Federal Court  Cour fédérale

Date: 20121220

Docket: T-2060-11

Citation: 2012 FC 1520

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

GRAND RIVERKEEPER, LABRADOR INC.
SIERRA CLUB OF CANADA, AND
NUNATUKAVUT COMMUNITY COUNCIL INC.

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF NATURAL RESOURCES,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT, AND
NALCOR ENERGY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, by which the Applicants challenge the lawfulness of the *Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador* ("the Report"). The Report was issued by a Joint Review Panel

(JRP or "the Panel") as the culmination of its environmental assessment ("EA") of the Lower Churchill Hydroelectric Generation Project ("the Project"). The Applicants seek prerogative remedies under section 18 to prohibit the various federal Respondents from issuing permits, authorizations or financial assistance relating to the Project, and to quash the Governor in Council's Response to the Report ("the Response"), which was made under subsection 37(1.1) of the *Canadian Environmental Assessment Act*, SC 1992, c 37 (CEAA).

I. Background

A. *The Parties*

(i) The Applicants

[2] The Applicants are: (1) Grand Riverkeeper, Labrador Inc. ("Grand Riverkeeper"), a federally-registered non-profit corporation with the object of protecting and preserving Grand River, which is otherwise known as Churchill River; (2) the Sierra Club of Canada ("Sierra Club"), a federally-registered non-profit corporation with environmental protection and conservation objects; and (3) NunatuKavut Community Council, Inc. ("NunatuKavut"), a Labrador Aboriginal organization registered as a society under the laws of Newfoundland and Labrador. NunatuKavut was previously named Labrador Métis Nation.

[3] All three groups participated throughout the EA process for the Project, and each was awarded funds through the Canadian Environmental Assessment Agency's ("the Agency") Participant Funding Program to facilitate its participation in the different phases of the assessment.

(ii) The Respondents

[4] The Respondents consist of: (1) the Attorney General of Canada (AGC), named in lieu of the Governor in Council, whose consent is required under subsection 37(1.1) of CEAA to issue the Response; (2) the Minister of Fisheries and Oceans, who, together with (3) the Minister of Transport and (4) the Minister of Natural Resources, constitute the Responsible Authorities ("RAs") related to the Project; and (5) Nalcor Energy ("Nalcor" or "the Proponent").

[5] Fisheries and Oceans Canada (DFO) and Transport Canada (TC) identified themselves from the outset as RAs with respect to the proposed Project. DFO determined that components of the Project would result in the harmful alteration, disruption or destruction of fish habitat and would consequently require authorizations under subsection 35(2) of the *Fisheries Act*, RSC 1985, c F-14. TC, for its part, determined that the Project would require formal approval under subsection 5(1) of the *Navigable Waters Protection Act*, RSC 1985, c N-22 (NWPA) because the Project's dams constitute named works under the NWPA.

[6] Natural Resources Canada became a responsible authority in August 2011, when the Government of Canada agreed to provide financial assistance to the Proponent in the form of a loan guarantee for a portion of the Project.

[7] The Proponent, Nalcor, is a Crown Corporation incorporated pursuant to the *Energy Corporation Act*, SNL 2007, c E-11.01. It is wholly owned by the Government of Newfoundland and Labrador ("the Province"), and was created to "engage in and carry out activities pertaining to

the Province's energy resources, including hydro-electric generation" (Application Record of the Respondent Nalcor Energy, vol 1, page 3). Nalcor is mandated to implement the Province's energy policy, and is governed in this regard by: the *Energy Corporation Act*, above; the Province's long-term energy policy, *Focusing Our Energy* ("the Energy Plan"); and the *Electrical Power Control Act, 1994*, SNL 1994, c E-5.1.

B. *The Project*

[8] Nalcor's proposed Project involves the construction and operation of two hydroelectric generation facilities on the lower section of Churchill River in Labrador – one at Gull Island and the other at Muskrat Falls. The Project further proposes the construction of transmission lines and access roads connecting the two sites to each other, and to the existing Labrador electricity grid.

[9] The Gull Island facility would have a generation capacity of 2,250 MW, necessitating the creation of a dam, a 232 km-long reservoir, and the flooding of an 85 km² area. The Muskrat Falls facility would have a generation capacity of 824 MW, with a dam, a 60 km-long reservoir, and a 41 km² flooded area.

[10] Three different versions of the Project were attempted, starting with the initial proposal made in 1978 by Nalcor's corporate predecessor. For various reasons, these earlier forms of the Project were not pursued. The current proposal was defined and registered for environmental assessment in November 2006.

C. *The CEAA Environmental Assessment Process*

[11] The Supreme Court recently described CEAA as "a detailed set of procedures that federal authorities must follow before projects that may adversely affect the environment are permitted to proceed" (*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] SCJ No 2 at para 1). The basic framework for EAs under CEAA involves four broad components. First, the RAs determine whether CEAA applies to the project and what type of assessment it will conduct. There are three main types of assessment: screening, comprehensive study, and panel review. While panel reviews are the most involved, screenings and comprehensive studies are the most common types employed by RAs. Second, the assessment itself is conducted – in this case, by the JRP – according to the parameters set by the appropriate authority under CEAA. Third, the RAs determine whether, based on the assessment, the project should proceed. Fourth and finally is the post-decision phase, in which notice is given to the public about the RAs' decisions, mitigation measures are monitored and potential follow-up programs are carried out.

[12] As previously mentioned, the Project in this case was registered with the federal authorities late in 2006. In February 2007, TC and DFO determined that an environmental assessment was required pursuant to CEAA. The Minister of the Environment subsequently referred the assessment to a review panel under the federal legislation in June 2007 and, as the Province concurrently determined that a public hearing was required for provincial environmental approvals, the two Governments established the JRP. To this effect, the "Agreement for the Establishment of a Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project" ("the JRP Agreement") was concluded in January 2009, and the five-member panel was jointly

appointed by the provincial Ministers of Environment and Conservation and Intergovernmental Affairs, and the federal Minister of the Environment.

[13] The JRP Agreement set out the Terms of Reference for the Panel's EA, which provided, in part, as follows (see Application Record of the Applicants Sierra Club Canada and Grand Riverkeeper, Labrador, Inc, vol 5, tab 7, page 1488):

> The Panel shall consider the following factors in the EA of the Project/Undertaking as outlined in Sections 16(1) and 16(2) of the CEAA and Sections 57 and 69 of the EPA:
>
> 1. Purpose of the Project/Undertaking;
> 2. Need for the Project/Undertaking;
> 3. Rationale for the Project/Undertaking;
> …
> 5. Alternatives to the Project/Undertaking;
> …
> 10. Any cumulative Environmental Effects that are likely to result from the Project/Undertaking in combination with other projects or activities that have been or will be carried out;
> 11. The significance of the Environmental Effects as described in items 9 and 10;
> …

[14] Prior to the conclusion of the final JRP Agreement, drafts that included the Terms of Reference were subject to public consultations.

[15] In July 2008, the Governments issued the Final Guidelines for the preparation of the Proponent's Environmental Impact Statement (EIS). Draft guidelines had been subject to public consultations between December 2007 and February 2008. Nalcor submitted its EIS, along with the component studies that had been carried out in conjunction therewith, to the Panel in February 2009.

In March of that same year, the JRP invited comments from the public and both federal and provincial governmental agencies on the adequacy of the EIS. Based on those comments and the Panel's own questions, five rounds of information requests were sent to Nalcor. In January 2011, the Panel determined that it had sufficient information to proceed to the public hearing phase of the EA.

[16] The JRP held thirty days of hearings in various communities between March 3 and April 15, 2011. Some of the hearings were issue-specific, while others were general sessions, in which the Panel invited participants to share their overall views and conclusions on the Project. Still others were community hearings, in which participants were invited to share their views on the impacts the Project might have on their specific communities. After the final hearing on April 15, the Panel declared the proceedings closed, determining that no further information would be considered. It issued the Report on August 23, 2011.

[17] The Applicants filed this application for judicial review on December 20, 2011. Pursuant to subsection 37(1.1) of CEAA, the RAs, with the approval of the Governor in Council, issued their Response to the Report on March 15, 2012. The Response included the RAs' course of action decision under section 37 of the same Act. While the parties debated the relevance of the Response in their oral submissions, I am not prepared to consider it for the purposes of this judicial review in light of the fact that it was issued subsequent to the notice of application. I am not convinced that it is needed to "complete the picture" as the Applicants suggest.

II. The Impugned Report

[18] The Panel's Report sets out the Proponent's and the public participants' views on a range of subjects, and gives over 80 recommendations. Overall, the Panel determined that the Project was likely to have significant adverse effects in the areas of fish habitat and fish assemblage; terrestrial, wetland and riparian habitat; the Red Wine Mountain caribou herd; fishing and seal hunting in Lake Melville should consumption advisories be required; and culture and heritage (the "loss of the river") (Report at page 269). It further identified that there was a range of potential benefits stemming from the Project. The Panel, in the final chapter of its Report, gave its thoughts on whether the proposed Project would create net benefits in a range of areas, including economics, social and cultural benefits, and benefits to future generations, to the Province, and to areas beyond the Province.

[19] The portions of the Report in dispute are those recommendations related to the: (i) need for (Recommendation 4.1), (ii) alternatives to (Recommendation 4.2), and (iii) cumulative effects of (Recommendations 16.1 and 16.2, though the cumulative effects of specific components were considered throughout the Report) the Project.

(i) Need

[20] With respect to the need for the Project, the Panel came to two conclusions at page 25 of the Report:

> The Panel concludes that, in light of the uncertainties associated with transmission for export markets from Gull Island, Nalcor has not

> demonstrated the justification of the Project as a whole in energy and economic terms.
>
> The Panel further concludes that there are outstanding questions for each of Muskrat Falls and Gull Island regarding their ability to deliver the projected long-term financial benefits to the Province, even if other sanctioning requirements were met.

[21] In response to these conclusions, the JRP recommended that, if the Project were to be approved by the RAs, the Province undertake a "separate and formal review of the projected cash flow" of the relevant Project component to confirm whether it would, in fact, provide "significant long-term financial returns to the Government for the benefit of the people of the Province" (Recommendation 4.1).

(ii) Alternatives

[22] The Panel determined that Nalcor's analysis showing that the Muskrat Falls component of the Project was the best and least cost option for meeting domestic energy demands was "inadequate." As such, it recommended that an "independent analysis of economic, energy and broad-based environmental considerations of alternatives" be carried out (Recommendation 4.2, at page 34 of the Report). The Panel outlined what it thought would be appropriate parameters for such an independent study, suggesting that the following question be analysed:

> What would be the best way to meet domestic demand under the "No Project" option, including the possibility of a Labrador-Island interconnection no later than 2041 to access Churchill Falls power at that time, or earlier, based on available recall?

(iii) Cumulative Effects

[23] Finally, the Panel allotted a chapter to the discussion of the cumulative effects of the Project. As previously stated, other chapters addressed the cumulative effects related to "specific valued ecosystem components and key indicators of the biophysical and socio-economic environments" (see Report at page 265). The Panel defined "cumulative effects" in Chapter 16 as "changes to the environment due to the Project where those overlap, combine or interact with the environmental effects of other existing, past or reasonably foreseeable projects or activities" (Report at page 265).

[24] The JRP concluded that Nalcor's approach to cumulative effects was "less than comprehensive" and that public participants "raised valid concerns that contributed to a broader understanding of the potential cumulative effects of the Project" (Report at page 267). It further noted that the Proponent's approach "illustrates the limitation of project-specific cumulative effects" (Report at page 267). The Panel gave the following recommendation on this point (Recommendation 16.1, Report at page 268):

> The Panel recommends that, if the Project is approved, the provincial Department of Environment and Conservation, in collaboration with the provincial Department of Labrador and Aboriginal Affairs and other relevant departments, identify regional mechanisms to assess and mitigate the cumulative effects of current and future development in Labrador.

III. Issues

[25] The principal issues raised in this application can be framed as follows:

A. What is the applicable standard of review?

B. Did the JRP fulfill its mandate with respect to the:

i. need for and alternatives to the Project; and

ii. cumulative effects of the Project?

[26] NunatuKavut also claims that the JRP breached principles of procedural fairness or violated its right to be heard.

IV. Analysis

A. *Standard of Review*

[27] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 requires that the Court first assess whether the existing jurisprudence has satisfactorily determined the degree of deference to be afforded to the category of question at issue (at para 62; see also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] SCJ No 53 at paras 16-17). Should the jurisprudence be found wanting, the Court must then assess the factors set out by the Supreme Court in *Dunsmuir*, above, including: (1) the existence of a privative clause; (2) the purpose of the tribunal as determined by interpreting the enabling legislation; (3) the expertise of the tribunal; and (4) the nature of the question at issue (*Dunsmuir*, above, at para 64). In light of the recent trend in Canadian jurisprudence on the standard of review, I find that, while instructive, cases that pre-date *Dunsmuir*, above, such as *Alberta Wilderness Association v Express Pipelines Ltd*, [1996] FCJ No 1016 (*Express Pipelines*), *Alberta Wilderness Association v Cardinal River Coals, Ltd*, [1999] FCJ No 441, [1999] 3 FC 425 (*Cheviot*), are not determinative. As such, an analysis of the *Dunsmuir* factors is required.

(1) Privative Clause

[28] While there is no privative clause in CEAA, the presence or absence of a privative clause is no longer determinative of whether a particular body will be afforded deference (*Canadian Human Rights Commission*, above, at para 17; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at para 25; *Dunsmuir*, above, at para 52). The remaining factors will be weighed more heavily in accordance with this pronunciation by the Supreme Court.

(2) & (3) Panel's Purpose and Expertise

[29] A JRP is established to fulfill an information gathering and recommending function under CEAA (section 34 of CEAA; *Express Pipelines*, above, at para 14). The Panel does not render any final decisions with respect to the Project, nor does it make absolutely binding recommendations. Rather, its primary goal is to assist the RAs – the ultimate decision-makers – in obtaining the information they need to make environmentally informed decisions. It is one piece of the decision-making process mandated by CEAA.

[30] As the courts found in both *Cheviot* and *Express Pipelines*, above, it is expected that a joint review panel boast a "high degree of expertise in environmental matters" (*Cheviot*, above, at para 24; *Express Pipelines*, above, at para 10). The JRP in this case was no exception, featuring five highly qualified members. The Panel was co-chaired by Ms. Lesley Griffiths, co-principal of a consulting firm that provides services in environmental impact assessment, among other things, and

Mr. Herbert Clarke, who has experience with aboriginal affairs and impacts and benefits agreements, and who has been involved with fisheries resource conservation. The other Panel members were: Dr. Meinhard Doelle, an environmental law professor at Dalhousie University and environmental Counsel to a private Atlantic Canada firm; Ms. Catherine Jong, a consultant in the health care and education sectors, based in Happy Valley-Goose Bay; and Mr. James Igloliorte, a former judge at the Provincial Court of Newfoundland and Labrador.

[31] The Panel's information gathering and recommending functions, along with its expertise in the matters before it, point towards a reasonableness standard of review.

(4) Nature of the Question at Issue

[32] The parties' contest as to what constitutes the appropriate standard of review stems primarily from their disagreement about the proper characterization of the issues raised in the application. The Applicants posit that the Panel's alleged failure to comply with the duties mandated by CEAA constitutes an error of law or a question of jurisdiction, both relating to the Panel's interpretation of CEAA. As such, they argue, they are reviewable on the standard of correctness.

[33] The Proponent, for its part, prefers to frame the issues raised by the Applicants as attacks on the quality of the evidence before the Panel and on the correctness of its consequent conclusions, and thus reviewable on the standard of reasonableness.

[34] The federal Respondents propose that the question of whether the Panel was required to make firm conclusions with respect to the need for, and alternatives to, the Project is a question of law, reviewable on the standard of correctness. All other issues, they assert, should be reviewed on the standard of reasonableness, as put forth by the Proponent.

[35] This dispute over the nature of the question is not a new one. This Court and the Federal Court of Appeal have both held, consistent with the contentions of the parties, that "it is important to appropriately characterize a perceived failure to comply as a question of law or merely an attack on the 'quality' of the evidence and, therefore, the 'correctness' of the conclusions drawn on that evidence" (*Cheviot*, above, at para 24; *Express Pipelines*, above, at para 10). The former characterization attracts review on the correctness standard, while the latter "must not lightly be interfered with" (see *Cheviot*, above, at para 24).

[36] In the case at hand, the Applicants do not challenge the Panel's determinations on the sufficiency of the evidence before it; in fact, they agree with the Panel's statements that there was inadequate information on the need for, alternatives to, and cumulative effects of the Project. The heart of the Applicants' challenge lies instead in their disagreement with the recommendations made pursuant to such determinations. They argue that the Panel ought to have taken a different course of action when faced with the information – or purported lack thereof – before it. This is evidence that the Applicants challenge the "correctness" of the conclusions drawn on the evidence before the Panel, and not a failure to exercise its jurisdiction.

[37] This characterization of the issues is particularly apt given the recent trend in the jurisprudence. As Justice David Stratas highlighted in *Fort McKay First Nation Chief and Council v Mike Orr*, 2012 FCA 269, [2012] FCJ No 1353 at para 10, the Supreme Court has both suggested that characterizing a legislative provision as "jurisdictional" for the purposes of judicial review should be avoided (see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] SCJ No 10 at para 34) and questioned the very existence of "true questions of jurisdiction" (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] SCJ No 61 at para 34). The Federal Court of Appeal followed suit in *Fort McKay*, above, and so should this Court.

[38] Furthermore, the Applicants' arguments that the JRP failed to provide a rationale for its conclusions must be read in conjunction with *Dunsmuir*, above, and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCJ No 62. In that case, the Supreme Court opined that *Dunsmuir* does not stand "for the proposition that the 'adequacy' of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result…It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (para 14). The Supreme Court further cemented its view on this point in *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, [2012] SCJ No 65:

> [3] The Board did not have to explicitly address all shades of meaning of these provisions. This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable. […]

[39] While the JRP is not a judicial or quasi-judicial body, I find that such a decision maker's "reasons" are akin to the "rationale" requirements imposed on the JRP by CEAA and its Terms of Reference, and are thus owed deference.

Conclusions

[40] Thus, in accordance with the recent jurisprudence, and given the purpose and expertise of the JRP, and the nature of the questions before it, I am satisfied that the entirety of issue (B) should be reviewed on the standard of reasonableness.

[41] The Federal Court of Appeal noted in *Iverhuron & District Ratepayers' Association v Canada (Minister of the Environment)*, 2001 FCA 203, [2001] FCJ No 1008 at para 40 that a reasonableness review requires merely that the Court be able to perceive a rational basis for the Panel's conclusions. This Court elaborated on the point in *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, [2008] FCJ No 324 (*Pembina*), stating that "deference to expertise is based on the cogent articulation of the rationale [*sic*] basis for conclusions reached" (para 75). This view is consistent with *Dunsmuir*, above, in which the Supreme Court held that reasonableness is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para 47).

[42] Finally, it is well-established that questions of procedural fairness are to be assessed on the standard of correctness (*Khosa*, above, at para 43). NunatuKavut's arguments related to their right to be heard will thus be assessed on this standard.

B. *The JRP's Mandate*

Purpose and Role of the JRP in the EA Process

[43] The basic goals of the EA process writ large are to ensure "(1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; [and] (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation" (*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] SCJ No 1, [1992] 1 SCR 3 at para 95). Section 4 of CEAA sets out the purposes of the Act:

Purposes	Objet
4. (1) The purposes of this Act are	**4.** (1) La présente loi a pour objet :
(a) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;	(a) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;
(b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy	(b) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;

economy;

[44] Review panels exist to fulfill the first goal. To this effect, CEAA imposes certain information gathering and reporting requirements on panels (see also *Express Pipelines*, above, at para 14), which are set out in section 34:

Assessment by review panel	Commission d'évaluation environnementale
34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,	34. La commission, conformément à son mandat et aux règlements pris à cette fin :
(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;	(a) veille à l'obtention des renseignements nécessaires à l'évaluation environnementale d'un projet et veille à ce que le public y ait accès;
(b) hold hearings in a manner that offers the public an opportunity to participate in the assessment;	(b) tient des audiences de façon à donner au public la possibilité de participer à l'évaluation environnementale du projet;
(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	(c) établit un rapport assorti de sa justification, de ses conclusions et recommandations relativement à l'évaluation environnementale du projet, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public;
(d) submit the report to the Minister and the responsible authority.	d) présente son rapport au ministre et à l'autorité responsable.

[45] Section 16 of CEAA includes a number of factors a review panel is mandated to consider:

Factors to be considered	Éléments à examiner
16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:	16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :
(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;	(a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;
(b) the significance of the effects referred to in paragraph (a);	(b) l'importance des effets visés à l'alinéa a);
(c) comments from the public that are received in accordance with this Act and the regulations;	(c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;
(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and	(d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;
(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and	(e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du

alternatives to the project, 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.

projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

Additional factors

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

Éléments supplémentaires

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants :

(a) the purpose of the project;

(a) les raisons d'être du projet;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

(c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

(d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

Determination of factors

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a), (b) and (d) and (2)(b), (c) and

Obligations

(3) L'évaluation de la portée des éléments visés aux alinéas (1)a), b) et d) et (2)b), c) et d) incombe :

(d) shall be determined	
(a) by the responsible authority; or	(a) à l'autorité responsable;
(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.	(b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

[46] Section 57 of the provincial *Environmental Protection Act*, SNL 2002, c E-14.2 sets out the requirements for an "environmental impact statement," the term defined as the "report that presents the results of an environmental assessment" (section 45(e)) for the purposes of that act:

> Environmental impact statement
>
> 57. An environmental impact statement shall be prepared in accordance with the guidelines, and shall include,
>
> (a) a description of the undertaking;
>
> (b) the rationale for the undertaking;
>
> (c) the alternative methods of carrying out the undertaking, and the alternatives to the undertaking;
>
> (d) a description of the
>
> (i) present environment that will be affected or that might reasonably be expected to be affected, directly or indirectly, by the undertaking, and
>
> (ii) predicted future condition of the environment that might reasonably be expected to occur within the expected life span of the undertaking, if the undertaking was not approved;

> (e) a description of
>
> > (i) the effects that would be caused, or that might reasonably be expected to be caused, to the environment by the undertaking with respect to the descriptions provided under paragraph (d), and
> >
> > (ii) the actions necessary, or that may reasonably be expected to be necessary, to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment by the undertaking;
>
> (f) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking;
>
> (g) a proposed set of control or remedial measures designed to minimize any or all significant harmful effects identified under paragraph (e);
>
> (h) a proposed program of study designed to monitor all substances and harmful effects that would be produced by the undertaking; and
>
> (i) a proposed program of public information as required under section 58.

[47] As previously introduced, the JRP's Terms of Reference further defined its mandate, reflecting the factors described in both the federal and provincial statutes:

> The Panel shall consider the following factors in the EA of the Project/Undertaking as outlined in Sections 16(1) and 16(2) of the CEAA and Sections 57 and 69 of the EPA:
>
> 1. Purpose of the Project/Undertaking;
> 2. Need for the Project/Undertaking;

3. Rationale for the Project/Undertaking;
…
5. Alternatives to the Project/Undertaking;
…
10. Any cumulative Environmental Effects that are likely to result from the Project/Undertaking in combination with other projects or activities that have been or will be carried out;
11. The significance of the Environmental Effects as described in items 9 and 10;
…

[48] This Court has held that, in order for the JRP to fulfill its "consideration" requirement pursuant to section 16 of CEAA, it must "perform to a high standard of care" (*Cheviot*, above, at para 36).

[49] The JRP's information gathering function was also laid out in *Cheviot*, above. Justice Douglas Campbell underlined that the Terms of Reference in that particular case amplified the requirement under section 34(a) of CEAA, obligating the panel "to obtain all available information that is required to conduct the environmental assessment" (at para 39). He went on to determine that "required information" is that which will meet the high standard of care owed by the JRP with respect to its consideration requirements. Justice Campbell also determined that the JRP must make use of the production of evidence powers accorded to it under section 35 of CEAA to the full extent necessary to obtain and make available all information required for the conduct of its review (at para 48). It is important to note that in *Cheviot*, above, the applicable Alberta legislation that formed part of that panel's mandate required it to determine whether a proposed energy development was in the public interest – in other words, to determine whether it was justified

(see *Cheviot*, above, at para 28). There is no equivalent requirement in the JRP's mandate in this case.

[50] Finally, the JRP's reporting obligations require it to state its recommendations clearly, including the evidence it has relied upon in reaching each recommendation (see *Cheviot*, above, at paras 43-51). In other words, the JRP must substantiate the recommendations it makes for the purposes of CEAA. This substantiation allows the public, government decision-makers, and courts to identify the rational basis upon which the Panel must make its recommendations (see *Iverhuron*, above, at para 40).

[51] The parties' main dispute in the case at hand is about the extent to which the JRP was mandated to consider and reach conclusions with respect to each of the factors listed in section 16 of CEAA and in its Terms of Reference. The general requirements for panel review set out in *Cheviot*, above, offer an instructive framework with which to assess the Panel's Report. As such, I will address three main issues with respect to each of (i) the need for and alternatives to the Project, and (ii) its cumulative effects, namely whether the Panel reasonably fulfilled its mandate to: (a) consider; (b) gather information; and (c) report.

[52] As a preliminary note, there is no dispute between the parties about the scope of the JRP's mandate to make findings on justification. They agree that the Panel was not required to make such findings. Additionally, I do not find it necessary to rule definitively on the question of the weight to be afforded to the affidavit of Mr. Stephen Chapman in these proceedings.

(i) "Need for" and "Alternatives to" the Project

(a) Consideration

[53] The Respondents propose that the Panel's requirement to consider should be informed by the ordinary meaning of that word. They cite the Oxford English Dictionary definition of "consider" as "to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of" (Factum of the Respondent, Nalcor Energy at para 65). The federal Respondents frame the requirement as meaning that the JRP "simply had to turn its mind to these issues without reaching hard conclusions" (federal Respondents' Memorandum of Fact and Law at para 66). Additionally, they posit that, once the Panel met the minimum requirement to turn its mind to the issues before it, it then had the discretion to determine the parameters of the consideration required.

[54] While the Applicants champion a more purposive conception, arguing that the Panel's failure to assess need and alternatives properly impeded its ability to reach conclusions on whether the Project was justified, I agree with the Respondents' position. It is clear that the JRP turned its mind to the issues of need and alternatives. These questions were at the center of at least one issue-specific public hearing, and were included in numerous information requests and responses throughout the EA process. Indeed, the extent to which the Panel requested further information was a matter for its judgment, judgment with which this Court is loath to interfere. It does not appear to me that the Panel misconceived of its responsibilities relating to need and alternatives. I find that the Panel considered the need and alternatives questions in a manner that is transparent, justifiable and intelligible. As such, it falls within an acceptable range of outcomes and is reasonable.

(b) Information Gathering

[55] There are two parts to the parties' contentions relating to the Panel's information gathering requirement: (1) whether the JRP's determination that there was "insufficient evidence" meant insufficient evidence for the purposes of its EA or for the ultimate decision maker's purposes; and (2) whether the JRP's referral of additional "information gathering" to (i) the Province and (ii) an independent study panel was reasonable.

[56] On the first part, the Applicants agree with the Panel's determination that there was insufficient evidence on need and alternatives, but posit that, given the paucity of evidence, it should have both obtained, through the use of its subpoena powers, and then assessed the requisite information. However, there is no evidence provided by the Applicants that such information existed for the Panel to obtain and utilize.

[57] Further, I agree with the federal Respondents' argument that the Panel's subpoena power cannot be used to compel the creation of new information. In essence, the Applicants contend that the Panel must use the subpoena power to engage in a fishing exercise for further information that may exist. However, as I already mentioned, there is no evidence in this matter that such information did, in fact, exist during the Panel's deliberations. Otherwise, the Applicants submit that the subpoena power is to be used to compel, in an ongoing fashion, the creation of new information prior to the Panel concluding its Report. In my view, neither of these arguments have merit. There is no evidence that information was withheld from the Panel during its deliberations.

Further, the Panel clearly drew upon its expertise to conclude that the information it had on hand was sufficient to fulfill its mandate. Such a conclusion should not lightly be interfered with by the Court.

[58] It then follows that the Proponent's characterization of the JRP's conclusions with respect to the further information to be collected in accordance with Recommendations 4.1 and 4.2 is correct. Rather than relating to the sufficiency of the evidence for the purposes of completing the EA, these conclusions were items the Panel thought the government decision-makers might find useful in determining whether the Project should proceed.

[59] Thus, to address the second part of the issue, it was entirely reasonable for the Panel to recommend that the Province and an independent study panel augment at a later time the information gathered with respect to the questions of need and alternatives. Indeed, this is expected behaviour from the Panel given the "ongoing and dynamic" nature of these large projects (*Pembina*, above, at para 24; *Union of Nova Scotia Indians v Canada (Minister of Fisheries and Oceans)*, [1996] FCJ No 1373 at para 65). As this Court held in *Pembina*, above, environmental assessment is "not to be conceptualized as a single, discrete event" (at para 24).

[60] This is particularly so given the uncertainty of the process and the early phase in the process at which the EA occurs. Subparagraph 5(2)(b)(i) of CEAA states that RAs "shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made."

[61] The Federal Court of Appeal explored this point in *Express Pipelines*, above:

> [14] 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 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 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.

[62] I am in accord with the Federal Court of Appeal's analysis in *Express Pipelines*, above, and find that the Panel reasonably fulfilled its information gathering mandate in this case.

(c) Reporting

[63] Finally, I am satisfied that the Panel adequately substantiated its conclusion that further study was needed in two areas. It explained in its conclusions on the need for the Project that there was insufficient information on the long-term financial viability of the Project, and, as such, that further study was recommended. Similarly, insufficient information was the reason cited as the basis for the Panel's recommendation that further study be conducted with respect to potential alternatives to the Project. These explanations each provide the rational basis that fulfills the Panel's reporting requirements for these items.

(ii) Cumulative Effects

(a) Consideration and (b) Information Gathering

[64] The Applicants allege that, apart from an evaluation of the cumulative effects stemming from the Project on the Red Wine caribou, the Panel failed to conduct any cumulative effects assessment. It is clear, however, in looking at the Report that the JRP turned its mind to the question. There is an entire chapter dedicated to the Proponent's approach to cumulative effects, and the notion is built into many other chapters dealing with more specific issues. The Panel requested further information specifically relating to cumulative effects from the Proponent on at least two occasions, and gathered information on this point from public participants. It stated specifically that public participants had "raised valid concerns that contributed to a broader understanding of the potential cumulative effects of the Project" (Report at page 267). I am thus satisfied that the Panel met its consideration and information gathering requirements with respect to cumulative effects.

(c) Reporting

[65] The main issue with respect to cumulative effects is the reporting requirement, more specifically the requirement to state conclusions clearly and substantiate them with evidence. The Applicants posit that the Panel's reliance on future regional processes within the control of provincial agencies in Recommendation 16.1 constitutes a failure to state a conclusion with respect to this specific Project. I disagree. The Panel dealt with cumulative effects in various parts of their Report. It also clearly considered and concluded in the Report that further future works were

required with respect to cumulative effects. The Panel recommended a possible mechanism for this work to proceed, which, in my view, was entirely reasonable given the ongoing and dynamic nature of this large Project (see *Pembina*, above, at para 24). It is not logical to expect that the Panel would have finalized all informational aspects of possible cumulative effects prior to reporting to the RAs. Its conclusions on cumulative effects are grounded in a rational basis and, as such, I find that the Panel reasonably fulfilled its reporting mandate with respect to cumulative effects.

NunatuKavut: Procedural Fairness and the Right to be Heard

[66] NunatuKavut argues that the Panel's failure to consider the need for, alternatives to, and cumulative effects of the Project effectively denied it its right to be heard. As I have already found that the Panel fulfilled its section 16 mandate to consider, this argument must be rejected.

[67] I must also reject NunatuKavut's arguments based on the Panel's purported duty to consult the group on all matters, and to compel evidence from them on all three issues in dispute in these proceedings. The Panel's mandate was not as expansive as NunatuKavut posits. Its Terms of Reference stated as follows:

> The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title (see Terms of Reference, Schedule 1 to JRP Agreement).

[68] The mandate to invite information cannot be said to include a mandate to compel evidence.

[69] Moreover, the Panel fulfilled its mandate by inviting, and accepting, on several occasions written submissions from NunatuKavut. In addition, the Panel heard from the group in the General Hearing Sessions it held in Happy Valley-Goose Bay and in St. John's. Indeed, the group received over $130,000 through the Participant Funding Program to participate in the EA process. NunatuKavut's choice not to participate in a portion of the hearings by virtue of its injunction proceedings, regardless of how good the group's intentions, cannot impose a duty on the Panel to compel evidence from it.

[70] For all of these reasons, I find that there was no infringement of NunatuKavut's right to be heard or of any other principle of procedural fairness with respect to the group's participation in the EA process.

V. Conclusion

[71] In light of my findings that the Panel reasonably fulfilled its mandate to consider, gather information, and report on the need for, alternatives to, and cumulative effects of the Project, the Applicants' prayer for relief is denied. Given the nature of the subject matter and the questions at issue, there will be no award as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no order as to costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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