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

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Overview

- 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

- The Present
  - EA as misunderstood and maligned ‘process-for-process’-sake’
    - 2002 Amendments to BC’s EEA

- The Future
  - EA → Sustainability Assessment? (Gibson et al., 2016)
  - EA as integral *and* integrated part of regional planning?
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.”

The Past: Canada

- **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"
The Past: CEAA, 1992

- **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”)

British Columbia’s Environmental Assessment Act

- 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

For further information, see Mark Haddock, “Environmental Assessment in British Columbia” (2010) University of Victoria Environmental Law Centre
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)
The Present: CEAA, 2012

- **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)
The Present: CEAA, 2012

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)

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<thead>
<tr>
<th>SAEE “justified”</th>
<th>SAEE “not justified”</th>
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<tbody>
<tr>
<td>Shell Jackpine</td>
<td>New Prosperity</td>
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<tr>
<td>Northern Gateway</td>
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<td>Site C</td>
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<td>Lower Churchill Falls</td>
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The Present: BC’s EEA

- 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)

See Mark Haddock, “Environmental Assessment in British Columbia” (2010) University of Victoria Environmental Law Centre
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.

Bob Gibson, Meinhard Doelle and John Sinclair, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment” (2016) 29 JELP (forthcoming)
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:

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Thank you!