



Industrial Cape Breton Community Alliance Group On The Sable Gas Project v. Sable Offshore Energy Project, 2000 CanLII 16338 (FC)

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Date: 200010

Docket: T-2551-

BETWEEN:

**THE INDUSTRIAL CAPE BRETON COMMUNITY ALLIANCE GROUP
ON THE SABLE GAS PROJECT**

Applicant

- and -

**SABLE OFFSHORE ENERGY PROJECT, MOBIL OIL CANADA
PROPERTIES, SHELL CANADA LIMITED, IMPERIAL
OIL RESOURCES LIMITED, NOVA SCOTIA RESOURCES LIMITED,**

**MARITIMES AND NORTHEAST PIPELINE PROJECT and
MARITIMES & NORTHEAST PIPELINE MANAGEMENT LTD.**

Respondents

REASONS FOR ORDER

MacKAY J.

[1] The applicant seeks judicial review of a decision made by the Joint Public Review Panel for the Sable Gas Projects (the "Panel"), recorded in its report of October 27, 1997, whereby it determined that studies of the socio-economic impact upon the economy and people of the Cape Breton Regional Municipality of the development of the natural gas fields located on the Scotian Shelf, near Sable Island, and the introduction of natural gas into the province, were beyond the scope of its review.

[2] The Panel was formed pursuant to an agreement (the "Joint Public Review Agreement")¹ signed by the Ministers of the Environment and of Natural Resources for Canada, the Ministers of Environment and of Natural Resources for Nova Scotia, the Chairman of the National Energy Board, and the Acting Chief Executive Officer of the Canada-Nova Scotia Offshore Petroleum Board ("OPB"). That agreement provided for a joint review panel to consider the environmental effects of projects proposed by the respondents, the Sable Offshore Energy Project ("SOEP") and the Maritimes and Northeast Pipeline Project, including their socio-economic effects. The agreement also provided a forum for the Commissioner appointed under the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Acts, of both Canada and Nova Scotia, to participate in the review and to make recommendations thereafter to the OPB.

[3] In October 1997 the Panel's Report was submitted to the sponsoring agencies and the Commissioner also reported to the OPB. Both reports recommended that the projects be approved to proceed under certain recommended conditions. Subsequently, regulatory approvals necessary for the projects were granted by the governments of Canada and Nova Scotia and the projects were well underway by the time this application was heard in May 1999.

[4] The applicant's application for judicial review as filed and its subsequent written submissions requested review not only of the Panel's Report but also of the Report of the Commissioner, which like that of the Panel, did not recommend a specific cost-benefit study of the projects including their impact on the socio-economic condition of the economy and the people of the Cape Breton Regional Municipality. The respondents urged that the Commissioner was not subject to judicial review in this Court, but insofar as the application related to review of the Commissioner's decision that request was withdrawn when this matter came on for hearing. Thus, only the report of the Panel is at issue in this proceeding.

[5] The applicant in this matter, the Industrial Cape Breton Community Alliance Group on the Sable Gas Project is a community group made up of the Cape Breton Regional Municipality, the Industrial Cape Breton Board of Trade, the United Steelworkers of America - Local 1064, the Cape Breton District Labour Council, the Cape Breton Island Building and Construction Trades Council, and the United Mineworkers of America - District 26.

[6] The respondents are, first, the Sable Offshore Energy Project ("SOEP"), a consortium and its members, Mobil Oil Canada Properties, Shell Canada Limited, Imperial Oil Resources Limited and Nova Scotia Resources Limited. The consortium is developing the natural gas resources located offshore Nova Scotia including the construction and operation of offshore facilities for drilling, production and transmission of natural gas and for its reception and treatment onshore at Goldboro in Guysborough County, and for transmission to Point Tupper, for processing there, of natural gas liquids. The second respondents, Maritimes & Northeast Pipeline Project and

Maritimes & Northeast Pipeline Management Ltd. (collectively, the "MNP Group"), are respectively concerned with construction and the management of pipeline facilities to transport the natural gas from SOEP's processing facilities at Goldboro across the Maritime Provinces region to the Maine.

[7] Under the Joint Public Review Agreement, the offshore development, of which SOEP is the proponent, and the onshore development, for which the MNP group is the proponent, comprise separate projects, both of which were subject to review by the Joint Panel. The Joint Public Review Agreement under which the Panel was constituted provided terms of reference for its task. Those that are most relevant to this application include consideration and review of:

6. The temporal and spatial boundaries of the study area(s),
7. The environment, including the socio-economic environment, which may reasonably be expected to be affected by the Projects,
8. The Environmental Effects of the Projects, including the Environmental Effects of malfunctions or accidents that may occur in connection with the Projects and any cumulative Environmental Effects that are likely to result from the Projects in combination with other projects or activities that have been or will be carried out,
9. The significance of the Environmental Effects referred to in item 8,
10. The socio-economic effects of the Projects,

[8] Descriptions of the projects, based on submissions of the respondent proponents to governments concerned were included in the terms of reference and the Panel was directed to review the proponents' submissions concerning the projects, in accord with its terms of reference. In the Panel's review process, it held 20 information and scoping hearings in Nova Scotia and New Brunswick, it received 1,270 exhibits of written submissions responding to the projects as proposed, and it conducted 56 days of public hearings in Halifax and Fredericton, from which more than 12,000 pages of transcript were produced.

[9] The background of the applicant's concern about the Panel's proceedings is said to originate in certain of its evidentiary rulings in the course of hearings, reflected in conclusions in its report, which, it is urged, demonstrate error in the Panel's interpretation of its jurisdiction. The first was a ruling to preclude the Allergy and Environmental Health Association of Nova Scotia ("AEHANS"), an intervenor, from cross-examining witnesses on the effects of the end uses of natural gas, particularly concerning the health effects of its use in the province of Nova Scotia. That ruling confirmed an earlier ruling that the Panel's examination of the projects did not include the effects on health of the end uses of natural gas. The ruling concerning questioning by AEHANS was later clarified by the Chair of the Panel, who emphasized continuing interest in socio-economic environmental effects of the projects, excluding general issues such as health effects of the uses of natural gas. He stressed that the Panel did not preclude questions relating to socio-economic effects, including possible displacement of coal by consumption of natural gas.

[10] In the course of its hearings certain intervenors urged that the Panel should order that the respondents produce a specific cost-benefit analysis of the socio-economic effects of the project, particularly upon industrial Cape Breton. In its report the Panel declined this request and, at page 55, the Panel set out its justification:

Intervenors expressed concern that the method used to forecast benefits was not optimal, and suggested that additional or different types of modelling or analyses should or could have been used. One intervenor maintained that because a cost-benefit analysis was not used, the socio-economic assessment was incomplete and that further study was essential. SOEP responded that an adequate socio-economic analysis was provided to the Panel and that a benefit-cost analysis is not a requirement of the environmental assessment legislation. The Panel ruled that a cost-benefit analysis was not required, it being but one approach among many regularly used to provide an adequate socio-economic analysis.

[11] The ultimate matter giving rise to the applicant's concern was the response of the Panel in its report to submissions made by the Cape Breton Regional Municipality and others regarding serious concern about possible displacement of coal by natural gas. In the course of public hearings a number of intervenors commented upon potential adverse effects upon the Cape Breton region if coal produced there were to be displaced by natural gas as the source of heat for generating electric power in the major generating stations in Nova Scotia. The Municipality

urged that the Panel order the proponents to produce a socio-economic analysis of the impact of Sable natural gas on the economy and the people of Cape Breton. The Joint Review Panel did not order such an analysis and in its final report it commented thus:

Other intervenors requested that the socio-economic assessment be broadened to consider specific impacts on industrial Cape Breton. In particular, they wanted studies of potential impacts of coal displacement by natural gas and a study of the impact of the provision or absence of a natural gas lateral to industrial Cape Breton. The Panel believes that the existing analytic approach, which considered general effects on Nova Scotia and specific effects on the most likely affected areas of Guysborough and Halifax Counties, was a sufficient basis for assessment. The Panel sees the studies proposed by the intervenors as matters for comprehensive, long range provincial development planning, which is beyond the scope of this review.² [Emphasis added.]

[12] The last sentence of the latter quoted passage is the focus for this application for judicial review. It is urged by the applicant that the Panel erred in defining its jurisdiction when it determined that studies proposed, concerning "potential impacts of coal displacement by natural gas and a study of the impact of the provision or absence of a natural gas lateral to industrial Cape Breton" were "beyond the scope of this review". That statement was referred to by the applicant as one determining that a socio-economic impact study of the effects of Sable gas projects upon industrial Cape Breton was beyond the scope of the Panel's review, i.e., was outside the jurisdiction of the Panel.

[13] The relief sought by the applicant, apart from that originally requested but withdrawn at the hearing in relation to the Commissioner, is that the report of the Panel be set aside, at least in part, and referred back to it for reconsideration, with directions. The directions requested are that the Panel direct SOEP to file a socio-economic impact study, incorporating an economic cost-benefit analysis, of the environmental effects of the respondents' projects on Cape Breton Regional Municipality; that the study include the direct and indirect long term environmental effects of the availability of natural gas liquids from the respondents' projects; that the Panel then provide reasonable opportunity for intervenors to cross-examine in regard to the study produced and to submit evidence in response to it; and that the Panel re-issue its report taking into account any further evidence that may be put before it. At the hearing of this application counsel emphasized that the applicant does not ask that approvals of the projects be set aside, or that the projects be stayed in any way. Rather it is urged that an assessment of socio-economic effects from the projects, on conditions in industrial Cape Breton, be undertaken, including recommendations to mitigate those effects.

The Issues

[14] The relief requested may seem unusual in the context of judicial review but before considering the relief requested, I turn to the merits of the application before the Court. Two basic issues arise, the characterization of the decision made by the Panel, and the appropriate standard of review and its application in the circumstances of this case.

Characterization of the Decision of the Panel

[15] The applicant submits that the Report of the Joint Review Panel, by the statement

... The Panel sees the studies proposed by the intervenors as matters for comprehensive long range provincial development planning, which is beyond the scope of this review.

is clearly a determination by the Panel concerning its jurisdiction.

[16] Reference by the applicant to the ruling by the Panel relating to questions on behalf of the intervenor AEHANS, that the review process did not include examination of the health effects of the use of natural gas, is made to support the applicant's view that the Panel took a narrow perspective of its role. It is urged that the Panel's terms of reference under the agreement are to be read in light of the broad mandate to be met by a panel appointed as this Panel was in accord with the *Environment Act*³ of Nova Scotia, which the applicant considers somewhat

more demanding in its application than its counter-part federal legislation⁴. The former Act, it is urged, requires assessment of environmental effects including "... any change that a Project may cause in the environment, including any effect on the socio-economic conditions ..."⁵.

[17] It is urged that industrial Cape Breton is particularly vulnerable to the effects that availability of natural gas for use in generation of electricity in Nova Scotia, now generated with substantial reliance upon coal, the bulk of which is obtained from mines in industrial Cape Breton. Indeed, it is said that it is self-evident there will be socio-economic effects upon Cape Breton by reason of the availability of natural gas for generation of electricity in the province, and the Joint Panel should have examined those effects with particular reference to industrial Cape Breton. Yet the Panel did not comment on the socio-economic effects of the Projects on industrial Cape Breton, rather the report included the determination that a study of those effects was beyond the scope of the Panel's review.

[18] For the respondents it is urged that the impugned passage in the Panel's Report was not a determination concerning its jurisdiction. Rather, it said that it recorded a judgment about the sufficiency of evidence, a decision within the Panel's jurisdiction as set out in its terms of reference, in essence that studies urged by intervenors concerned with potential effects upon Cape Breton were not studies necessary for its assessment of those projects.

[19] The two opposing positions reflect those commented upon by my colleague Mr. Justice Campbell in *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*⁶ He discussed the distinction between errors of law and qualitative errors in an environmental review process in the following terms, referring to the decision of Hugessen J.A. in *Alberta Wilderness Assn. v. Express Pipeline Ltd.*⁷:

The principle that an environmental assessment can be challenged and found not to be in accordance with [the *Canadian Environmental Assessment Act* ("CEAA")] on an error in law was previously established in *Alberta Wilderness Assn. v. Express Pipelines Ltd.*

Adapted to the present application, the points that emerge from Hugessen J.A.'s decision are these: the Joint Review Panel's failure to comply with a requirement of s. 16 of the CEAA can constitute an error of law; 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; if a perceived failure is in the latter category, no question of law arises and, therefore, the conclusions of the Joint Review Panel stemming from an uncontested high degree of expertise in environmental matters, must not lightly be interfered with; determining the "significance" of an environmental effect under s. 16(1)(b) of CEAA involves subjective determination by the Joint Review Panel and does not involve an interpretation leading to possible error in law ...

[20] In my opinion, in light of the Panel's process the words of its report upon which this application arises constitute a conclusion reached by the Panel after consideration of the evidence before it, and they are not an *a priori* assessment of its jurisdiction under its terms of reference. The words in issue do not seek to interpret the statutory provisions, federal or provincial, under which the Panel was created and upon which its process was based. Nor are those words directly concerned with interpretation of the terms of reference which define the jurisdiction of the Panel.

[21] The Panel did not originate the projects, or environmental studies about them. Rather, its task was to consider, in accord with its terms of reference, the projects as proposed in light of comments and submissions by government agencies, public and private organizations, and citizens interested or concerned about the projects. It then reported, ultimately recommending that the projects be approved to proceed with recommendations concerning conditions that should be imposed.

[22] In this case the offshore project proposed by the respondent SOEP did include examination of anticipated socio-economic effects. That examination related to the effects upon Nova Scotia as a province, with particular attention to areas where the effects were expected to be most significant, in Halifax County, and in the Guysborough County - Strait of Canso area which includes the sites for the natural gas processing plant at Goldboro and facilities for handling natural gas liquids at Point Tupper, to which the liquids are to be piped by a line to be constructed by SOEP. The onshore project, for conveying natural gas through Nova Scotia and New Brunswick to Maine, included examination of environmental effects of that project of construction and of its operation. Neither

the proposed projects included provision for, or examination of, any facility or use that could be considered the end use or ultimate consumption of the natural gas to be produced, processed and transported by the projects here reviewed by the Panel. The respondents urge that there will be further environmental reviews when proposals are made for projects that will provide for end uses of the gas. Presumably that would include any project proposing the utilization of natural gas for generation of electricity in the province, a use not here envisaged in the projects proposed.

[23] In the course of its work the Panel did not preclude submissions urging particular methods of study to be undertaken, e.g., cost-benefit studies, nor did it preclude submissions on questions concerning apprehended socio-economic effects upon industrial Cape Breton, including the possible displacement of coal by natural gas as fuel for generating electricity in Nova Scotia. The Municipality of Cape Breton County made such a submission, as did others. A representative of the Nova Scotia government before the Panel was questioned about why the province did not insist on such a study by the proponents, particularly because similar concerns had been expressed in an earlier assessment of potential effects upon the province of development of the offshore gas resources. That representative, incidentally, commented that after serious consideration among those concerned in provincial agencies it was concluded that the projects as proposed did not in themselves have significant socio-economic effects upon industrial Cape Breton.

[24] In its process the Panel heard submissions and questions concerning potential displacement of coal in Nova Scotia by natural gas. It did not recommend in its report studies of the sort the applicant urges should have been undertaken. Its report came only after public hearings, undertaken after a number of scoping sessions in Halifax and Fredericton, intended to convey information about the projects, the Panel's task, and the importance of submission from the public. The report includes the judgment that studies of sort here urged were for "comprehensive, long range provincial development planning, which is beyond the scope of this review".

[25] At the end of the process, in relation to the offshore project proposed by SOEP, the Panel commented in its report, *inter alia*, on socio-economic issues, including the sentence giving rise to the applicant's concerns. That sentence is included within the introductory paragraphs on Socio-Economics Issues⁸ (at Panel's Report, p. 55), where, in three paragraphs, the text reviews "Methodology" and proposals made in the course of its hearings by intervenors. Among these proposals were submissions that methods other than those used by SOEP, including cost-benefit analyses, should or could have been undertaken to forecast benefits from the project. The Panel noted that no particular method was required, and it was satisfied with the method used by SOEP, one of many that it might have used. In a similar vein, other intervenors urged that the socio-economic assessment be broadened to include a specific review of particular effects upon industrial Cape Breton, such as the potential displacement of coal in generation of electricity. To these proposals the Panel expressed its opinion or conclusion that the analytic approach by SOEP, which included socio-economic effects on Nova Scotia generally and specifically on the areas most likely to be affected, Guysborough and Halifax Counties, was adequate for the Panel's purpose of assessing the proposal.

[26] As a matter of grammar, the last phrase of the impugned sentence "which is beyond the scope of this review" refers to "long range provincial development planning". Nevertheless, I accept that the classification by the Panel of the projects proposed under that general planning description for examination of specific socio-economic effects on industrial Cape Breton, raises the applicant's concerns. In my opinion, in light of the process followed by the Panel, the decision expressed in its report, implicitly that the studies in which the applicant is interested were "beyond the scope of this review", was not a statement concerning the jurisdiction of the Panel. It was a statement made after consideration of the submissions made to the Panel, and that statement described the Panel's conclusion after deliberation, that the studies proposed were not to be recommended in its report. The Panel, in my view, was acting within its jurisdiction as defined by its terms of reference, particularly in considering "the temporal and spatial boundaries of the study area(s)" and "the environment, including the socio-economic environment which may reasonably be expected to be affected by the Projects" and "the socio-economic effects of the Projects", factors specified for the Panel's consideration within its terms of reference.

The Standard of Review

[27] There was considerable difference between the parties, when this matter was heard, about the appropriate standard of review. That difference was based on their different perceptions of the appropriate characterization of the decision or issue before the Court. If the decision were determined to relate to the Panel's jurisdiction as the applicant urged, the respondent did not disagree that the appropriate standard of review is correctness. If the

decision is characterized as one within the jurisdiction of the Panel based on its assessment of the evidence before it, the applicant did not disagree that the appropriate standard of review is reasonableness.

[28] Counsel were asked at the hearing to comment on the appropriate standard of review in light of the decision of Mr. Justice Bastarache in *Pushpanathan v. Canada (M.C.I.)*⁹, and following the hearing counsel made written submissions in relation to the application of that decision in this case, submissions which were of assistance to the Court.

[29] Subsequently in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*¹⁰, Mr. Justice Rothstein speaking for the Court of Appeal, in essence upheld the view of the trial judge, Mr. Justice Gibson, that in relation to questions of law, whether they concern the jurisdiction or interpretation of statutory authority, the standard of review under the *Canadian Environmental Assessment Act* is correctness. For the exercise of discretion under that Act the standard review was reasonableness. This reflects the decision in *Pushpanathan* and the jurisprudence in this Court in relation to federal environmental assessment legislation and the process of review panels. In this case, while the review process is somewhat differently based, by agreement between the government and their agencies concerned, as a joint panel dealing with the various concerns of agencies acting under federal and provincial legislation, that standard of review as enunciated by Rothstein J. is applicable.

[30] I agree that a question of law concerning the jurisdiction of the Panel is to be assessed against the standard of correctness. However where the Review Panel, composed of accepted experts, acts within its jurisdiction, as I have found to be the case here, the Court will give significant deference to the decision of the Panel. The Court would not intervene unless it is satisfied that the Panel's determination is unreasonable on the basis of the evidence before it.

[31] I am not persuaded by any evidence or argument that in this case the Panel's decision is unreasonable, given that it is one within the authority of, and in light of the evidence before, the Panel. The applicant does urge that it would have been reasonable for the Panel, in light of the submissions made to it, for the Panel to recommend that studies of the possible effects upon industrial Cape Breton ought to be carried out. If such a recommendation had been made by the Panel, that recommendation could hardly be questioned. Conversely, the fact that such a recommendation was not made does not constitute unreasonableness in the exercise of its responsibility by the Panel. There is no evidence or argument that the Panel did not hear or consider the submissions made to it. Obviously the Panel had before it different views about the spatial factors to be considered in assessing the socio-economic effects of the projects.

[32] In my opinion there is no evidence, and I am not persuaded by argument, that the Panel's failure to recommend the studies sought by the applicant can be said to be unreasonable.

Conclusion

[33] For these reasons, an order issued on October 11, 2000, dismissing the application by the Industrial Cape Breton Community Alliance Group on the Sable Gas Project for the Court to intervene and to provide directions for further review by the Panel.

[34] In these circumstances, there is no reason for the Court to consider the particular directions sought by the applicant. The concern of the applicant for assessment of socio-economic effects upon Industrial Cape Breton of the use of natural gas in Nova Scotia, in particular any use of gas as a replacement for coal in the generation of electricity in the province, is left to be addressed by the Government of Nova Scotia and by the proponents of projects that are directed to the end uses of natural gas in the province.

[35] I note that the respondents did not seek costs, either in written or oral submissions, and no costs were awarded. The order issued disposing of this matter directs that each party shall bear its own costs.

(signed) W. Andrew MacKay

Judge

OTTAWA, Ontario

October 17, 2000

¹ Reproduced as Appendix I to the *Joint Public Review Panel Report: Sable Gas Projects*, dated October 1997.

² *Joint Public Review Panel Report: supra*, note 1 at 55. (Page 68 in Applicant's Record.)

³ S.N.S. 1994-95, c. 1.

⁴ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

⁵ The words here quoted are based on those in subparagraph (v) of s. 3 of *Environment Act*, *supra*, note 3, which is included in the definition of "environmental effect" in the Agreement for a Joint Public Review.

⁶ 1999 CanLII 7908 (FC), [1999] 3 F.C. 425, [1999] F.C.J. No. 441 at para. 23, (T.D.).

⁷ *reflex*, (1996), 137 D.L.R. (4th) 177 (F.C.A.).

⁸ *Supra*, note 2.

⁹ 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982.

¹⁰ 1999 CanLII 9379 (FCA), [2000] 2 F.C. 263; [1999] F.C.J. No. 1515, (C.A.).

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