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Federal Environmental Assessment Re-Envisioned to Regain Public Trust – The Expert Panel Report

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Report Commented On: Expert Panel on the Review of Federal Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*

This post considers the report of the Expert Panel (Panel) on the Review of Federal Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* released April 5, 2017 (EP Report). It provides background to the Report and focusses on three issues: The Purpose of Assessment, Who Assesses, and Interjurisdictional Assessments. Other faculty members may be providing further comments on the EP Report in future posts.

About the Panel and the EP Report

The Prime Minister's November 2015 Environment and Climate Change mandate letter instructed Minister Catherine McKenna to commence a number of law review and reform initiatives, including to "immediately review Canada's environmental assessment processes to regain public trust …." Minister McKenna followed through by establishing the Panel. Through September to December the Panel held public and indigenous meetings in numerous locations in Canada, invited written and online submissions, and formed a Multi-Interest Advisory Committee (MIAC) to provide perspective and advice. Professor Shaun Fluker with Anne Marie Syslak, Executive Director of the Canadian Parks and Wilderness Society, presented to the Panel in Calgary on November 23 (see ABlawg post here), and Professors Martin Olszynski and Arlene Kwasniak separately presented on November 21 (Olszynski's ABlawg post is here). All written submissions to the Panel are accessible on the Panel's website. At the Panel's behest, Professors Kwasniak and Olszynski additionally provided expert written advice, and participated in a meeting hosted by the Panel in Ottawa in February. The Panel received over 800 written submissions, heard over 400 oral presentations, and received 2,673 responses to the online Choicebook, a survey-like tool designed to gauge views on assessment reform. The public has until May 5th to comment on the EP Report, through the website Let's Talk Environmental Assessment. From my reading of the Report, the Panel clearly took its mission to regain public trust in federal environmental assessment very seriously and, excepting for reservations mentioned later, will be successful in its mission if government follows through with legislation that faithfully reproduces its bold vision in legislative details.

Background to Federal EA Law Review

The question to begin with is: why does the public trust in federal environmental assessment (EA) need to be regained?

The ratcheting down of EA legislation during the Stephen Harper administration, culminating in the repeal of the *Canadian Environmental Assessment Act*, SC 1992, c 37 (CEAA 1992) and replacing it with the *Canadian Environmental Assessment Act 2012*, SC 2012, c 19 (CEAA 2012) through the use of omnibus bills accounts for part of the loss of public trust. Through the years ABlawg has reported on the changes and their impacts, including my posts The Eviscerating of Federal Environmental Assessment in Canada (March 31, 2009) and The Fading Federal Presence in Environmental Assessment and the Muting of the Public Interest Voice (October 19, 2011). The Panel notes that "Several participants criticized the omnibus bills that amended Canadian environmental laws in 2012, describing these changes as unilaterally imposed by the previous federal government without consulting Canadians … This concern most clearly emerged in responses to the online survey and was directly tied to lack of trust in the current assessment process. Participants cautioned against repeating this process of legislative change" (EP Report, s 4).

The Harper-era changes were largely about reducing EA numbers and federal EA involvement. CEAA 1992 incorporated an "all in unless out" approach to federal EA. The Act required an EA of proposed activities not listed on the *Exclusion List Regulation, 2007*, SOR/09-88 that were under the responsibility of a federal authority for which there is an EA trigger (CEAA 1992, s 5). A key trigger was a federal authority having to make a decision under legislation listed in the *Law List Regulation*, SOR/ 94-636, for example, to authorize a harmful alteration, disturbance or destruction to fish habitat under section 35(2) of the then *Fisheries Act*, RSC 1985 c F-14. Although numbers varied, several thousand federal EAs were triggered annually under CEAA 1992. The Act did, however, provide for various levels of assessment from check-the-boxes replacement class screenings to rigorous panel reviews. The Act also provided mechanisms to reduce or simplify assessments, such as exclusions and class screenings.

Here is how the Harper administration de-regulated federal EA pre-2012:

- 2009 Cabinet amendments to the *Exclusion List Regulations*, SOR/2007-108 and new *Infrastructure Projects Environmental Assessment Adaptation Regulations*, SOR/2009-89 excluded from federal EA around 2000 Building Canada Plan projects (information from the Regulatory Impact Analysis Statement published with the regulation) and authorized the substitution of provincial EA processes for federal ones for Building Canada Plan projects that were not excluded. Prior to this, harmonization of processes could reduce duplication and inefficiencies, but provincial/federal substitution was not permitted.
- The 2009 omnibus *Budget Implementation Act*, SC 2009, c 2, ss 317-341 permitted discretionary executive exemptions from EAs otherwise triggered through the then *Navigable Waters Protection Act*, RSC 1985, c N-22.
- Bill C-9, *The Jobs and Economic Growth Act* (made law by SC 2010, c 12), amended CEAA to give the Environment Minister the right to slice and dice projects from how described by proponents so that only one or more components is assessed, thereby permitting narrower and less intensive federal EA reviews.

CEAA's legislated seven year review of the Act requirement was pre-empted in July 2012 with federal Bill C-38, the *Jobs, Growth and Long-term Prosperity Act* (made law by SC 2012 c 19), which directed CEAA's repeal and replacement by the *Canadian Environmental Assessment Act, 2012* (s 52).

CEAA 2012 is different from CEAA 1992 in ways that also help explain concerns about federal EA:

- CEAA 2012 resulted in an astronomical decrease in EA numbers. Instead of CEAA 1992's all in unless out approach, under CEAA 2012 all projects are out unless in. Only physical activities that are listed as Designated Physical Activities under the *Regulations Designating Physical Activities*, SOR/2012-147 are potentially subject to EA (s 6), though the Minister may permit an EA for non-designated projects (s 15(2)). Except for projects subject to the National Energy Board (NEB) or Canadian Nuclear Safety Commission (CNSC) regulatory processes, being on the Designated Project List does not guarantee a federal EA. The Canadian Environmental Assessment Agency (Agency) may decide whether such projects will undergo federal EA. Changing from the trigger to the list approach has resulted in thousands of fewer federal EAs a year, For example, according to the Canadian Environmental Assessment website, in 2014 there were only 23 EAs.
- The Designated Projects list is roughly the same as the list of projects that was on the *Comprehensive Study Regulation*, SOR/94-638 list under the CEAA 1992 (a comprehensive study is a level of review for larger listed projects), with some glaring absences. For example, there are no projects in National Parks or other federal heritage sites on the list.
- CEAA 2012 mandates provincial substitution if a province requests it and if certain conditions are met.
- CEAA 2012 reduces participation opportunities. Under CEAA 1992 any interested person could participate in an EA, and apply for participant funding in a hearing. Under CEAA 2012 for NEB pipelines, and panel reviews, to participate or be funded a person must be *directly affected* or have relevant information or expertise (ss 2(2), 15(b) and 38).
- CEAA 2012 narrows the scope of effects to be considered in EA by specifically limiting environmental effects to those that are within legislative authority of Parliament (s 5). CEAA 1992 applied to all bio-physical effects of a project (s 2(1)).

Although the public trust's erosion in the efficacy of federal EA may be attributed to these legislative changes, that is not the entire account. As the EP Report relates, trust is lacking on account of frustrations and concerns of a range of sectors and interests in society. The Report recounts concerns – to mention a few – that EA does not have a clear purpose or the right purpose; that EA should assess social, economic and cultural impacts, and not just environmental ones; that EA seems to be just a hoop for proponents and government; that decisions are perceived as pre-ordained; that EA processes and decisions lack transparency, and are or appear biased; that EA processes lack standards and are inconsistent; that EA processes lack effective follow-up or monitoring mechanisms; that EAs are carried out in isolation and EA processes do not support learning from past EA experience or mistakes; that Aboriginal rights, interests, knowledge and experience are not taken into account or respected; that public participation processes do not induce meaningful participation; that EA processes may involve delays and duplicative processes.

The aim of regaining the public trust in federal EA gave the Panel the unique opportunity not to just putter with EA legislation, but the chance to re-envision and re-invent it to better ensure environmental, social, and economic sustainability for present day and future Canada.

The Purpose of Assessment: From Avoiding Significant Adverse Effects to Achieving Net Sustainability Benefits

From the beginning of legislated federal EA the objective of EA processes has been to provide information for the EA decision maker to determine whether, taking mitigation measures into account, a project is likely to cause significant adverse environmental effects (e.g. CEAA 2012, s 52). If a project would, then unless it could be justified in the circumstances, the federal authority could not approve it. The EP recommends replacing this approach with a new one, stating "it was undoubtedly the case that there was broad interest from presenters across Canada in adopting a sustainability focus for federal IA [Impact Assessment]" (EP Report, 2.1.3).

Sustainability as a core principle is associated with a number of EA academics, and is well represented in the article by Robert Gibson, Meinhard Doelle, and John Sinclair, "Fulfilling the promise: basic components of next generation environmental assessment" (2015) 29 JELP 251. The five pillars of sustainability are environment, economy, social, cultural, and health. With a sustainability focus the decision maker does not just look at adverse environmental impacts. Instead the decision maker looks at positive and negative impacts in each of the sustainability pillar areas and in the end determines whether the project contributes positively to sustainability, recognizing that there may be trade-offs between adverse and beneficial effects within and among sustainability pillars. In the Panel's words, "To meet the needs of current and future generations, federal IA should provide assurance that approved projects, plans and policies contribute a net benefit to environmental, social, economic, health and cultural well-being" (EP Report, 2.3.1). The Panel received significant support for adopting the sustainability approach including "more than 11,000 letters from supporters of the David Suzuki Foundation and more than 500 letters from supporters of the West Coast Environmental Law Association" (EP Report 4.0).

In keeping with this change of focus the Panel re-coined the EA process as "impact assessment" or "IA." This change is a significant departure from CEAA 2012, which, as noted earlier, limited the EA review to environmental effects within areas of federal legislative authority. Sustainability IA is not limited to impacts falling under a federal head of power. The EP Report statement that "There is broad federal authority to gather relevant information on all five pillars" no doubt relies on pivotal decisions on environmental jurisdiction such *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3 (CanLII). The Panel recognizes the challenges this may pose with respect to conditions on an approval that could ameliorate sustainability concerns that do not fall under a federal head of power. This important discussion will be left for other commentary.

The Panel recommends that the "IA process should result in a clear decision, informed by the sustainability test. If a project fails to pass the test, IA decision-makers should have the authority to say "no" to the project as proposed and such a decision should restrict the issuance of subsequent federal regulatory approvals" (EP Report 2.1.3). IA decisions would be appealable to Cabinet and Cabinet's "decisions should be evidence-based, supported by reasons related to the five pillars of sustainability, prompt and publicly available" (EP Report 3.2.2.3). This would be a welcome change from CEAA 2012 and CEAA 1992 where the "justified in the circumstances" finding required no reasons or criteria.

Who Assesses: From Regulatory Authorities to the Impact Assessment Commission

There are two models for conducting assessment federally: self-assessment, where the federal authority that has regulatory authority over a project conducts the EA, and assessment carried out by an independent body that does not have regulatory authority over a project. Early on in federal EA the first model was the standard. This put considerable pressure on regulatory authorities who made numerous regulatory decisions that triggered federal EA, such as the Department of Fisheries and Oceans, and resulted in inconsistent processes among authorities and dissatisfaction of a number of stakeholders. This was partially remedied in 2010 with amendments to make the Agency, which is not a regulatory decision-maker, responsible for comprehensive studies, except for projects under the authority of the NEB or the CNSC (CEAA 1992, s 11.01, added by SC 2010, c 12, s 2154). CEAA 2012 reduced the number of authorities that conduct EAs to three, being the Agency, the NEB and the CNSC. The CEAA 2012 refers to all three as "Responsible Authorities" (RAs) though self-assessment applies only to the NEB and the CNSC.

A controversial issue during the EA review was whether the NEB and the CNSC should remain responsible for assessment, or whether all IA should be conducted by an independent body? The Report states:

> Some proponents and practitioners submitted that, because of the technical expertise required to assess the merits of nuclear plants and pipelines, the NEB and CNSC should be responsible for those assessments. Moreover, these participants said that the results of an assessment are more easily transferred into a licensing process if both are overseen by the same body, and that this lifecycle approach is a good way to build relationships.
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> Other participants were concerned about having the NEB and CNSC conduct assessments. A frequently cited concern was the perceived lack of independence and neutrality because of the close relationship the NEB and CNSC have with the industries they regulate. There were concerns that these Responsible Authorities promote the projects they are tasked with regulating. The apprehension of bias or conflict of interest, whether real or not, was the single most often cited concern by participants with regard to the NEB and CNSC as Responsible Authorities. The term "regulatory capture" was often used when participants described their perceptions of these two entities. The apprehension of bias on the part of these two Responsible Authorities eroded confidence in the assessment process. (EP Report 3.1.1)

The Panel recommends that all federal assessment of projects, including those under the regulatory authority of the NEB and CNSC, be conducted by an independent body it calls the "Impact Assessment Commission" (IAC). This recommendation recognizes the distinction between assessing the impacts of a project and regulating it and the different processes and expertise required for each (EP Report 3.1.1). The recommendation does not reduce the NEB's or CNSC's powers to regulate. The Panel states "the goal of restoring trust and confidence in the process is a belief that the authority conducting the assessment must be free from bias and conflicts of interest … if there is trust in the authority conducting the IA, the outcome is more likely to be considered fair and thus be accepted by all parties, even if their particular positions do not win the day. As such, an authority that does not have concurrent regulatory functions can better be held to account by all interests than can entities that are focused on one industry or area and that operate under their own distinct practices" (EP Report 3.1.1).

As a single body, the IAC will oversee all assessments using a fairly intensive IA process. One might well ask how many there may be and how they will be chosen: will there be triggers as in CEAA 1992 or a short list as in CEAA 2012 or something else? The Panel opts for a list, longer than CEAA 2012, but not very long (EP Report note 27), with an imprecisely described additional trigger mechanism (EP Report 3.2.1). The Panel does not mention whether projects in National Parks or federal heritage sites will be included on the list. This undefined list plus trigger approach is most concerning to me, and constitutes the Panel recommendation that is the least likely to regain public trust. Many smaller projects that impact matters within federal jurisdiction – e.g. fisheries – likely will not be assessed unless the mysterious trigger mechanism is activated. Professor Mark Winfield of York University discusses these issues in his blog post Expert Panel Outlines Future Direction of Federal Environmental Reviews, but Significant Gaps Remain, and there may be more forthcoming on these issues from our Faculty.

Multi-jurisdictional Assessment: Co-operation and Cooperative, Rigorous Substitution

Given the division of legislative powers in the Constitution, in some cases both the federal and a provincial government have legislative authority over a proposed project. A question for the Panel was how IAs are best handled so that each level of government acquires the appropriate information during the assessment process to decide whether to issue the authorizations to permit the proposed project to proceed, and under what conditions, without unduly burdening proponents of projects, the public, Indigenous communities, and others affected by projects (see my commissioned report on this topic to the Panel here). The Panel describes possible methods to handle such situation:

> Co-operation [harmonization]: Co-ordinate EA processes with the objective of "one project, one assessment." All jurisdictions conduct their respective EAs, while aligning their processes to the extent possible.
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> Substitution: When an EA law or process of one jurisdiction (A) is substituted for an EA law or process of another jurisdiction (B). The process of jurisdiction A is applied to meet the obligations of jurisdiction B. Jurisdiction B makes its decisions based on the results of A's process.
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> Equivalency: When it is determined that Jurisdiction A's process is equal to Jurisdictions B's process and they are therefore essentially the same. An assessment under B's process is therefore not required and only A makes a decision at the end of the EA (EP Report 2.2).

CEAA 1992 directed the Agency to "to promote uniformity and harmonization in the assessment of environmental effects across Canada at all levels of government" (CEAA 1992 s 62(b)). This Agency charge was aided by the sub-agreement on harmonized EA under the Canadian Council of Ministers of the Environment (CCME) initiated *Canada-wide Accord on Environmental Harmonization*. At one time there were seven EA harmonization agreements in place between provinces and the federal government. As mentioned earlier, provincial/federal substitution was permitted in a very limited fashion under CEAA 1992. However, CEAA 2012 not only permitted provincial/federal substitution (except for NEB or CNSC EAs), it required it when requested by a province and it met certain conditions including that the substituted process included key elements of the CEAA 2012 process. The Act also permitted, but did not require, substituted processes in respect of Indigenous land claim or self-government bodies with EA responsibilities

(ss 32, 33). CEAA 2012 also permitted EA provincial/federal equivalency by Cabinet Order (s 37) though the section has not been utilized.

The Panel strongly supports the principle of one project, one assessment stating that it is "central to implementing IA around the five pillars of sustainability. Other options will result in fragmented, inefficient and inconsistent IAs and project decisions" (EP Report 2.2.1). The Panel recommends co-operative IA, to the highest standards, as the primary mechanism to deal with multi-jurisdictional assessment. But current harmonization agreements will not suffice. The Panel states "Where co-operation agreements now exist between the federal and provincial government, or between the federal government and Indigenous Groups, they should be revisited to ensure that they reflect a sustainability-based IA model and meet the principle of harmonization upward, meaning co-operation to meet the highest standard of IA. Co-operation agreements should also demonstrate how the principles of UNDRIP would be reflected in co-operative assessment processes." (EP Report 2.2.1). UNDRIP is the United Nations Declaration on the Rights of Indigenous Peoples, and it calls for, among other things, Indigenous peoples' free, prior and informed consent to projects that affect their lands or resources (UNDRIP article 32).

The Panel allows for substitution, but not for substitution in the sense characterized in the beginning of this section, where the federal government simply relies on another jurisdiction's assessment process, looks at the results, and then makes its own decision. "Substitution" as characterized by the Panel is more akin to co-operative IA, as it requires ongoing and active federal involvement. As well, the ability to substitute would be held to a rigorous test. For the Panel, substitution criteria should include:

- Sustainability-based scope of issues based on criteria identified in the Planning Phase.
- Transparent and accessible information.
- Comparable opportunities for public engagement.
- Active engagement of federal experts and federal regulators.
- Delegation of procedural aspects of the duty to consult.
- The principles of UNDRIP, specifically consent, reflected into decision-making.
- Integration of independent science throughout the impact assessment. (EP Report 2.2.2)

Regarding the first bullet point, the EP report recommends three phases of IA: the Planning Phase, the Assessment Phase, and the Decision Phase (EP Report 3.2.2.1-3). The addition of the Planning Phase to assessment recognizes that assessment is meant to be a planning tool, and as such requires the involvement of affected Indigenous peoples, stakeholders and the public prior to planning decisions being made. This requirement alone will stymie the possibility of substituted IA unless the other jurisdiction's assessment process also begins at the planning stage. The requirement that the assessment be based on sustainability principles also will stymie substitution. Unless the other jurisdiction's assessment process involves sustainability assessment, rather than, for example, just assessing environmental impacts, substitution would not be appropriate. A similar point may be made about other criteria, for example, the integration of independent science throughout the assessment. If another jurisdiction permits the proponent to provide scientific information, substitution would not be appropriate.

Of the potential for federal/provincial substitution under the proposed IA regime, including for continuing federal/British Columbia substitution (BC is the only province that has engaged in CEAA 2012 substitution), the EP Report states:

> The Panel understands that it is recommending a higher bar for the approval of substitution. This may inhibit jurisdictions from taking on a substituted assessment and would also require the renegotiation of the substitution arrangement between the Canadian Environmental Assessment Agency and the British Columbia Environmental Assessment Office. An immediate emphasis on joint or co-operative assessment processes should minimize any transitional challenges to a new substitution regime. Where the goal of a rigorous and transparent assessment process remains the objective of all jurisdictions, the new criteria should not impede future substitution opportunities. (EP Report 2.2.3).

Equivalency, in effect, exempts a project from federal assessment. As the EP Report advances an approach to federal IA that is "focused on impact to matters of federal interest," and that "seeks co-operation with other jurisdictions, as this is fundamental to ensuring that all impacts across the five pillars of sustainability are appropriately addressed" and as "equivalency does not advance these objectives" the Panel rejects equivalency as an option in a multijurisdictional situation (EP Report 2.2.3).

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