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Expert Panel Releases its Review of Canada's Environmental Assessment Process

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On April 5, 2017, the Federal Minister of Environment and Climate Change received her report from an expert panel of four, comprised of three lawyers with significant environmental and aboriginal law experience as well as a retired senior executive of a resource company.

What's New

Environmental Assessment (EA) becomes Impact Assessment (IA). Moving beyond the biophysical environment to encompass all impacts on matters of federal interest both positive and negative.

Sustainability is central to IA. The five pillars of sustainability are environmental, social, economic, health and cultural well-being. The object of the IA must be an assurance that projects, plans and policies contribute a net benefit to the five pillars of sustainability, recognizing that trade-offs may be necessary.

Triggers for an IA. Likelihood of consequential impacts on matters of federal interest to the five pillars of sustainability should determine whether an IA is required. Federal policies, plans and programs which have consequential implications for a federal project would trigger a strategic IA.

Rights of Indigenous Peoples. Indigenous Peoples should be included in decision-making at all stages of IA in accordance with their own laws and customs. Further, Indigenous knowledge should be integrated into all phases of the IA, in collaboration with and with the permission and oversight of Indigenous Groups. The IA must reflect the principles of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. Article 32 of UNDRIP enunciates the right of Indigenous Peoples to free, prior and informed consent. The Panel states: "While Indigenous Peoples have the right to say no, the Panel believes this right must be exercised reasonably". Parties would have various options including dispute resolution at various decision points to review the reasonableness of all decisions, including the reasonableness of Indigenous Groups withholding their consent to a project going forward.

Participant Funding. Such funding should be commensurate with the costs associated with meaningful participation in all stages of the IA including monitoring and follow-up.

Preparation of Impact Statement. The Panel has heard that delegation of IA responsibilities to the proponent for collection of data, conduct of studies and analysis of results has resulted

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"in a clear perception of bias in the results, regardless of whether this is warranted." (p.46) In response, the Panel recommends a significant shift in responsibility for the preparation of the IA document from the proponent to the Impact Assessment authority using a team of consultants and experts retained by the authority. The initial scoping of the IA even before the studies were initiated, would involve a consensus-based approach involving dialogue between interested parties and expert involvement in identifying methodological concerns. Indigenous Groups and other interested parties would provide input on the professionals selected to prepare the Impact Statement. With respect to the Impact Assessment itself, the Panel suggests that "although it would be essential for the IA authority to lead the Impact Statement, the studies that would feed into the Impact Statement could be conducted by various parties. " (p.47)

Evidence-Based. IA legislation must require the development of a central consolidated and publicly available database to house all baseline and monitoring data collected for IA purposes. The IA authority should have the power to compel expertise from federal scientists and to retain external scientists to provide technical expertise as required. IA decisions must explain the criteria and trade-offs used to achieve sustainability outcomes.

IA Decision-Making. A single authority, the Impact Assessment Commission, with capacity to act quasi-judicially should conduct and decide upon IA's before any regulatory approvals may follow. This represents a shift from the current *Canadian Environmental Assessment Act 2012 (CEAA)*. The current law (s. 52) confers decision-making authority for EA's primarily on three authorities: the CEAA Agency and for projects which fall within their jurisdiction, the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC), respectively, both of which already have quasi-judicial authority. If any of these authorities, taking into account appropriate mitigation measures, determines that there are likely to be significant adverse environmental effects, the final decision as to whether such effects are justified presently falls on the federal Cabinet. The Panel proposes that IA decisions should be subject to appeal to Cabinet on the basis of errors in the sustainability decision.

What's Next

Wider Assessment Review. CEAA 2012 narrowed the number of projects subject to review by substituting a list of projects designated by regulation for a list of regulatory approvals which captured a far greater number of projects. The Panel now recommends a potentially far broader scope of review by triggering an IA when there is a likelihood of consequential impacts on matters of federal interest on the five pillars of sustainability.

Building Trust Through Consensus & Collaboration. A consensus-based approach to the study phase and a collaborative approach to the preparation of the Impact Statement would, in the Panel's view, “eliminate the need for a lengthy information request process that frequently stops the regulatory clock and draws out assessment timelines. " (p.47) The diffusion of responsibility through the various stages of the IA is a significant departure from the control currently exercised by the proponent over the preparation of the EA. Whether the Panel's recommendation will prove more efficient and achieve greater buy-in to the final product will

depend upon participants' acceptance of one another's responsibilities. For example, will Indigenous Groups accept the base-line bio-physical data presented by the proponent and will the proponent accept health impact studies of Indigenous Groups? The desire to work together ultimately rests with a set of common beliefs and mutual respect. The regulatory framework may facilitate this process.

Achieving Consensus -Aspiration or Prerequisite? Incorporating UNDRIP in the IA process will be a major challenge. As the Panel heard in their inquiries, for the assessment process to have legitimacy with Canada's Indigenous Peoples, potentially affected Indigenous Peoples must be directly involved in the decision-making process during each stage of the project from planning to regulatory approval and on to implementation. At the same time, while a dispute resolution process and a good understanding of the reasons for saying no to a project may offer opportunities for compromise at various stages of disagreement, there will be times when an impasse will present itself. In such cases, there may be more than one Indigenous Group impacted and there may be disagreement between Indigenous Groups on the net benefits of the project. Even if all Indigenous Groups line up against the project, would the test of reasonableness in relation to a refusal to approve of a project fail to be met if the economic benefits to the nation as a whole were considered paramount? The Panel has recognized that free, prior and informed consent is not absolute. This reflects the view held by Canadian Courts in such recent cases as *Prophet River First Nation and West Moberley First Nations v. Canada (Attorney General et al.),* 2017 FCA 15 at par. 49*; Prophet River First Nation and West Moberley First Nations v British Columbia (Environment),* 2017 BCCA 58 at par. 65, both of which upheld assessment decisions in relation to British Columbia Hydro's Site C Dam Project. Moreover, this view also reflects those of James Anaya, the former U.N. Special Rapporteur on the Rights of Indigenous Peoples, Matthew Coon Come, and other Aboriginal leaders in Canada, that Article 32 of UNDRIP does not endorse an absolute right of veto for Indigenous Peoples in all cases affecting Indigenous lands. As Michael Coyle, wrote in an article in 2016 in *67 University of New Brunswick Law Journal 235 at 242:*

> "The original draft of article 32 had provided that indigenous peoples had '*the right to require* that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources.' The final version, as noted, provides that states must consult with Indigenous peoples 'in *order to obtain*' their free and informed consent. This language lies somewhere between the right to require consent and the right to be consulted with a view to obtaining consent."

Broader Review of Alternatives. The Panel states that IA "needs to better address a review of alternatives. There is a need for an open and informed discussion about the nature of developments, and including the review of pros and cons of more than one option is essential." (p.20) At the same time, the Panel has also heard from some participants that long timelines to complete EA's reduce investor certainty, increase project costs and compromise project viability. (p.103) If the IA decision-maker's responsibility is expanded to weigh the net costs and

benefits of alternatives to the project in regard to all 5 pillars of sustainability, it will have assumed the oversight role of one or more Parliamentary committees.

Timelines for Completion of Review Process. More involvement in public policy will increase timelines for completion of assessments. The right of a participant to appeal decisions of the IA decision-maker to Cabinet on the basis of sustainability errors will further increase timelines since errors of fact are, as a general rule, not entertained by courts on judicial review and judicial review to the courts is the only available remedy currently for overturning unfavourable EA decisions. To the extent that sustainability errors are couched as errors of law, an appeal to Cabinet injects duplication and further delay into the system.

IA Authority. Regulatory authorities with specialized expertise like the NEB and the CNSC could be reluctant to relinquish their current authority for precisely the reasons which some proponents and practitioners offered the Panel during their inquiry: technical expertise and seamless transition from the early assessment review to the progressive licensing stages in the lifecycle of a project. The regulator's familiarity with its capacity to manage impacts during the various licensing stages of a project make it arguably more equipped to understand the actual risks to the 5 pillars of sustainability during the earlier IA than a separate IA Decision-Making Authority.

Public Comment Period

There was a 30 day public comment period which expired on May 5, 2017.