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# Environmental Review Tribunal Exercises Discretionary Remedial Power in Ostrander Wind Farm Case

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In its June 6, 2016 decision, the Environmental Review Tribunal (Tribunal) revoked the Renewable Energy Approval (REA) that had been granted to Ostrander Point GP Inc. (Ostrander) to develop a nine turbine wind farm. This decision is relevant for stakeholders in Ontario's renewable energy industry because it is the first case to provide insight into how the Tribunal will exercise its discretionary remedial powers where a REA is found to meet the "harm test" in section 145.2.1(2)(b) of the *Environmental Protection Act* (EPA).

**Factual and procedural background**

In December 2012, the Ontario Ministry of the Environment and Climate Change (Ministry) issued a REA authorizing Ostrander to construct and operate nine wind turbines on a site in Prince Edward County (the Project). In July 2013, the Tribunal revoked Ostrander's REA on the grounds that the Project would cause serious and irreversible harm to the Blanding's turtle, an endangered species. The Tribunal's decision was significant because it was the first REA appeal where the harm test had been met.

The proponent appealed the Tribunal's decision to the Ontario Divisional Court. The Divisional Court overturned the Tribunal's ruling and allowed the REA for the Project to stand.[2]

Opponents of the Project appealed the Divisional Court's decision to the Ontario Court of Appeal. The Court of Appeal held that the Tribunal's finding that "serious and irreversible harm" would befall the Blanding's turtle as a result of the Project was reasonable, but that the Tribunal's decision on the appropriate remedy to grant in the circumstances – revoking the REA – was unreasonable because the Tribunal had simply revoked the REA without any analysis or submissions from the parties on remedy.[3] On that basis, the Ontario Court of Appeal remitted the issue of remedy back to the Tribunal to decide.

The Tribunal's June 6, 2016 decision[4] constitutes its ruling on the appropriate remedy in this case, after hearing evidence from all parties concerning the additional mitigation measures proposed by the proponent, Ostrander, to avoid such harm to the Blanding's turtle population on the Project site.

## The Tribunal's decision

### *(a) Statutory provisions*

The harm test in section 145.2.1(2)(b) of the EPA asks whether a REA will cause "serious and irreversible harm to plant life, animal life or the natural environment". As the Court of Appeal had already confirmed the harm test had been met, the key issue in this case was the appropriate remedy. According to section 145.1.1(4) of the EPA, the Tribunal may exercise its discretionary remedial power to:

> (a) revoke the decision of the Director;
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> (b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
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> (c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

### *(b) The scope of the Tribunal's remedial powers*

A significant part of the Tribunal's decision is spent considering the scope of its remedial powers under s. 145.2.1(4) of the EPA. The Director and Ostrander argued for a narrow approach, in which the Tribunal could only exercise its powers under s. 145.2.1 of the EPA to focus upon the precise "serious and irreversible harm" in question. The opponents of the Project argued for a broader approach, in which the Tribunal "stands in the shoes of the Director" and exercises all of the Director's REA approval powers, and considers the general purpose of the EPA and the Ministry's Statement of Environmental Values (e.g., precautionary principle, ecosystem approach), among other things.

The Tribunal opted for the broader approach, concluding that where the harm test has been met, it has the power to "step into the shoes of the Director" and exercise the Director's powers to determine what is in the public interest.

Regarding burden of proof, the Tribunal appears to have ruled that once an appellant has discharged its burden of proving the serious and irreversible harm and the Tribunal moves to a consideration of the appropriate remedy, no one party bears the "burden of proof". Rather, the Tribunal will exercise its discretion "on the basis of the parties' submissions on the evidence, as proved on a balance of probabilities" – in other words, after weighing all of the remedy evidence.

### *(c) Tribunal's consideration of the evidence*

The balance of this lengthy decision reviews and rules upon the evidence presented by all parties at the remedy hearing. It is noteworthy that while Ostrander adduced "fresh evidence" on a variety of the mitigation measures it proposed with a view to preventing or

reducing the harm to the Blanding's turtle population, the Director and appellants were permitted to adduce responding evidence. Ostrander was given a further right of reply.

Ostrander adduced fresh evidence on two types of mitigation measures proposed to reduce road mortality in the Blanding's turtle: 1) measures to keep the turtles off the roads and 2) measures to keep traffic off the roads where turtles are present. The measures to keep turtles off roads included the use of culverts, fencing, and the creation of artificial nesting sites in safe locations, to name a few.

With respect to fencing, the Tribunal found that it was not an appropriate mitigation measure for several reasons, including: the difficulty of locating high-frequency intersects at which to place the fencing; the fact that the proposed roads effectively circled the site while turtles may crisscross the site in every direction for their various life cycle requirements; and the fact that fencing would fragment this high quality habitat, creating more harm than good.

With respect to the creation of artificial nesting sites, the Tribunal concluded that because Ostrander's expert could provide no scientific studies showing these have been successful, it preferred the opinion of the expert for the Prince Edward County Field Naturalists who indicated that creating artificial nest sites has not been shown to be successful at directing Blanding's turtles away from nesting on roadsides.

The Tribunal also rejected evidence that Ostrander could create artificial wetlands or harden road shoulders with new vegetation to discourage roadside nesting. With regard to the latter, it found that the proposed mitigation measures were "exceedingly vague, and their consequences in this location had not been examined".

Concerning the use of nesting cages to prevent predation, the Tribunal found that nest cages help protect eggs from predation and thus increase hatchling survival, but do not serve as an effective tool to mitigate against adult turtle road mortality or poaching.

With respect to the other types of mitigation measures – keeping traffic off the roads where turtles are present – Ostrander proposed gated access to the access roads for the Project, which would be locked from May to October each year and otherwise monitored by trained staff, to eliminate public access to these roads. However, experts for the Project opponents noted that members of the public could drive around the gates, could disregard the no access signage, and that these measures would have no effect on the poaching opportunities afforded by the access roads. The Tribunal also noted that, under Ostrander's *Endangered Species Act* permit, no road maintenance was permitted during the nesting season (May to October), and otherwise there was no evidence that Ostrander employees would be present at the site during this time period to engage in monitoring and enforcement. As a result, the Tribunal accepted that:

> … on a balance of probabilities, that the gates will deter some public road users, and it is likely that there will be less public traffic on Project access roads with the gates, than without them. For all of the listed reasons, however, the Tribunal

> concludes that the success of the gates in preventing public access over the time period of relevance to this species depends almost entirely on well-intentioned visitors not to use the access roads because they are gated and signed. It is unlikely poachers will be deterred at all, and in fact easier access to the Site via better roads will likely facilitate poaching. The Tribunal received insufficient evidence on which it can reliably find, on a balance of probabilities, that the elements of the Road Access Control Plan will effectively deter members of the public from driving vehicles on access roads.

***(d) Tribunal's conclusion on the evidence***

Based on all the above, the Tribunal concluded that the mitigation measures proposed by Ostrander would not be effective in preventing serious and irreversible harm to the Blanding's turtle, stating:

> [132] For the above reasons, the Tribunal finds that Ostrander and the Director have not demonstrated, on a balance of probabilities, that the measures outlined in the IMP dated November 15, 2013, including the Road Access and Control Plan, together with the pre-existing REA conditions, will prevent serious and irreversible harm to the population of Blanding's turtle at the Project Site and surrounding area, as was found in the 2013 APPEC decision.
>
> [133] The Tribunal finds that a small number of individual adult turtles will be killed annually, that poaching will not be reduced but rather facilitated, and that there will be no measurable change to the impacts of predation. The Tribunal finds that these harms cumulatively over the lifetime of the Project will cause irreversible harm to the local population, and lead to the eventual loss of the population.

***(e) Tribunal's ruling on appropriate remedy***

In considering its remedial powers and the appropriate remedy on the facts of this case, the Tribunal concluded that revocation of the REA remained the appropriate remedy:

> [143] In summary, and although the promotion of renewable energy and its related benefits, and streamlining approvals, are important factors in consideration of the public interest, the Tribunal finds that not proceeding with this nine wind turbine Project in this location best serves the general and renewable energy approval purposes in sections 3(1) and 47.2(1) of the EPA, the public interest under s. 47.5, and the precautionary principle and ecosystem approach.
>
> [144] Having weighed all of the relevant considerations, the Tribunal finds that the remedies proposed by Ostrander and the Director are not appropriate in the unique circumstances of this case. The Tribunal finds that the appropriate remedy under s. 145.2.1(4) is to revoke the Director's decision to issue the REA.

**Implications of the Tribunal's decision**

This decision is significant, from both a legal and practical perspective.

***(a) Relaxation of legal test for revoking REAs at remedy stage***

Legally, it is significant for its ruling that once "serious and irreversible harm" is found and the Tribunal moves into a consideration of appropriate remedy, the Tribunal will step into the Director's shoes to fashion an appropriate remedy. The Tribunal has now ruled that, in doing so, it may consider the general purpose of the EPA, the general purpose of REAs, the public interest under section 47.5 of the EPA, and the principles set out in the Ministry's Statements of Environmental Values (including the ecosystem approach and the precautionary principle).

This legal ruling is important because in its earlier decision in *Erickson*[5] the Tribunal took the position that for an appellant to satisfy the stringent legislative harm test under s. 145.2.1 of the EPA, it could not rely upon the precautionary principle and such other factors. With the *Ostrander* decision, the Tribunal now appears to be saying that once the more stringent harm test has been met, and the Tribunal moves to a consideration of "remedy", it has licence to consider a much broader range of factors, including the precautionary principle. This raises the question of whether the decision has opened a backdoor for the Tribunal to relax the stringent harm test imposed by the statute.

***(b) Proponents must prove harm can be eliminated at remedy stage***

Moreover, at the remedy stage, all parties will be allowed to adduce evidence on proposed mitigation measures, and the Tribunal will consider all the evidence in determining what has been proven, on a balance of probabilities. Although the Tribunal suggests that this remedy hearing process does not impose a "burden of proof" on any one party, one cannot help but note that, in considering the evidence and making a ruling on remedy, the Tribunal effectively imposed upon Ostrander the burden of proving, on a balance of probabilities, that its additional mitigation measures would completely **eliminate** the serious and irreversible harm to the Blanding's turtle. Given the long life and low reproductive rate of the turtle, reduction of mortality was not enough.

***(c) Proponents should not wait until remedy stage to adduce all mitigation measures***

Practically, the decision is significant because it suggests that in a "remedy hearing", once a finding of "serious and irreversible harm" has already been made by the Tribunal in the hearing proper, the die may already be cast. That is, it may be very difficult for a project proponent to persuade the Tribunal that it has fresh evidence of mitigation measures, which were not previously considered by the Tribunal, that will effectively eliminate the serious and irreversible harm in question. While on the face of this decision, the Tribunal in this case, after being directed to do so by the Court of Appeal, appeared to conduct an additional "remedy hearing" in which it scrutinized and weighed all available evidence relating to the

relevant mitigation measures, both pro and con, one cannot help but conclude that it may have been more effective and persuasive to present this evidence in the hearing proper, and hopefully maximize the chances of avoiding a finding of "serious and irreversible harm" at first instance.

### *(d) Impact upon other REA projects*

The decision is of further practical importance because of the effect it could have on other REA projects in similar situations. For example, located in close proximity to the Ostrander site is the proposed White Pines Wind Farm Project. In its decision released on April 8, 2016, after making findings of serious and irreversible harm to Little Brown Bats and the Blanding's turtles, the Tribunal stayed the proposed 29 turbine White Pines project pending a remedy hearing. It would appear that the Tribunal is now automatically applying the suggestion of the Court of Appeal in *Ostrander*, regarding a remedy hearing, to all REA hearings. Arguably, this should not be necessary, either legally or practically speaking, where a proponent is prepared in the main hearing to present all of its mitigation measure evidence.

### *(e) Appeal possible*

Finally, we note that in *Ostrander* there may yet be a right to appeal the remedy hearing decision to the Divisional Court, so the *Ostrander* saga may not be over.

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[1] The first four authors are partners of Osler, Hoskin & Harcourt LLP. The last is an associate of the firm.
[2] Please see our report on the Div. Ct. decision at: https://www.osler.com/en/resources/regulations/2014/divisional-court-overturns-environmental-review-tr.
[3] Please see our report on the C.A. decision at: https://www.osler.com/en/resources/regulations/2015/ontario-court-of-appeal-decides-ostrander-wind-far.
[4] *Prince Edward County Field Naturalists v. Ostrander Point GP Inc.* (Environmental Review Tribunal, Case No. 13-003, June 6, 2016
[5] Please see our report on *Erickson* at: https://www.osler.com/en/resources/critical-situations/2011/the-ontario-environmental-review-tribunal-decision.

Toronto Law Journal

# Gateway to Nowhere: Environmental Assessment, the Duty to Consult, and the Social License to Operate in *Gitxaala Nation v. Canada* (Northern Gateway)

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In *Gitxaala Nation v. Canada,*[1] a majority of the Federal Court of Appeal quashed the Governor-in-Council (Cabinet) Order directing the National Energy Board to issue a certificate of public convenience and necessity to the Northern Gateway oil pipeline project on the ground that the federal government failed to fulfill its constitutional duty to consult affected First Nations. The majority's reasoning is a remarkable indictment of the Harper government's consultation of First Nations: "we are satisfied that Canada failed" during the project's consultation process "to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations."[2] But the Court's decision unwittingly discloses an even more damning indictment of both the federal environmental assessment regime and the constitutional duty to consult, both of which tend to substitute procedure for substance. Neither regime as presently constituted is capable of delivering on Canada's closely related commitments to sustainability and reconciliation with Indigenous peoples.

**Background: The Northern Gateway Oil Pipeline Proposal**

Northern Gateway is a proposed 1,178 kilometer, $7.9-billion oil pipeline that would carry approximately 525,000 barrels per day of oil sands crude from Alberta through the Great Bear Rainforest to the coast of British Columbia for export to Pacific markets.[3] Characterized as a "critical infrastructure project" by Northern Gateway's president and supported enthusiastically by the former Harper government at the federal level and tacitly by the Notley government in Alberta, the project would also entail the construction of tanker and marine terminals in Kitimat, British Columbia to accommodate some 190-250 tanker calls per year. The estimated operational life of Northern Gateway, were it ever to be approved and constructed, is approximately 50 years.

[1] *Gitxaala Nation v. Canada,* 2016 FCA 187 (CanLII) ["*Northern Gateway*"].
[2] *Ibid* at para. 279.
[3] Technically, the project actually entails two pipelines. The other would run from the Pacific coast at Kitimat, B.C. back to Alberta carrying condensate removed from the oil tankers at Kitimat for distribution to Alberta markets.

Myriad competing interests are at stake. First, in favour of the project are the proponent, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc., which are backed by Enbridge Inc. as well as Suncor Energy Inc., Cenovus Energy Inc., MEG Energy Corp., Nexen Energy ULC, and Total SA. As noted above, the project was supported by the former federal government and the current Alberta provincial government; both the National Energy Board and the Attorney General of British Columbia intervened in the case before the Federal Court of Appeal, along with the Canadian Association of Petroleum Producers, an industry lobbyist. The project also has 26 Aboriginal equity partners representing almost 60% of the Aboriginal communities along the pipeline's right of way, approximately 60% of the area's First Nations' population, and approximately 80% of the area's combined First Nations and Métis population.[4]

Opposed to the project are a number of First Nations, including Gitxaala Nation, Haisla Nation, Gitga'at First Nation, Kitasoo Xai'Xais Band Council, Heiltsuk Tribal Council, Nadleh Whut'en and Nak'azdli Whut'en, Haida Nation.[5] Also opposed to project are a number of NGOs, including ForestEthics Advocacy Association, Living Oceans Society, Raincoast Conservation Foundation, B.C. Nature, Amnesty International, and the labour union Unifor.[6] A number of individuals also appeared before the court on their own behalf. Finally, the municipality of Kitimat previously held a plebiscite over Northern Gateway and voted against the project by a margin of 58.4% to 41.6%.[7]

**Federal Environmental Assessment: Polycentric, but Predetermined?**

The majority was critical (if obliquely) of the Joint Review Panel charged with conducting the environmental assessment of the project; the panel was formed under the *Canadian Environmental Assessment Act, 2012*[8] and the *National Energy Board Act*.[9] According to the majority, "legitimate and serious concerns about the effect of the Project upon the interests of the affected First Nations" remained even after the pipeline proponent's voluntary undertakings and the 209 conditions imposed on the project by the panel. "Some of these [remaining concerns] were considered by the Joint Review Panel but many of these were not, given the Joint Review Panel's terms of reference."[10]

[4] *Northern Gateway*, *supra* note 1 at para. 16.
[5] *Ibid* at para. 17.
[6] *Ibid* at para. 18.
[7] Robin Rowland, "Kitimat residents vote 'no' in pipeline plebiscite", *The Globe and Mail*, (12 April 2014), online: <http://www.theglobeandmail.com/news/british-columbia/kitimat-residents-vote-in-northern-gateway-oil-pipeline-plebiscite/article17949815/>.
[8] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.
[9] *National Energy Board Act*, R.S.C. 1985, c. N-&, as amended.
[10] *Northern Gateway, supra* note 1 at para. 326.

The previous federal government's authoritarian, top-down approach to Northern Gateway "fell short of the mark."[11] Given the plurality of stakeholders having a serious interest in the project and its effects, how could such an approach have turned out otherwise?

The majority of the Federal Court of Appeal appears to have recognized this complicating factor in Northern Gateway, explaining that the Governor in Council's assessment of the project had to grapple with a broad variety of matters, including economic, social, cultural, environmental, and political matters, which are "of a polycentric and diffuse kind."[12] A decision-making process that excludes or effectively ignores the concerns and perspectives of affected stakeholders runs the very real risk of being, not only substantively incomplete and wrongheaded, but also democratically unaccountable and politically illegitimate (as well as legally invalid, under particular circumstances such as those in the case at bar). *Northern Gateway* is anything but a special case. It represents the "realpolitik" of environmental assessment in Canada today.

However, an important caveat is in order. *Genuine* polycentric environmental decision-making must ask, not *how* a proposed project will inevitably proceed, but *whether* it should proceed at all. The mere opening up of sustainability-based decision-making to a broader array of interests and interactions – urgent as that opening-up is – cannot be a process-based substitute for substantive sustainability. If an environmental assessment process cannot say "no" to a proposed natural resources project, then no amount of procedure, no amount of consultation and public participation, can make up for the end result being predetermined from the outset, as the Court seems to imply. This caveat becomes clearer still in light of the Court's analysis of the government's consultation of affected First Nations and Indigenous peoples.

**The Duty to Consult: Good Faith, or Check-the-Box Constitutionalism?**

As noted above, the majority's reasoning in *Northern Gateway* is a remarkable indictment of the Harper government's consultation of First Nations: "we are satisfied that Canada failed" during the project's consultation process "to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the

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[11] *Ibid* at para. 332.

[12] *Ibid* at paras. 139-140. But see Martin Olszynski, "Northern Gateway: Federal Court of Appeal Applies Wrong CEAA Provisions and Unwittingly Affirms Regressiveness of 2012 Budget Bills", *Ablawg.ca,* (5 July 2016), online: <http://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions/>, who argues convincingly that the majority of the court seems to misconstrue the nature of EA generally.

material concerns raised. *Missing was a real and sustained effort to pursue meaningful two-way dialogue*."[13]

While the Court in *Northern Gateway* appears to understand the polycentric nature of the project's assessment and the failure of the government to engage in meaningful consultation with affected First Nations stakeholders, its articulation of the constitutional duty to consult falls far short of the demands of genuinely polycentric decision-making. According to the Court,

> [327] However, the Phase IV consultations did not sufficiently allow for dialogue, nor did they fill the gaps. In order to comply with the law, Canada's officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed to be placed before the Governor in Council for its consideration. In the end, it has not been demonstrated that any of these steps took place.
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> [328] In our view, this problem likely would have been solved if the Governor in Council granted *a short extension of time* to allow these steps to be pursued. But in the face of the requests of affected First Nations for more time, there was silence. As best as we can tell from the record, these requests were never conveyed to the Governor in Council, let alone considered.
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> [329] Based on this record, *we believe that an extension of time in the neighbourhood of four months—just a fraction of the time that has passed since the Project was first proposed—might have sufficed*. Consultation to a level of reasonable fulfilment might have further reduced some of the detrimental effects of the Project identified by the Joint Review Panel. And it would have furthered the constitutionally-significant goals the Supreme Court has identified behind the duty to consult—

[13] *Ibid* at para. 279 [emphasis added].

> the honourable treatment of Canada's Aboriginal peoples and Canada's reconciliation with them.[14]

"*It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples*," the majority added.[15]

Contrast this check-the-box reasoning – which curiously conjoins "meaningful dialogue" and "little time and little organizational effort" – with Gitga'at First Nation elder Art Sterritt's response to the Court's judgment. According to Mr. Sterritt, additional consultation will not pave the way to his nation's acceptance of the project. "The Gitga'at people are absolutely against this project. There is really no good that can come of the Northern Gateway project…. Just one spill from this project basically wipes out our access to our food, wipes out our economy, wipes out our culture."[16]

In a properly polycentric model of sustainability-based decision-making, "no" must be on the table as a legitimate outcome from the very outset of any assessment and/or consultation process. Again, no amount of consultation, public participation, or "best practices" can substitute for a lack of substantive sustainability as determined through a genuinely plural and structurally balanced learning and decision-making process.

This is true, moreover, not only as a practical matter of facilitating and accelerating sustainability, but also as a matter of recently-settled Aboriginal law. In *Tsilhqot'in Nation v. British Columbia,* the Supreme Court of Canada held that "incursions on Aboriginal title [and arguably other Aboriginal rights] cannot be justified if they would substantially deprive future generations of the benefit of the land."[17]

**Conclusion: From Procedure to Substance to Shared Commitments**

While Northern Gateway is now all but off the table, this does little to change the popular perception that "Canada needs a way to get Albertan oil to new markets, and that the most efficient and safest way to do that is via pipeline."[18] Following the Federal Court of Appeal's decision in Northern Gateway, *The Globe and Mail's* editorial board declared that the "best bet now is Kinder Morgan's Trans Mountain

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[14] *Ibid* at paras. 327-329 [emphasis added].
[15] *Ibid* at para. 325 [emphasis added].
[16] Quoted in Shawn McCarthy & & Jeff Lewis, "Court overturns Ottawa's approval of Northern Gateway pipeline", *The Globe and Mail,* (1 July 2016), online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/federal-court-overturns-ottawas-approval-of-northern-gateway-pipeline/article30703563/>.
[17] [2014] 2 S.C.R. 257 at para. 86.
[18] Globe Editorial, "Ottawa has to prove it can get a pipeline built", *The Globe and Mail,* (4 July 2016), online: <http://www.theglobeandmail.com/opinion/editorials/ottawa-has-to-prove-it-can-get-a-pipeline-built/article30747419/>.

project, which would bring Alberta crude to the Port of Vancouver."[19] The trouble with this assessment, however, is that Vancouver wants nothing to do with the Trans Mountain pipeline, and has commenced a judicial review of the National Energy Board's conditional recommendation of the project.[20] The municipality of Burnaby, British Columba also opposes the project because the pipeline would run through a significant local conservation area. A number of First Nations (including Tsleil-Waututh, Squamish, and Musqueam), NGOs, and a large number of concerned citizens also oppose the project.[21] A number of other major natural resources projects – TransCanada's Energy East pipeline, Petronas' LNG terminal, any number of proposed industrial wind turbine projects – raise substantially similar sustainability concerns and face equally significant legal and political opposition. The need for a renewed, polycentric model of decision-making in Canada regarding natural resources projects and Indigenous rights, particularly after Canada's ratification of the Paris climate change agreement, is urgent. Neither the current environmental assessment regime nor the duty to consult Aboriginal peoples under s. 35 of the constitution have proven capable of satisfactorily resolving these super-wicked public policy problems, largely because they provide for only procedural rights and tend to ignore underlying substantive issues – say, the failure of a proposed natural resources project to make a net contribution to sustainability or to attract the consent of affected Indigenous peoples.

Where to go from here? No doubt law reform is needed. Thus far, however, initial indications are not hopeful.[22] The federal government is already being criticized on the ground that its supplementary review of the Kinder Morgan Trans Mountain pipeline proposal is committing the sins of the Harper government just excoriated by the Federal Court of Appeal in *Northern Gateway*.[23] Meanwhile, the federal government has taken a step backwards in declaring that the promised adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including the principle of free, prior, and informed consent (FPIC), into Canadian law would prove "unworkable."[24]

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[19] *Ibid.*

[20] Laura Kane, "Vancouver takes legal action to block Kinder Morgan pipeline plan", *The Globe and Mail*, (20 June 2016), online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/vancouver-takes-legal-action-to-block-kinder-morgan-pipeline-plan/article30523616/>.

[21] Gordon Hoekstra, "First Nations vow to fight Trans Mountain despite NEB approval", *Vancouver Sun*, (20 May 2016), online: <http://vancouversun.com/news/local-news/first-nations-vow-to-fight-on-despite-neb-approval-for-trans-mountain-pipeline>.

[22] See e.g. Jason MacLean, "How to restore trust in Canada's environmental regulations", *Toronto Star*, (23 June 2016), online: <https://www.thestar.com/opinion/commentary/2016/06/23/how-to-restore-trust-in-canadas-environmental-regulations.html>.

[23] Peter O'Neil, "Trudeau making same mistake as Harper on pipelines, say critics", *Vancouver Sun*, (18 July 2016), online: <http://vancouversun.com/news/politics/trudeau-making-same-mistake-as-harper-on-pipelines-say-critics>.

[24] Hon. Jody Wilson-Raybould, Minister of Justice, "Notes for an Address by Jody Wilson-Raybould," Assembly of First Nations Annual General Meeting, Niagara Falls, Ontario, (12 July 2016), online: <https://drive.google.com/file/d/0B_bPXJbq-wgWenpoa2NIRmgwT2NlWkx3enNSWXJELTFSSzc4/view?usp=sharing>; see also John Ivison, "First Nations hear hard truth that UN indigenous rights declaration is 'unworkable' as law", *National Post*, (14 July

Law reform alone will not resolve these contentious social policy issues, which have given new life and application to the concept of the social license to operate (SLO),[25] which seeks to fill the gaps emergent and inherent in *legal* license (be it the conditional recommendation of the National Energy Board, or even consultation under s. 35 of the constitution). As legal theorist Rod Macdonald wrote about regulatory reform over thirty years ago, legal principle alone is rarely if ever enough. Instead, Macdonald argued that "[r]e-creating an element of shared commitment in our political life ought therefore to be at the top of any agenda for regulatory reform."[26] Those words have never been truer.

2016), online: <http://news.nationalpost.com/full-comment/john-ivison-first-nations-hear-hard-truth-that-un-rights-declaration-unworkable-as-law>.

[25] For an initial discussion of the origin and scope of SLO, see Jason Prno & D. Scott Slocombe, "Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories" (2012) 37:3 Resource Policy 346.

[26] Roderick A. Macdonald, "Understanding Regulation by Regulations," in I. Bernier & A. Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) at 139.

Toronto Law Journal

## Conflict of Interest Narrowed: Statutory Third Party Representation

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For the past 10 years, Master Dash's decision in *Ho* v. *Vo*, [2006] O.J. No 4333 has been the authority on conflict of interest when counsel wished to represent the insurer as statutory third party after defending the insured. In *Ho* v. *Vo,* Beard Winter represented the insured defendant Mr. Vo through the discovery stage. The defendant failed to attend his discovery and failed to cooperate with his counsel Beard Winter. As such, the firm brought a motion to be removed as solicitors of record for Mr. Vo, and also brought a motion to add the insurer Kingsway as a statutory third party who would be represented by them.

Master Dash was concerned that Beard Winter had given a coverage opinion to Kingsway while representing Mr. Vo, and that representing Kingsway would be a clear conflict of interest. This was regardless of whether counsel had received any confidential information from Mr. Vo. He concluded that counsel cannot act against the interests of a former client in the same manner in which they represented the former client.

However, Master Dash reconsidered his position in a new case in January 2016, *Ibarra* v. *Ibrahim* (2016), ONSC 218. He considered his approach in *Ho* v. *Vo* and some other related case law and decided that it was time to reconsider the earlier decision. The facts of *Ibarra* are very similar to *Ho* (defended the insured through the discovery phase; insured did not cooperate), other than the fact that counsel had not provided an opinion on coverage to the insurer.

Master Dash stated that counsel is not necessarily or automatically conflicted by going off record for the insured defendant and then acting for the insurer as statutory third party. As confirmed in two other cases dealing with the obligations of a statutory third party, Master Dash recognized that the insurer as statutory third party must act in the best interests of its insured and it cannot take any position in the action contrary to the interests of its insured in any way. Insured and insurer as statutory third party share a common interest in fighting the insured's liability as a defendant and in contesting the extent of the plaintiff's damages. The insurer as statutory third party has the same rights as its insured under s.248(15) of the *Insurance Act* to file a defence, contest liability and damages claimed, have production and discovery and participate at trial.

He therefore concluded that there is no automatic conflict of interest if counsel represents the insurer after having represented the insured defendant, *so long as* counsel has not provided a coverage opinion contrary to the interests of the insured or received confidential information from the insured defendant. The same counsel may not, however, subsequently act for the insurer against its insured to recover any judgment or settlement paid out to the plaintiff, as this would clearly represent action against the interests of their former client. If

any conflict of interest arises after counsel begins acting for the statutory third party insurer, counsel is still obligated to remove themselves as lawyers of record.

This decision brings clarification to the conflict of interest question and more appropriately fits with how insurers and their counsel have often believed such matters should be handled.