The Statutory Regime

The sections of EPEA relevant to this case set out the procedure to be followed when the initial review of a proposed activity results in a decision that further assessment is necessary. Section 43(1) requires that the Director prepare a screening report and then decide whether to order an EIA report. This section provides no guidance on how that discretion is to be exercised. Pursuant to s. 44, however, the Director is required to "give due consideration to all statements of concern that have been submitted" when making his decision under section 43(1)(b). If the Director decides not to order an EIA report, the Minister may override this decision "if he is of the opinion that ... [an EIA report] is necessary because of the nature of a proposed activity" (s. 45).

An order to prepare an EIA report has two significant consequences. First, it results in a detailed project review which must address, unless the Director provides otherwise, the issues listed in s. 47 of EPEA. These issues include: potential environmental impacts, including *cumulative, regional, temporal and spatial considerations*; the significance of these impacts; and planned mitigation measures. Second, for several classes of projects (including recreational or tourism projects), it triggers application of the NRCB Act. The decision not to order an EIA report therefore precluded a public review of BHB's proposal before the NRCB.

The Decision

Madam Justice Kenny began by considering the appropriate standard of review. Her conclusion was that she was "entitled to review only those matters which lie outside the Director's area of expertise, unless a decision within that area was patently unreasonable or the Director acted unreasonably in evaluating the evidence to reach that decision".[13] She also outlined the policy rationale for EA and quoted the statutory purposes in EPEA.

The judgment then turned to the four issues raised by the applicants. First, Madam Justice Kenny rejected the argument that the NRCB retained jurisdiction over the project by virtue of the initial order for an EIA report under the LSCRA. Second, she held that the applicants were not entitled to an EIA report and consequent NRCB hearing on the basis of their legitimate expectations regarding opportunities for consultation and public input into decision making.

The third issue was whether the resort was a mandatory activity under EPEA. Madam Justice Kenny rejected "a legalistic and narrow interpretation" of the criteria for mandatory activities.[14] Citing the Alberta Court of Appeal's recognition "of the need to encourage the liberal assessment of environmental concerns", she stated that:

A liberal assessment of environmental concerns in this case requires that the objectives of environmental protection statutes and the adoption of a construction which considers the cumulative effects of development in environmentally sensitive areas be followed.[15]

Madam Justice Kenny concluded that the resort would satisfy the two conditions required for a mandatory tourism facility: annual visitation of 250,000 people and location immediately adjacent to a natural area. However, she refused to overturn the Director's decision on this issue on the grounds that, while incorrect, it was not patently unreasonable.

Finally, Madam Justice Kenny considered whether the Director had breached his duty under s. 44 to "give due consideration to all statements of concern" submitted at the screening stage. She noted that the applicants' concerns regarding impacts on the north-south wildlife corridor and cumulative effects were also raised in an internal Alberta Environmental Protection memorandum, written by the Director of the Eastern Slopes Region, Division of Fish and Wildlife Services in response to the Screening Report.[16]

Madam Justice Kenny found that the Screening Report and the letter to the applicants announcing the Director's decision failed to disclose "any evidence ... to contradict the concerns regarding the north-south wildlife corridor and cumulative effects".[17] She concluded, therefore, that the Director had not satisfied his statutory obligation to give due consideration to the applicants' statements of concern and that his decision not to order an EIA report was patently unreasonable. On this basis, she ordered that an EIA report be prepared.

Discretion and the Rule of Law

The Limestone Valley decision addresses the substantive content of the Director's obligation to give due consideration to concerns raised at the screening stage when deciding whether or not to order an EIA report. In particular, it indicates that where uncontradicted evidence of significant environmental effects is adduced at the screening stage, a decision not to order an EIA report is patently unreasonable. The broader issue raised by this judgment is whether there are other circumstances under which the Director is effectively obliged to order an EIA report if his or her

decision is to withstand legal scrutiny. To answer this question, one must consider the legal reasoning that led to the finding of patent unreasonableness. This reasoning is rooted in the statutory context within which the Director's discretion is exercised. At the heart of Madam Justice Kenny's judgment is the fundamental inconsistency between the Director's decision not to order an EIA report and the policy objective, statutory purposes and legislative scheme under EPEA.

Madam Justice Kenny addressed the policy issue by quoting from Mr. Justice LaForest's judgment in *Friends of the Oldman River* v. *Canada*.[18] According to Mr. Justice LaForest, a "fundamental purpose" of EA is the "early identification and evaluation of all potential environmental consequences of a proposed project".[19] He also described EA as "an integral component of sound decision-making".[20]

This policy objective is reflected in the statutory purposes in EPEA. For example, s. 38 states that the purposes of EA include predicting environmental consequences of proposed activities, assessing plans to mitigate adverse impacts, and providing for public involvement.

Finally, the purpose of the EIA report, as indicated by s. 47 of EPEA, is to examine proposed projects in more detail in light of issues and gaps in information that may emerge from the screening stage. As noted above, the matters listed include a description of potential environmental effects (including cumulative and regional considerations), an analysis of the significance of these effects, and the consideration of mitigation measures.

A purposive interpretation of Alberta's EA regime thus highlights the following themes: provision of information regarding environmental effects, attention to mitigation measures, and meaningful public involvement. To what extent, then, does this context translate into legal constraints on the Director's discretion under s. 43(1)(b) of EPEA?

On the Limestone Valley facts, the constraint is clear. Uncontradicted concerns at the screening stage render a refusal to order an EIA report patently unreasonable. It would be a triumph of form over substance, however, if the Director could avoid judicial review simply by paying lip service to concerns such as those raised in response to the Limestone Valley Screening Report. If these concerns cannot be addressed in a reasoned manner on the basis of credible information available at the screening stage, according them due consideration would require further scrutiny of the project by means of an EIA report. Madam Justice Kenny's decision to order an EIA report directly, as opposed to referring the matter back to the Director for reconsideration, indicates that in her view the *only* reasonable decision open to the Director was to order an EIA report.

There are two other circumstances where a failure to order an EIA report might be subject to judicial review. The first is when there is significant uncertainty regarding the nature or extent of a project's environmental effects. For example, where there is credible and conflicting evidence on these matters at the screening stage, a decision that no further study is required should arguably include a complete and reasoned explanation of why one view was accepted over the other. It may well be patently unreasonable to terminate an EA process immediately following screening unless the Director can demonstrate reasonable certainty regarding the project's likely effects.

Second, a decision not to order an EIA report might be vulnerable if there is evidence of significant public concern. The Director is undoubtedly entitled to terminate the EA process if public comments are frivolous or vexatious. However, if they are genuine and substantial, such a decision might be patently unreasonable unless the Director provides a reasoned explanation for dismissing those concerns.

In practice, it may not be easy to establish patent unreasonableness on the grounds of uncertainty or significant public concern. Nonetheless, the possibility of litigation may encourage the Director to provide at least a clear account of the evidence and reasoning supporting a conclusion that an EIA report is not required. Anything less would not satisfy the obligation to give due consideration to public concerns, nor would it be consistent with the purpose and structure of the EA regime.

Conclusion

The immediate significance of Madam Justice Kenny's judgment, assuming that it is not successfully appealed, is that the Limestone Valley resort will not be approved without a more comprehensive EA process, likely including an NRCB hearing. The decision may also lead to greater care in the administration of EPEA's EA provisions. The finding that the Director acted in a patently unreasonable manner is a severe judicial reprimand. Decision making under EPEA will certainly be subject to increased public scrutiny, and possibly more frequent litigation, given Madam Justice Kenny's willingness to review the exercise of even broadly worded discretionary powers.

The standard of patent unreasonableness remains, of course, a high threshold for judicial review. As Madam Justice Kenny noted, a statutory decision maker acting within his or her area of expertise is entitled to be wrong.[21] In common with most environmental legislation in Canada, EPEA's highly discretionary EA regime provides plenty of scope in this regard. Its effectiveness will inevitably depend in large measure on the priorities, judgment and good faith of officials and ministers whose decisions will generally be accorded curial deference by the courts.

Judicial deference does not, however, entitle statutory decision makers to exercise their discretion in an unreasonable manner. The reasonableness, and hence legality, of decisions should be judged in light of the policy objectives, statutory purposes, and internal coherence of the authorizing legislation. Where a decision is arbitrary in the sense of being clearly inconsistent with a purposive interpretation of the relevant statutory scheme, the courts can and should intervene. The Limestone Valley case illustrates this principle in action, bringing EA in Alberta face to face with the rule of law.

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Notes

1. Energy projects are subject to a different process which falls, in large measure, under the auspices of the Alberta Energy and Utilities Board.

2. S.A. 1992, c. E-13.3.
3. See EPEA, ss. 42, 43(1)(a), 43(1)(b), 45, 46, 47.
4. S.A. 1990, c. N-5-5.
5. EPEA, s. 42(1)(a); *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93, Schedule 1.
6. EPEA, ss. 43(1)(b), 45.
7. *Bow Valley Naturalists Society and Canadian Parks and Wilderness Society (Alberta)* v. *The Honourable Ty Lund, Minister of Environmental Protection, Robert Stone, Director of Environmental Assessment and BHB Canmore Ltd.* (27 October, 1995) Action No. 9501 10222 (Q.B.).
8. These areas are established pursuant to the *Wilderness Areas, Ecological Reserves and Natural Areas Act* R.S.A. 1980, c. W-8.
9. G.J. DeSorcy, G.A. Yarranton, C.H. Weir and C. Dahl Rees, *Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta*, NRCB Decision Report # 9103, November, 1992, p.13-3.
10. *Ibid*, pp.12-2 - 12-3
11. R.S.A. 1980, c. L-3.
12. Limestone Valley judgment, p.1
13. Limestone Valley judgment, p.9. Judicial *dicta* relevant to defining "patently unreasonable" are cited by Madam Justice Kenny.
14. Limestone Valley judgment, p. 22
15. *Ibid*, pp.23-24
16. Madam Justice Kenny quotes the key paragraphs from this memorandum at p.26 of her judgment.
17. *Ibid*, p. 26.
18. [1992] 1 S.C.R. 3.
19. *Ibid*, at p.71; quoted by Madam Justice Kenny at pp.11-12 of her judgment.
20. *Ibid.*
21. Limestone Valley judgment, pp.8, 24.

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Resources
No. 52 Fall 1995

Resources is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newsletter's purpose is to provide timely comments on current resources law issues. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. *Resources* is mailed free of charge to more than 5,400 subscribers throughout the world. (ISSN 0714-5918) *Editor:* Nancy Money

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