

Ensuring Effective and Efficient Federal Environmental Assessment

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Introduction

Consider for a moment picking up the newspaper and finding out about a new project or undertaking proposed for your constituency. This is how many Canadians find out about projects that affect them in a myriad of ways. These projects may bring benefits to the community, but they also may bring risks to the environment, to an area's socio-economic future and to the very health of the community. Your personal reaction may be in relation to the potential direct and indirect jobs that the project/undertaking is going to generate and the economic potential of this. Your neighbour may be concerned that the direct jobs seem to be of a low paying and transient nature which could well impact the social services department she works for. The local environmental organization wonders about the waste water and stack emissions from the facility, while a neighbourhood group worries about the traffic that will be generated and where the employees will park. The thing all these people and groups have in common is that they want to share their ideas and ensure that there is an effective, efficient and fair process for deciding on whether the project should proceed. The people who call your constituency office are assured that a proper pre-approval assessment will be undertaken.

This scenario is likely repeated on a daily basis across our country. Canadians have come to depend on environmental assessment (EA) policy tools as a key way of ensuring that projects are more sustainable and provide net benefits to affected regions and communities. EA has evolved to fill this role, since it is essentially a decision-making process that helps to ensure 'minimum regret planning' (Beanlands and Duinker 1983). Through assessment, we attempt to guarantee that externalities are identified, evaluated and incorporated into the planning and decision-making processes. EA is 'in principle, no more than a process by which common sense concerns about community futures are

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incorporated into decisions—public or private—that will affect the future’ (Meredith 2004). As such, EA is a tool available to governments to help achieve the societal objectives of environmental protection and sustainable development (e.g., Doelle 2008; Lawrence 2003).

In part due to its potential as a tool to help governments achieve sustainability outcomes, EA is now carried out in more than 100 countries worldwide and has deep roots in many nations. In most jurisdictions, EA has evolved from being voluntary and discretionary to more mandatory in process and substance. This evolution of EA is in part due to the maturing of the environmental crises and the growing understanding that continued human activity without limitations and without thorough consideration of the environmental implications of such activity is no longer possible (Sinclair and Doelle 2010).

In Canada, as in other countries, EA has also evolved over time and this Committee’s work is essential to the continued strengthening of Federal EA process. This is a daunting task, as there are many issues that deserve your attention – the refocusing of environmental assessment to sustainability assessment, the types of projects that should be assessed, whether to continue with a multi-agency approach to EA or move to a single agency, the role of strategic assessment, the ‘how to’ of cumulative effects assessment and meaningful public participation, and the use of discretion, to mention a few. In the time available today I will direct my comments to three areas:

- Meaningful Public participation;
- Multi-jurisdictional Assessment and Substitution; and,
- The Focus of our EA Laws and Policies.

Meaningful Public Participation

While public participation is viewed by many as a cornerstone of EA, whether the benefits of participation are realized in practice depends to a large extent on the legislation and policy applicable to the particular EA. Despite years of experience with public participation and volumes documenting how best to undertake it, meaningful participation has proven elusive. The *Canadian Environmental Assessment Act (CEAA)* clearly underscores the importance of public participation in stating that one of its purposes is:

“to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process”.

As well, the federal Minister of Environment in 2004 indicated to Canadians that one of the three key goals of the Five Year Review of CEAA was the identification of provisions for more meaningful public participation. Despite this focus, implementing meaningful participation has proven to be a vexing task. Since the Five Year Review the Government has, for example, moved to provide funding for participants in comprehensive studies, modified the FEIA and created some excellent guidance material on meaningful public participation for responsible authorities.

http://www.ceaa.gc.ca/1FE6A389-4547-4B5C-8DE1-1196B1AE19C9/Assessing_the_Need_for_and_Level_of_Public_Participation_in_Screenings_under_the_CEEA.pdf

There have been no open evaluations of these changes to my knowledge and I feel that present practices show that we still have a long way to go to fully incorporate meaningful participation into EA. Participants that I, and others, have worked with still raise a number of ongoing concerns about key issues such as accelerated decision processes, insufficient resources for participants, information and communications deficiencies, lack of participation at early stages of the decision process (normative stages) and weak public participation in follow-up (Sinclair and Didiuck 2009). I also note these as a participant of EA processes myself.

There is now a significant amount of literature on meaningful participation, but I will draw here on a near consensus definition reported by the Regulatory Advisory Committee to the then Minister during the Five Year Review:

“Should be based on full access to relevant and required information;
Must include the opportunity to critically review and comment on the information in a two-way exchange;
Must be done early enough to allow participants to have an influence on the planning of the project; must allow sufficient time to review and respond;
Must require a consultation plan to be developed and shared with the public;
Must be efforts to relate public comment to process or project decisions;
Must include notification, information out, and information discussion and exchange; and,
Must be timely.”

Any moves to achieve more efficient EA processes must ensure that there is still fairness for participants. One of the prime characteristics of meaningful participation is the opportunity for an early two-way discussion and exchange of ideas on a project – an exchange that promotes both learning and sustainability outcomes.

“Meaningful public participation” must be entrenched as a core element in any revised EA law. In this regard deliberations before this Committee should at a minimum include:

- Clarifying what meaningful participation is (perhaps starting with the definition above);
- Identification of specific and codified direction for carrying out such participation (especially if consultation is going to be done by a third party and in addition to any specific direction on hearings);
- The identification of avenues for accessing resources that will aid participants;
- Ways to provide easy access to information and knowledgeable people; and,
- The identification of alternative ways to resolve disputes that should be included in any legislation.

There is information available on all of these issues, developed by government agencies, practitioners, academics and participants.

Multi-jurisdictional Assessment and Substitution

We are all aware that the widespread adoption of EA by different governments and institutions throughout the world has created a context in which any one project may trigger more than one assessment. Federal, provincial, territorial and some municipal governments in Canada all have their own EA processes. For example, the Wuskwatim Project involves the construction of a low-head dam and three 230-kV transmission line segments in northern Manitoba. The proposal triggered reviews under the Canadian Environmental Assessment Act (S.C. 1992, c.37) and the Manitoba Environment Act (SM 1987-88, c. 26). Rather than duplicate efforts to evaluate a project's potential impacts on the environment, there was some inter-jurisdictional co-ordination of EA practices in this case.

Given the complexity of jurisdictional responsibilities between the federal and provincial governments, Canada has a growing history of inter-jurisdictional co-ordination. Three approaches to inter-jurisdictional co-ordination have been considered in Canada, including 'standardization', 'harmonization', and 'substitution'. A colleague and I have considered each of these and more detailed consideration of each is required during this review (Fitzpatrick and Sinclair 2009). Many contend that there is duplication of EA process in Canada and once this is fixed, process efficiencies will be gained. My analysis contends that whatever duplication there was has been largely dealt with by government agencies that have been forced to consider duplication and efficiency by their political masters.

Standardization involves devising one common EA process to be used across different jurisdictions. This is complex in the Canadian context and however desirable, probably not worth a lot of your time. One issue, process triggers, highlights the problem. Triggers vary by region. For example, some EAs are initiated by both public and private developments (e.g., the Manitoba EA process), while others are triggered only by public developments (e.g., the federal EA process). Some EAs focus on physical works (e.g., the federal EA process), while others consider projects, policies, and programs (e.g., the Ontario EA process). Issues like this make standardization efforts in Canada very complex.

Harmonization involves rationalizing EA so that the requirements of all applicable legislation are met through one process. There are two traditions of harmonization in Canada: *bilateral agreements* between governments about how their processes will be harmonized and *project-specific agreements* between governments about how to proceed with an assessment for a specific project. Bilateral agreements are negotiated under the Canada-Wide Accord on Environmental Harmonization and agreements have been signed in each jurisdiction west of Quebec. Our research on bilateral agreements shows that we need to consider more fully how such agreements are being implemented. We have identified a considerable lack of consistency, for example, in the provisions included for public participation in the various agreements. While this may be expected to some degree, it creates another level of uncertainty for proponents and participants.

A project-specific approach is employed when the federal/provincial/territorial governments have not established a bilateral agreement. These agreements vary widely, even in relation to specific aspects of EA such as public participation. The Sable Gas Project on the east coast is an example of a project-specific agreement. The negotiation of such agreements on a case by case basis is clearly cumbersome and the outcome not guaranteed.

The third approach to inter-jurisdictional co-ordination is substitution. According to the Canadian federal EA process, if a project under the Act is subject to a review by a federal authority that is deemed to be an appropriate substitute, that review may replace the federal EA process. The Emera Brunswick Pipeline Project, which involved the construction of a natural gas pipeline in New Brunswick, was the first and only completed EA substitution under the CEAA. The project triggered both the CEAA for EA purposes and the National Energy Board Act for regulatory purposes.

Substitution of EA process may have the great appeal to government decision makers because process responsibility may shift from one agency to another. This approach, however, concerns the public mainly due to the varying processes that might be used in coming to a decision about a case. A preliminary assessment of the Brunswick pipeline project substitution in Canada that colleagues and I carried out indicates that the substituted process did not resolve issues of process uncertainty, particularly from the point of view of assessment participants (see Sinclair et al. 2012; CEAA Agency 2008). Furthermore, the lack of consultation regarding the decision to substitute processes was of serious concern to the public, as was the process followed by the review agency.

My colleagues and I do not see the widespread use of substitution outside of one jurisdiction's family due to constitutional complexities. Each level of government in Canada is still required to exercise its jurisdictional responsibilities surrounding EA as outlined in their various laws.

For the reasons above, I feel that the focus of the review should be on the content and direction of bilateral agreements. Specifically:

- Bilateral agreements should be completed with all provincial jurisdictions;
- Existing agreements should be strengthened to ensure process certainty for proponents and the public while limiting the variation in requirements among agreements;
- Misunderstandings about decision authority should be corrected; and
- Harmonization to a higher, and not a lower, standard.

In relation substitution under CEAA, I recommend that it should be eliminated, or at least restricted, until regulatory processes are modified. We need further discussion on how and whether it is even appropriate to substitute what is largely viewed as a planning tool for sustainability (CEAA) with a regulatory tool (such as the NEB).

Focus of our EA Law and Policy

It has been suggested to you that we can gain EA process efficiency and effectiveness through reducing the number of EAs undertaken under CEAA. On the surface this seems like a reasonable prospect, until one starts to consider how it might be done. I will speak very briefly to just two potential ways of reducing the number of assessments that are being discussed: abolition of screening level assessments and adopting a ‘project of national significance’ approach.

Screening level assessments have been a target for elimination for as long as I can remember. While there are cogent arguments for reducing the number of screenings, especially now that we have a number of class assessments, you need to very carefully review the sorts of projects that would potentially not be assessed if screenings were dropped. While proponents of this approach like to point to the requirement for an EA of the proverbial “park bench”, this class of assessment includes many large projects that are controversial, have significant sustainability impacts and could end up being the cause of court action if not properly assessed. So, I would recommend that a class of assessment not just be eliminated.

In terms of a whole new model of determining which projects/undertaking are assessed, it has been suggested that you consider the notion of ‘projects of national interest’. Consideration of this approach will require that you tackle the delicate issue of how to make such a determination in a way that does not seriously limit the types of projects assessed. You will be directed to the Australian experience in this regard, which is worthy of further evaluation. Keep in mind though that the Australian Environmental Protection and Biodiversity Conservation Act relates to “projects of national environmental significance” and that the Act combined a number of other pieces of legislation related to wetlands, biodiversity, whaling, etc. that help to define the significance criteria. It is also worth noting that the number of cases that were subject to EA actually went up after the Act was passed and they too are looking to strategic assessment as a way to reduce this number.

As well, the EPBC Act delegates almost all EA responsibility for projects other than those of national environmental significance to the State level. While bilateral agreements exist with all states, only some - such as Western Australia - are set up for what has been described as an off-loading of responsibility that has impacted the effectiveness, fairness and sustainability outcomes of EA in some states. We would clearly have the same problem here in Canada, so I recommend against outright delegation of Federal responsibility to Provinces and Territories, if for no other reason than wanting to avoid the prospect of proponents shopping provincial processes and provinces selling the ease of obtaining EA approval in their jurisdiction. All EA processes must meet international standards.

Conclusions

Much has been learned about EA law, policy and practice from the Canadian experience. At one time we were one of the go-to jurisdictions internationally for ideas and innovation in relation to EA process and practice. Many Canadian EA practitioners, academics and lawyers continue to be leaders by sharing their knowledge. Nationally, though, many leaders in the field are concerned about slippage as we move to make EA processes more efficient by limiting the scope of the assessment, restricting public input and spending time in court. We only need to look at some of the projects we undertook before formal assessment processes were in place to see the value of the forward-looking requirements of EA. Parliament must do a better job of ensuring that Canadians have the tools to advance sustainability, protect ecosystems and maintain their socio-economic well-being. This requires strong EA law, regulation and policy that is legislated, gives the public a meaningful voice in decisions, avoids duplication and is effective, efficient and fair.

Lastly, it is unfortunate the CEAA Regulatory Advisory Committee has been sidelined and has not been a part of discussions about recent regulatory changes to the Act, nor have RAC members been consulted about the Seven Year Review. It was not that long ago that I was asked to write about the RAC process as a model within government. In my experience, RAC as a multi-stakeholder committee provided sound advice to the Minister and the Agency. Its strength rested in its ability to influence government policy where there was room for common ground among industry, environmental groups and aboriginal organizations. The relationships built were important for EA in Canada. It is unfortunate that the present government seems to see no role for such a model of cooperation. In closing, I recommend to you that an Advisory Committee model again be instituted to help guide the implementation of EA at the Federal level.

References

Beanlands, G.E., and P.N. Duinker. 1983. *An Ecological Framework for Environmental Impact Assessment in Canada*. Halifax: Institute for Resource and Environmental Studies, Dalhousie University.

CEA Agency. 2008. *Substitution under the Canadian Environmental Assessment Act: A Report on the Evaluation of the Substitution of the National Energy Board Review Process for a Canadian Environmental Assessment Act Review Panel for the Emera Brunswick Pipeline Project*. Available at, www.ceaa-acee.gc.ca/Content/E/5/C/E5C188AA-2D80-483C-8207-4B84437250E5/report-eng.pdf

Doelle, M. 2008. *The Federal Environmental Assessment Process: A Guide and Critique*. Markham, ON: LexisNexis.

Fitzpatrick, P., and A.J. Sinclair. 2009. 'Multi-jurisdictional environmental impact assessment: Canadian experiences'. *Environmental Impact Assessment Review* 29 (4): 252–60.

Lawrence, David P. 2003. *Environmental Impact Assessment: Practical Solutions to Recurrent Problems*. Hoboken, NJ: Wiley-Interscience.

Meredith, T. 2004. 'Assessing environmental impacts in Canada'. In *Resource and Environmental Management in Canada: Addressing Conflict and Uncertainty*, B. Mitchell, (ed.). Don Mills, ON: Oxford University Press, pp. 467-96.

Sinclair, A.J., and A.P. Diduck. 2009. 'Public participation in Canadian environmental assessment: Enduring challenges and future directions'. In *Environmental Impact Assessment Process and Practices in Canada*, 2nd edn, K.S. Hanna (ed.). Toronto: Oxford University Press, 56–82.

Sinclair, A.J. and Doelle, M. 2010. Environmental assessment in Canada: Encouraging decisions for sustainability. In *Resource and Environmental Management in Canada: Addressing Conflict and Uncertainty*. Fourth edition, B. Mitchell (ed.). Toronto: Oxford University Press, pp. 462-495.

Sinclair A.J., Schneider, G., and Mitchell, L. 2012. Environmental impact assessment process substitution: Experiences of public participants, *Impact Assessment and Project Appraisal*, In Print. (available at www.scipol.co.uk/iapahome1.html)