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Nuisance Claims May Now Be Easier to Prove

St. Lawrence Cement Inc. v. Barrette, 2008 SCC 64

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On November 21, 2008, the Supreme Court of Canada ordered St. Lawrence Cement Company (SLC) to pay $15 million in damages to nearby neighbours for "excessive annoyance" even though the company complied with all applicable regulations and standards.[1] While this ruling applies specifically to Quebec – which has a distinct Civil Code that differs from the common law practiced in the rest of Canada – some broad principles in the decision could have far-reaching implications all across Canada, particularly for nuisance claims.

Facts

The unanimous judgment by the Supreme Court puts an end to a long-running battle between SLC and people living near its plant in Beauport, Quebec. In 1994, following years of complaints to the Minister of the Environment, a group of over 2,000 residents initiated a class action suit, alleging that the disturbances caused by SLC's plant due to noise, smoke and dust were abnormal and excessive. Even though the company shut down the plant in 1997 after spending over $8 million between 1991 and 1995 to install new dust collectors for its kilns, the class action remained a live issue.

Decision

In its decision, the Supreme Court recognized that SLC did not commit any fault in the performance of its activities. However, it held that the company was still liable on the grounds that its activities caused "abnormal or excessive annoyances to the neighbourhood" in accordance with the *Quebec Civil Code* (*QCC*).[2]

Specifically, article 976 of the *QCC* sets a limit on property rights by providing that a landowner may not impose abnormal or excessive annoyances on its neighbours, but that limit depends on the results of an act committed by an owner, not on an owner's conduct. The Court found the *QCC* required no proof of faulty behaviour to establish the liability of an owner who caused excessive neighbourhood annoyances.

In other words, despite SLC's efforts to comply with the relevant standards in operating its plant, its emissions caused abnormal annoyances for its neighbours and it was therefore civilly liable under the *QCC*. This is termed "no fault liability," meaning that the liability focuses on the harm suffered by the victim rather than on the conduct of the person who caused the harm.

As examples of what the Court found to be abnormal and excessive annoyances, many residents had to wash their cars, windows and garden furniture frequently and could not enjoy their property due to dust deposits from the plant. This led to considerable effort associated with maintenance and painting in order to use and enjoy their outdoor spaces. The Court also found that the plant's sulphur emissions, smoke, odours and noise were

"beyond the limit of tolerance neighbours owe to each other according to the nature and location of their land."[3]

Broader implications

Even though this decision specifically considers liability issues for neighbourhood disturbances under Quebec's civil law, it may have a broader application to the rest of Canada for two reasons.

First, the Court found that a no-fault liability scheme is consistent with general policy considerations, such as the objective of environmental protection and the application of the polluter pays principle. Thus, this reasoning is not simply limited to the *QCC.*

Second, the Court found that the concept of no-fault liability for neighbourhood disturbances is consistent with the approaches taken in Canadian common law. For example, at common law one can sue in nuisance for unreasonable interference with the use or enjoyment of land. Whether the interference results from intentional, negligent or no-fault conduct is of no consequence to the claim provided that the harm can be characterized as a nuisance. The only requirements are that the interference must be intolerable to an ordinary person[4] and substantial, which means that compensation will not be awarded for trivial annoyances.

Thus, for citizen groups, this decision could form the basis for neighbours to sue companies that are causing "excessive" environmental annoyances in their neighbourhoods in claims of nuisance. Further, a common defence raised in nuisance actions is the defence of statutory authorization; in effect, if the government authorized the offensive activity (by issuing an approval or permit to do it), then the company should not be found liable in nuisance. This decision may make this defence harder to prove, since SLC was held liable even though it followed the environmental regulations and standards pertaining to its industry.[5]

For industry, this decision sends a clear message that companies must employ a high level of environmental due diligence in their operations in order to avoid being sued by their neighbours. Simply relying on complying with the standards of the day may no longer be good enough.

[1] *St. Lawrence Cement Inc. v. Barrette,* 2008 SCC 64.
[2] *Civil Code of Québec*, R.S.Q. c. C-1991.
[3] *Supra* note 1 at para. 95.
[4] This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity.
[5] *Supra* note 1 at paras. 87-92.

Comments on these articles may be sent to the editor at elc@elc.ab.ca.

Joint Review Panels: Considering Environmental Impacts of New Nuclear Power Projects

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Introduction

The possibility of nuclear power being used in Alberta, either in conjunction with oil sands production or generally as a source of electricity, continues to be a topic of interest.[1] Previous issues of *News Brief* broadly described the constitutional jurisdiction of the federal Canadian Nuclear Safety Commission (CNSC) to regulate nuclear power plants and provided a high level introduction to CNSC processes.[2] The purpose of this article is to describe the joint review panel (JRP) process that the CNSC has recently proposed for the consideration of environmental impacts of the Ontario Power Generation (OPG) project in the municipality of Durham, Ontario.[3] This process should interest Albertans as it may foreshadow the approach that the CNSC may take in considering the impacts of the proposed Bruce Power nuclear power plant in Alberta.

Jurisdiction to establish a JRP

The jurisdiction to establish a JRP is found in section 40 of the *Canadian Environmental Assessment Act* (*CEAA*), which provides that where the referral of a project by the federal Minister of Environment (Minister) to a review panel is required or permitted under *CEAA*, the Minister may enter into an agreement with a "jurisdiction" that has powers, duties or functions related to the assessment of the environmental effects of the project.[4] This agreement relates to the joint establishment of a JRP and the manner in which the environmental assessment is to be conducted by the JRP.[5] Albertans are familiar with JRPs as they have been used most commonly in respect of oil sands projects. Those panels were comprised of provincial and federal regulators each with the responsibility to conduct an environmental assessment of the proposed oil sands projects. However, an agreement of this sort need not be between the Minister and a provincial government or agency. It may also be between the Minister and a federal agency.

The parties to the draft agreement to establish a JRP for consideration of the environmental impacts of the proposed OPG project are the Minister and the CNSC. The Ontario government is not a party to the agreement. The draft agreement in respect of this project is substantially identical to an earlier agreement entered into by the parties to consider a nuclear power project application submitted to the CNSC by Bruce Power in respect of a new nuclear power plant to be located in Kincardine, Ontario.[6] The Ontario government was not a party to that agreement either.

Ontario's *Environmental Assessment Act* requires that an environmental assessment be conducted in respect of all public sector projects, unless there is a statutory exemption that is applicable.[7] The Ontario government passed a regulation that had the effect of exempting nuclear power generation projects from the requirement to be assessed under the *Environmental Assessment Act.*[8]

Establishing the JRP

The draft agreement provides that the JRP will consist of three members. Two of the members will be appointed by the CNSC President with the approval of the Minister. The Minister will propose to the President a candidate as a third member of the JRP. The President must approve of this candidate, who may also serve as a temporary member of the Commission. This process gives the President a significant amount of power in terms of constituting the JRP. In fact, the Minister is not able to appoint even a single JRP member free of influence from the President of the CNSC.[9] *CEAA* establishes a different process, requiring that any agreement to establish a JRP must provide, among other things, that "the Minister shall appoint or approve the appointment of the chairperson or appoint a co-chairperson and shall appoint at least one other member of the panel."[10]

The significant control of the CNSC President over the population of the JRP raises concerns about a potential lack of independence. This is because the CNSC and Atomic Energy of Canada Limited (AECL), a federal Crown corporation involved in the development of nuclear energy, both answer to the federal Minister of Natural Resources. The International Atomic Energy Agency's Nuclear Law Handbook discusses, in detail, the principle of independence and states that:[11]

> [n]uclear law places particular emphasis on the establishment of a regulatory authority, whose decisions on safety issues are not subject to interference from entities involved in the development or promotion of nuclear energy.

The JRP Agreement also provides for the establishment of a Secretariat, formed of professional, scientific, technical or other Canadian Environmental Assessment Agency and CNSC personnel necessary for the purposes of the review. The Secretary of the CNSC will act as Secretary to the JRP and as a co-manager of the Secretariat. The CNSC will work closely with the JRP and the Secretariat, both of which will operate out of CNSC offices.[12] The closeness of this relationship raises additional concerns about the impartiality of the JRP members.

JRP timeline

The CNSC will release draft Environmental Impact Statement (EIS) Guidelines in respect of the OPG project and will, after public comments are received, issue the final EIS Guidelines. OPG will prepare the EIS and submit it to the JRP. The EIS will be announced and a maximum six month period for review and public comments will be allowed. While the JRP is able to require more information from the applicant, intervenors are not. Once the JRP is satisfied that the EIS and any subsequent information received from the proponent conforms with the EIS Guidelines, the JRP will issue a notice of hearing 90 days prior to the hearing.

JRP hearing procedure

Part III of the Draft Terms of Reference (TOR) for the JRP of the OPG project describe the procedure that the JRP would follow. These procedures are very similar to those established in the CNSC Rules of Practice. Significant elements of the proposed procedure are as follows: [13]

- timelines will be established for presentations to the JRP;

- each presentation will be followed by a question and answer period led by the JRP, followed by questions from other intervenors;

- questions will be directed through the JRP Chair who may subsequently allow a participant to put questions directly to the presenter.

The TOR calls for meaningful and timely participation by the public and Aboriginal groups and participant funding will be made available pursuant to the requirements of *CEAA*.

What this could mean for an Alberta application

One would expect that the Minister and the CNSC would be parties to any JRP Agreement struck in respect of an Alberta project. However, it is unclear whether the government of Alberta would also be a party to such a JRP. The form of agreement entered into by the Minister and the CNSC to establish joint review panels in respect of the Bruce and OPG applications might be used in Alberta.

One possible difference between the environmental assessment of a project in Alberta and Ontario is that Ontario has a specific regulation in place exempting electricity projects from the requirement to be assessed under the provincial environmental assessment act. Currently, there is no such express exclusion in Alberta. The *Environmental Protection and Enhancement Act*[14] and *Environmental Assessment* (*Mandatory and Exempted Activities*) *Regulation*,[15] which do not expressly refer to nuclear power generation, suggest that a provincial environmental assessment may be required.[16]

If a JRP agreement and TOR like the ones used in Ontario were used in Alberta, it would contain procedures that are quite different than those used in JRPs between federal authorities and the Energy Resources Conservation Board (ERCB) in respect of oil sands. Albertans accustomed to participating in federal/ERCB joint review hearings or hearings of the ERCB alone would find their rights of participation more limited under a CNSC/Canadian Environmental Assessment Agency Joint Review.

The Bruce Power application for a new nuclear power plant in Alberta is in the process of being reviewed by the CNSC. No specific information has been released about the state of that review or the timeline for the environmental assessment. The Government of Alberta has established an expert panel to consider the possibility of nuclear power being added to Alberta's energy mix and to prepare a comprehensive report on the matter.[17]

[1] Chris Turner, "The Big Decision" *Alberta Views* 11:8 (October 2008) 26.
[2] Dean Watt, "Nuclear Power for the Oil Sands: A Regulatory Framework" *Environmental Law Centre News Brief* 22:1 (2007) 1, online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/NuclearPower.pdf>; Dean Watt, "Action Update: Nuclear Energy-Siting Concerns" *Environmental Law Centre News Brief* 22:3 (2007) 12, online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/ActionUpdate-NuclearEnergy.pdf>.
[3] Federal Minister of the Environment and the Canadian Nuclear Safety Commission (CNSC), *Draft Agreement to Establish a Joint Review Panel for the New Nuclear Power Plant by Ontario Power Generation (Darlington) Within the Municipality of Durham, Ontario (September 2008)*. Online: Canadian Nuclear Safety Commission <http://www.cnsc.gc.ca/eng/pdfs/Draft_JRP_Agreement_Darlington_e.pdf> [Draft JRP Agreement].
[4] S.C. 1992, c. 37, s. 40(1). A jurisdiction is defined to include, among other things, a federal authority and any other agency or body established pursuant to an Act of Parliament or the legislature of a province having powers, duties or functions in relation to an assessment of the environmental effects of a project. The CNSC is a federal authority.

[5] *Ibid*., s. 40(2).
[6] The final JRP Agreement and Terms of Reference for that project have been released and the period for public comment has commenced. Materials can be found on the CNSC's website. Online: Canadian Nuclear Safety Commission <http://www.nuclearsafety.gc.ca/eng/mediacentre/releases/news_release.cfm?news_release_id=326>.
[7] *Environmental Assessment* Act, R.S.O. 1990, c. E.18, ss. 3 nad 3.2. OPG is a provincial Crown Corporation. The OPG project is a public sector project.
[8] *Electricity Projects Regulation*, Ont. Reg. 116/91.
[9] Environmental groups expressed concern about the apparent control of the CNSC over the appointment process when the JRP agreement for the Bruce Power nuclear project was released in the summer of 2008. The final JRP agreement was not changed in response to those comments and the current draft OPG JRP agreement uses the same language.
[10] *CEAA*, *supra* note 4, s. 41(a).
[11] International Atomic Energy Agency, "Nuclear Law Handbook" (Vienna, International Atomic Energy Agency, 2003) at 9; online: International Atomic Energy Agency, <http://www-pub.iaea.org/mtcd/publications/PDF/Pub1160_web.pdf>.
[12] Draft JRP Agreement, *supra* note 3, s. 5. The Canadian Environmental Assessment Agency shall appoint the other co-manager of the Secretariat.
[13] See Draft JRP Agreement, *ibid*. at Appendix.
[14] R.S.A. 2000, c. E-12.
[15] Alta. Reg. 111/93.
[16] *Ibid*., Schedule 1, s. (k). An environmental assessment is mandatory for the construction, operation or reclamation of a thermal electrical power generating plant that uses non-gaseous fuel and has a capacity of 100 megawatts or greater.
[17] Alberta Government, News Release, "Expert panel to develop comprehensive research paper on nuclear power" *(*23 April 2008*)*, Online: Alberta Government < http://alberta.ca/ACN/200804/233657C6EDEA5-9B60-24AA-27EAA9EF9AB2048A.html>.

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Court of Appeal Confirms Regulation is of Limited Use

Canada (Fisheries and Oceans) v. MiningWatch Canada, 2008 FCA 209

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The relevance of the *Comprehensive Study List Regulation*[1] has been consistently put in question by a string of federal court decisions related to interpretation of the *Canadian Environmental Assessment Act*[2] (*CEAA*). The Court has consistently found that the scoping power of the responsible authority under the Act is absolute when defining what a "project" is under the legislation. The breadth of this scoping power, when considered in conjunction with the enumerated activities in the comprehensive study list, results in several questions about the logic of this approach to federal environmental assessments and may justify revisiting the legislation.

Canada (Fisheries and Oceans) v. MiningWatch Canada (*MiningWatch*) is the most recent case confirming the ability of federal authorities to use their discretion to define what projects are for the purpose of *CEAA*. The Court of Appeal decision overturned the trial judge's approach (discussed previously in *News Brief*[3]) and followed the previous Federal Court decision dealing with the TrueNorth oilsands assessments.[4]

The Court of Appeal in *MiningWatch* held that reference to a "project" in *CEAA* will almost invariably be qualified by reading in "as scoped" by the responsible authority. This overturned the approach of the Trial Division in this case, and appears to go against the plain reading of section 21 of *CEAA* which was directly considered by both courts. Section 21(1) states:

> Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

Reading in "as scoped" not only nullifies the relevance of the word "described" in this provision, it also effectively removes any mandatory public participation. By scoping a project out of the list, the government avoids the mandatory duty placed on it in section 21(1).

The Court of Appeal's logic is put in further question when one considers the projects enumerated in the comprehensive study list itself. The list includes a variety of mining and industrial projects that are defined by virtue of being a specific size or production capacity. The difficulty with the Court's approach to the "scoping" discretion is that it has focused on the constitutional basis of scoping and indicated the ability of the government to limit the scope of a defined project to the aspect over which they have constitutional jurisdiction. The result is that project size or production rates and related impact on the environment are completely irrelevant. Practically, all the list provides is discretion for the federal government to scope the

project to undertake a comprehensive study in certain instances. When this will occur is an open question and a proponent of an activity may find minimal need to rely on the regulation itself. Rather, it is the scoping decision that will determine what environmental assessment track the project will be on. To further add to the confusion, some listed projects likely cannot be "scoped out" of a comprehensive study; for instance, projects related to nuclear energy production.

A string of judicial interpretations has effectively allowed federal departments to call an apple an orange, with the results of less detailed environmental assessments being conducted for projects with a high probability of having significant environmental effects and a reduction in public participation in the process. Further, the approach creates an interesting dichotomy between the approach to the scoping decision of the government and the regulatory approach based on an activity's production or size. It appears that the former approach is guided substantially by constitutional jurisdiction and justifying the narrowed scoping in this manner. In contrast, the approach taken in the regulation itself is largely blind to constitutional constraints.

The latter approach is in line with the purpose of assessing the significance of environmental effects while the former limited scoping approach appears focused solely on potential inefficiencies and possible overlap with provincial assessment processes. However, these provincial assessment processes are rarely evaluated for their efficacy and feared duplication of provincial assessments remains largely unsubstantiated.

The statutory construction of *CEAA* could have been simplified by providing the Minister of Environment the discretion to order a comprehensive study as opposed to creating regulations of dubious relevance. Similarly, if the intent was to limit the meaning of "project" to that as scoped by the responsible authority, the drafters could have simply added that phrase. Instead the plain reading of the Act appears to be ignored with the judicial interpretation resulting mainly in increased efficiency in environmental assessment processes. The end result may be a subversion of the purpose of environmental assessment by denying the public its right to participate and by undermining a rigorous evaluation of methods of avoiding or mitigating significant environmental effects.

[1] SOR/94-638.
[2] S.C. 1992, c. 37.
[3] Jason Unger, "Federal Court Finds CEAA Amendments Alter Government's Scoping Powers" *Environmental Law Centre News Brief* 23:1 (2008) 15.
[4] *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans),* 2006 FCA 31; leave to appeal to S.C.C. refused [2006], Docket: 31370.