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Avoiding the "Tyranny of Small Decisions": A Canadian Environmental Assessment Regime for the 21st Century

By: Martin Olszynski

Matter Commented On: Expert Panel Review of Environmental Assessment Processes

The Expert Panel charged with reviewing Canada's environmental assessment regime lands in Calgary this week. Professor Emeritus Arlene Kwasniak and I are presenting to the Panel later today, while Professor Shaun Fluker and students from University of Calgary's Public Interest Law Clinic will be presenting on Wednesday. In this post, I step back a bit from the nuts and bolts of environmental assessment and consider the nature of modern environmental law – and environmental assessment law in particular – as primarily a decision-making process and whether this is sufficient going forward. My full submission – indeed all submissions to the Panel – can be found on its website.

"If [Humans] Were Angels, No [Environmental Law] would be Necessary" – James Madison

When considering Canada's future environmental assessment (EA) regime, it is useful to keep several realities and principles in mind. The first is to recall that it was not so long ago that governments had no formal processes for assessing the environmental effects of projects or their decisions. The first such law was the United States' *National Environmental Policy Act* (1969), the first of five American environmental laws passed in that country's "environmental decade" (A. Dan Tarlock, "Is There a There There in Environmental Law?" (2004) 19 J Land Use & Envtl L 213). It was not until 1992 that Parliament introduced Canada's own EA law in the form of the first *Canadian Environmental Assessment Act* SC 1992 c 37. Around that time, the Supreme Court of Canada's decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 (CanLII)described EA regimes as intended "to *ensure* that [departments] took account of environmental concerns in taking decisions that could have an environmental impact." (at 17)

This is a fundamental point. Notwithstanding the Supreme Court's subsequent endorsement of EA as "as an integral component of sound decision-making," over two decades of *CEAA* caselaw (and four decades for *NEPA*) makes plain that EA continues to be something that governments – of all persuasions – resist. After all, the identification and disclosure of the environmental effects of development can constrain short-term economic – and political – interests. The Newfoundland and Labrador Court of Appeal made a similar observation in *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 1997 CanLII 14612 at paras. 11-12:

> [11] …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.

Such an approach may seem burdensome, or even anti-democratic, but it is actually rooted in the same basic principles animating the separation of powers and other widely valued constitutional norms. As noted by American environmental law professor Richard Lazarus: "…the existing structure of our government is riddled with efforts to anticipate the dangers of unchecked democracy because of concerns about human nature and its potential interference with our nation's aspirations for a just society…" (Richard Lazarus, "Environmental Law After Katrina: Reforming Environmental Law by Reforming Environmental Lawmaking" (2007) 81 Tul L Rev 1019-1058 at 1046). In addition to features like bicameralism (*i.e.* having two legislative chambers rather than one), modern constitutions include "limitations on democratic lawmaking designed to guard against perceived human tendencies to rush to judgement against the criminally accused, to silence unpopular speech, to disrespect minority religions…" etc. (Lazarus, at 1047). The same basic dynamic is at play in environmental law, which attempts to constrain various human tendencies, including our disproportionate discounting of distant and/or future environmental harms (Lazarus, at 1035).

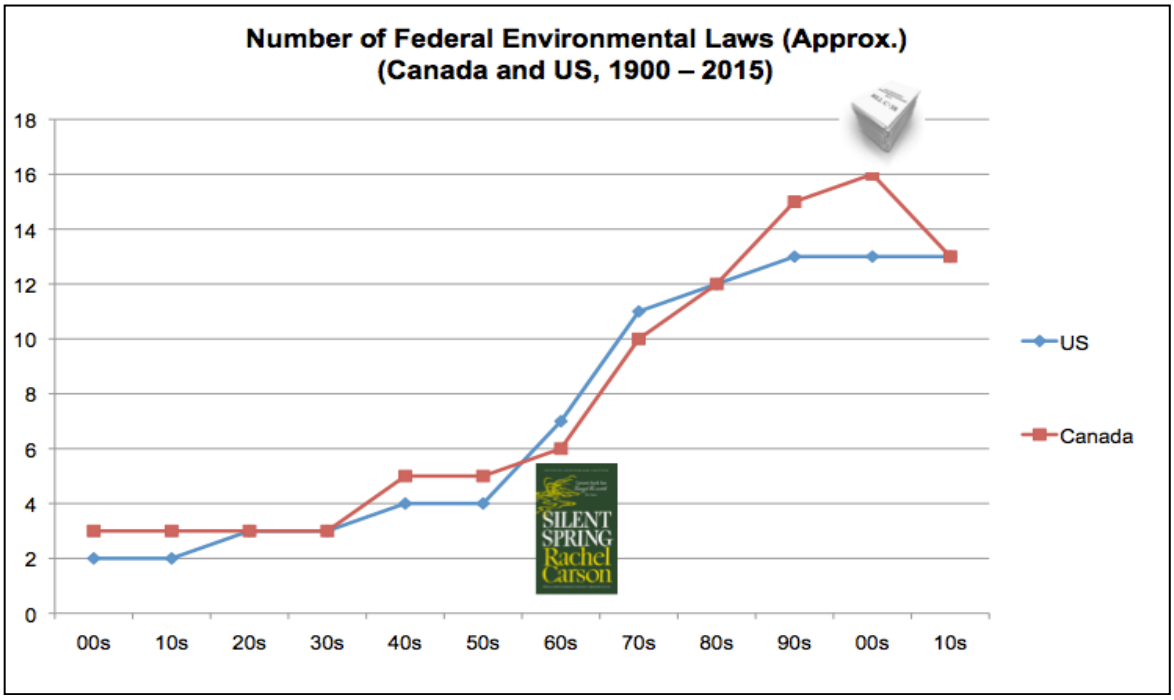
The questions, then, are (i) whether Canadian environmental law – and EA law in particular – is doing an adequate job and (ii) whether it can be expected to do so going forward. With respect to (i), definitive answers are not possible because of the lack of reliable monitoring data at the national level. What evidence there is, however, does suggest a continuing trend of environmental degradation (see *e.g.* Favaro B, Claar DC, Fox CH, Freshwater C, Holden JJ, Roberts A, et al. (2014) Trends in Extinction Risk for Imperiled Species in Canada. PLOS ONE 9(11)).

Reconsidering the Procedural Focus of EA Law

With respect to (ii), I return to the observation that at their core most Canadian environmental laws basically just set out decision-making processes, with EA laws (including both the previous and current *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52) being paradigm examples: they require the identification and disclosure of adverse environmental effects, which can sometimes be significant, without imposing any clear substantive limits on decision-making. Such effects must merely be deemed "justified in the circumstances" (*CEAA, 2012* section 52). In this way, the *CEAA* is essentially like the *NEPA*, which the U.S. Supreme Court described as "prohibi[ting] uninformed – rather than unwise – agency action." (*Robertson v Methow Valley Citizens Council*, 490 US 332 (9th Cir 1989) at 351). The critical assumption behind such regimes is that disclosure enables political accountability, which in turn should "compel" government agencies and departments to "curb their most environmentally destructive practices" (Bradley C Karkkainen, "Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance" (2002) 102:4 Colum L Rev 903 at 912).

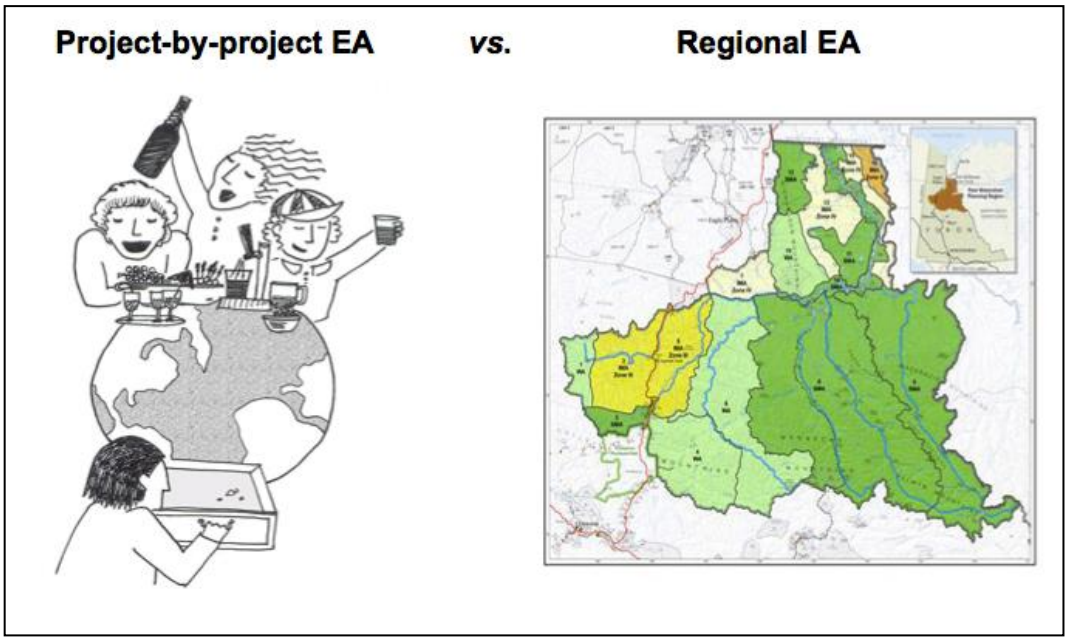
The fundamental question facing the Panel is whether this assumption of political accountability is a still a reasonable one (if it ever was) and, if not, how it might be supplemented. On this point, it is important to recall that the environmental-law-as-process paradigm arose in the 1970s

– an era of heightened environmental awareness (see figure below, which is a very rough approximation of legislative activity on the environmental front).



While environmental concerns are still prevalent, especially with respect to climate change, they have more or less resumed their place in public debate amongst other equally pressing concerns, including equality, disparity, national security, and the economy. There has also been a surge of available information following the advent of the internet. While access to this information is critical and has enabled broad public debate about some of Canada's largest industrial projects (*e.g.* pipelines), the amount of potentially relevant information can also be overwhelming. In other words, while the case for political accountability was probably always tenuous, it is even more so now, especially for the vast majority of projects, programs, and policies that do not attract media or public scrutiny.

In my view, all of this suggests that Canada's next EA law requires that at least some *substantive* standards be built into it. Professors Gibson, Doelle, and Sinclair have suggested sustainability assessment as part of a next generation of EA laws. I think their proposal merits serious consideration. Regional EAs are another way of introducing substantive standards into the EA regime. The current project-by-project approach presumes an endless frontier – and with it an endless supply of freshwater, forests, and wildlife. Of course, the idea of a perpetual frontier has been widely discredited; it is the reason that Alberta embarked on its ambitious land use framework almost a decade ago now. And while that regime has yet to live up to its potential (see *e.g.* here and here), the basic premise is still the most sound: in a finite world, it is better to first take stock of our natural resources, identify what's important, and then develop accordingly. Along these lines, such an approach also appears increasingly necessary if Canada and the provinces are to fulfill their constitutional obligations to Canada's Indigenous peoples.



(Illustration credit: Dr. Aftab Erfan)

Finally, even political accountability won't work if there is no public knowledge about a given project or program whatsoever. On this point, I agree with Professor Gibson that regimes like *CEAA, 2012*, which focus exclusively on *major* projects and on mitigating *significant* adverse effects, "move us further away from sustainability, though usually only in small steps" (Robert B Gibson, "Favouring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the Canadian Environmental Assessment Act" (2000) 10:1 J Envtl L & Prac 39 at 43). Over three decades ago, American ecologist William E. Odum described this process as the "tyranny of small decisions." With respect to the eutrophication of lakes, for example, Odum noted that

> [f]ew cases…are the result of intentional and rational choice. Instead, lakes gradually become more and more eutrophic through the cumulative effects of small decisions: the addition of increasing numbers of domestic sewage and industrial outfalls along with increasing run-off from more and more housing developments, highways, and agricultural fields.
>
> William E Odum, "Environmental Degradation and the Tyranny of Small Decisions" (1982) 32:9 Bioscience 728.

In my view, the previous *CEAA, 1992* regime, which saw over 3,000 projects being reviewed annually, and the current *CEAA, 2012* regime, which sees roughly 65, could be viewed as representing opposite ends on a spectrum with respect to the number and kinds of federal EAs. Identifying the optimum point on this spectrum won't be an easy task but the Panel – and ultimately Parliament – should adopt an evidence-based approach. This would include examining and identifying the major drivers of environmental degradation in Canada, both presently and in the future, bearing in mind especially the challenges associated with climate change.

This post may be cited as: Martin Olszynski "Avoiding the "Tyranny of Small Decisions": A Canadian Environmental Assessment Regime for the 21st Century" (21 November, 2016), online: ABlawg, http://ablawg.ca/wp-content/uploads/2016/11/Blog_MO_EA_Review_Nov2016.pdf

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