Federal Environmental Assessment Reform Summit

Proceedings

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August 2016

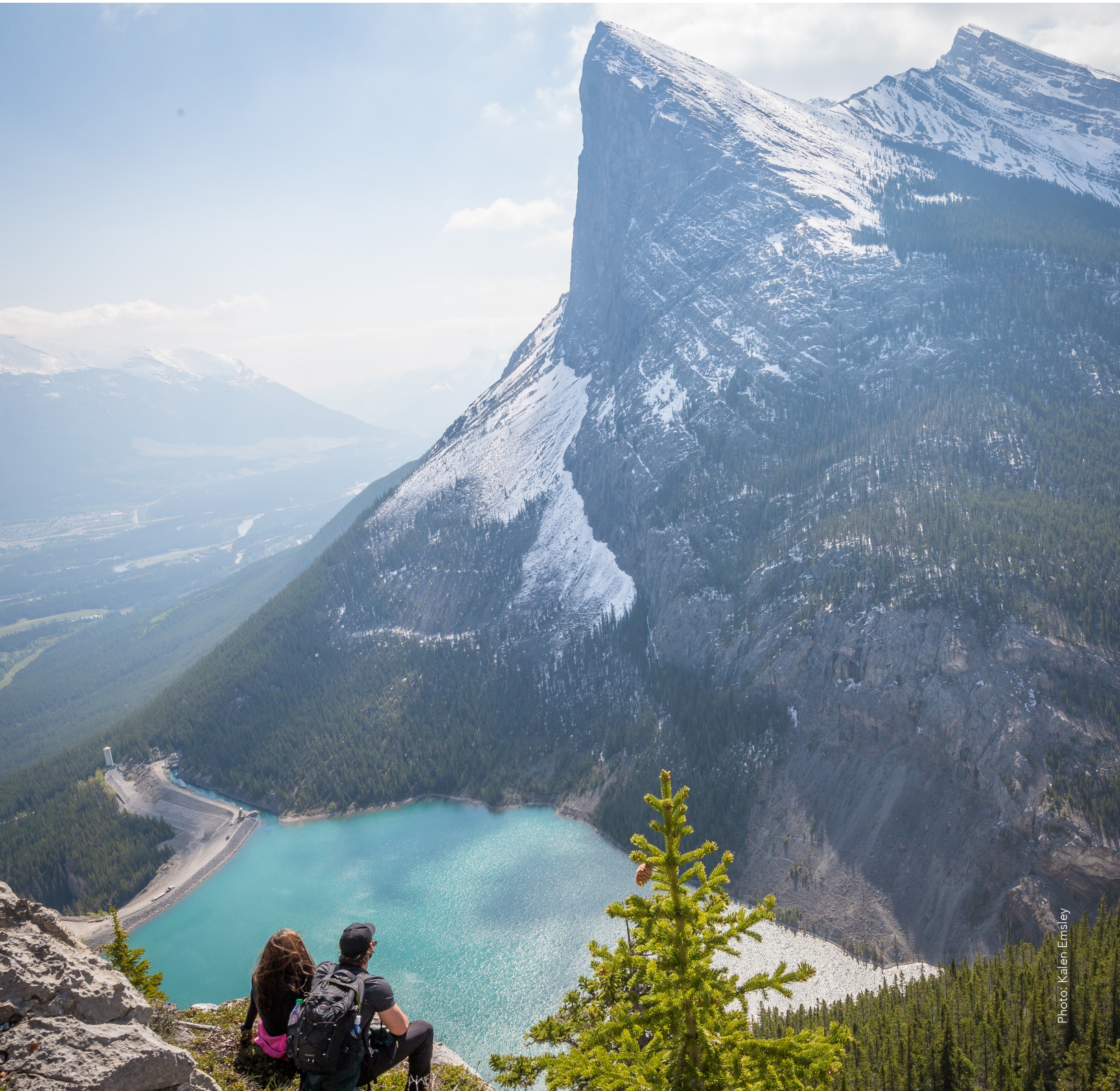

Photo: Kalen Emsley

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Photo: A. Wright

Executive Summary

From May 1-3rd 2016, in response to the announcement of the Government of Canada's mandate to review federal environmental assessment processes, West Coast Environmental Law organized a Federal Environmental Assessment Reform Summit in Ottawa. Over 30 of Canada's leading environmental assessment experts, academics, lawyers and practitioners gathered to discuss, crystallize thinking, weigh options and seek to find common ground on how to fix Canada's broken environmental assessment regime.

Information on the Summit, including the Federal Environmental Assessment Reform Summit Proceedings, session topics and background materials, is available at www.envirolawsmatter.ca/easummit.

An opening plenary and eight workshops on key issues for federal environmental assessment reform identified key principles, implementation recommendations and outstanding issues that require further investigation.

As a starting point, participants agreed that the current environmental assessment regime in Canada under the *Canadian Environmental Assessment Act, 2012* is broken. Rather, Canada needs a new regime consisting of "next-generation" assessment law, regulations and policies to deal with modern day undertakings, environmental threats and impacts.

The key principles and recommendations that flowed from the Summit workshops can be distilled down into twelve interdependent pillars of a visionary new environmental assessment regime for Canada.

Twelve Pillars of a Next-Generation Environmental Assessment Regime

1. Sustainability as a core objective

All assessments should ensure the long term health of the environment and social values, and the equitable distribution of risks, impacts and benefits.

Next-generation environmental assessment is broad, value-driven, aspirational and inclusive. It is about advancing sustainability while protecting the things we value, and increasing fairness in the distribution of benefits and burdens. Sustainability has long been the goal of environmental assessment in Canada: next-generation environmental assessment operationalizes that goal. It asks, do proposals represent the best option for achieving equitably distributed net sustainability-enhancing outcomes? Do they advance us towards an envisioned future? The goal of all levels of assessment and decision-making is sustainability-enhancing outcomes. Underpinning concepts include the need to set limits on adverse human impacts, and enhancing resilience and justice. Sustainability-based decision-making criteria are used to guide decision-makers. Ultimately, assessments should ask: will this proposal relative to other reasonable options make the best net contribution to lasting environmental, social and economic well-being without demanding trade-offs that entail significant adverse effects?

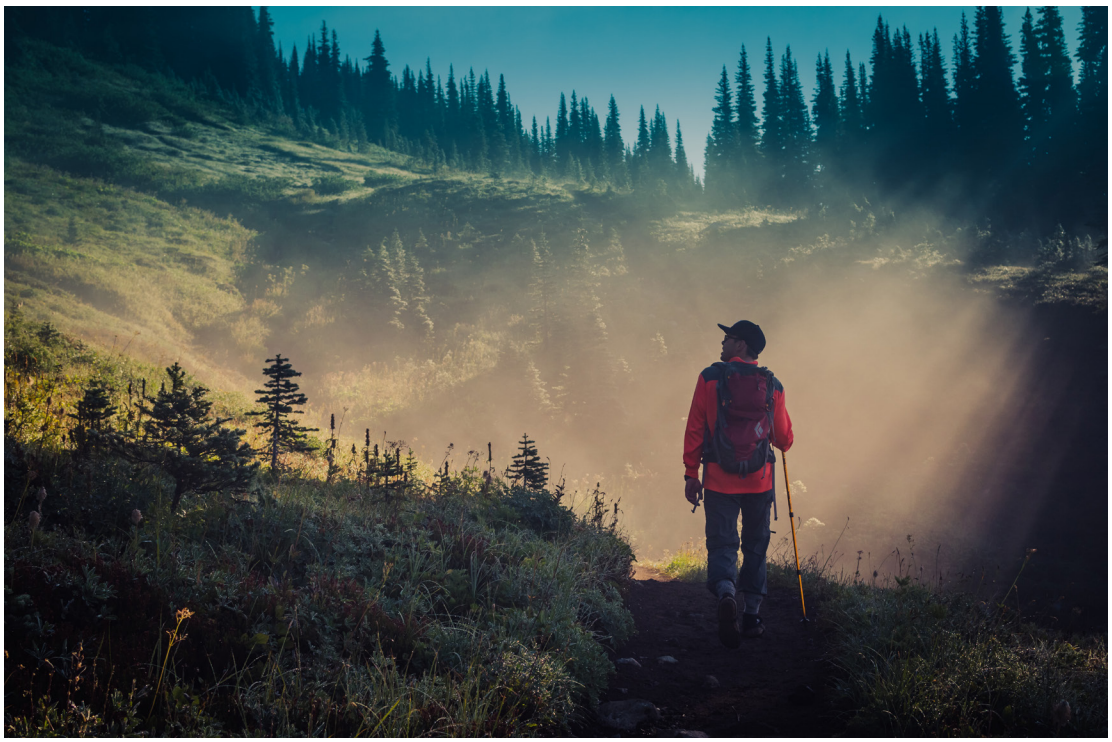

Photo: Anton Bielousov

2. Integrated, tiered assessments starting at the strategic and regional levels

Participatory and sustainability-based assessments occur at the regional, strategic and project levels, and each of those levels inform the other.

In next-generation environmental assessment, project-level, regional and strategic assessments, and regulatory processes are tiered and integrated. Sustainability-based regional assessment of anticipated and possible stresses and opportunities, and associated development pathways, further the understanding of actual and potential cumulative effects arising from past, present and alternative future scenarios. It provides better opportunities for Indigenous peoples and the public to evaluate broad alternatives for shaping the future of their regions and clarifies regional requirements and expectations, thus easing the burden of these considerations on project-level assessments. Strategic plans, policies and programs are developed through similarly open and sustainability-based processes and linked to regional and project assessments to help ensure their net contribution to sustainability. Strategic assessments help ensure that policy needs are considered, and help avoid policy debates at the project level. Project assessments fit within the vision set at the regional and strategic levels, informed by and feeding back into those processes and outcomes. All levels of assessment are tiered and integrated, with information flowing between them as a dialogue, not a monologue. Next-generation environmental assessment recognizes that the effective design, linking and coordinating of the tiers is critical to achieving a true integration of effectiveness, efficiency and fairness in assessments. Legislation establishes the legal framework, including: when they are triggered; their processes and substantive requirements; linkages to other levels of assessment, resource management and planning; public and stakeholder engagement requirements; and provision for Indigenous co-governance of all those elements. Flexibility is built-in for case-by-case process design.

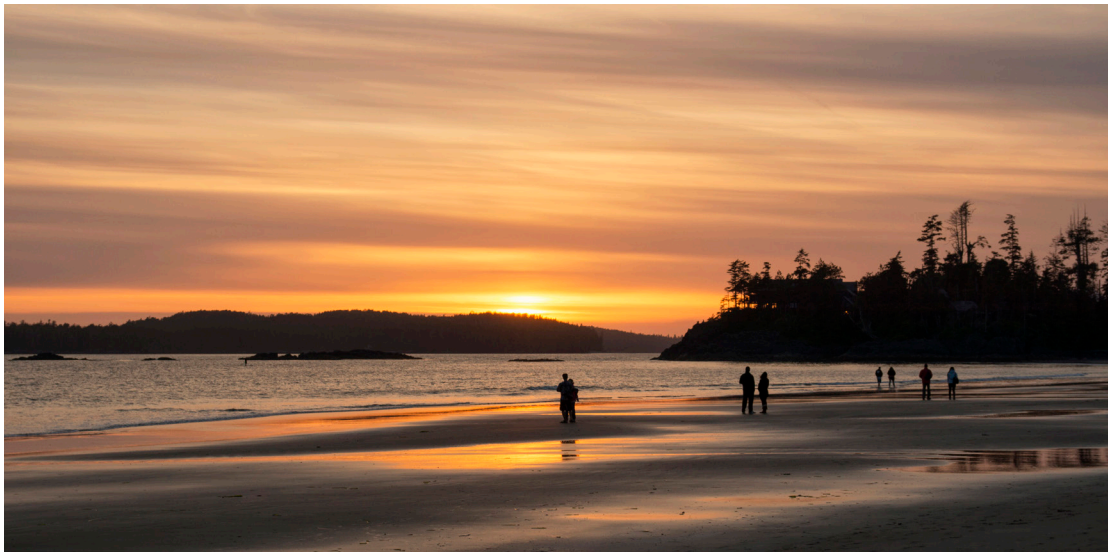

Photo: Brett Kauffmann

3. Cumulative effects assessments done regionally

Cumulative effects assessment is regional, focuses on environmental health, and looks to the past, present and future.

Next-generation environmental assessment recognizes that the most important effects are cumulative, and that effects are interactive and the results often non-linear. It presumes that impacts are cumulative and considers the impacts of smaller projects. Especially where there have been or will likely be multiple projects, other pressures and opportunities affecting the environment and communities, it assesses cumulative effects and alternative future scenarios at the regional level, setting the stage and parameters for a long-term understanding of environmental effects within a region. Cumulative effects assessments focus on ecosystems rather than human activities, and take a long-term and wide-ranging view. They look backwards at historic evidence to determine existing accumulations of effects, trajectories and directions, to present-day multiple and integrating stressors, and forward by projecting, testing and, where necessary, adjusting alternative future scenarios. Consideration of cumulative effects at the regional level shows current and possible cumulative effects, the broad alternatives for development pathways, and protective measures that would favour positive cumulative effects and reverse negative ones. As with project-level assessments, cumulative effects assessment focuses on achieving sustainability-enhancing outcomes and well-being through the application of a sustainability decision-making framework.

4. Collaboration and harmonization

Jurisdictions harmonize their assessments to the highest standard, collaborating on processes and decisions wherever possible.

In next-generation environmental assessment, jurisdictions cooperate in project-level assessment, and especially in regional and strategic assessments. All decision-making authorities are directly involved in assessment processes so they have a better sense of ownership and understanding of the issues and potential outcomes. Multi-jurisdictional processes are harmonized upward to the higher standard of assessment scope, criteria and process requirements wherever possible, with each jurisdiction actively engaged in the processes. Jurisdictions collaborate on decisions with the aim of achieving consensus, but retain distinct decision-making authority. There is a consistent, minimum, nation-wide assessment standard, with harmonized assessments guided by the key principles of understandable and accessible information, sustainability as a core objective and guiding principle, meaningful opportunities for public participation, and precaution. In recognition of both the equal legitimacy of Indigenous laws and the historical context, equivalency remains an option when Indigenous jurisdiction is involved, guided by the above principles.

5. Co-governance with Indigenous Nations

Collaborative assessment and decision-making processes are based on nation-to-nation relationships, reconciliation and the obligation to secure the free, prior and informed consent of Indigenous peoples.

In all next-generation assessments, the federal government complies with the United Nations Declaration on the Rights of Indigenous Peoples, with environmental assessment decision-making conducted on a nation-to-nation basis and in a manner respectful of Indigenous peoples' right to free, prior and informed consent. The duty of reconciliation and the Truth and Reconciliation Commission's Recommendations, as well as climate change obligations, are guiding principles. Processes like collaborative consent are iterative and adaptable to different circumstances and nations. While legislation and nation-to nation agreements set out frameworks, they have flexibility built-in in order to adjust models for specific groups and circumstances and policy spaces for nation-to-nation dialogue.

6. Climate assessments to achieve Canada's climate goals

A climate test ensures that projects keep Canada on track to meeting its climate change commitments and targets.

To avoid the challenges of showing causal links between incremental project-specific GHG emissions and environmental, social and economic effects, next-generation climate assessment seeks to understand whether and how far the greenhouse gas emissions of a proposal will move Canada towards or away from its climate goals and its international commitments. While federal climate obligations and goals are of particular importance, local, provincial and Indigenous objectives should provide helpful context and guidance on this question. While the threshold question in a next-generation climate assessment is whether a proposal will help Canada meet its international climate change commitments, climate-related aspects of a proposal are assessed through a sustainability framework and will be expected also to serve other sustainability assessment objectives. Assessments may need to be based on more rigorous targets or outcomes than are provided for in Canada's Paris commitments. Regional assessments offer larger and more effective means of understanding the implications of greenhouse gas reductions commitments, and evaluating options for meeting them effectively, efficiently and with a fair distribution of benefits and burdens. Strategic assessments help develop plans, policies and programmes to ensure Canada meets or exceeds its commitments. The character and effects of proposed projects are then assessed in light of those strategies. The key questions in a climate test are: 1) Would this proposal help or hinder Canada's ability to meet its climate commitments while also serving other sustainability objectives; 2) What is the degree to which it is helping or hindering; and 3) Would it deliver a fair distribution of benefits and burdens?

Photo: Mike Petrucci

7. Credibility, transparency and accountability throughout

Legislation sets out criteria, rules and factors to guide assessments and discourage politicized decisions. An independent body conducts assessments and the public has the right to appeal decisions.

To have legitimacy, next-generation processes and decisions are credible, transparent and accountable. Assessments are conducted by an independent, impartial body that is guided by clear sustainability-based principles and goals. Legislation requires that to be approved, a proposal makes a net contribution to sustainability and avoids significant adverse effects. The law also sets out generic decision-making criteria to guide decisions and provides for the establishment of case-specific decision-making criteria. It sets out explicit trade-off rules and factors to guide decisions in the case of residual impacts. These criteria and rules constrain Cabinet's discretion, discourage politicization and incentivize allowing processes to play out. The legislation also establishes a meaningful public right of appeal through an independent and impartial adjudicatory body to reconsider process and final decisions, and establishes broad powers and obligations to monitor and act on non-compliance. Policy and guidelines provide guidance for the development of case-specific decision-making criteria.

8. Participation for the people

Meaningful public participation is early, ongoing, accessible and dynamic. It occurs at all levels of assessment and has the ability to influence outcomes.

In next-generation environmental assessment, the public is actively and dynamically engaged from the early stages, before proposals are submitted and strategic decisions are made, all the way through monitoring and enforcement. Public participation is not a one-size-fits-all process. Written comment periods are not enough and while hearings play an important role, the public should be involved in designing alternative engagement processes that are appropriate for the circumstances and public's needs. Assessments consider alternatives to the project, including the no-project alternative, and "need for" analyses are based on the public interest perspective. So is the elaboration of context-specific sustainability criteria for the assessment. Government is responsible for participatory processes, which at a minimum include: fair notice; disclosure; respect; a scope broad enough to encompass the full range of public interest considerations; access to information; adequate resources and education; the ability to influence outcomes; integration of public opinion and expertise; written reasons; explanations of how comments were received, considered and reflected in decisions; opportunities to test evidence; and trustworthy and independent reviewing bodies. There are opportunities for meaningful and robust oversight through appeal and review mechanisms both of the evidence upon which decisions are made, as well as the decisions themselves. Reconciliation with Indigenous peoples is a foundational principle and objective.

9. Transparent and accessible information flows

All relevant information is easily accessible to the public, is shared between different levels of assessment and remains available for future use.

Understandable and accessible information is a cornerstone of next-generation assessment. At all levels, the starting point of assessments is the identification of the information needed to form a basis for decision-making. Information is made to flow among the various tiers of assessment, from the regional and strategic level down to the project level and from the project level back up to regional and strategic assessments, and among those interested and engaged. All relevant information, including the data collected prior to the assessment baseline data, is made permanently available in an easily searchable public repository and optimally used to ensure current and future proposals make a net contribution to efforts to develop a sustainable society.

10. Ensuring sustainability after the assessment

After projects are approved, the law requires robust follow-up, monitoring, adaptive management, compliance and enforcement.

In next-generation environmental assessment, follow-up, monitoring, adaptive management, compliance and enforcement are robust, well defined and mandatory. Legislation requires follow-up and monitoring process conditions to be attached to approvals of project and strategic undertakings, and makes those conditions and mitigation measures legally binding. Guidelines provide specifics for follow-up programs and adaptive management, and clarify that adaptive management is a means of addressing uncertainty, not a mitigation measure, and is not appropriate where there is risk of irreversible or irreparable harms. Adaptive management is not feasible in the absence of adaptable design, and is not a replacement for application of the precautionary principle. The regulatory framework clarifies what types of mitigation measures can be relied upon as mitigation of adverse environmental effects, and establishes reliable means of assessing in advance whether such measures will deliver the promised results. Follow-up data for project-level and cumulative effects assessment feeds into regional and strategic assessments and proponents are required to report publicly on compliance. All information is made publicly available and there are legal mechanisms for public and Indigenous involvement in enforcement and follow-up. Time limits or conditionality are imposed on authorizations so they can be revoked where follow-up has not performed as predicted or is not effective.

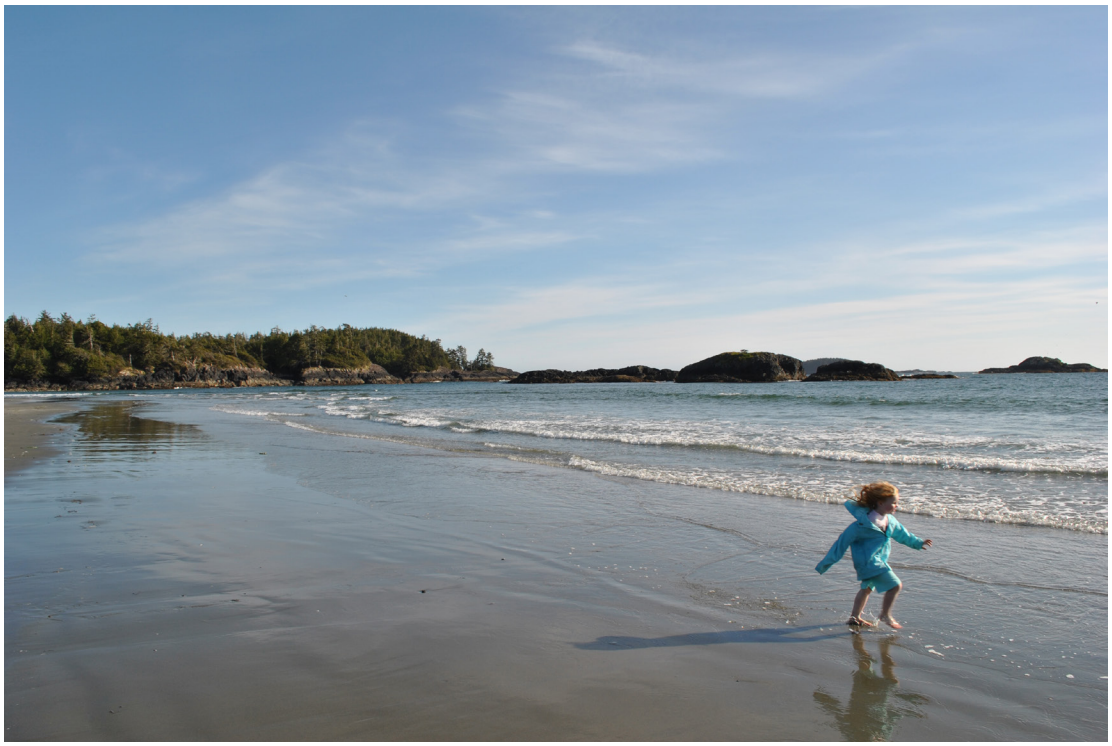

Photo: Aaron Carlson

11. Consideration of the best option from among a range of alternatives

Assessments consider alternative scenarios, including the "no" alternative.

Next-generation environmental assessment recognizes that selecting the best option among feasible alternatives to meeting a particular need or opportunity is integral to wise decision-making. Accordingly, it identifies and compares alternatives to the proposal, including the "null" or "no" alternative, and alternative scenarios in determining which option among the alternatives best meets the sustainability-based decision-making criteria. Identifying and comparing among alternatives in the early stages of assessment processes provides the public with a more meaningful say in critical decisions and helps achieve sustainability-enhancing results.

12. Emphasis on learning

The assessment regime fosters opportunities for learning, to ensure more informed and better decisions now and into the future.

Next-generation environmental assessment is centred around and fosters learning. Public participation processes are designed to promote mutual learning among all parties, and are monitored and evaluated to learn from assessment processes' successes and failures. Data from monitoring and follow-up, and lessons from adaptive management, inform future assessment and decisions, closing the circle of learning for EA. The focus is not on requiring proponents to jump through hoops, but on improved and shared understanding, and more informed and better decisions.

Many thanks to the Summit participants for their valuable contributions, and especially the workshop leaders and organizing committee. Special thanks to John Sinclair, Meinhard Doelle, Jamie Kneen, Justina Ray and Byron Williams for their thoughtful guidance, keen editorial eyes and help pulling the Summit together.

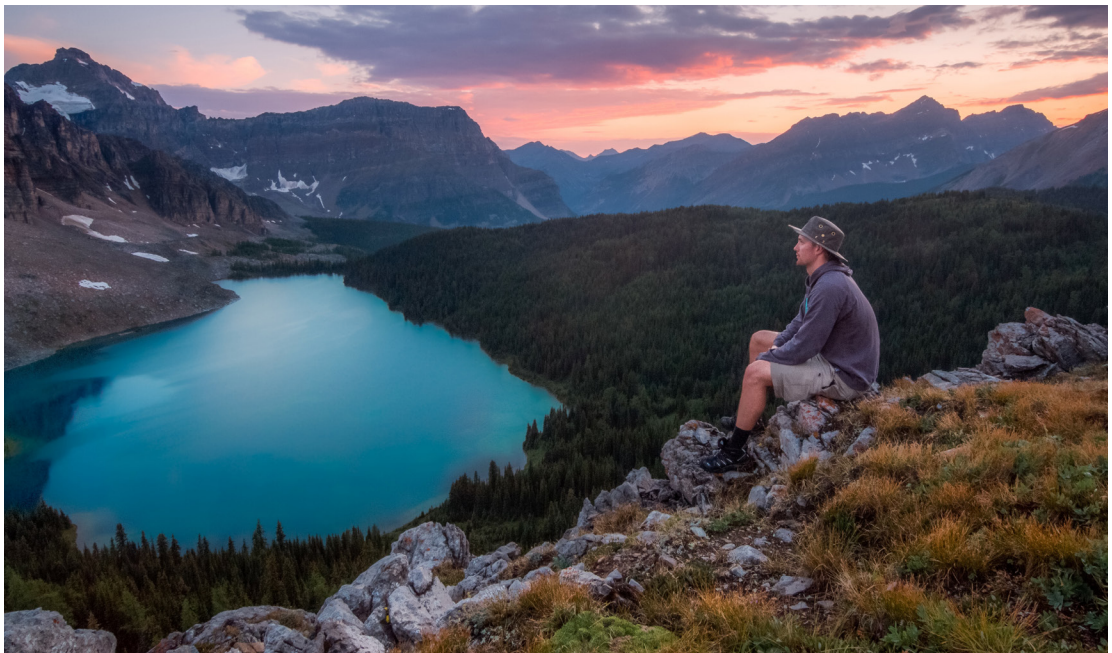

Photo: Kalen Emsley

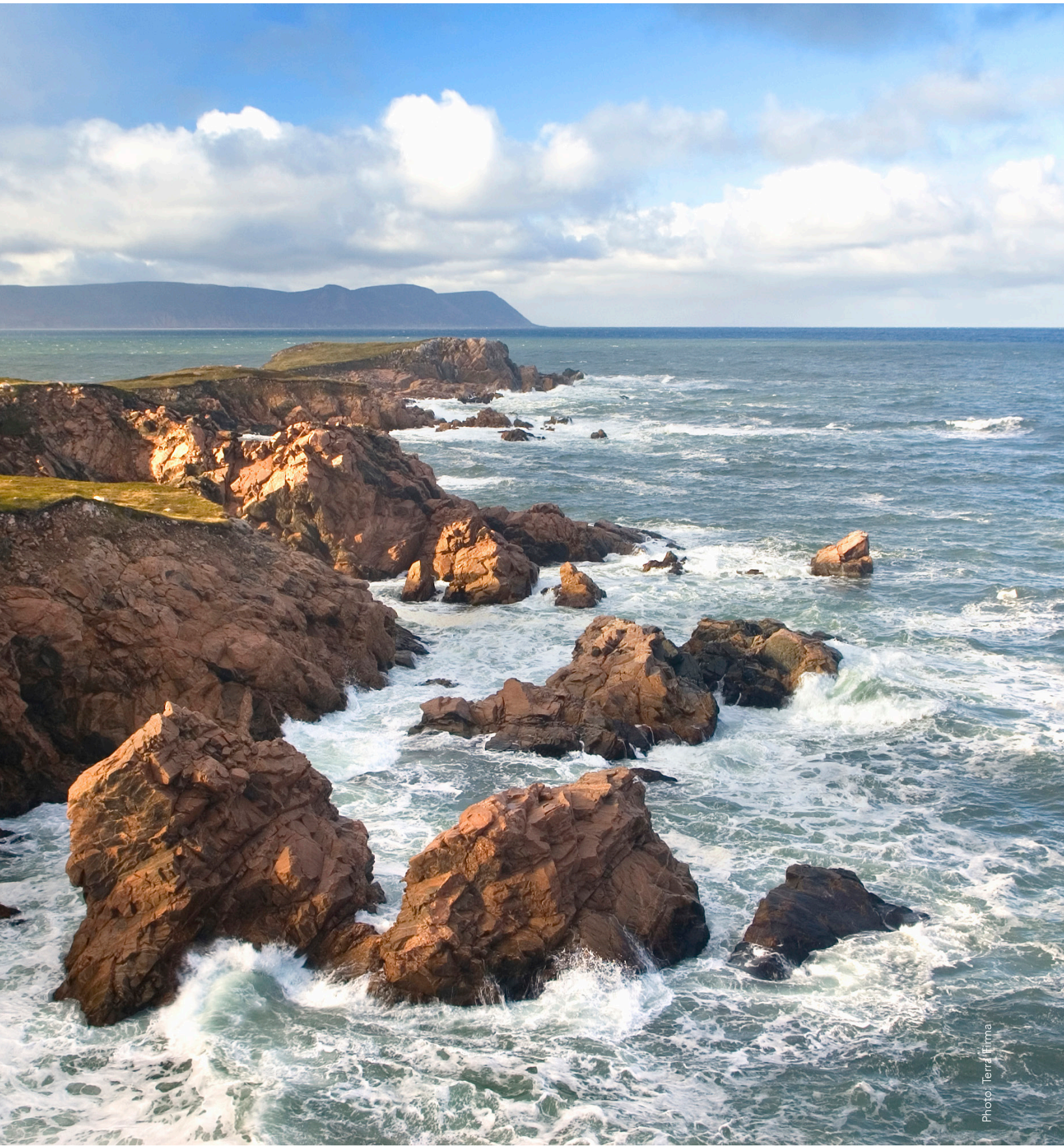

Photo: Terra Firma

Introduction

In November 2015, the Ministers of Environment and Climate Change, Fisheries, Transport, Natural Resources, Indigenous and Northern Affairs, and Science were given the mandate to "immediately review Canada's environmental assessment processes" or to support that review.

In anticipation of the announcement of that review, West Coast Environmental Law hosted a Federal Environmental Assessment Reform Summit in Ottawa May 1-3rd, 2016. Attended by approximately 30 of Canada's leading environmental assessment experts, academics, lawyers and practitioners, the Summit was an opportunity to discuss, crystallize thinking, weigh options and seek to find common ground on key components of a "next-generation" environmental assessment law for Canada.

Information on the Summit, including workshop topics and background materials, is available at www.envirolawsmatter.ca/easummit.

The 2016 EA Summit Proceedings summarize the discussions that took place over the three days of the Summit. They begin with a summary of the May 1st plenary that set the stage for the eight workshops that took place on May 2nd and 3rd. Those workshops were:

1. Sustainability Assessment
2. Strategic EA and Regional Assessments
3. Follow-up, Adaptive Management, Monitoring and Enforcement
4. Multijurisdictional Assessments
5. Public Participation
6. Nation-to-Nation Relationships and UNDRIP
7. Cumulative Effects Assessment
8. Assessing Climate in EA

Each workshop was introduced by one or more workshop "leaders," who provided background reading materials and gave a brief overview of the main issues and proposed solutions, then opened the workshop up for facilitated discussion. Two workshops were held concurrently during each session and following each session there was a group discussion among all participants of the key take-aways from the workshops, with an opportunity for questions and comments.

For each workshop, these proceedings list the background materials relied on and provide an overview of workshop introductions. They then summarize the main outcomes of the discussion, including the key principles on which there was general consensus, recommendations for how to implement those proposed reforms and issues that require further discussion and thinking. Following the main outcomes is a description of the overall discussion.

Lists of Summit participants and the background materials are attached as appendices to these proceedings.

Opening Plenary

Next-Generation Environmental Assessment

Speakers: A. John Sinclair, Meinhard Doelle, Mark Winfield and Merrell-Ann Phare

Background Papers

Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2013) 24 *J Envtl L & Prac* 1.

Robert B. Gibson, Meinhard Doelle, A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment," (2016) 29 *J Envtl L & Prac* 257.

Mark Winfield, "A New Era of Environmental Governance in Canada" (2016: Metcalf Foundation).

Presentations

A. John Sinclair

We will all present ideas during the next two days about next-generation EA – and this Summit is in fact set-up to discuss and workshop particular issues – but conceptually we want to establish at the outset the importance of thinking about these as a package of interdependent parts. We cannot for example just have cumulative effects assessment without SEA and consideration of broad alternatives.

To begin, we should note some of the things that are obsolete thinking in EA processes. Highlights include:

- Focusing on the individual effects of big projects;
- Relying on fragmented agencies to govern narrowly motivated proponents; and
- Making trade-offs "justified in the circumstances."

We are trying to move beyond these obsolete premises of current EA regimes and transition towards the next-generation.

There are five main transitions that are critical to the next-generation of EA:

1. Proposals that represent the best options for delivering lasting well-being that is fairly distributed, in contrast to the prevailing focus on mitigating significant adverse effects;

2. Recognition that with sustainability, the social, economic and environmental realms are interconnected, in contrast to the common notion that economic, ecological and social objectives are inherently in conflict, can be addressed separately and will be accommodated through trade-offs that are "acceptable in the circumstances;
3. Acknowledgement that effectiveness, efficiency and fairness are not competing, moving away from the sole focus on efficiency as delivering benefits and understanding that these three elements are interdependent;
4. Recognition of EA as the main public vehicle for deliberations and decisions, not just one input to the broader set of largely inaccessible decision-making processes affecting individual projects; and
5. Establishment of assessment processes centred on learning built on a culture of sustainability, shifting from processes where proponents are required to jump through hoops towards building regulatory processes to improve decisions that are made.

What is required of next-generation law and policy?

- The development of sustainability-based criteria to guide and evaluate decisions;
- The identification and comparison of alternatives, and seeking out best options;
- The goal of fairly distributed and lasting gains while avoiding significant effects;
- Assessment that is part of the planning, not regulatory, stage, and processes that are applied to all significant undertakings;
- A focus on cumulative effects; and
- A fostering of learning.

We must think about strategic and project assessment, cumulative effects, ensuring meaningful public participation that integrates multi-stakeholder engagement, coordinated regulatory licensing, ensuring effective monitoring of all parts of the process, and harmonizing upwards.

Meinhard Doelle

Three interconnected components are at the core of the transition to next-generation EA:

1. Tiering: Tiering is about two things: one is the integration of REA, SEA and project EA into a comprehensive and coordinated approach to EA; the other is the need to properly integrate EA into other decision making processes, including broader policy and planning processes and regulatory processes;

2. Multijurisdictional EA: Tiering should happen in a multijurisdictional context. EA involves more than just the federal government: provincial, municipal and Indigenous governments are also involved. Cooperative approaches that involve all affected jurisdictions actively in one comprehensive assessment process should be preferred; and
3. Sustainability assessment: Broaden the scope from biophysical impacts to integrating biophysical, social and cultural impacts to come up with an overall decision about the proposal and maximize net contributions to sustainability.

Tiering and linking processes at different levels: We should envision regional EA at higher levels setting the broad context for lower-level EAs. Strategic EA can be utilized to deal with significant changes, new industries, etc., to update regional EAs in light of new information, new project types or other significant broad changes. Project assessments take place in the context of REAs but can also identify through feedback if an REA is outdated or contains gaps. Regulatory processes that implement project EA decisions must include follow-up and closing of the circle of learning for EA. There must be ongoing regulation of activities after approval.

Multijurisdictional EA: How do we do it in a country with many levels of government? To begin with, we can separate out information-gathering from decision-making in order to deal with some of the constitutional division of powers issues and recognize that while there may be limits on the ability of one government to make decisions, there are no such limits on gathering information, assessing and engaging the public. The jurisdictional constraints on the federal government arise at the triggering and decision-making stage, not the information-gathering, assessment and engagement stages. This understanding represents a fundamental shift from the past.

There are different approaches to harmonization; we take the position that ideally, EA is harmonized through cooperation that actively engages all jurisdictions with potential decision making responsibility. It's not about the feds pushing the provinces out of the picture, but a situation where all potentially affected jurisdictions are actively involved in one comprehensive process that informs all decisions.

An open dialogue with aboriginal communities is needed to operationalize the promised nation-to-nation approach to EA; it will require considerable dialogue with a diversity of organizations. At a municipal level, a particularly promising area for engagement is regional planning. Municipalities are often dismissed as not being a legitimate level of government. They can have capacity issues but we need to look at changing that because of their important role to play in having a higher tier context for decision-making.

Sustainability assessment: Moving from looking at just biophysical impacts to a broader focus adds an additional layer of complexity to tiering and multijurisdictional issues. We already have some experience with existing federal processes of dealing with socio-economic factors. The key question is: how to implement multi-jurisdictional EA to resolve the constitutional and political constraints on implementing a sustainability-based approach at the federal level?

Mark Winfield

There is a political rationale for why governments might want to invest political capital in reforming EA processes.

The efforts of streamlining have failed to deliver on the goal of accelerating EA processes. The architects of EA streamlining failed to understand that the key goal of EA is to provide a structure for the management and resolution of societal conflicts (the distribution of risks and costs and benefits for major projects and undertakings). If you do not have somewhere to house these conflicts, they can and have reached the point of having very serious political consequences.

EA participants need a place for the resolution of their conflicts that they see as legitimate in order to accept the outcome.

There is some concern that although there is a change in the federal government's tone, the change in substance has been thin. The window of opportunity may be closing, or we may be getting very close to it closing before a formal legislative review process is announced (we may be entering a new electoral cycle). The interim measures fell far short of expectations in terms of short-term fixes.

This conversation is fundamentally driven by the pipeline conversation. Even if pipeline projects were approved tomorrow, it is becoming increasingly unlikely that the projects will ever be built. Market conditions alone mean the economic rationale is not there. A move toward a quick approval could send political and legal conflicts into overdrive. Energy East in Quebec could make Northern Gateway look like a walk in the park politically and legally.

An additional complication is the traditional mechanisms for resolving province-to-province conflicts. Federal-provincial "accommodation" does not carry the legitimacy it used to in this modern age. We have not been through an attempt to resolve these types of province-to-province conflicts in about 30 or 40 years. It is not clear whether those types of elite-level accommodations will work to resolve or reinforce conflicts. The best option for the government may be to invest time and energy into designing an effective decision-making process. It may find that in the long term, that is it's the better option, even though it may slow processes in the short term.

It is important to keep in mind that EA is only one part of the process: we focus on EA processes because of the conversations around energy and climate change had nowhere else to go, so EA became the proxy conversations. But assessment conversations can only be one part. We need to think about access to information reform and where the *Federal Sustainable Development Act* and strategy fit into the conversation. There are other elements that require investments of energy and political capital.

Merrell-Ann Phare

We need to focus on two things:

1. We have 1,265 days until the next election. Take off the pre-election show-down and we may have less than 1,000 days. Keep that in mind when we think about what we want to improve in EA and come up with robust EA processes as mandated by the PM. We need to think about practical improvements. "Perfect is the enemy of the good."

   There is no silver bullet, but maybe we should be looking for them. What are the solutions that can get at some of the core principles we are challenging?

2. The goal of restoring trust in EA. The EA process may be viewed as an industrial revolution-era process that no longer has relevance because the world is more complex and diverse. One step-by-step process does not fit anymore.

   There is a complex overlap between Indigenous rights and challenges Indigenous groups are facing and EA.

   Public trust: What public? Indigenous people are within the public, but there are many lenses with which to view Indigenous people. In the division of powers, one level of government is responsible for people based on their race. Constitutional rights create real duties, such as the duty to consult and accommodate guided by the honour of the Crown. Indigenous peoples are founding nations of Canada. Their rights are closely related to nationhood. That is why the government's commitment to nation-to-nation relationships is significant. One of the ways that relationship can be expressed is through EA. EA can be a nexus point.

   In its best case scenario, EA is a process that can be participated in fully where the decision at the end for the project will be a "yes" or a "no." In the worst case scenario, EA is a licensing process designed only to minimize impacts.

   Many Indigenous people see EA as a final tool for the disposition/disconnection of their rights and culture.

If we are going to look at how Indigenous issues affect EA, we must take Indigenous rights and the challenges Indigenous peoples face into account.

There is hope: At the end of the day, the Crown must engage in dialogue with Indigenous communities. Information that is broader than just environmental impacts is important. Social, cultural, governance and law-making are critical to the conversation with the Crown about how a project can impact Indigenous peoples.

UNDRIP has been founded on the principle of nation-to-nation. We need to get at the fundamental concepts and the concept of reconciliation can have potential. What if we subjected decision-making to something like a "reconciliation test:" where does the project put us on the path to reconciliation? It is the dialogue of how to right the wrongs of the past.

Test: Does the decision allow Indigenous governments to occupy their place at a governance table? If Indigenous people are sitting at the decision-making table, many of the things that come up at a project EA would no longer come up.

- Does a project/regional decision increase the equity within a region?
- Using the imagery of the Berlin wall and conceiving of Murray Sinclair's "wall of law," as we go forward in our relationships with Indigenous nations, then does the project decision exasperate the "wall of law?" That "wall of law" is in the process of falling over. At any given moment do our actions prop up the wall, or let it fall?
- Does the decision acknowledge and provide space for Indigenous laws and processes in the EA?
- Fundamentally, would all of this move us further down the process of reconciliation or not?

Main Discussion Points

One of the main challenges we have with sustainability assessment is getting buy-in to implement it and ensuring that the criteria are genuinely applied. If a decision-maker is pre-motivated to a certain outcome, the risk is that they will utilize the criteria to justify the outcome that they want.

This suggests that lack of independence of tribunals is a key piece of legislative reform. A key question is whether independence is needed at each or only some of the critical stages of EA, including triggering, scoping, process decisions, public engagement, assessment, project decision making, and post EA activity.

Fair geographic distribution is already a criterion of sustainability assessment, and one of the elements of that is net benefits in each affected community. That is your starting point.

High-level policy decision-making processes are outside EA processes. EA is a final decision-making tool, but in policy the principles of sustainability and the equitable

access of resource decisions are made at the government table. EA is an evaluation tool of those decisions. We have to agree on our goals, which are policy decisions. The decision to build pipelines is not an EA decision, it is a policy decision. Government must decide what kind of EA it wants: for only mega projects, or for better processes.

We need to aim higher: Part of aiming higher is thinking beyond project to policy and programs before thinking about the project level.

The policy context is the context of what we care about: what do we want to promote and what are our goals. Those contexts are the unstated assumptions behind EA. EA practitioners often say that "this is a policy conversation." We need to stop doing that. We need to say good EA only happens in the context of valid policy and participatory decision-making that includes Indigenous peoples. The commitment to nation-to-nation is an opportunity to create that table for those conversations to happen.

How far are decision-makers prepared to go to open their accountability and dialogue with Indigenous peoples? We are facing public demands for accountability. What we are looking for is trying to get away from managing conflicts and into a relationship of collaboration.

The dialogue around veto is not helpful. Agreement at the end of the day is a consent approach. Polarized positions are a result of process. When good processes exist, people are prepared to look beyond their own self-interest.

We have an amazing wealth of information and knowledge of how to do EA better. It is just a matter of putting the pieces together.

Workshop 1

Sustainability Assessment

Leaders: John Sinclair and Meinhard Doelle

Introduction and Background Materials

Background reading

Meinhard Doelle, "The Lower Churchill Panel Review: Sustainability Assessment under Legislative Constraints," (August 14, 2014).

Robert B. Gibson, Meinhard Doelle & A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment," (2016) 29 *J Envtl L & Prac* 257.

West Coast Environmental Law, "A Better Approach to Environmental Reviews: A Sustainability Assessment and Democratic Decision-Making Act," (2015).

West Coast Environmental Law, "Environmental Assessment Law for a Healthy, Secure and Sustainable Canada: A Checklist for Strong Environmental Laws," (2012).

Introduction

The workshop leaders began with a presentation of their paper "Fulfilling the Promise" (above). They explained that sustainability assessment (SA) is a process that has sustainability and lasting well-being as its outcome. It has underpinning concepts, such as the need to set limits on human activities, and enhancing resilience and justice, which are used to guide decision makers.

SA looks at impacts, benefits, risks and uncertainties. It has an overarching goal of lasting wellbeing (ecological, social and economic) and applies a 'net contribution to sustainability' test.

There are two main steps to the sustainability test: first is applying sustainability-based decision-making criteria to a proposal to determine whether it will make a net contribution to sustainability; and second, if it is determined that there will be negative impacts and risks, then the proposal undergoes an identification and justification of the trade-offs that would be necessary to approve the proposal.

The sustainability test entails three sets of criteria:

- Generic criteria set out in law (applied in the first step);
- Case-specific criteria designed with public consultation (applied in the first step); and

- Explicit project-specific rules for dealing with trade-offs in the event that there is a finding of no net contribution to sustainability (applied in the second step, if necessary).

There are six categories of sustainability criteria (the first step): ecological impacts, economic impacts, social/cultural impacts, risks and uncertainties, geographic distribution, general distribution, and integration (are the solutions integrated?).

For the project-specific trade-off rules (the second step), the critical question is how to make sure decision-makers do not get to this second step until they have done the first step (applying the sustainability-based decision-making criteria) well.

The Lower Churchill Joint Panel Review provides an example of a sustainability framework in the Canadian context.

Main Discussion Outcomes

Key principles

- Environmental assessment needs to consider more than just biophysical/ecological impacts.
- Sustainability assessment is a recommended evolution of EA that can get us to a consideration of more than biophysical impacts.
- We need to shift the current focus in EA from simply addressing and mitigating the impacts of proposed projects to protecting the things we value, which is what sustainability assessment is about.
- Canada needs a system where projects won't get approved if they do not make a net contribution to sustainability.
- Next-generation EA should focus on sustainability-enhancing outcomes and a net contribution to well-being (environmental, social and economic).
- Next-generation EA should better utilize the information gathered in EA to make decisions that approve projects and impose conditions that make a net contribution to efforts to develop a sustainable society.
- A core tenet of sustainability assessment is that proposals must fit within a vision set at the regional and strategic levels, rather than be assessed at the project level independent of strategic and regional EA. Regional and strategic assessments should set the context for project assessments, so that decisions are made within the context of regional and strategic assessments and based on a net contribution to sustainability test.
- Decision-making criteria are the expression of the normative frame, a means of moving away from decisions being made in the black box of politics and towards a more deliberative decision-making process.

- It is critical to ensure that the public do not lose their voices in the process of trade-off decision-making.
- A fundamental goal is legitimacy of the process that leads to general acceptance of decisions.
- The starting point of assessments should be the identification of the information needed to form a basis for decision-making.
- The need for hard rules and legislation must be balanced against the need for flexibility.
- An independent, impartial sustainability assessment decision-maker with a Cabinet veto power, and a separate adjudicatory body, would help ensure that decisions are appropriately based on sustainability criteria and trade-off rules.
- Fundamental components of sustainability assessment are:
  - A transparent framework and process for trade-off decisions;
  - A sustainability imperative;
  - Assessment and decisions based on the core question of net environmental, social and economic benefits; and
  - Deliberative democratic model as a base.

Implementation recommendations

- Legislation should:
  - Provide for SEA and REA and require decisions on individual undertakings to be based on the outcomes of SEA and REA. That way, the regulatory framework will provide for hard safeguards against proposals with too high a degree of impacts, risks and uncertainties.
  - Set out generic decision-making criteria.
  - Provide for the establishment of case-specific decision-making criteria.
  - Set out a threshold proponents must meet in the first stage (net contribution to sustainability) before going to the second stage (consideration of trade-offs).
  - Include an intermediate step or pathway to minimize the use of trade-offs, an opportunity after a finding of no net contribution to sustainability to avoid having to make a trade-off decision.
  - Set out explicit trade-off rules and factors to guide decisions on trade-offs and decisions to assist the court or tribunal when reviewing challenges to trade-off decisions.
  - Provide for an independent tribunal review for when a decision is made on a trade-off rather than criteria (first stage) basis.

- Policy and guidelines should:
  - Provide guidance for the development of case-specific criteria.
- The institutional architecture should include:
  - An independent, impartial sustainability assessment body empowered to make decisions with a ministerial override (or recommendations with strong influence – but the former is preferable).
  - A Cabinet veto, but with clear criteria so that it is messy for politicians to get involved and there is incentive for the process to play out.
  - A separate, independent adjudicatory body to reconsider decisions (including trade-off decisions), separate from the courts but that still provides for an independent and impartial tribunal review of decisions.

Issues for further discussion

Technical analyses require some level of direction. It was not determined whether this direction should occur in legislation or policy/guidance.

Where decision-making powers come from, who holds that power and what is the institutional architecture?

Overall Discussion

Environmental assessment needs to consider more than just ecological impacts. We need to improve our ability to utilize the information gathered in EA to make decisions that approve projects and impose conditions on approved projects that make a net contribution to efforts to develop a sustainable society.

Sustainability assessment is a recommended evolution of EA that can get us to a consideration of more than biophysical impacts.

We need to shift the current focus in EA from simply addressing and mitigating the impacts of proposed projects to protecting the things we value.

Canada needs a system where projects won't get approved if they do not make a net contribution to sustainability.

The regulatory framework should allow for regional and strategic assessments to set the context for the assessment of individual undertakings so that proponents will know to propose undertakings that fit within the sustainability framework set out in that context.

Transitioning to a process whereby decisions are made within the context of regional and strategic assessments and based on a net contribution to sustainability test will avoid having bad projects being proposed in the first place.

Strategic EA should not be used as a means of giving a green light to certain kinds of projects, but rather a means of safeguarding against proposals with too high a degree of impacts, risks and uncertainties. While the legislation should provide for REAs and SEAs and link decisions on individual undertakings to the outcomes of REAs and SEAs, decisions on project EAs should still be required to pass the net contribution to sustainability test.

There should be a first hearing on the methodology of the assessment. Subsequent hearings should be guided by the outcomes of the first hearing and the lens of sustainability.

There is a question of how to implement a sustainability framework and test on lower-level projects where there will not be a panel review.

There is also a question of where criteria such as resilience and adaptability fit into sustainability assessment. Resiliency should be examined in the future foreclosure context and should ask whether effects to resiliency undermine the future goals of the community.

There is a need to ensure that the proponent is not hiring the consultants who then allow project-specific criteria to guide the preparation of information - i.e., who simply check off boxes when preparing their information.

Information-gathering and decision-making are distinctly separate stages and must be considered as such.

The starting point of an assessment must be changed from a conclusion of "no likely significant adverse effects" to a document that has categories identifying the information needed to form a basis for a decision.

The need for hard rules and legislation must be balanced against the need for flexibility.

To allow for public confidence, decision-making criteria must be legislated. Technical analysis also requires some level of direction.

However, a collaborative and deliberative democratic model needs more flexibility, which can be achieved through project-specific criteria that are based on and build upon the generic criteria set out in legislation.

Project-specific criteria will differ based on the community, project and environment, so are difficult to set out in clear overarching lists.

To prevent a "rush to trade-offs," the legislation should set out a threshold that proponents must meet in the first stage (net contribution to sustainability) before going to the second stage (consideration of trade-offs).

It should also include an intermediate step or pathway to minimize the use of trade-offs, an opportunity after a finding of no net contribution to sustainability to avoid having to make a trade-off decision.

There must also be available an independent tribunal review for when a decision is made on a trade-off rather than criteria (first stage) basis.

Under CEAA 2012, justification is the role of Cabinet, considered a "black box" for which submissions are rarely provided.

To move towards a deliberative democracy model of decision-making, Canada needs to move away from the model of providing information to government, which then makes decisions. With a better process, we can get to a point where people understand each other's interests.

At the same time, sustainability assessment is not necessarily about taking away all decision-making power from government.

To achieve legitimacy and deliberative democracy, there needs to be clarity and principles about the characteristics of decision-makers and what they decide. Do not want to take politicians' power away, just make it messy for them to overturn decisions.

To prevent the trade-off stage from becoming similar to (i.e., falling into the same trap as) the justification regime under CEAA 2012, trade-off rules must be transparent and explicit and based in legislation. At a minimum, there needs to be factors to guide decisions on trade-offs to allow for challenges and reviews of trade-off decisions, and specific guidelines to assist the court or tribunal when reviewing challenges to trade-off decisions.

The institutional architecture should include:

- An independent, impartial sustainability assessment body empowered to make decisions with a ministerial override (or recommendations with strong influence – but the former is preferable).
- A Cabinet veto, but with clear criteria so that it is messy for politicians to get involved and there is incentive for the process to play out.
- A separate, independent adjudicatory body to reconsider decisions (including trade-off decisions), separate the courts but that still provides for an independent and impartial tribunal review of decisions.

It is imperative to ensure the independence of any new bodies. Potential models for decision-making include:

- The Ontario Energy Board
- The Quebec Bureau d'audiences publiques sur l'environnement (BAPE), which has a bottom-up legitimacy that means when it speaks, the government listens.

Workshop 2

Strategic and Regional Environmental Assessment

Leaders: Stephen Hazell, with Cheryl Chetkiewicz and George Stuetz

Introduction and Background Materials

Background reading

Office of the Auditor General, "Departmental Progress in Implementing Sustainable Development Strategies," *2015 Reports of the Commissioner of the Environment and Sustainable Development* (2015).

Cheryl Chetkiewicz & Anastasia M. Lintner, *Getting it Right in Ontario's North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire [Wawangajing]*, (2015: Wildlife Conservation Society Canada and Ecojustice Canada).

Cheryl Chetkiewicz & Bram Noble, "Regional Strategic Environmental Assessment: Opportunities and Challenges in northern Ontario and across Canada," (Presentation, 2016).

Courtenay Fidler & Bram Noble, "Advancing Regional Strategic Environmental Assessment in Canada's Western Arctic: Implementation opportunities and challenges," (2013) *JEAPM* 15:1.

Bram Noble, "Cumulative Effects Research: Achievements, Status, Directions and Challenges in the Canadian Context," (2015) 17 *JEAPM* 1.

Bram Noble and Kelechi Nwanekezie, "Conceptualizing strategic environmental assessment: Principles, approaches and research directions," (2016) *EIA Review* (forthcoming).

Hugh Benevides, Denis Kirchoff, Robert B. Gibson & Meinhard Doelle, "Law and Policy Options for Strategic Environmental Assessment in Canada," (2009).

Introduction

This workshop included a guest presentation by George Stuetz, Director of Sustainable Development Strategies, Audits and Studies – Commissioner of the Environment and Sustainable Development (Auditor General of Canada).

Strategic EA

The story of the development of the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (the Directive) is one of slow progress. Since its implementation, there have been six audits of departmental application of it.

A 1998 study showed the government was slow to implement strategic environmental assessment (SEA) and a 2004 audit found a number of deficiencies, including: there was a low level of commitment in conducting SEAs; most departments were not implementing the Directive; there were major gaps in how the Directive was being applied; few departments had training or tracking systems for SEAs; few SEAs were being conducted in detail; there was insufficient direction to departments; and there was no monitoring of compliance with the Directive. A key recommendation of the 2004 audit was that the Canadian Environmental Assessment Agency should assess the quality of SEAs being done.

A 2008 follow-up to the 2004 audit revealed little progress in addressing the Commissioner's recommendations. In particular: most departments were not preparing public statements; there was weakness in transparency and accountability; there were insufficient mechanisms for holding agencies to account under the Directive; and public statements that were released were difficult to find.

In 2013, the Commissioner developed a six-year strategy to examine how all 26 federal departments and agencies required to contribute to the Federal Sustainable Development Strategy apply the Directive and its related guidelines. To date, they have found that while some federal departments (Natural Resources and Transport Canada) have established mechanisms for implementing the Directive, most have not. Information about SEAs conducted is not properly inducted and most departments are not making public statements regarding SEAs or ensuring that potential environmental impacts are included in proposals.

A 2015 audit examined whether four departments (Agriculture and Agri-Food Canada, the Canada Revenue Agency, Canadian Heritage, and Fisheries and Oceans) adequately applied the Directive, reported on the extent and results of their SEA practices and met their departmental sustainable development strategy commitments to strengthen their SEA practices. The audit found that in the majority of cases, Ministers are not being provided with information about environmental effects of plans, policies or proposals. For example, the Directive was only applied to five out of 16,000 proposals to Ministers and Cabinet, most of which did not meet Directive requirements.

Time and time again, the results of the six audits have shown that there needs to be leadership in SEA, a body overseeing departments' SEA processes and ensuring that departments are implementing the Directive.

Two main barriers or challenges to implementing SEA in the federal government are capacity and demand by senior management:

- The government has little capacity to conduct SEAs and a conceit that anyone can do them. While it's generally accepted that you need experts to do legal, financial or economic analyses, there is a belief that anyone can do an SEA regardless of expertise or experience. This misconception is a big problem, because regardless of the goodwill of people conducting SEAs, they need the relevant skills and knowledge to do it well.
- As for the need for senior management, while many departments see the Directive as mandatory, if the Minister or Deputy Minister show little interest, enthusiasm or incentive to do SEAs, they will not get done.

Regional EA

There is no one definition of regional environmental assessment (REA). REAs have emerged for various reasons and in various forms and contexts, including to help assess cumulative effects, provide clearer contexts for project EAs and decisions, and recognize limits on tolerable change.

Regional Strategic Environmental Assessment (RSEA) tends to be nested between the policy level (e.g., land use plans and broader policies, plans and programs) and project assessments.

Key questions include:

- What are the values and objectives for the region?
- What are the key drivers in the region (past and into the future)?
- What are the strategic options and opportunities for the region (including desired conditions)?
- What institutional or policy transformations are needed to realize a more sustainable future?

There are a number of different methodological approaches to RSEA in practice and they have been used in a number of different ways (e.g., as an assessment tool, a planning and visioning tool, and a strategic decision support tool).

Case studies include the Greater Sand Hill Regional Environmental Study in Saskatchewan, the Beaufort Sea Regional EA in Inuvialuit, the South Athabasca Oil Sands RSEA in Alberta, and the Elk Valley Cumulative Effects Framework in BC.

Key lessons learned from these case studies include:

- More data and more maps do not equal better assessment, management or decisions;
- Institutional arrangements and governance (not methods and data) are the primary obstacles/challenges to regional approaches;
- REA is about the future(s) and uncertainties;
- There needs to be clear objectives, expectations and understanding;
- Timing and tiering are key to influence project EA;
- Collaborative approaches are essential; and
- There needs to be a clear mandate and capacity to implement and sustain processes over the long term.

Mining development in Ontario's far north (especially in the Ring of Fire) has created a need for a regional framework for that area. Key aspects of planning in Ontario's Far North include:

- Values (vison) for the region;
- Full involvement of Indigenous groups;
- Incorporation of independent expert advice (e.g., sustainability assessment, science, elders);
- Explicit and robust cumulative effects design;
- Clear commitment to transparency in decision-making; and
- Protection of the public interest.

Challenges include:

- Piecemeal environmental planning and land use planning is not integrated with assessment;
- No regional mandate or expertise;
- Regional approach to land use planning is weak;
- No regional thinking about the future;
- Limited understanding of RSEA/REA and no models or precedence in Ontario; and
- Limited institutional capacity (First Nations) and no political will (Ontario government).

Main Discussion Outcomes

Key principles

- To meaningfully implement SEA and REA, the following changes are needed:
  - Government capacity, leadership and resources;
  - Incentives for senior management to demand SEAs in the early stages of the development of policies, plans and proposals;
  - Public disclosure of SEAs;
  - Incentives for the public, Indigenous groups and other jurisdictions to participate;
  - Longer terms and a system for encouraging they are conducted early on;
  - Harmonization with other jurisdictions, with the federal government taking a leadership and oversight role;
  - Better information, with standards and regional-based information; and
  - Insurance and risk management to avoid against environmental collapses.
- Necessary foundational changes to SEA and REA include:
  - Indigenous involvement;
  - Better information;
  - A mindset change within government institutions;
  - Better standards and tests;
  - Higher-level incentives for undertaking SEAs and REAs;
  - A defined role of the federal government (e.g., as a provider of resources, an overseer and leader); and
  - Adequate resources, including community training.
- Additional necessary foundational changes to REA include:
  - Collaborative governance; and
  - A recognition of the importance of assessing cumulative effects at a regional scale.
- Options for implementing the above changes include:
  - Legislated requirements and frameworks;
  - Public standing to uphold legal requirements;
  - Incentives for the government to uphold its obligations; and
  - A working group to develop and feed into government processes.

Implementation recommendations

- SEA and REA should be set out in legislation in order to provide a legal framework for conducting SEA and REA, linking them with other levels of assessment and planning, and provide the public with a legal mechanism for upholding requirements regarding SEA and REA.

Issues for further discussion

- How to encourage provincial SEA and integrate federal and provincial (all eggs are not in the federal basket, so how to get REA and SEA when the provinces also have jurisdiction)?
- Who has oversight?
- Who is checking in (i.e., ensuring compliance)?
- Does there need to be a legislated recognition of a public trust in the environment in order to ensure that the public has standing to enforce SEA and REA requirements?
- Is there a way to involve not just EA experts, but insurance and financial risk assessors, in demanding better assessments of the potential risks of plans, policies and proposals, and risks in a regional context?

Overall Discussion

SEA needs to be codified into law. But codification is not enough; there must be a commitment within departments and oversight of them (whether the directive is in a policy instrument or legislation). To see improvement we need leadership, accountability and incentives.

A workshop participant commented that at CIDA, the Directive is officially considered to be discretionary, not mandatory. Its strongest word is "expect." However, the Environmental Assessment and Review Process Guidelines Order of the 1980s, from which SEA came, was considered to be a regulation. Thus there may be a future lawsuit seeking to have the Directive similarly declared to be a mandatory regulatory tool that departments must demonstrate they follow.

The non-mandatory nature of the Directive is contributing to problems with its implementation. SEA needs to be codified into law, a legal tool to hold departments accountable from the outside.

There is great value in SEA and REA. The question is how to implement both? There are significant implementation challenges due to capacity and funding of both tools, as well as challenges at the leadership level within federal departments. Senior management often lack buy-in for SEAs and therefore do not demand them.

There is consensus on the great value of both SEA and REA. Both have the capacity to address cumulative effects assessments, take much of the burden for CEA off of project-level assessments and provide clarity on project-level EAs.

The question is not whether, but how; it is a question of how to provide the triggers, incentives and disincentives to implement SEA and REA.

A next-generation environmental assessment law should stimulate government to use the tools it already has (SEA and REA). It should also shift SEA and REA from reactive to integrated, ongoing processes.

Legislation should provide legal requirements and frameworks for conducting SEAs and REAs; ensure accountability and adequate resources for conducting SEAs and REAs and tiering those processes into other regulatory processes; and provide the public with legal mechanisms for ensuring that the government upholds its requirements related to REA and SEA.

However, legislation is not enough. There also needs to be political will to undertake SEAs and REAs within federal departments. That political will can be generated through financial incentives (e.g., federal departments cannot have money to implement plans, policies or proposals without an SEA); a better understanding of how SEAs and REAs can lead to shorter project-level EA timelines and a lessening of the burden of cumulative effects assessments at the project level; time-specific processes; and adequate funding and resources to undertake SEAs and REAs.

There also needs to be incentive and mechanisms to undertake SEAs and REAs before projects are proposed and a perception develops that it is too late to undertake assessments at the strategic and regional levels.

There will not be significant improvement in SEA without both departmental capacity and a demand by senior management. Thus, there needs to be an enculturation in federal decision-makers and institutions of its importance.

There also needs to be a foundational change in the governance of SEA and REAs. For REAs, those who are responsible for conducting the assessments must have capacity to put into place the recommendations made at the outcome.

Both SEA and REA require Indigenous involvement as well as meaningful public participation, which requires community-level training and resources.

The federal government is a participant in the development of SEA, but sometimes is a minor participant. Knowledge often comes from the local level, whereas resources need to come from the federal level.

While SEA of federal plans, policies and programs is a matter of federal jurisdiction, REAs intuitively involve provincial, territorial, local and Indigenous jurisdictions. A legislated tiered approach to REA and project EA would lead to more efficient project-level assessments of undertakings within federal jurisdiction.

Lessons can be drawn from existing co-management regimes, such as the integrated resource management regime set out under the *Mackenzie Valley Resources Management Act* (MVRMA) in the Northwest Territories, which sets out a measurement structure, shared jurisdiction, independent boards and panels and the execution of public governance.

There needs to be a shift from a proponent-driven process with an economic focus to a government-driven, planning-based one with sustainability objectives and standards.

We need not only adequate information to inform plans, policies and programs, but also standards for which of those are able to be carried forward.

Better information and tests are needed for approving polices, plans and proposals that undergo SEAs (e.g., will the program reduce greenhouse gas emissions?). At the end of the day, information and governance tools depend on capacity.

Workshop 3

Follow-up, Adaptive Management, Monitoring and Enforcement

Leaders: Melissa Gorrie and Karen Campbell

Introduction and Background Materials

Background reading

Nathalie J. Chalifour, "Case Comment: A (Pre)Cautionary Tale about the Kearl Oil Sands Decision: The Significance of *Pembina Institute for Appropriate Development et al. v. Canada (Attorney-General)* for the Future of Environmental Assessment."

Melissa Gorrie and Karen Campbell, "Workshop on Adaptive Management, Follow-up, Monitoring and Enforcement," (2016).

Brenda Heelan-Powell, "A Model Environmental and Sustainability Assessment Law: Annotated Version," (2013) Environmental Law Centre.

Arlene J. Kwasniak, "Use and Abuse of Adaptive Management in Environmental Assessment Law and Practice: A Canadian example and general lessons," (2010) 4 *JEAPM* 1 at 425.

Sarah Njoki Macharia, "A Framework for Best Practice Environmental Impact Assessment Follow-up: A Case Study of the Ekati Diamond Mine, Canada," A Thesis Submitted to the College of Graduate Studies and Research in Partial Fulfillment of the Requirements for the Degree of Master of Arts in the Department of Geography University of Saskatchewan Saskatoon (2005).

Martin Z.P. Olszynski. "Adaptive Management in Canadian Environmental Assessment Law: Exploring uses and limitations," (2010) 21 *J Envtl L & Prac* 1.

Introduction

The workshop leaders presented their primer and suggested that the workshop ask the questions: what's working, what's not working, what can be done differently, and what are the models for doing each right. They then provided an overview of the four elements of the workshop: adaptive management, follow-up, monitoring and enforcement.

Adaptive management tries to address uncertainty in the natural world that arise from nature's complex and dynamic systems. It reflects the understanding that even if we are confident with how things will play out, we may not be right and must be able to adapt. It is not defined in CEAA 2012, but is defined in the Practitioner's Glossary as consisting

of a planned and systemic practice process for continuously improving management practices by learning about their outcomes and involves implementing new or modifying mitigation measures over the life of the project to address unanticipated environmental consequences.

There are two main problems with how adaptive management currently works: 1) it is inappropriately applied; and 2) it is not being implemented or enforced. There is a need to ensure that proponents are required to design an adaptive management process where appropriate by setting out in legislation or regulations objectives, indicators of progress, and how to monitor and feed information back to decision-making. To be enforceable, requiring proponents to have adaptive management plans should be a condition of approval.

It should only be used where there is lack of scientific data or uncertainty, not to lend certainty to uncertain mitigation measures, as a substitute for committing to specific mitigation measures or as a justification to evade requirements under CEAA 2012. It especially should not be used when consequences are irreversible.

Follow-up, monitoring and enforcement is a comprehensive bundle pertaining to the back-end of the project. Independent monitoring agencies that are tasked with follow-up mechanisms came from federal EA processes in the context of land claims agreements. Follow-up and monitoring process conditions should be attached to project approvals, with enforcement being key to the system's legitimacy.

The current definition of follow-up is too limited; it should be comprised of monitoring, evaluation, management and communication, with governance and resourcing overarching the bundle.

Generally, proponents have the burden of collecting data, which leads to inconsistencies and pushback from industry. Government roles should specify what needs to be done and ensure consistency in the process. There is also a need for transparency, mechanisms for public agency, clarity, centrality and a broader governance structure for enforcement.

Main Discussion Outcomes

Key principles

- Adaptive management is a frame of mind that should be applied to the task of EA throughout.
- Adaptive management is a form of dis-continuous improvement that should be applied to major uncertainties, but not irreparable or irreversible (significant) harms.
- The government should provide procedural guidance or specifics for follow-up programs.

- Follow-up data for cumulative effects assessment should feed into the bigger picture (e.g., REA and SEA).
- Mitigation should be included as a project condition.
- Proponents should be required to publicly report on compliance and all information should be made publicly available.
- The reviewing body needs broad powers to monitor and act on non-compliance.
- All recommendations and mitigation measures should be binding so they are enforceable and so that proponents can be held accountable.
- There should be mechanisms for public enforcement and follow-up.
- There should be time limits or conditionality on authorizations in order so they can be revoked where follow-up has not performed as predicted or is not effective.

Implementation recommendations

- If adaptive management is retained (in a better format), then guidance should include a clear definition on where, when and how it is used, as well as how it should not be used.
- Guidelines should be established for follow-up programs.
- The legislation should require that follow-up and monitoring process conditions be attached to project approvals.
- The legislation should make all recommendations and mitigation measures legally binding.

Issues for further discussion

- Should adaptive management be abolished because it is being so misused, or redefine and reframe it as "re-evaluation process?"
- There are outstanding questions of what are the best governance structures for ensuring follow-up is effective (what are the respective roles of the federal government and proponents in follow-up, and where is federal responsibility housed?).
- How to ensure the government has capacity to effectively implement follow-up?

Overall Discussion

Adaptive management

Currently, adaptive management is being misused. It has been slipped into the back end of EA and is being used by proponents and governments to short circuit a good EA process by claiming that potential consequences can be adaptively managed down the road.

Rather than being tacked on at the end of EA processes or as a tool within EA, it should be a frame of mind applied to the task of EA, a regulatory system that provides an opportunity to look at impacts down the road.

Adaptive management should be a vein that runs through all aspects of the process. It should become integrated into the mindset of EA at the front end of how follow-up is designed and alternatives must be considered before proposals are approved. The enterprise of adaptive management demands the best possible predictions, the best possible monitoring and the best possible comparison of predictions to outcomes.

There are real risks that if kept, adaptive management will continue to be used poorly due to the fundamental misconception with what it is and how it should be used. If it is retained, it may require reframing as a regulatory evaluation system.

There needs to be a clear definition on where, when and how it is used. Adaptive management was developed to identify major uncertainties, not minor ones. Done right, it is not a process of changing what is being done based on new information; nor is it "continuous improvement," which is only helpful in identifying minor, not major, uncertainties. Rather, it is dis-continuous improvement. However, it should not be used for irreparable/irreversible or significant harms, as irreparable harms have nothing to adapt to.

Adaptive management should be used from design through to reclamation. It should be applied in developing projects and there should be a clear sense of when it will be used and specific goals of the project.

Done properly, EA is a planning management tool. Ideally, EA and adaptive management should be similar ways of making predictions and implementing the science of monitoring to test hypotheses, and means of adapting to uncertainties.

Perceiving adaptive monitoring as a process for figuring things out later is a fundamentally wrong interpretation of it. The enterprise demands the best forecasts we can possibly make in advance of committing resources as to what the outcomes will be, the best possible monitoring program to test those forecasts and a comparison of the two to see where we ended up and what we learned.

If it is kept, adaptive management should be legislated, with guidance to direct how it should be used as a front-end process.

Follow-up, Monitoring and Enforcement

Follow-up encompasses monitoring, evaluation, management and communication, with resourcing and governance overarching those four elements.

It is recommended that the government provide procedural guidance or specifics for follow-up programs.

For cumulative effects assessment, follow-up data needs to feed into the bigger picture, leading to a need for changes to governance structures.

Follow-up and monitoring process conditions should be attached to project approvals.

The federal agency or entity responsible for assessments needs broad powers to monitor and act on non-compliance.

Proponents should be required to publicly report on compliance and all information should be made publicly available.

All recommendations and mitigation measures should be binding so they are enforceable and so that proponents can be held accountable. There also needs to be mechanisms for public enforcement and follow-up.

There should be time limits or conditionality on authorizations in order so they can be revoked where follow-up has not performed as predicted or is not effective.

Workshop 4

Multijurisdictional Assessments

Leaders: Meinhard Doelle, Chris Tollefson and Jason MacLean

Introduction and Background Materials

Background reading

Meinhard Doelle, Chris Tollefson and Jason MacLean, "Multi-Jurisdictional and Polycentric Environmental Assessment Workshop: A Once-in-a-Generation Law Reform Opportunity," (2016).

Introduction

The workshop leaders presented the above-referenced briefing paper and then opened the workshop up for discussion. The paper outlined six law reform challenges for multijurisdictional assessment:

1. Overcoming constitutional, legal and political obstacles and integrating governments and stakeholders.
2. Reanimating the concept of "cooperative federalism" in the context of a multijurisdictional and polycentric EA to facilitate comprehensive environmental reviews, and encouraging a reinvigorated cooperative federalism that actively engages all jurisdictions with potential decision-making roles.
3. Determining how the core elements of EA will fit and operate in a multijurisdictional and polycentric EA regime.
4. Conceptualizing and institutionalizing the relationship of tiered decision-making processes, including REA, SEA, project-level EA, and post-EA decision-making in a multijurisdictional context.
5. Rethinking how the traditional measures of EA outcomes (effectiveness, efficiency, and fairness) can be operationalized and interpreted in the context of a multi-jurisdictional and polycentric EA regime that holds government decision makers accountable.
6. Determining whether and how sustainability assessment fits into a reformed, multi-jurisdictional and polycentric EA regime.

Main Discussion Outcomes

Key principles

- Key principles to guide multi-jurisdictional assessments include:
  - Understandable and accessible information;
  - Sustainability assessment throughout the process;
  - Meaningful opportunities for public participation; and
  - The precautionary principle.
- Key truths include:
  - When decision-makers are involved they have a better sense of ownership and understanding of the issues and possible outcomes and therefore should be involved in the process;
  - Participants must understand the outcomes;
  - Community consent should be a goal of approvals;
  - Governments should require at least a minimum nation-wide standard set out in federal legislation;
  - Cooperation and mutual benefits should be achieved through sustainability and inclusiveness (i.e., sustainability should be a core objective and guiding principle when harmonizing upward); and
  - Panels should be empowered to engage in the process design.
- The preferred model is harmonization upward to the higher standard.
- Substitution and equivalency do not meet the key principles of cooperative harmonization.
- Equivalency may need to be an option when Indigenous jurisdiction is involved, to demonstrate recognition of both the equal legitimacy of Indigenous laws and the historical context.
- While processes can be harmonized, decisions must remain the distinct obligation of each jurisdiction in light of the constitutional division of powers, and each jurisdiction must be actively engaged in the process to ensure it is in a position to make good decisions based on the outcomes of the EA process.
- In REAs, information-gathering should be separate from decision-making to help carve out a federal role and incentivize REAs where they are needed.
- There needs to be enough flexibility in the process to allow for the building of harmonized processes that best suit the circumstances (while adhering to standards and principles).
- Assessment needs to be broader, value-driven, aspirational and inclusive.

- Deliberative democracy and a ground-up process are essential means of achieving these goals.
- Empowering reviewing bodies to be the driving force for assessments feeds into the deliberative democratic process and helps ensure that project-specific principles reflect the values of interested and affected groups.
- Reviewing bodies and decision-makers must have the mandate, objective and intention to build processes.

Implementation recommendations

- "Best process" should be defined through general principles in order to ensure that 'best' is meant as best for the environment and public. One principle is sustainability as a core objective.
- There needs to be a list of triggers for project-level EA, as well as for SEA and REA. REA and SEA triggers can be watershed-based, when there is a significant interest in development in the area, when a first major project is proposed for a region, when certain thresholds are met, or when a reviewing body of a project EA determines an REA is necessary.
- EA should be properly nested inside REA and policy directives so that multi-jurisdictional approaches start at the sustainability level. Once federal responsibility for sustainability objectives is determined, then REA and SEA can help understanding of federal levels and thresholds of concern for various effects.
- Harmonization upward should be guided by key principles, including sustainability as a core objective.

Issues for further discussion

- What do we mean by 'consent' when we talk about free, prior and informed consent of Indigenous peoples?
- Further thinking needs to be done on whether the federal government should be empowered to substitute Indigenous processes for federal ones, or find Indigenous processes to be equivalent.
- There needs to be further thinking on how to ensure alignment between new federal legislation and other jurisdictions' processes, especially community-based assessments.
- How to undertake multi-jurisdictional EAs of smaller projects in a manner that is effective, efficient and fair?
- Co-operative federalism means that the federal government may have jurisdiction at the front end but not the back end, which needs further thinking. Also, could the federal government have responsibility to give information even where it does not have decision-making power?

- How to define 'harmonizing upwards' so that 'best possible outcome' or 'best process' means best for the environment and the public interest?

Overall Discussion

Key principles to guide multi-jurisdictional assessments are: understandable and accessible information, sustainability assessment throughout the process, meaningful opportunities for public participation, and the precautionary principle.

Key truths include:

- Decision-makers should be involved in the process: there is much evidence that when decision-makers are involved they have a better sense of ownership and understanding of the issues and possible outcomes, whereas when they are not involved, they are more likely to be disengaged and misunderstand results.
- Participants must understand the outcomes.
- Community consent should be a main goal.
- Governments should require at least a minimum nation-wide standard in federal legislation.
- Cooperation and mutual benefits should be achieved through sustainability and inclusiveness (i.e., sustainability as a core objective and guiding principle when harmonizing upward).
- Panels should be empowered to engage in the process design.

There needs to be a list of triggers for project-level EA, as well as for SEA and REA. Among other things, REA and SEA triggers can be watershed-based, or when cumulative effects are large.

Harmonization is preferred approach, but harmonization must occur upwards; i.e., where there are different standards among jurisdictions, the obligation must be to the higher standard.

There needs to be a separation of assessment processes and decision-making, so that while processes can be harmonized, decision-making remains the distinct obligation of the different jurisdictions and is made in light of the constitutional division of powers.

For REAs, separating information-gathering from decision-making will help carve out a federal role and could incentivize REAs where they are needed.

The ESPOO Convention, which deals with how to handle trans-border environmental effects, might serve as a good model of multijurisdictional assessment, as it also deals with SEAs.

When harmonizing upwards, it's important to define what 'upwards' is. It is harmonization towards the best process and outcomes and should be guided by key principles. One of

those principles is sustainability as a core objective. Also, harmonization should keep the integrity of all jurisdictions involved so that the result is more than the sum of their parts.

But there may be a need to determine a minimum standard of process, a bottom-line benchmark or standards built into the legislation (e.g., sustainability as a core objective, rights of participation, sufficient and flexible timing, and steps of the review for consistency) that can be built upon but not undermined. But it is important to allow for variation on a regional basis as required (e.g., as is enabled under the Mackenzie Valley Resources Management Act (MVRMA).

One-size-fits-all processes, such as what exists under CEAA 2012, do not work well. There needs to be enough flexibility in the process to allow for the building of harmonized processes that best suit the circumstances (while adhering to minimum standards and principles).

Empowering reviewing bodies, including panels, to build processes with public investment is key (as occurred in the Voisey Bay EA and many other panel reviews in the early years of CEAA 1992, where the panel was trusted to do the scoping hearings). Empowering such bodies to be the driving force for assessments feeds into the deliberative democratic process and helps ensure that project-specific principles reflect the values of interested and affected groups.

There needs to be a different and more encompassing approach to multijurisdictional responsibilities, beyond the project level. If EA is properly nested inside REA and policy directives, then multijurisdictional approaches must start at the sustainability level. Once federal responsibility for sustainability objectives is determined, then REA and SEA can help us understand federal levels and thresholds of concern for various effects. Those in turn provide guidance for how and when project EAs should occur and the proper role of the federal government in those processes.

As REA plays an important role in shaping the federal role in multijurisdictional assessments, the question of what triggers an REA is important. Triggering can occur when there is a significant interest in development in the area, when a first major project is proposed for a region, when certain thresholds are met, or when a reviewing body of a project EA determines an REA is necessary. Regarding federal jurisdiction, constitutional limitations are often misapplied; Peace, Order and Good Governance is a broad head of power and there is no limitation on the federal government's ability to gather information.

If it is a fundamental truth that decision-makers need to be involved in the process to fully buy into and understand the end result, then equivalency cannot be an approach to multijurisdictional assessments.

There is a need to be careful with language like 'integration' when talking about multijurisdictional assessments with Indigenous governments. Equivalency may need to be an option when Indigenous jurisdiction is involved, to demonstrate recognition of both the equal legitimacy of Indigenous laws and the historical context. Also, when

considering nation-to-nation processes, the law must be careful not to allow the infringement of treaty rights, e.g., by including a provision stating that any decisions are subject to existing land claims and treaty rights.

There is also a need to consider who the reviewing bodies and decision-makers are. Assessment needs to be broader, value-driven, aspirational and inclusive. Deliberative democracy and a ground-up process are essential means of achieving those goals. While the NEB and CNSC have some expertise, the reviewing body and decision-makers of next-generation EA must have broader sustainability-based mandates, objectives and intentions.

Harmonization should include incentives to encourage jurisdictions to work together. Making community consent a condition of approval is both a carrot and a stick, a reason to harmonize upward.

Workshop 5

Public Participation

Leaders: John Sinclair, Pat Moss and Gary Schneider

Introduction and Background Materials

Background reading

Pat Moss, Gary Schneider and John Sinclair, "Public Participation in Next Generation EA – A Primer" (2016).

A.J. Sinclair, G. Schneider and L. Mitchell, "Environmental impact assessment substitution: Experiences of public participants," (2012) *Impact Assessment and Project Appraisal*, 30(2): 85-94.

A.J. Sinclair and A.P. Diduck, "Reconceptualizing public participation in environmental assessment as EA civics," (In press) *Environmental Impact Assessment Review,* available at "articles in press" at www.elsevier.com/locate/eiar.

Introduction

This workshop began with a presentation of the workshop leaders' primer (described above), a description of what we know are and are not the general characteristics of meaningful public participation and some essential elements of meaningful public participation. As the paper states:

> "Participatory processes in next generation assessment regimes need to incorporate the insights of deliberative democracy, collaborative rationality and environmental justice – in other words they need to be more citizen oriented. By participation we mean encouraging and facilitating the active involvement of members of the public, stakeholders, relevant authorities and proponents in environmental assessment with the aim to enhance the quality and credibility of assessment decision making and to ensure associated learning and capacity building benefits are captured. To ensure the basic legitimacy of next generation assessment, participatory processes also need to be meaningful by incorporating the basic components of participation into environmental assessment"

We know what meaningful public participation *isn't*. It is not a human relation exercise with an attempt to sell a pre-determined solution, a haphazard string of encounters with the public, a hollow attempt at transparent decision-making where information is withheld and planning occurs behind closed doors, or a one-way communication process where the reviewing body fails to recognize that public participation is both about

providing and receiving information.

The essential elements of meaningful public participation are well documented. They include certainty that the public has the ability to influence decisions, integrity, accountability, transparency, sincerity of the lead agency, clarity of process intentions and outcomes, fairness, time, inclusive and adequate representation (which includes engaging interested and affected parties), fair and open dialogue, positive communication, building capacity in people who want to participate, multiple and appropriate forms and methods (staged processes, appropriate techniques and consultation on design), adequate and accessible information, and informed participation.

Main Discussion Outcomes

Key principles

- There needs to be processes designed as if people matter.
- Public participation is not a one-size-fits-all process. There is not one form that will work for all communities and all cases. Rather, meaningful public participation processes need to be custom built for individual cases according to a series of principles and a body of information based on past processes.
- While hearings allow for cross-examination, more informal processes can be better suited for many participants and for the earlier stages of assessments.
- Non-hearing pathways should have the same minimum requirements: notice, disclosure, access to information, written reasons, and explanations of how comments were received, considered and reflected in decisions.
- Both hearing and non-hearing pathways should be supported by the availability of an appellate body to enforce and ensure fairness and adherence to minimum standards and principles.
- To be meaningful, public participation has to be early, ongoing, and engaged at the strategic and regional levels.
- An essential framework for public participation should have opportunities to participate in different processes at multiple levels and link processes at regional, strategic and project assessments.
- Governments, not proponents, should run participatory programs and report them to the public.
- The public must be involved in the design of public participation processes.
- There can be a toolbox of public participation options, which should be selected and modified where appropriate with the involvement of the public.

- Reviewing bodies must be independent and trustworthy in order for public trust to in the process.
- Consideration of alternatives needs to be reinstated, the "need for" the project should be based on the public interest perspective, and the public needs to be able to participate in the early stages, before proposals are submitted and strategic decisions are made.
- Key elements of meaningful participation include:
  - Meaningful engagement of the public;
  - Access to information;
  - The ability to influence outcomes;
  - Integration of public opinion and expertise, and accountability for how public comments have influenced the outcome;
  - Respect;
  - The public's involvement in designing participatory processes;
  - Appropriate tools (options for engagement);
  - Early and ongoing engagement and fair notice;
  - Appropriate processes for the circumstances and the public's needs;
  - Adequate resources, including participant funding, paid for by the proponent;
  - Reconciliation with Indigenous peoples as a foundational principle and objective;
  - Facilitated mechanisms for collaboration;
  - Phased processes;
  - Appeal rights;
  - Independent reviewing bodies with transparent appointment processes;
  - Non-hearing means of designing further processes;
  - Participation in all levels of assessment (EA, REA and SEA) and links between those levels;
  - Government involvement (as opposed to proponent-led processes); and
  - Hearings and the ability to test evidence.

- The process toolbox can include (among other things):
  - Mediation;
  - Local government liaison or community consultant for big projects;
  - Working groups comprised of representatives of key groups for deeper consultation on bigger assessments; and
  - Hearing and non-hearing pathways.
- Key to meaningful engagement is changing the locus of control over participatory processes and reporting from proponents to government. Government should be reengaged, the responsible government agency made responsible for participatory processes and required to release a public report on the role of participants, their level of participation in the process and the outcome.
- Early involvement is especially key where there has not been an SEA or REA and should be able to make an early determination of the merits of the proposal before going into its details.
- Reviewing bodies need to be trustworthy and independent and decisions should follow recommendations wherever possible.

Implementation recommendations

- Legislation should set out general requirements and principles for meaningful participation so the public can see in the legislation what, at a minimum, will be available to them.
- Specific processes should not be set out in legislation. Guidelines can provide a non-exhaustive "tool box" of options, but because every participation process should be different and the public involved in shaping them, we cannot legislate what those processes should be, just the principles that should guide them.
- There should be an appellate body to enforce requirements and standards, ensure fairness and adherence to minimum standards and principles, and provide a right of appeal for participants.

Issues for further discussion

- Who should be the agency and decision-maker in non-hearing processes? Where should the authority be located? Not the MPMO, NEB or CNSC, but where?

Overall Discussion

It is possible to design and facilitate processes that people will trust, so that even if they continue to oppose projects they will at least feel as if they have been heard.

The potential to actually influence outcomes – and the public's trust in their ability to have that influence – is critical. In the NEB's review of Enbridge Northern Gateway, groups did a lot of work persuading people that there was value in participating in the process. It was all ignored when the report came out and now people who participated in the process will be reluctant to participate in EA processes in the future.

One participant noted that the litmus test for meaningful public participation is whether members of the public are actually listened to and their concerns reflected and accommodated in decisions.

Timing is also a key aspect of the ability to influence decisions: currently, public participation opportunities are not provided up-front, but rather do not appear until after critical decisions have begun to be made. For example, removing the need to assess alternatives in CEAA 2012 and pushing public participation back to later in the process means that the public does not get to have a say in critical decisions. As it currently stands, public participation at best can influence small design matters and conditions, rather than have the ability to influence the overall outcome.

Consideration of alternatives needs to be reinstated, the "need for" the project should be based on the public interest, not the proponent's, perspective, and the public needs to be able to participate in the early stages, before proposals are submitted and strategic decisions are made.

Phased hearings can help make early determinations of proposals on their merits for whether they should even go to a full EA without needing to delve into the nitty gritty of project EA.

To be meaningful, public participation has to be early, ongoing, and engaged at the strategic and regional levels. An essential framework for public participation has opportunities to participate in different processes at multiple levels and links processes at regional, strategic and project assessments.

Key to meaningful engagement is changing the locus of control over participatory processes and reporting from proponents to government. Currently, proponents are encouraged to engage communities before they submit proposals, run participatory programs and report back to the public. Government has withdrawn from early engagement and should be reengaged.

The authority should be responsible for participatory processes and required to release a public report on the role of participants, their level of participation in the process and the outcome.

Public participation is not a one –size-fits-all process. There is not one form that will work for all communities and all cases. Rather, meaningful public participation processes need to be custom built for individual cases according to a series of principles and a body of information based on past processes.

Open houses and letter writing have their place as onramps to better processes; they can be useful tools for designing participatory processes.

There is also a need for mechanisms to allow Indigenous participants to build their own processes based on their traditions, ceremonies and laws.

There needs to be monitoring of participatory processes and assessing their outcomes in order to build a library of experience from which to draw when creating subsequent processes.

The public should be highly engaged in designing public participation processes and there must be room for adaptation along the way.

When there are hearings, there needs to be procedural rights, such as the right of cross-examination of proponent witnesses. The right to cross-examine is critical; while it is important to let the public design processes that work best for them, there needs to be the right of cross-examination at some stage.

It would be helpful to members of the public, especially those unfamiliar with the process, to have somebody from the government come to affected communities early on to explain the process, answer questions and otherwise act as a community consultant.

Capacity is also key: the public needs to have capacity to participate. Different groups (individuals, community groups, larger NGOs) have different needs.

Capacity requires adequate funding, but also means time, especially when groups are faced with a number of proposals.

Funding is not currently adequate. The participant funding program should be recast to a proponent-pays program and provide sufficient funding to meaningfully participate.

Capacity and efficiency can be assisted through opportunities to pool expertise and interest and collaborate in areas of shared interest. While people can't be forced to work together, general expectations and discretion in allocating funding can be used to encourage collaboration. The Canadian Environmental Assessment Agency encourages participant funding applicants to collaborate in areas of shared interest, for example in hiring experts on subject matter areas, which makes processes more efficient and facilitates collaboration among participants.

There are many models for how to encourage collaboration, such as through mediation, formal hearings, and information gathering at an early stage. Helpful examples may be found in the Ontario Energy Board, or the former Ontario EA advisory committee, which had preliminary hearings.

There needs to be two different pathways: one that leads to a hearing which entails overseeing what has occurred in public participation processes; and a non-hearing pathway. While the public presumes that hearings are the only fair process, other, more informal types of processes can be better suited for many participants and still involve lawyers and experts. They are also better suited for the earlier stages of assessments, as they provide more opportunities for dialogue. The question is when to have a hearing and when not to.

Both hearing and non-hearing pathways should be supported by the availability of an appellate body to enforce and ensure fairness and adherence to minimum standards and principles.

Non-hearing pathways should have the same minimum requirements: notice, disclosure, access to information, written reasons, and explanations of how comments were received, considered and reflected in decisions.

Should the presumption be that there will be a hearing unless the Minister or authority is satisfied that non-hearing processes would be better? Or should there be a screening process to determine when a hearing is necessary? REA and SEA can identify instances when the scale, scope or public interest warrant a hearing.

The critical notion is that the design of public participation processes must be designed with the public. There can be a toolbox of participation options, which should be selected and modified where appropriate with the involvement of the public.

Who the authority is and where it is housed is a critical question. Public trust in the process and in the ability to influence outcomes relies on the credibility of assessment bodies and where decision-making is located. Reviewing bodies must be independent and trustworthy. There are great inconsistencies between NEB, CNSC and CEAA processes. Also, in the case of the NEB at least, panel members are appointed by the NEB and have close ties to industry, which undermines confidence in their impartiality. Also, the MPMO is duplicative and inefficient and perceived as a lobbyist for proponents and should not be the central agency.

There also needs to be a greater incentive for political decision-makers to follow the recommendations of the reviewing body, as decisions that do not follow recommendations erode public trust and credibility of the process.

A more transparent appointment process for panels would build trust in processes and outcomes.

Working groups can be useful means of engaging interests more deeply. They should be comprised of local and Indigenous governments, and stakeholders such as community groups, ENGOs and industry/business. Working groups get deeper consultation by receiving information early on and the opportunity to have deliberative, roundtable dialogues with the proponent and authority.

Workshop 6

Nation-to-Nation Relationships and UNDRIP

Leaders: Merrell-Ann Phare, Michael Miltenberger and Larry Innes

Introduction and Background Materials

Background reading

Merrell-Ann Phare, Michael Miltenberger and Larry Innes, "Collaborative Consent: Considering a framework for building nation-to-nation relationships in environmental assessment" (Presentation, 2016).

Reading: *Collaborative Consent: A Nation-to-Nation path to partnership with Indigenous Governments*, (2015: Prepared for the Minister of Natural Resources by: Ishkonigan, Inc, The Phare Law Corporation & North Raven.

Introduction

The workshop was introduced with a presentation (above) on a framework for collaborative consent, a context within which the presenters suggested all decision-making should be made.

Key drivers of change include:

- A federal commitment to nation-to-nation relationships;
- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the most important section of which is the commitment to Free, Prior and Informed Consent (FPIC); and
- The federal commitment to the Truth and Reconciliation Commission's recommendations, including those regarding implementing UNDRIP.

The goal in the relationship between the Crown and Indigenous peoples is reconciliation, with the key question here being what does that look like in the EA context.

The leaders proposed that EA reform should go beyond the duty to consult and accommodate (DTCA - which should be a floor, not a ceiling). EA reform should address all drivers and has both procedural and substantive elements. It is an issue of political self-determination and control and ownership. EA reform is more than just a tinkering opportunity; let's do it over and get it right.

Collaborative consent is:

- About sitting around the table and not leaving until you get an agreement;
- An ongoing, iterative process that is part of a bigger discussion (so not a one-time discussion);
- A deliberative process involving meaningful engagement;
- A dialogue, not just the presentation of something: it is response and knowledge-based so is about responding to timelines and whether it's the right time for a project;
- Aimed, with no guarantee and no veto: the issue is who is still in control; and
- Based on the premise that each party must agree: if you can build trust and share information, you can often move to a multi-party proposal.

Collaborative frameworks should be applied as upstream as possible, at the land-use planning and REA/SEA stages, so that projects that do not fit within the visions that come out of those processes do not need to be considered.

Collaborative consent is co-jurisdictional. Models from the Northwest Territories include:

- Co-management boards under the MVRMA;
- Co-drafting of legislation (Wildlife Act and Species at Risk Act), which recognizes that the Crown is only one decision-maker;
- Development of policy (e.g., water development strategy, a comprehensive progressive document constructed in aa similar process to co-drafting);
- Revenue models (resource sharing under devolution agreement); and
- Negotiations.

Hallmarks include:

- Building trust;
- Getting to mutual solutions; and
- Its application in multiple fora (it's not all on the EA table).

The Voisey Bay assessment provides a helpful case study of a framework that worked well. The project fell within the shared jurisdiction of the Inuit and Innu and within two years resulted in the parties agreeing on mini land claims, environmental impacts and the life of the project.

Main Discussion Outcomes

Key principles

- Collaborative consent is:
  - About sitting around the table and not leaving until you get an agreement;
  - An ongoing, iterative process that is part of a bigger discussion;
  - A deliberative process involving meaningful engagement;
  - A dialogue;
  - Aimed, with no guarantee and no veto; and
  - Based on the premise that each party must agree and that if you can build trust and share information, you can get to that agreement.
- The three hallmarks of good EA are:
  - At the strategic level, having a broader dialogue and collaboration on policy directions; and
  - At the regional level, determining how and when development should occur.
  - At the project level, getting to better decisions because many of the strategic questions have been worked out.
- Political will at the higher level is not enough: the mindset and culture of civil service must also be changed.
- Collaborative consent is an iterative process that must be adaptable to different circumstances and nations.
- There need to be policy spaces for nation-to-nation dialogue.
- The duty of reconciliation and the Truth and Reconciliation Commission's Recommendations, as well as climate change obligations, should be guiding principles.

Implementation recommendations

- Key aspects of collaborative consent should be set out in legislation, but there needs to be flexibility in order to adjust models for specific groups and circumstances.
- Nation-to-nation agreements should be used to define and separate the issues at hand.

Issues for further discussion

- How to situate EA in the broader context of Indigenous rights and governance, as well as other issues such as climate change etc?
- How to make sure from a law reform perspective that the designs that are more likely to maximize the chances of true collaboration get into the law so as to minimize the chances that EAs go bad?

Overall Discussion

Collaborative consent is an attempt to move beyond the DTCA and the public policy discourse of Indigenous people having a veto. Rather, it is a deliberative dialogue process that aims at achieving consent and agreement.

At its core, it is the idea that Indigenous people come to the table as governments.

Co-management is an issue of peace, which results in political will at the high level. However, there is a need to change the mindset of the civil service, which is more slow-moving. It is important to change the culture - e.g., Parks Canada originally was determined to keep parks 'pure' but then shifted to understanding that such a disposition was destructive and so it needed co-management (an example of Inuit indigenizing Parks services).

The big challenge is not generally related to proponents, but rather getting the two levels of government onside.

There is a need for multiple iterations of collaborative consent for different groups and circumstances, but key aspects of what we know works should be in the legislation.

Collaborative consent is meant to be an ongoing and deliberative process that connects the other policy dialogues. It relates to the idea of what it would be to have a nation-to-nation government framework.

There needs to be nation-to-nation policy spaces.

EA reform needs to be nested in the larger framework of the Minister's mandate.

To make sure we get Voisey Bay and not Lower Churchill, there needs to be jurisprudence and a basis for treating different Indigenous groups differently. Panels are suited to gather facts to make these decisions, but there also needs to be agreements between the governments to separate the issues.

To move from the current ad-hoc system to a more predictable one, we should lay the groundwork for project EAs through nation-to-nation agreements on higher level policy development. Then we can move to figuring issues out in the context of a region and whether projects fit within the broader framework when they are proposed.

There needs to be a clear and convincing way of situating EA in the broader context of Indigenous rights and governance, as well as climate change, natural resources etc. Otherwise, reviewing bodies will become overburdened with trying to resolve regional issues.

Outside of iterative EA processes, there needs to be broader dialogue and collaboration with regards to general policy directions. The higher level should seek agreement on general directions, freeing up space at the EA level to maximize project-level decision-making.

The three hallmarks of good EA are:

- Outside the EA process, having a broader dialogue and collaboration on policy directions;
- At the regional level, determining how and when development should occur; and
- At the project level, getting to better decisions because many of the strategic questions have been worked out.

The duty of reconciliation and the Truth and Reconciliation Commission's Recommendations should be guiding principles for building and participating in collaborative consent processes. Climate change obligations can be further principles.

Preparedness is key: it's crucial to ensure that communities are prepared for these developments before they happen.

Could collaborative consent be co-opted by the Crown as a way of simply cleaning up its consultation record? The answer lies in looking at what is good EA. Good EA is having a meaningful collaboration between governments in shaping the process and shaping what the decision is going to look like from the outside.

How can we make sure from a law reform perspective that the designs that are more likely to maximize the chances of true collaboration get into the law so as to minimize the chances that EAs go bad?

Workshop 7

Cumulative Effects Assessment

Leader: Peter Duinker

Introduction and Background Materials

Background reading

Peter N. Duinker & Lorne A. Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006) *Environmental Management*, 34:2, 153-61.

A. John Sinclair, Meinhard Doelle & Peter Duinker, "Looking Up, Down, Sideways: Reconceiving Cumulative Effects Assessment as a Mindset" (2016) *Environmental Impact Assessment Review*.

Introduction

The workshop was led by using key contributors to the health of the human heart (diet, smoking, exercise and alcohol) as a metaphor for the accumulation and integration of stressors on environmental components. Whereas project assessment looks at one thing (e.g., a wind farm) and its effects, cumulative effects assessment must take a different perspective, by adopting the point of view of environmental components (e.g., the moose) and ask how stressors (e.g., the wind farm) affect it.

The presentation then described the history of CEA in Canada and made the following observations:

- Pretty much any effect we can consider in EA is, in one way or another, a cumulative effect.
- Cumulative effects assessment is not being done often and where it is being done, it's not being done well.
- Cumulative effects are the 'real' effects.
- CEA belongs at the strategic and regional level. If it stays at the project level, we'll have achieved nothing in our next-generation environmental assessment law.

Main Discussion Outcomes

Key principles

- There is a desperate need to do CEA in REA and SEA and the sooner REA and SEA can be meaningfully and robustly undertaken, the better.
- Once cumulative effects assessments have been undertaken in regional and strategic assessments, project proponents can be required to buy its 'share' of the regional CEA to help pay for the REA retroactively. It would then update the REA with the details of its project and see to it that some of the CEA/REA is redone with the updated information. That way, CEAs are like a living tree.
- Doing CEA in REA and SEA is not a one-way street, but rather must be a dialogue between the regional and the project-specific EA, tied to ongoing observation and monitoring. The dialogue can go both ways between regional and project levels, with information feeding up from projects and supporting regional assessments, and vice versa.
- The goal should not be to reach immediate conclusions, but rather to set parameters and the stage for a long-term understanding of the effects of given projects in the context of a region.
- Good CEA is a question of mindset and of willingness. There must be political will to invest in the informational infrastructure and the government structure that will allow us to have the basis for informational dialogue, and willingness on the part of proponents, consultants, departments and others who have a stake or role in implementation.
- There is a need to change the mindset of CEA from one of minimizing, mitigating or reducing adverse impacts to one of achieving net benefits, of positive contributions on biodiversity and system services.
- There must be a transition stage to bring us from the flawed process of doing CEA exclusively in EA to building it into REA and SEA.
- Determining thresholds for the intensity and extent development and impositions on ecosystems must be flexible, informed and deliberative, not static.
- CEA is neither a snapshot nor backward-looking (except to the extent that it looks at historic evidence to determine trajectories and directions) but rather a projection of an understanding of future scenarios and projections that can be tested and adjusted.
- CEA must look at existing accumulation of effects, but also be forward-looking and scenario-based, looking to where we are going.
- There needs to be a significant improvement to access to information and data, and time to access that information.

- CEA (and so REA and SEA) must be done by an independent, trusted body with a mandate to collect community-level information and achieve existing local knowledge.
- A sustainability test or sustainability decision-making criteria applied to the determination of threshold criteria could help avoid the problematic world of determining thresholds.
- There is great uncertainty in the notion of thresholds and when those thresholds are passed. Key to CEA is understanding how far you are from reading unsustainable conditions.

Implementation recommendations

- Consider legislating a trigger for an REA or SEA upon a petition by an Indigenous government to and a mechanism for co-designing that process.
- A public repository is required to hold and make available all relevant information, including the data collected prior to assessment baseline data.
- The regulatory regime needs to require CEA at the SEA and REA levels.

Issues for further discussion

- What are the mechanism and governance of CEA? Should a central agency or body be responsible, or regional bodies? If regional bodies, who would be responsible overall? Having too many bodies does not work well. The National Round Table worked because it was multi-sector and participatory, so reports were always based on consensus. There needs to be more research into other models of functional units.
- Linking CEA with REA and SEA is vital. A key question is what should be the triggers to launch REA and SEA so they do not become too vague or discretionary.
- What should be the transitionary process for moving CEA to the REA and SEA level?
- How do you legislate willingness?

Overall Discussion

All effects are essentially cumulative.

One obstacle to understanding CEs at the project level is a reluctance by proponents to disclose information about their projects' impacts.

But an obstacle to moving CEA to the SEA and REA levels is that the provinces would need to be trusted to do the job, which they currently are not.

One option would be to have joint federal-provincial REAs for each province.

When a project triggers an EA, the proponent should first have to buy its CEA 'share' of the REA to help pay for it retroactively. It would then update the REA with the details of its project and see to it that some of the CEA/REA is redone with the updated information. That way, CEAs are like a living tree.

Not ready to concede cutting CEA out of project EA but see the merits in better ensuring it occurs at the SEA and REA levels.

It is important to have the heavy lifting (the CEA based on a pre-industrial baseline) at the regional level, and then require proponents to use that assessment and assess how their project contributes to the CEs. Thus there is a place for CEA at the project level, but there needs to be a trigger for CEA at the regional and strategic levels, too.

One option would be to legislate a trigger for REA and SEA that is activated when Indigenous governments petition for one, and a mechanism for Indigenous groups to design the scope and boundaries and create cooperation. It must occur in a nation-to-nation framework.

The dialogue can go both ways between regional and project levels, with information feeding up from projects and supporting regional assessments, and vice versa.

REAs would have to be crafted around criteria and emerging issues and accumulate data as information from projects is fed in.

All relevant information, including the data collected prior to assessment baseline data, needs to be made publicly available, meaning there needs to be a repository and mechanisms for holding it in.

Data is an issue, but there is a lot of knowledge at the community level about what is going on in the environment. There are some technical and analytical challenges to relying on that information but the basic framework is pretty testable and accessible.

On the other hand, the question is not one of sufficiency of data but which direction EA is looking. EA must be prospective and look to the future of stressors, the future context of the project and how it is behaving.

On the transition question (until we get to next-generation environmental assessment), an independent monitoring agency that is linked to and reports directly to government could be helpful. It would allow access to data and could be trusted by Indigenous groups, as they could have membership in it.

Resourcing and data analysis is the biggest challenge for proponents. One option is collaboration between industries, such as occurred in the 1990s in northern Alberta where proponents all brought their CEs to the table, which was fed into a broader REA.

While EA can be seen as an administrative process, CEA is a way of thinking that needs to permeate EA.

Thresholds need to be built into the system, but it is not as simple as just numbers. E.g., it is one thing to say a region can sustain ten mines, but what about when combined with forestry?

CEA is not as simple as looking at residual and cumulative effects; it needs to include the totality of effects on the ecosystem in its current state and considering all other stressors it's under, as well as positive effects.

Determining thresholds, in terms of development (intensity and extent) and impositions on ecosystems, must be flexible, informed and deliberative, not static. CEA is neither a snapshot nor backward-looking (except to the extent that it looks at historic evidence to determine trajectories and directions) but rather a projection of an understanding of future scenarios and projections that can be tested and adjusted. CEA must look at existing accumulation of effects, but also forward to where we are going.

A sustainability test or sustainability decision-making criteria applied to the determination of threshold criteria could help avoid the problematic world of determining thresholds. There is a need to change the mindset of CEA from one of minimizing, mitigating or reducing adverse impacts to one of achieving net benefits, of positive contributions on biodiversity and system services.

There are objective social criteria that can be monitored at particular points in time, can track changes and will indicate if there has been improvement or deterioration. Established social variables can be tracked, although it can be hard to measure and determine causality. There are two different approaches to social impact objectives: analytical done by social scientists, and participatory done by the people subjected to impacts. Participatory is important to do but is less analytically tractable than the colder social science-oriented view of impacts.

How to measure impacts is important. For First Nations, it's deeper than just whether they can have a particular food tonight. Impacts need to be studied at the strategic level, e.g., through a First Nations land a resource study or plan with a focus on sustainability. What factors need to be there in order for that culture to survive? What are the important things that need to be there (e.g., water)? Aesthetics also matter, as you can't go out hunting if it smells or there is noise, as there is a perception contamination. All those things can be easily identified, whereas it becomes tricky when you begin to quantify what is needed (e.g., how much food, what degree of cleanliness of water, how much pollution can be tolerated, etc.).

How do you legislate willingness? There needs to be political will to do CEA and time to implement processes. In Canada there has not been a will or commitment to CEA because it is linked to individual impact requirements tasked to proponents, when it actually requires a bigger, higher-level review.

Climate change is central to CEA but is not currently being considered. If climate change isn't included in a CEA, it's an invalid assessment.

Workshop 8

Assessing Climate in EA

Leaders: Chris Tollefson and Anthony Ho

Introduction and Background Materials

Background reading

Anthony Ho & Chris Tollefson, "Sustainability-based Assessment of Project-related Climate Change Impacts: A Next Generation EA Policy Conundrum," (Forthcoming, 2016).

Introduction

The workshop leaders introduced their paper (above), in which they bring the SA model to bear in the context of assessing and making decisions around climate change (CC).

They modelled the paper as a case study: Would a SA run into some of the same theoretical, technical and conceptual problems that have plagued traditional EA when assessing climate change? How might a SA compare with an EA in terms of CC?

Using the proposed Pacific NorthWest Liquefied Natural Gas (LNG) Project as a case study, they compared and contrasted how the Canadian Environmental Assessment Agency has analyzed CC impacts under CEAA 2012, versus how they might have analyzed them under a sustainability assessment model as proposed by Bob Gibson.

They found that the SA does offer some very significant benefits to the analysis by widening the frame and being clearer about trade-offs.

But by virtue of the intractable nature of CC as a global problem, many of the challenges that have impacted traditional EA in terms of CC are equally faced by the sustainability model. The sustainability model does not have all the answers.

They concluded that CC is a complicated sui generis problem that will always pose specific challenges. It is clear that project-level EA is not going to get us anywhere. There is a compelling need to nest CC assessment in a tiered system of strategic and other types of assessments that can grapple with the larger problem in a fashion that is intelligible, coherent and allows us to achieve international obligations.

A major difference between the frameworks is that in SA there is equal attention paid to social, economic and ecological risks and benefits, whereas under CEAA 2012 there is no requirement to assess socio-economic impacts except in respect of Indigenous peoples. We know CC is not just an ecological problem, that it creates socio-economic inequalities, so the current model ignores important aspects of CC.

Common issues between the frameworks include criteria interpretation. At the conceptual level, EA and SA are doing the same thing: applying a set of criteria to a question. EA determines adverse effects, whereas SA determines whether there will be a net positive contribution to sustainability. Different people applying even the same set of factors to the same problem can have different results. The SA criteria are just as subject to the problem of interpretation.

Regardless of whether you include sustainability in project-level EA, it may not be the appropriate tool to deal with CC. With our current science, we cannot directly link a project-level emission to any impact.

Main Discussion Outcomes

Key principles

- Science-based decision making needs to be respected by Cabinet.
- The starting point should be that projects should be required to help Canada meet its commitments under the Paris Agreement, but we may need to aim beyond those commitments.
- Any reasonable decision-making process should take a project that hinders targets very seriously.
- All projects should be seen through the lens of sustainability.
- It is nearly impossible to assess climate impacts without the inclusion of REA and SEA processes.
- Assessing climate is about understanding GHG emissions in the context of the project and figuring out if the project is moving Canada in the right or wrong direction, and how far.
- The key questions in a climate test are: 1) Is this project helping or hindering Canada's ability to meet its climate commitments; 2) What is the scale at which it is helping or hindering; and 3) Is there is a fair distribution of benefits and burdens? With those, we can make a reasonable assessment of how the project fits into the overall problem on CC.
- EA should not be a mathematical assessment, but rather include values and principles in the analysis in order to assess project that are supposedly renewable (e.g., hydroelectric dams) but have GHG emission implications nevertheless.
- Assessments should consider the regional impacts of climate change and the whether there is a fair distribution of benefits and burdens of those impacts. The risks and impacts of inaction are distributed disproportionally.

- The sustainability framework should separate out uncertainty, including of displacement, and consider whether undertakings may tip the balance in places that are particularly vulnerable.

Implementation recommendations

- The legislation should contain criteria for determining the significance of GHG emissions.

Issues for further discussion

- Where do uncertainty and the precautionary principle fit in?
- Should there be a moratorium on the approval of new projects until Canada has implemented a climate change policy against which projects can be assessed?

Overall Discussion

The significance of a project's GHG emissions change based on the scale (provincial to national to global). Whether or not a project makes a net contribution to sustainability sometimes depends on scale.

May want to ask the question a different way by focusing more on the resilience precaution capacity criteria. The question is: Is the project viable, resilient and sufficiently adaptive? Does it survive a meaningful CC policy regime?

There is still hope for the significance test, but not in its current formulation. If it continues to be ill-defined there will be bad outcomes. The Agency criteria should be parachuted into the Act. But still, that does not get at whether the impact on CC is significant or not.

Where do uncertainty and the precautionary principle fit in?

We need to figure out whether GHG emissions from a project are a problem or not. We have to recognize that some project emissions are helping reduce emissions elsewhere. It's about understanding those emissions in the context of the project and figuring out if the project is moving us in the right or wrong direction and how far. One way to position that is in the context of commitments under the Paris Agreement. We may have to go beyond those targets.

There is the broader issue of how to deal with projects that helps Canada meet its target but pushes those problems to other countries. So the questions are: 1) Is this project helping or hindering Canada's ability to meet its commitments; 2) What is the scale at which it is helping or hindering; and 3) Are we downloading the problem elsewhere? Then we can make a reasonable assessment of how the project fits into the overall problem on CC.

Some parts of Canada suffer CC more than other regions. Regional impacts of CC should factor in somehow. Will this assessment tip the balance in places that are particularly vulnerable? The risks and impacts of inaction are distributed disproportionally.

SEA and REA should encompass the issue of regional vulnerability to CC.

There may be a similarity with material contribution to the risk that we see in toxic torts. Could we apply material contribution to the test to sector-specific emissions?

The first question should be whether the project is contributing to the problem or solution and quantifying that. Is the project contributing to the problem either by hindering meeting targets rather than helping it (every project should be helping meet Paris commitments)? To what extent? Then the question is, how much of a problem is that?

Ask whether there are net economic, social and environmental benefits. Is there a fair distribution of benefits and burdens?

The starting point should be that we should not approve projects that will make it harder to achieve our commitments under the Paris Agreement. Any reasonable decision-making process should take a project that hinders targets very seriously. But that is a question of how rigorous the overall framework is at ensuring good decision-making.

In the Gibson sustainability framework, one of the trade-off rules requires that the burden of proof lies on the proponent. If the proponent wants to claim that the project will displace other emissions, it must prove it.

The sustainability framework should separate out uncertainty, including of displacement.

Is there a more aggressive take on economic and social impacts? We have the environmental take; can we then tag on some sort of socio-economics assessment? Are health impacts as measurable as economic impacts? Economic impacts are a question of resilience: can the project survive market changes?

What is needed is specific public policy capping emissions in specific industries.

We don't know all the risks associated with big emission projects. The costs involved in the big projects demand we do something different. It is a shift, not a balance.

Do we need SEA and REA processes in place? Otherwise it is nearly impossible to assess climate impacts. The problem is that the projects will come up a lot faster than a CC strategy, which puts us back into the box of how to deal with the problem at the project level.

Impact assessment is not decision-making; it is there to support decision-making. We agree as a group that science-based decision making needs to be respected by Cabinet. We know that three of the Stockholm planetary boundaries have already been exceeded. The science should be around those nine boundaries. We already have the science on climate. If we want EA to go forward, those decisions need to be based on science to

assist Cabinet and Indigenous and public participation.

How to deal with major projects during the transition? It would be nice to have the government say no more major projects until we have a climate policy.

An easy push is that projects have to help Canada meet the Paris Agreement.

There should be no more approvals of major projects until climate change and nation-to-nation are resolved. It's not about being anti-fossil fuels; it's about good policy.

We have to do fulsome fixing up front. Tinkering has a high potential to not get us far enough.

We need to deal with macro climate change policy or we are stuck dealing with CC at the project level.

What about smaller projects? For large projects we want to apply a net contribution to sustainability test, but do we want that or all EAs? Yes. If a proponent (even of smaller projects) doesn't do everything they can to help meet climate goals, the project should not get approved. All projects should be seen through the lens of sustainability.

EA should not be a mathematical assessment, but rather include values and principles in the analysis in order to assess project that are supposedly renewable (e.g., hydroelectric dams) but have GHG emission implications nevertheless.

Many thanks to the Summit participants for their valuable contributions, and especially the workshop leaders and organizing committee. Special thanks to John Sinclair, Meinhard Doelle, Jamie Kneen, Justina Ray and Byron Williams for their thoughtful guidance, keen editorial eyes and help pulling the Summit together.

Appendix A

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Appendix B

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