COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Peace Valley Landowner Association v. British Columbia (Environment)*, 2016 BCCA 377

Date: 20160915
Docket: CA42977

Between:

Peace Valley Landowner Association

Appellant
(Petitioner)

And

Minister of Environment and the Minister of Forests, Lands and Natural Resource Operations and British Columbia Hydro and Power Authority

Respondents
(Respondents)

Corrected Judgment: The text of the judgment was corrected on the title page where changes were made on September 16, 2016.

Before: The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated July 2, 2015 (*Peace Valley Landowner Association v. British Columbia (Environment)*, 2015 BCSC 1129, Vancouver Docket No. S148276)

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Place and Date of Hearing:	Vancouver, British Columbia April 4 and 5, 2016
Place and Date of Judgment:	Vancouver, British Columbia September 15, 2016

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Fitch

Summary:

An environmental assessment report in respect of the proposed Site C dam project included 50 recommendations. While most dealt with conditions that might be attached to an environmental assessment certificate, four were suggestions regarding future government regulation of BC Hydro. The Ministers granted an environmental assessment certificate, but in doing so did not address those four recommendations. The appellant sought judicial review, arguing that the Ministers' failure to consider the recommendations was unlawful. It was unsuccessful in the Supreme Court. Held: appeal dismissed. While s. 17 of the Environmental Assessment Act requires ministers to consider "recommendations" of a hearing panel before issuing a certificate, the recommendations referred to are those that relate to the granting or withholding of a certificate or to conditions to be attached to it. The four recommendations at issue in this case were not "recommendations" contemplated by s. 17 of the Environmental Assessment Act. Any failure by the Ministers to consider those four recommendations before issuing a certificate, then, did not constitute an error.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The Site C hydroelectric project is a large infrastructure project proposed by the BC Hydro and Power Authority ("BC Hydro"). It would involve the construction of a massive earthfill dam on the Peace River near Fort St. John. Site C is a "reviewable project" under the *Environmental Assessment Act*, S.B.C. 2002, c. 43. BC Hydro, therefore, was required to apply for and obtain an environmental assessment certificate before proceeding with the project.

[2] The Peace Valley Landowner Association ("PVLA") opposes the project. After the Ministers issued the required certificate, the PVLA brought judicial review proceedings to quash it. It was unsuccessful at first instance, and appeals to this Court.

The Joint Review Panel Report

[3] The Site C project is a massive economic undertaking, and it would have significant environmental impacts. The nature of the project makes it reviewable under the British Columbia *Environmental Assessment Act*, and also under the *Canadian Environmental Assessment Act*, S.C. 2012, c. 19. The current proceedings are concerned only with the issuance of a certificate under the

provincial statute. The Court was advised, however, that separate proceedings in the Federal Court have been filed to challenge aspects of the approval under the federal statute.

[4] The two statutory schemes allow for a degree of cooperation between federal and provincial agencies. Sections 27 and 28 of the British Columbia *Environmental Assessment Act* contemplate agreements between the federal and provincial governments to avoid duplication of efforts in the environmental assessment processes. In accordance with those provisions, the federal and provincial Ministers of Environment announced, in September 2011, that they had reached an agreement on a joint process to be followed for the environmental assessment under the statutes.

[5] Together, the Canadian Environmental Assessment Agency and the British Columbia Environmental Assessment Office produced "Environmental Impact Statement Guidelines" setting out the scope of the Site C assessment. Those guidelines were completed in September 2012. Under the guidelines, BC Hydro was required to furnish specific information, and to provide a comprehensive "Environmental Impact Statement". The Environmental Impact Statement was to address the need for and purpose of the project; technical and economic alternatives to the project; and the benefits of the project.

[6] BC Hydro submitted an Environmental Impact Statement in January 2013. Following review and public comment, it was required to make amendments to the Statement. The amended Statement was accepted by the federal and provincial agencies in August 2013. A single hearing panel (the "Joint Review Panel") was established to conduct an assessment for the purposes of both the federal and provincial statutes.

[7] Between September and November 2013, the Joint Review Panel made requests for additional information from BC Hydro. By November, it considered the matter ready for public hearings. The hearings took place in December 2013 and

January 2014. On May 1, 2014, the Joint Review Panel produced its report on the project.

[8] The report did not unequivocally recommend either the issuance of a certificate or rejection of the application. The report included fifty recommendations. Most of the recommendations were suggestions as to conditions that could be incorporated in a certificate: such things as requirements that the proponent satisfy preconditions before undertaking work, that it perform its work in a particular fashion, or that it furnish undertakings. Some of the recommendations, however, were not capable of being incorporated as conditions to a certificate, and a few did not even relate specifically to the Site C project. The recommendations included suggestions that the government consider particular initiatives and that it modify existing regulatory regimes.

[9] The panel was conscious of the magnitude of the project, and of its significance to the future of the Province. At page 307 of its report, it included the following discussion under the heading “Panel’s Reflections”:

> Site C is not an ordinary project. At $7.9 billion, it might be the largest provincial public expenditure of the next twenty years. In the long run, it would provide a large increment of inexpensive firm power at a low cost in greenhouse gases, an attribute whose value will only grow with time. Moreover, there is little doubt about the competence of BC Hydro to build and operate the Project efficiently, and to live up to the conditions that would be imposed in its approvals. Today’s BC Hydro is not the same company that rode roughshod over the interests of nature and the First Nations in the 1960s. The Panel has been generally impressed by the quality of the EIS, the Proponent’s participation at the hearing, and the passionate engagement of so many others.
>
> How one regards the economics of a large capital-intensive project depends on how one values the present versus the future. If today’s society values current over future consumption, such a project is daunting. A few decades hence, when inflation has worked its eroding way on cost, Site C could appear as a wonderful gift from the ancestors of that future society, just as B.C. consumers today thank the dam-builders of the 1960s. Today’s distant beneficiaries do not remember the Finlay, Parsnip, and pristine Peace Rivers, or the wildlife that once filled the Rocky Mountain Trench.
>
> Site C would seem cheap, one day. But the Project would be accompanied by significant environmental and social costs, and the costs would not be borne by those who benefit. The larger effects are:

> - Significant unmitigated losses to wildlife and rare plants, including losses to species under the *Species at Risk Act* and to game and plant resources preferred by Aboriginal peoples;
> - Significant unmitigated losses to fish and fish habitat, including three distinct sub-groups of fish preferred by Aboriginal peoples, one of which is federally listed as a species of special concern;
> - Losses of certain archaeological, historical and paleontological resources;
> - Social costs to farmers, ranchers, hunters, and other users of the Peace River valley; and
> - Forced changes to the current use of lands and waters by signatories to Treaty 8, other First Nations and Métis, whose rights are protected under article 35 of the *Constitution Act*, 1982.
>
> These losses will be borne by the people of the Valley, some of whom say that there is no possible compensation. Those who benefit, once amortization is well underway, will be future electricity consumers all across the province.

[10] The panel obviously considered the Site C project to have particular significance, and that fact probably accounts for its decision to use the assessment report as a vehicle for making recommendations extending beyond the terms to be attached to an environmental assessment certificate. In prefacing its list of recommendations, the panel explained its purpose in doing so:

> A number of the Panel's recommendations are addressed to governments rather than BC Hydro and are not to be interpreted as conditions to be attached to Project approvals. Rather, they are put forward to assist governments and proponents with assessments of this and future projects.

[11] On receipt of the Joint Review Panel's report, the Executive Director of the Environmental Assessment Office examined the recommendations, and considered how each of them could be incorporated as a condition to an environmental assessment certificate. He produced a document dealing with the recommendations, which document has been referred to as the "Executive Director's Response to the Joint Review Panel Report".

[12] Four recommendations made by the Joint Review Panel, and the Executive Director's response to those recommendations are of importance on this appeal:

Recommendation 46:

Joint Review Panel Recommendation:

If it is decided that the Project should proceed, a first step should be the referral of Project costs and hence unit energy costs and revenue requirements to the BC Utilities Commission for detailed examination.

Executive Director's Response:

The Executive Director notes that this recommendation is outside the scope of the Panel's mandate. The Executive Director advises that this not be a condition of an Environmental Assessment Certificate.

Recommendation 47:

Joint Review Panel Recommendation:

The Panel recommends that BC Hydro construct a reasonable long-term pricing scenario for electricity and its substitutes and update the associated load forecast, including Liquefied Natural Gas demand, and that this be exposed for public and Commission comment in a BC Utilities Commission hearing, before construction begins.

Executive Director's Response:

The Executive Director notes that this recommendation, although directed to BC Hydro, is a Government of British Columbia decision and is outside the scope of the Panel's mandate. The Executive Director advises that this recommendation not be a condition of an Environmental Assessment Certificate.

Recommendation 48:

Joint Review Panel Recommendation:

The Panel recommends, regardless of the decision taken on Site C, that BC Hydro establish a research and development budget for the resource and engineering characterization of geographically diverse renewable resources, conservation techniques, the optimal integration of intermittent and firm sources, and climate-induced changes to hydrology, and that an appropriate allowance in its revenue requirements be approved by the BC Utilities Commission.

Executive Director's Response:

The Province approved BC Hydro's Integrated Resource Plan in 2013 and therefore confirmed the corporation's research and development plans. Further the Executive Director notes that this recommendation although directed to BC Hydro, is a Government of British Columbia decision and is outside the scope of the Panel's mandate. The Executive Director advises that this not be a condition of an Environmental Assessment Certificate. The Province may wish to take this recommendation under advisement.

Recommendation 49:

Joint Review Panel Recommendation:

The Panel recommends that, if Ministers are inclined to proceed, they may wish to consider referring the load forecast and demand side management plan details to the BC Utilities Commission.

Executive Director's Response:

The Executive Director notes that this recommendation is directed to the Government of British Columbia, not BC Hydro, and is outside the scope of the Panel's mandate. The Executive Director advises that this not be a condition of an Environmental Assessment Certificate.

The Issuance of the Certificate

[13] Section 17 of the *Environmental Assessment Act* sets out the procedures to be followed on completion of an assessment by a hearing panel:

> 17 (1) On completion of an assessment of a reviewable project … the … hearing panel … must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).
>
> (2) A referral under subsection (1) must be accompanied by
>
> (a) an assessment report prepared by the … hearing panel …,
>
> (b) the recommendations, if any, of the … hearing panel …, and
>
> (c) reasons for the recommendations, if any, of the … hearing panel ….
>
> (3) On receipt of a referral under subsection (1), the ministers
>
> (a) must consider the assessment report and any recommendations accompanying the assessment report,
>
> (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and
>
> (c) must
>
> (i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,
>
> (ii) refuse to issue the certificate to the proponent, or
>
> (iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.
>
> …

[14] A package of materials that included the Joint Review Panel's report and the Executive Director's Response was delivered to the Ministers on September 7, 2014. On October 14, 2014, the Ministers issued an Environmental Assessment Certificate under s. 17(3)(c)(i) of the statute. The certificate commences with a number of recitals, including the following:

> The [Ministers] have considered the Pre-Panel Stage Report, amended Environmental Impact Statement, Joint Review Panel Report, Federal/Provincial Consultation and Accommodation Report, and the Executive Director's Response to the Joint Review Panel Report.

[15] The issued certificate includes a number of conditions (annexed to the certificate as a schedule), but it does not address recommendations 46 through 49 of the Joint Review Panel's report. The Ministers did not provide any formal reasons for the issuance of the certificate or for the conditions that they chose to attach to it. The Minister of Environment, however, held a media conference when the certificate was issued. The petitioner says that the following exchange between the Minister and a reporter during a question and answer session at the media conference sheds light on the matters considered by the Ministers in deciding to issue the certificate:

> Reporter: Has the government asked Hydro to respond particularly to any of the economic challenges that the joint review panel raised where they said they just didn't think Hydro had done enough work on the costing of the project, on matters like geothermal power or some of the alternatives, natural gas? Has the cabinet asked Hydro to resubmit on any of that on the economic side?
>
> Minister: I can speak to what we've done from the Environmental Assessment Office side. As our offices, both mine and the federal government were in review of the recommendations from the joint panel, one of the things that became apparent was that there were recommendations that went beyond the scope of what we are to be analyzing in the environmental assessment process. So in terms of things that would be directed at Hydro, that would be issues for another day if they're outside of this scope in terms of recommendations from the joint panel that relate to government. Again, those not only would be out of scope but the conditions in a certificate can only be placed on the proponent, not on government. So many of those things will be visited at another time.
>
> Reporter: Now the cabinet will make a decision based on the investment decision. So what is the process implicated in that? What's going to happen? Is there going to be more calls for more financial studies or is this, like, what we have is what we have?

> Minister: That would be a decision of cabinet as to whether or not they needed more information to consider. It's not something that I could provide you with information about today.
>
> Reporter: Could you tell us again why this doesn't have to go to the Utilities Commission?
>
> Minister: Well, that was a decision made by government and with respect to recommendations made. Again, that would be recommendations by the joint panel. Those would be recommendations to government, not to BC Hydro and so they're not appropriate in an environmental assessment certificate so we're not putting it in there. It's certainly open to government to consider how they might approach those recommendation or not.
>
> Reporter: So would …. It's still on the table theoretically when the cabinet comes to the final investment decision?
>
> Minister: Well, I don't typically answer theoretical questions. But it's over to government, it's over to cabinet to decide if they need any more information or any more process with respect to their decision on final investment.

The Judicial Review Application

[16] Following the issuance of the certificate, the PVLA commenced judicial review proceedings to quash it. It contended that the Ministers failed to consider recommendations 46 through 49 of the Joint Review Panel's report, and in doing so failed to fulfil the requirements of s. 17(3)(a) of the statute.

[17] The PVLA accepted that the Ministers were not required to give reasons for issuing the certificate, and acknowledged that, in the absence of evidence to the contrary, public officials are presumed to have complied with their statutory duties. It pointed to three pieces of evidence from which it said it could be inferred that the Ministers failed to consider the recommendations:

> a) the statements in the Executive Director's Response to the Joint Review Panel Report to the effect that recommendations 46-49 were "outside the scope of the panel's mandate";
>
> b) the absence of any reference to recommendations 46-49 in the certificate or surrounding documents;
>
> c) the Minister of Environment's statements to a reporter that "there were recommendations that went beyond the scope of what we are to be analyzing in the environmental assessment process".

[18] The judge did not accept that the evidence supported an inference that the recommendations were not considered. With respect to the Executive Director's Response, he said:

> [103] … [T]he primary purpose of the Director's response to the Economic Recommendations was to advise the Ministers that they should not be made conditions of the Certificate, if issued, and that his comments about scope were made in that context. I cannot conclude from the words used by the Director that he advised the Ministers that they could or should simply ignore any part of the Report, including the Economic Recommendations.

[19] The judge went on to consider whether recommendations 46 through 49 were "outside the scope of the Panel's mandate". In the final analysis, however, the judge deferred to the Executive Director's assessment:

> [105] The Director's advice that the Economic Recommendations were outside the scope of the Joint Review Panel's mandate relates to a matter that was clearly within the scope of the Director's expertise and is one to which the court should show considerable deference.

[20] With respect to the absence of any mention of recommendations 46 through 49 in the certificate and related documents, the judge noted that the recommendations were not capable of being incorporated into the certificate as conditions:

> [109] In the Report, the Panel itself recognized that some of its recommendations could not appropriately be made conditions to the Certificate:
>
> > A number of the Panel's recommendations are addressed to governments rather than BC Hydro and are not to be interpreted as conditions to be attached to Project approvals. Rather, they are put forward to assist governments and proponents with assessments of this and future projects. (p. 310)
>
> [110] I agree with the Director's advice that none of the Economic Recommendations could properly have been made conditions to the Certificate. Two are directed to government and therefore beyond BC Hydro's control. The two that are directed to BC Hydro do not directly affect the Project or any adverse environmental effects of the Project.
>
> [111] In my view all of the Economic Recommendations fall into the category of recommendations that the Panel did not anticipate being made conditions of the Certificate. Given this conclusion, no inference can be drawn from the fact they were not made conditions of the Certificate.

[21] Finally, the judge addressed the issue of the Minister of Environment's statement to the media:

> [113] As I understand her comments, the Minister intended to convey her view that the concerns giving rise to the Economic Recommendations were not matters that should prevent the issuance of the Certificate but which might be matters that could be addressed elsewhere, such as by Cabinet in its decision about funding the Project.
>
> [114] In my view, the Minister's comments to the media were also consistent with the Panel's own comments with respect to the purpose of some of its recommendations, referred to above. The Economic Recommendations did not relate exclusively to the Project. For example, Recommendation 48 was that BC Hydro establish a research budget regardless of whether the Project proceeded. Recommendation 49 was directed to actions that the Ministers may wish to consider if the Project was approved.
>
> [115] Given the general nature of the question that the Minister was answering, the nature of the Economic Recommendations and the informal situation in which the Minister was speaking, I cannot draw the inference that PVLA urges on me from her comments.
>
> [116] In summary, the Minister of the Environment's comments to the media do not support an inference that the recommendations were simply ignored. On the contrary, in the interview she gave reasons why she, as Minister of Environment, did not act on the recommendations, thereby indicating that she did in fact consider them.

[22] The judge's reasons also include an extensive discussion of standard of review. He found the appropriate standard to be "reasonableness" and said that a failure by the Ministers to take into account a recommendation "would not automatically render their decision invalid but would be a factor to consider in determining the overall reasonableness of the decision."

Issues on Appeal

[23] The PVLA contends that the judge made three errors in his analysis, which they describe as follows:

> a) The chambers judge erred in … finding that the Ministers may lawfully decline or fail to consider mandatory factors … in deciding whether to grant an Environmental Assessment Certificate;
>
> b) The chambers judge erred … in determining that the Economic Recommendations were outside the scope of the Joint Review Panel's mandate; and

> c) The chambers judge committed an error … in determining that the Ministers "considered" the Economic Recommendations ….

The Role of Recommendations in the Assessment Process

[24] It will be helpful, before addressing these specific issues, to consider the scheme of the *Environmental Assessment Act*, and the role of hearing panel recommendations in the assessment process.

[25] The PVLA urges the Court to see the *Environmental Assessment Act* as an important limitation on the Provincial government's ability to pursue economic objectives at the expense of the environment. It refers to *Friends of Davie Bay v. Province of British Columbia*, 2012 BCCA 293, as setting out the appropriate interpretive approach to the statute. In that case, the Court said:

> [33] The modern approach to statutory interpretation has been recently stated in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at para. 27:
>
> > [27] The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of [the Legislature] by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute. In addition to this general roadmap, a number of specific rules of construction may serve as useful guideposts on the court's interpretative journey. …
>
> [34] Here, the object of the legislation is environmental protection. This important object must not be lost in the minutia. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71, La Forest J., for the majority, cited with approval the fundamental purposes of environmental impact assessment identified by R. Cotton and D.P. Emond in "Environmental Impact Assessment" in J. Swaigen, ed.,*Environmental Rights in Canada* (Toronto: Butterworths, 1981) 245 at 247:
>
> > (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (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.
>
> [35] I adopt, as a correct approach to the interpretation of environmental legislation, the following passages from *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4th) 50 (N.L.C.A.) at paras. 11–12, to which the chambers judge also referred at para. 72:

> [11] Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA); *Environmental Assessment Act*, R.S.N. 1990, c. E-13 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.
>
> [12] The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

[26] The aspirational tone of the quote from *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* serves as an important reminder that there is a great deal at stake in environmental law. Environmental legislation is often broadly worded, but there is a real danger that bodies motivated by other agendas (including governments overwhelmed by short-term economic goals) will interpret it narrowly. The courts must not allow environmental legislation to be emasculated through unduly narrow interpretation. That said, *Friends of Davie Bay*, makes the important point that general rules of statutory interpretation apply to environmental statutes. Provisions are interpreted “by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute”.

[27] The *Environmental Assessment Act* provides for an environmental assessment process for a broad array of projects. The assessment process is a robust one. A hearing panel appointed to conduct an assessment has broad powers. Its mandate must be interpreted generously, given the subject matter of the statute.

[28] The panel is required to provide a report, and specifically empowered to make recommendations. The recommendations must be supported by reasons. As I read the statute, the intention is that the hearing panel engage in a comprehensive, independent, detached analysis of the environmental and other impacts of a proposal.

[29] The role of the ministers in the statutory scheme is decidedly different from the role of the hearing panel. The ministers are, ultimately, the decision-makers. Their decisions are to be informed by the hearing panel's report and recommendations, and the ministers must give consideration to them. In the final analysis, however, the discretion given to the ministers is very broad. They are entitled to consider a wide array of factors favouring or militating against the granting of a certificate. I agree with the chambers judge's characterization of the Ministers' decisions as essentially political in nature:

> [94] The Ministers' decision about whether to issue the Certificate was a political one. It was described by Bauman J., as he then was, in *Do Rav Right Coalition v. Hagen*, 2005 BCSC 991 at paras. 31-36:
>
> > [31] I make several elementary observations concerning the statutory scheme.
> >
> > [32] First, it contemplates the assessment of works and activities which may have significant adverse environmental, economic, social, heritage or health effects.
> >
> > [33] Second, the process contemplates an *ad hoc* régime for public notice, access to information and consultation, tailored for each assessment by a person with broad discretionary authority which, in turn, is loosely guided by the Regulation.
> >
> > [34] Third, at the end of the process, a political, policy-driven decision is made by elected Ministers of the Crown; they are given a very broad discretion to consider the issue: they may consider "any other matters that they consider relevant to the public interest in making their decision on the application".
> >
> > [35] The environmental assessment process is not, in substance, one engaged in resolving a dispute between a project proponent and affected individuals. It is, on the contrary, one which assesses a project in the context of its broad impacts on society, weighs the efficacy of mitigative measures, and authorizes a project to proceed if it is in the public interest to do so.
> >
> > [36] In the language of the cases, the process is highly polycentric, not bipolar.

[30] The assessment process established under the *Environmental Assessment Act* is aimed at providing ministers with adequate information (including recommendations) to allow them to make informed decisions. At the end of the process, the ministers have three options: they may (i) issue a certificate, attaching any conditions they consider necessary, (ii) refuse to issue a certificate, or (iii) order further assessment.

[31] These possible dispositions must be kept in mind in considering the role given to "recommendations" in s. 17 of the statute. A purposive approach to the interpretation of the statute is called for. In my view, the "recommendations" referred to in s. 17(2)(b) and 17(3)(a) of the statute, are recommendations as to what decisions the ministers should make on the application for a certificate.

[32] Thus, the "recommendations" referred to in those sections are confined to recommendations to issue a certificate, attach conditions to a certificate, refuse a certificate and, perhaps, to require a further assessment (this latter possibility is problematic, however, because it is the hearing panel, itself, that is charged with conducting a comprehensive assessment in the first instance). Any other suggestions made by a hearing panel are not "recommendations" under s. 17(3)(a), whether or not the panel uses the word "recommendation" to describe them.

[33] The proper interpretation of s. 17 of the statute is critical to the disposition of this appeal. Having discussed the role of "recommendations", I note that Recommendations 46 through 49 in the Joint Review Panel's report were not directed to any disposition open to the Ministers under the statute. I agree with the chambers judge's assessment that Recommendations 46 through 49 in the Joint Review Panel's report were not intended to be used as conditions to be attached to a permit. As the Executive Director pointed out, the recommendations are directed at regulatory activities of the Provincial government, not at matters within the control of the project proponent. Further, the implementation of those recommendations would require legislative change, as s. 7(1)(d) of the *Clean Energy Act*, S.B.C. 2010, c. 22 exempts BC Hydro from certain provisions of the *Utilities Commission Act*, R.S.B.C.

1996, c. 473 in respect of the Site C project. While the Ministers might have the ability, as members of the Executive Council, to press for legislative change, they did not have the ability to unilaterally implement such change, and certainly had no ability to do so as part of the environmental assessment process.

[34] I turn, now, to the specific issues raised by the appellant on this appeal.

The Jurisdictional Issue

[35] The appellant contends that the Executive Director erred in describing recommendations 46 through 49 in terms that suggested that the Joint Review Panel had exceeded its jurisdiction. It says, further, that the judge erred in deferring to the Executive Director's interpretation of the statute. Finally, it says that the Ministers, themselves, must have been under the same misapprehension as to jurisdiction as the Executive Director.

[36] Apparently relying on principles derived from *Dunsmuir v. New Brunswick,* 2008 SCC 9, the chambers judge held that the Court owed deference to the Executive Director on the issue of the jurisdiction of the Joint Review Panel:

> [105] The Economic Recommendations were not specific to the Project. Generally they made public recommendations to government with respect to future actions it should or could take to be better informed about broader economic energy related issues. The Director's advice that the Economic Recommendations were outside the scope of the Joint Review Panel's mandate relates to a matter that was clearly within the scope of the Director's expertise and is one to which the court should show considerable deference.

[37] I have some difficulty with this conclusion. The Executive Director is only one of several actors under the *Environmental Assessment Act*. He was neither the tribunal charged with making recommendations nor the body that received the recommendations. In the circumstances, it is difficult to understand why the Court would be driven to afford greater deference to his views than to the views of the hearing panel (the body whose jurisdiction was being debated) or those of the ministers (whose ultimate decision is the one being judicially reviewed).

[38] The deference given to the Executive Director's comment is particularly curious given the judge's own comment, at para. 104 of his judgment, that "it is difficult to determine the basis on which the Director concluded that the Economic Recommendations were outside the scope of the Panel's mandate."

[39] I am not, in any event, convinced that the Executive Director's statements that certain recommendations were "outside the scope of the Panel's mandate" was intended to be a pronouncement on the jurisdiction of the Joint Review Panel rather than a comment on the scope for "recommendations" under s. 17 of the statute.

[40] It is unfortunate that the Executive Director described recommendations 46 through 49 simply as being "outside the scope of the Panel's mandate", because it focused attention on parsing the precise language of the Environmental Impact Statement Guidelines to determine the boundaries of the hearing panel's jurisdiction. I doubt that that is what the Executive Director intended.

[41] The hearing panel is not a decision-making body, and need not have legal training. Its "mandate" is a broad one, and the boundaries of its jurisdiction to inquire and to make observations and suggestions should not be unduly narrowed.

[42] In this case, the Joint Review Panel explained its purpose in making recommendations that could not be translated into permit conditions. I would not fault the panel for having made the recommendations, nor would I characterize them, as "beyond the scope of the panel's mandate". While the recommendations were not of the sort contemplated by s. 17 of the *Environmental Assessment Act*, I would not go so far as to say the Joint Review Panel exceeded its authority by making observations and suggestions about future governmental action.

[43] The comments by the Minister of Environment to the reporter at the media conference do not suggest that she was of the view that the Joint Review Panel exceeded its jurisdiction by making recommendations. Rather, they indicate, at most, that she considered Recommendations 46 through 49 to be matters that had

to be deferred, as they were not matters that could be dealt with by granting, withholding, or imposing conditions in a certificate.

[44] In summary, I am not persuaded that the Ministers' decision reflects any misconception as to the proper role of review panel recommendations in the certificate process.

Did the Ministers have to Consider the Recommendations?

[45] While I would not characterize Recommendations 46 through 49 as being beyond the jurisdiction of the Joint Review Panel, I would hold that they do not constitute "recommendations" as that word is used in s. 17(2)(b) and 17(3)(a) of the statute. Accordingly, the provision of s. 17(3)(a) requiring the ministers to consider hearing panel "recommendations" did not apply to Recommendations 46 through 49.

Can Failure to take a Mandatory Consideration into Account be Reasonable?

[46] In the result, the question of whether a discretionary decision made without taking into account a mandatory consideration can be reasonable does not need to be determined in this case.

[47] Without deciding the issue, I would observe that judicial review is concerned primarily with the decision-making process rather than the wisdom of decisions. It is difficult, then, to accept that a tribunal's failure to take into account a mandatory consideration could be characterized as reasonable, even if the tribunal's ultimate decision itself appears to a court to be an appropriate result.

Did the Ministers Ignore Recommendations 46 through 49?

[48] The factual issue of whether the Ministers took Recommendations 46 through 49 into account is also, in the circumstances, of no moment. I would say, however, that I agree with the judge's apparent view that the Ministers were aware of the recommendations and concluded, after due consideration, that they should not affect the issuance of the certificate, though they might be considered by government after issuance of a certificate.

Conclusion

[49] Recommendations 46 through 49 in the Joint Review Panel's report were not "recommendations" coming within the ambit of s. 17 of the *Environmental Assessment Act*. They, therefore, did not need to be considered by the Ministers when they decided to issue an environmental assessment certificate. I would, therefore, dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Fitch"