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EIA Law Class Recommendations for Reforming Provincial Environmental Assessment

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Matter Considered: [Nova Scotia Environmental Assessment \(EA\) Modernization initiative](#) and other existing and future initiatives to reform provincial assessment regimes

Last week, my Environmental Impact Assessment (EIA) Law class generated recommendations to submit to the Nova Scotia [Environmental Assessment \(EA\) Modernization initiative](#). To do so, we employed a “policy lab” approach, which entails an open and collaborative space where students can be innovative and apply the expertise and knowledge they’ve gained through the course to date. The idea is essentially collaborative problem-solving that resembles what students will hopefully encounter in their future careers in law and policy reform, be it in private, public, not-for-profit, or other settings. In class, students worked in small groups focused on particular issues and areas (e.g. climate change, public participation) and then generated preliminary draft recommendations, workshopped those drafts with peers and professor, and then fine-tuned to finalize. The final version was submitted to the Nova Scotia engagement process. Nova Scotia was a natural focus because that jurisdiction is currently engaged in reform. Notably, this EA “modernization” is actually required by law, as it is an explicit commitment set out in s 12 of Nova Scotia’s *Environmental Goals and Climate Change Reduction Act*, [SNS 2021, c 20 \(EGCCRA\)](#) (for context about using a legislated approach to strengthen environmental governance, see [this excellent article](#) by Meinhard Doelle and William Lahey).

While the students generated recommendations with the Nova Scotia process as a starting point, the premise of the policy lab was to draft recommendations that would be of interest and value to any province that may be engaging in reform of EA laws and processes (for example, Ontario has also recently been engaged in “modernization”, as explained [here](#) and [here](#), which has attracted [criticism](#)). Having said that, this is a relatively small group of students, and so the recommendations are not comprehensive and are relatively high-level. There would certainly be other types of reforms to consider, as well as technical details to work through. In any event, the class was interested in publishing a slightly modified version of the recommendations on ABlawg so that the recommendations could be available to the public, to governments, and to any other groups who may find them useful in the future. Hence this post.

Unfortunately, there is no commitment or expressed desire by the current Alberta government to reform the existing Alberta EA regime, but one can hope that this will happen in coming years given that it is far from perfect and has not undergone any meaningful changes for many years. This stands in contrast, for example, with the recent updates to British Columbia's *Environmental Assessment Act*, [SBC 2018, c 51](#) (EAA), which now includes explicit reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including a statutory basis for the government and Indigenous nations to enter into consent based decision-making agreements (at ss 7, 41; see [here](#) for an example of one of these agreements).

By way of context, the EIA Law course is focused entirely on environmental impact assessment, with particular attention to recent developments in the field and contemporary law and policy challenges. The course covers federal as well as provincial regimes, and the curriculum includes assessment basics but also innovations, tensions, and opportunities in law and policy spheres. Given that this year's course coincided with the Nova Scotia EA modernization process, we turned our attention to that matter. The primary question animating students' work to generate recommendations was "how should provincial EA law be modernized to integrate components of 'Next Generation Impact Assessment?'" That substantive starting point of 'Next Gen IA' stems from recent literature and best practices, as discussed in [this article](#) by John Sinclair et al.

It should be noted that the Supreme Court of Canada's (SCC) opinion on the constitutionality of the federal *Impact Assessment Act*, [SC 2019, c 28](#), will not materially affect these recommendations. In fact, if the SCC concludes that federal jurisdiction is somehow circumscribed for some projects or for aspects of the assessment process, it may become even more important for provincial regimes to be reformed to ensure that projects are comprehensively assessed and adverse impacts are systematically avoided and mitigated (see my [recent post](#) about the reference case for additional context).

EIA Law Class Recommendations for Reform of Provincial EA laws and process

1. Improve Compliance and Follow-Up

Provincial EA laws should ensure meaningful monitoring and compliance for projects that are approved under their processes. As such provinces should reform EA processes to explicitly require data and information reporting with respect to conditions attached to an approval under the EA process. Such reporting should be required at regular intervals throughout the life of an approved project, and there should be mandatory posting of that data and information on a public registry. This recommendation is important because transparent mechanisms for monitoring whether projects adhere to terms and conditions improve learning by the public, proponents, and government, which in turn fosters continual improvements in the EA process.

More generally, a focus on monitoring and compliance allows for continuous internal adaptation of the EA regime by identifying and avoiding the use of dated or irrelevant terms and conditions.

A more transparent process promotes public and academic scrutiny, which then encourages better decision-making and a heightened level of trust, credibility, and accountability in the EA process. Without integrating this requirement in the EA process, a province's process would miss a key opportunity to make such improvements and fail to comprehensively improve and ensure monitoring and compliance in the EA framework. Furthermore, without publicly available, transparent information, there is risk of an erosion of public trust in the entire EA process.

2. *Learning Facilitated through Assessments*

Provinces should reform EA processes to emphasize learning throughout all stages of assessment, and also beyond individual assessment processes. This shift is key to creating a process that is administratively sustainable and avoiding the repetition of errors made in the past. Important changes can be made in the assessment, decision making, and monitoring stages of EA. We envision learning to include both the information obtained through EAs and lessons learned as a result of the assessment process and the collaborative mindset that facilitates such learning.

During the assessment phase we suggest centralizing access to resources and materials that will be used by stakeholders, rights-holders, proponents, and the government. This single portal of contact would additionally assist in streamlining this process while allowing lessons learned to be integrated in real time. Technology to further streamline and facilitate timely and open communication between parties should be introduced where possible. Where needed to cultivate a collaborative and collegial atmosphere between parties, mediation or other problem-solving oriented methods should be emphasized to prevent relationship breakdown.

We also recommend introducing a reflection element after each EA process is completed, through which stakeholders, rights-holders, proponents, and government officials would have the opportunity to submit lessons learned and feedback with respect to the process for consideration and integration into future assessments. The government department leading the assessment should offer to meet with key stakeholders, e.g., the proponent and Indigenous communities, to discuss the assessment outcome and final decision, and to provide feedback.

3. *Improve Collaboration & Engagement with Indigenous Communities, Including Indigenous-Led EA*

Provinces should reform EA regimes to provide an explicit and broad basis for collaboration and engagement with Indigenous communities, with a view to incorporating Indigenous knowledge and meeting the requirement of free, prior, and informed consent. This aspect of EA reform should be conducted collaboratively with Indigenous communities and leaders. Furthermore, the EA regime should be reformed to go beyond facilitating “consultation” and “engagement” by providing a statutory basis for Indigenous-led EA. This could, for example, resemble the approach taken in the federal Impact Assessment Act, which requires that the process take into account any EA conducted by an Indigenous governing body (at s 22(1)(q), (r)), and also provides a basis for

an Indigenous-led EA to substitute for all or part of the process (at s 31). This could also resemble a federal-provincial joint review that is already familiar in any provincial EA regime.

Given that Canada is a full supporter of UNDRIP and Indigenous self-determination, the EA reform should encourage Indigenous communities, governments, or organizations to conduct assessments based on their own laws and systems of governance. Such assessments should be a factor in the assessment phase, but also in the final decision to approve or reject a project. In pursuing this particular reform, some provinces may wish to emulate the above-mentioned recent changes to British Columbia's *Environmental Assessment Act* including the explicit linkage with BC's *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019, c 44](#) to facilitate implementation of UNDRIP and to create a statutory basis for consent-based decision-making agreements.

Finally, the provincial EA legislation should be reformed in collaboration with Indigenous communities and leaders to include appropriate, respectful language and terminology throughout, and to remove any outdated or inappropriate language.

4. *Require “Meaningful” Public Participation and Improve Associated Processes*

Provinces should reform EA processes to have an explicit requirement for meaningful public participation. This reform should include a robust definition for the term “meaningful public participation at the statute level, accompanied by detailed guidance that is based on best practices and lessons learned. In practical terms, meaningful participation would include improved education and awareness for the public regarding its role in the EA process. It would also include participation funding for all project assessments. This reform is important because, in order to have meaningful participation, the public needs to understand its role in the process and needs to be informed through multiple outlets that reach all demographics. Past practice in some provinces has seen information provided through limited channels, such as newspapers and government websites. These are not realistically on the radar for a large section of the public who have moved to online resources. Without integrating this requirement in the EA reforms, members of the public may not properly understand their role in the EA process and will therefore not be able to meaningfully contribute. This, in turn, can lead to diminished public confidence in the system and missed opportunities for important community input that could improve a proposed project.

At a more detailed level, the following modifications could contribute to realizing meaningful public participation in a provincial EA process: a requirement that the government provide the public with ample notice that a project that may require impact assessment; a requirement that the Minister take special care to ensure that members of the public who may be directly affected receive written notice of participation and funding opportunities through multiple channels; a requirement that the Minister take proactive steps to educate the public and to provide notice over social media; a requirement that the Minister hold town halls to mitigate contentious issues and to provide education opportunities for the public; a requirement that the Minister provide detailed

written reasons for not considering issues brought forward through public participation; and, an explicit requirement that the Minister provide detailed written reasons for all project approvals, including explanations of how public input and concerns were taken into account.

5. *Improve consideration of cumulative impacts, including analysis of alternatives*

Provinces EA processes need to explicitly require the meaningful consideration of a project's cumulative impacts on the region. While the effects of one project may be considered insignificant, these insignificant effects can accumulate and result in degraded environmental conditions over time. Many current provincial EA regimes consider the direct effects that a particular project is likely to produce but leave out a consideration of the interacting effects to which a project contributes.

A cumulative impacts analysis should also include an evaluation of alternative means of carrying out a project, as well as alternatives to the project, including not proceeding with the project at all. This allows decision-makers to assess whether alternatives would offer a more beneficial way forward than the proposed project for a region. Considering cumulative impacts allows for the decision-maker to make an informed decision on whether or not to approve a project. This reform is important to maintain healthy communities and support the reduction of GHG emissions on a regional scale.

The proponent, government(s), and Indigenous communities should be involved in the cumulative impacts assessment process. As this process is complex and involves multiple layers of analysis, any uncertainties or assumptions in the cumulative effects analysis should be disclosed and discussed in the EA.

6. *Integrate Sustainability-Based Assessment and Associated Criteria*

Provinces should reform EA processes to include explicit requirements to integrate sustainability-based assessment and associated criteria during the assessment and decision-making process. This would include a wide scope of relevant considerations and their interactions, including trade-offs. One approach could be to integrate sustainability criteria based on the United Nation's [17 Sustainable Development Goals](#).

To inform this reform, provincial regimes could reflect the sustainability considerations found within the federal *Impact Assessment Act* and [associated guidance](#). For example, provincial EA laws (at the level of statute and/or regulation) should adopt a consideration of “the extent to which the designated project contributes to sustainability” (at s 22(h)), as well as “the intersection of sex and gender with other identity factors” (at s 22(s)) to ensure that the legislation reflects an intersectional understanding of sustainability. Sustainability principles should also be reflected in the purpose section of the legislation and in the factors that must be taken into account in the final decision-making framework in the legislation.

This reform is important because without clear guidance to proponents, rights-holders, the public, and decision-makers, a core goal of good EA – i.e. fostering sustainability – is difficult to assess and implement.

7. Explicitly Require Consideration of Climate Change and Impacts of a Project's Greenhouse Gas Emissions

Provinces should reform EA processes to explicitly require consideration of a proposed project's greenhouse gas emissions and climate change impacts. Specifically, there should be an explicit requirement in the EA law to take into account a proposed project's potential positive or negative impacts on achieving provincial, federal, and international greenhouse gas emission reduction targets. To be clear, it is critical that this specific EA law reform must go beyond requiring mere quantification of a project's emissions. It must be required that such emissions information is then considered in relation to emission reduction targets, carbon budgets, and decarbonization pathways. This reform could also include a requirement to express greenhouse gas emissions in monetary terms using the metric known as the "social cost of carbon" (see [this previous post](#) for context). Without such reference points, it is not possible to engage in a meaningful assessment and analysis of a projects' greenhouse gas data. Such information needs to be tethered to an analytical framework. Additionally, these requirements should very clearly require calculation and consideration of scope 1, 2, and 3 emissions (i.e. direct, upstream, and downstream).

These new climate change requirements should be explicitly mandatory during all stages of the EA process, most notably the assessment, decision-making, and follow-up/oversight phases. For example, proponents should be required to include this information in the initial project proposal and ensuing submissions and responses to information requests, and the reviewing government department/agency should be required to consider this factor when developing recommendations to inform final decision-making. Similarly, the decision-maker should be explicitly required to take this into account during final decision-making (i.e., granting approval or not). Finally, the EA regime should provide an explicit basis for mandatory GHG-related conditions (e.g., emission reduction targets and technologies) to be imposed on the project, which then must be complied with by the proponent during the entire project lifecycle. Including these explicit, new requirements in the provincial EA regime will provide enhanced regulatory certainty for proponents, encourage adoption of technologically feasible emission mitigation measures, and generate critically important data and information for compliance and enforcement. Generating this information through the EA process will also provide important data for nation-wide cooperation to achieve national and international climate change commitments.

Conclusion

The EIA Law class is hopeful that the submissions to the NS EA modernization process are useful as that government works toward meeting its legislated commitment to modernize and improve the provincial EA laws and practices by 2024. It will be interesting to see how innovative the

reforms are, and the extent to which the changes align with components of Next Generation EA. As the class stated in the submission, now is not just the time to “get it done”, it is also the key opportunity to “get it right”. Beyond the Nova Scotia process, the class is hopeful that this set of recommendations is useful for other provinces that may engage in such a law reform initiative in years to come, including in Alberta.

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