

# The Past, Present, and Future of Environmental Assessment in Canada



UNIVERSITY OF  
CALGARY

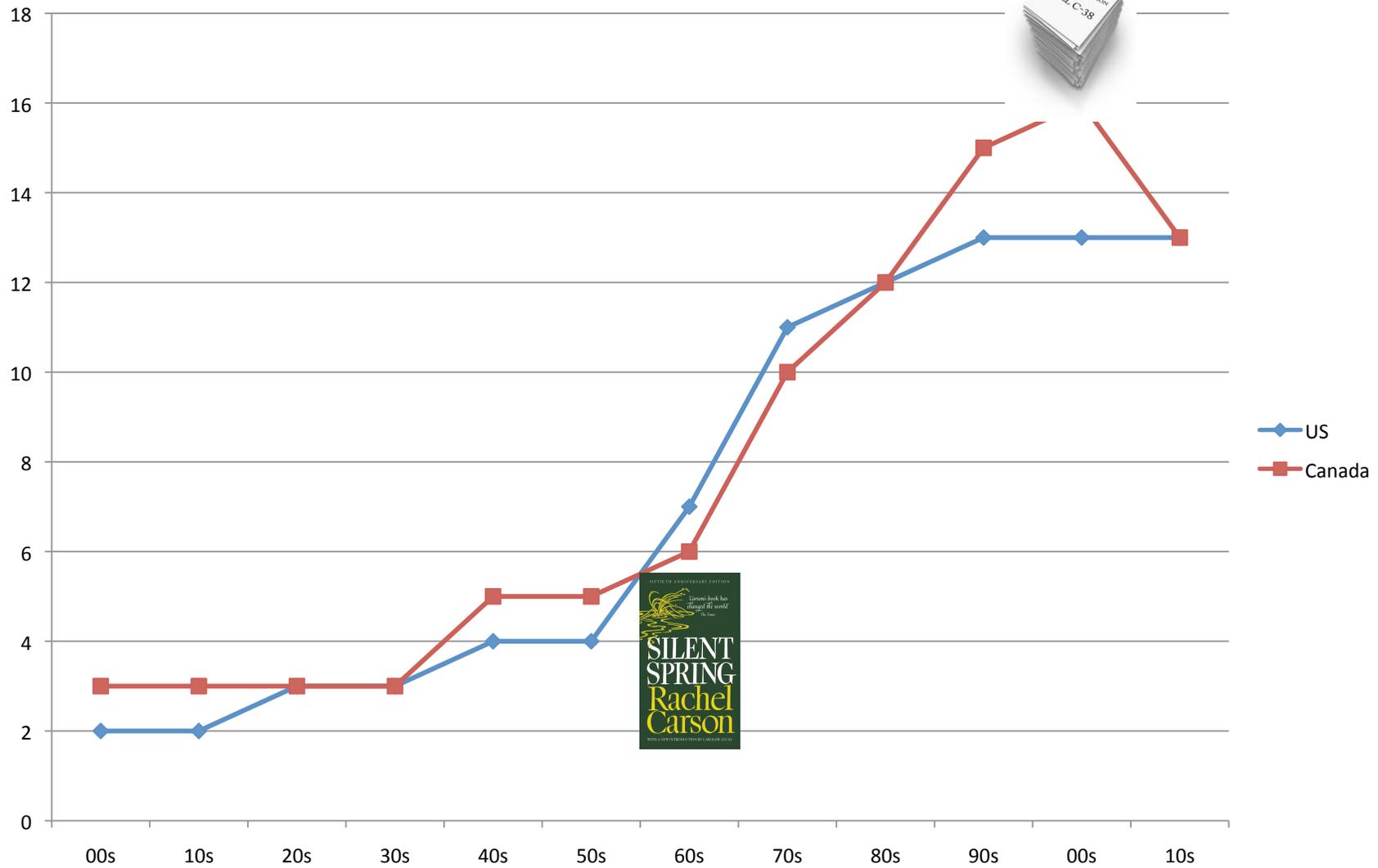
Professor Martin Olszynski  
University of Calgary Faculty of Law  
23 February 2016

- The Past:
  - EA as decision-making process in era of environmental consciousness;
    - *NEPA*: Progenitor of all modern EA laws
    - Canada: EARPGO (1984) to *CEAA*, 1992
    - BC: *Environmental Assessment Act* (1994)
  
- The Present
  - EA as misunderstood and maligned ‘process-for-process’-sake’
    - *CEAA*, 1992 – *CEAA*, 2012
    - 2002 Amendments to BC’s *EEA*
  
- The Future
  - EA → Sustainability Assessment? (Gibson et al., 2016)
  - EA as integral *and* integrated part of regional planning?



UNIVERSITY OF  
CALGARY

# **The Past: EA as Decision-Making Process in the Era of Environmental Consciousness**



NEPA's "logic and legislative history...suggest that [it's] authors expected...**public scrutiny to act as an independent constraint on agency discretion...** *NEPA*'s principal sponsor in the Senate argued that public disclosure would lead to **political accountability that would compel agency managers** to curb their most environmentally destructive practices."

- *Environmental Assessment and Review Process Guidelines Order (EARPGO)* enacted in 1984
  - Subordinate legislation (regulation) pursuant to *Department of Environment Act*
  
- Considered by Supreme Court of Canada in *Friends of the Oldman River v. Canada (Minister of Transport)* (1992)
  - Confirmed constitutionality of federal EA, though not entirely clearly (more on this later)
  - Described EA as “**integral component of sound decision-making**”:
    - “both an **information-gathering** and a **decision-making component** which provide the decision maker with an **objective basis for granting or denying** approval for a proposed development”

- **Triggering:** Automatic ('in unless out' model)
  - Section 5 triggers :
    - Fed as (a) proponent, (b) lender, (c) landowner or **(d) regulator**
  - *Fisheries Act & Navigable Waters Protection Act* most common
  
- **Types of EA (tracks) (least to most rigor):**
  - screening, comprehensive study, panel review
  
- **Scope of EA:**
  - All environmental effects, including effects on “current use of lands and resources for traditional purposes by Aboriginal persons” (s. 2)
  
- **Nature of EA:** “ancillary, information-gathering process”
  - Intended to inform and improve *federal* decision-making

## Problems with implementation:

- Screenings & Comp Studies conducted by RAs (e.g. DFO, TC)
  - Difficulties coordinating, causing delays
  - Supporting agencies (e.g. EC as an FA) were insufficiently resourced, lacked clear mandate and accountability
  
- Jurisdictional uncertainty (rooted in *Oldman River*)
  - ‘Scoping to trigger’ approach (though not uniformly)
  - Concerns about terms and conditions outside RA’s mandate
  
- Cumulative effects analysis
  - Generally inadequate, recognition of proponent limitations
  
- Variability in quality of assessments
  - **Key test** – likelihood of significant adverse environmental effects – notoriously vague and subjective
  - **NB: very few projects concluded SAEE**, few of those that did were approved further (deemed “justified in the circumstances”)

- From 1980 – 1994, at least 4 separate processes under various mandates/regimes
- Consolidated in *EEA* (1994)
  - Establishment of Environmental Assessment Office (BC EAO)
- Project list approach (based on thresholds)
  - Industrial, mining, energy, waste management, water management, tourism resort, transportation and food processing projects
- Fairly detailed procedures with project committees comprised of provincial, federal, municipal, regional and First Nations government representatives



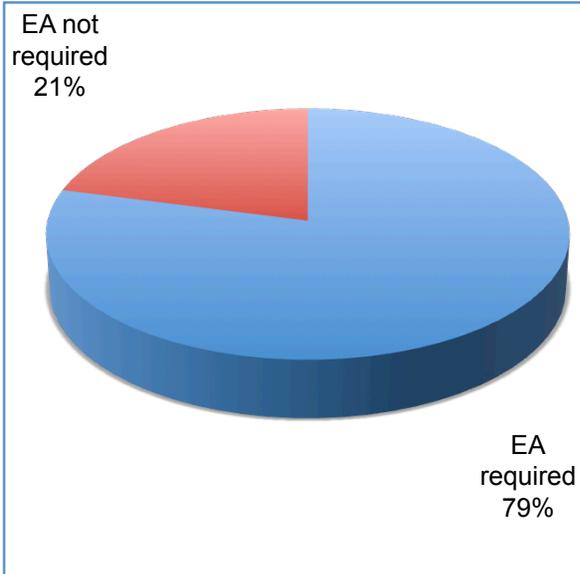
UNIVERSITY OF  
CALGARY

**The Present:  
Misunderstood & Maligned  
'Process-for-Process'-Sake'**

## The Present: Introducing *CEAA, 2012*

- *CEAA, 1992* went for Parliamentary Review in late 2012;
- Less than 2 months of hearings, with minimal input from civil society or public;
  - Hearing transcripts suggest fundamental misunderstanding of Canadian environmental law generally and EA specifically
- Committee Report released in early 2012
  - Recommended fundamental changes to federal EA regime, esp. **adoption of a project list**
- 2012 Budget Bills (C-38 and C-45):
  - *CEAA, 1992* repealed and replaced with *CEAA, 2012* (amongst other fundamental changes)

- **Triggering:** Discretionary (unless NEB or CNSC)
  - *Regulations Designating Physical Activities* + s. 10 “screening” decision
- **Types of EA:**
  - EA by Agency, NEB, or CNSC (comp studies?) & panel reviews
  - **2,970** screenings terminated with arrival of *CEAA*, 2012
- **Scope of EA:**
  - Subs. 5(1): Effects falling within federal jurisdiction
  - Subs. 5(2): Effects “directly related” or “necessarily incidental” to an exercise of federal power
- **Nature of EA:** Substantive regulatory regime?
  - “**protect** the components of the environment that are within the legislative authority of Parliament from SAEE...” (s. 4)



## Problems with implementation:

- Uncertainty/lack of clarity re: selection of projects for project list regulations
- Uncertainty/lack of clarity re: section 10 screening decision (whether to proceed to EA)
- Inconsistency in application of new ‘standing’ rules (“directly affected”)
- Inconsistency in application of section 5 (environmental effects w/in federal jurisdiction)
- Cumulative effects better but still a challenge
  - Aboriginal and Treaty rights
- NB: More projects = SAEE, but most deemed “justified in circumstances” (w/out actual justification)

SAEE “justified”	SAEE “not justified”
Shell Jackpine	New Prosperity
Northern Gateway	
Site C	
Lower Churchill Falls	

- Amendments in 2004 part of “deregulation” agenda
  - Government criticized “inflexibility of the current one-size-fits-all process”, desired “more streamlined and flexible process.”
  - Reduced local and First Nations participation;
  - Eliminated requirement for “alternatives” assessment;
  - More discretionary (no “purposes” section against which to measure government decision-making)



UNIVERSITY OF  
CALGARY

# The Future?

- Gibson, Doelle and Sinclair suggest that “next generation” of EA would:
  - expect proposals to represent **best option** for delivery of lasting wellbeing;
  - recognize that sustainability-enhancing economic, ecological and social objectives are **interdependent**;
  - recognize that effectiveness, efficiency and fairness are logically and practically interdependent, calling for EA at higher levels of decision-making (**strategic EA**);
  - become a tiered and integrated sustainability governance process;
  - be centered on **learning**, building a culture of sustainability and serving the long as well as short term public interest.

- Problems with project-by-project approach
  - Presumes an endless frontier;
  - Sustainability is not an abstract concept – it is place-based!
    - Depends on ecosystems, other uses/development, etc...
- Need regional planning regimes to situate project review:
  - Some regimes already exist (e.g. BC, Alberta, Yukon)
    - These need to be encourage *and* improved
  - Need to recognize Aboriginal and treaty rights

## Questions?

### Additional Commentary:



<https://twitter.com/molszyns>



<http://ablawg.ca/author/molszynski/>

## Thank you!