EA Crisis in Canada: The Road to Recovery?

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Abstract

The author's paper (with Leeder and Federico) "Environmental Assessment Crisis in Canada: Reputation versus Reality?" delivered at IAIA 2005, argued that environmental assessment (EA) in Canada, as administered by the federal government, is inefficient, frequently of poor quality and fails to meet its basic objective as a tool of sustainable development. The authors made a number of suggestions for potential change. Since that time, the Government of Canada has increasingly recognized these challenges and begun to make some improvements and changes in policy and legislation in an attempt to improve efficiency and certainty in process. Changes in policy have seen improved decision making in scoping and reducing the number of EAs for projects of low environmental consequences. Considerable further is needed to address concerns regarding the administration of the *Canadian Environmental Assessment Act (CEAA)*, including duplication with other (*e.g.,* provincial and territorial) jurisdictions, the challenges of self-assessment (by proponent government departments) and the pursuit of meaningless or unnecessary EA that leads to little improvement in environmental performance. This paper explores the key remaining issues and offers suggestions around what the federal government needs to do commencing with the parliamentary review of the legislation in 2010. This includes continued focus on improved administration and practices while pursuing the rationalization of EA, through the achievement of a national framework for adoption by all jurisdictions to minimize duplication, uncertainty, inefficiency and ineffectiveness.

Background

In a paper presented at IAIA 2005, Barnes *et al.* (2005) argued that federal EA in Canada is inefficient, frequently of poor quality and is failing to meet its basic objective as a key tool of sustainable development. Many inter-related factors are contributing to this situation. *CEAA* is fraught with jurisdictional challenges and uncertainties. Founded on the principles of self-assessment, various federal authorities must, for each of 6,000-plus assessments annually, determine which government departments are involved and in what capacity. This leads to inconsistent application of *CEAA* and varying standards of quality. There is insufficient emphasis on training and quality within government departments.

Contributing to these problems is the duplicative nature of overlapping EA processes required by various levels of government. The Canadian federation involves devolution of regulatory responsibilities to provincial, and Aboriginal and territorial governments. There also is a diversity of federal and provincial boards, and tribunals, that also administer EA processes (e.g., the National Energy Board, provincial energy utilities boards). The application of these various EA processes to projects is often complex and duplicative. The complexity of overlapping jurisdictions in EA is an impediment to investment in Canada. Projects that are the subject of overlapping EA often do not enjoy added value from an environmental protection perspective that could be attributable to multiple reviews.

Barnes *et al.* (2005) suggested a number of potential changes and improvements to get EA in Canada on track. Suggestions included the establishment of a federal EA body to manage all federal EA in Canada, reversing the problematic self-assessment principle and providing an opportunity for

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consistency and higher quality review and administration. It was suggested that amendment to legislation needs to include measures that reduce the number of unnecessary project assessments on small projects of little or no environmental consequence and providing for more comprehensive strategic EA (regional and sector) to support consideration of cumulative environmental effects.

Changes Since 2005

A number of significant changes have occurred since 2005 that aim to address some of the problems of efficiency and effectiveness. The following describe these changes.

Minimizing EA of Inconsequential Projects

In 2006, Crown corporations (some 75 in number) were added to the list of authorities to which *CEAA* applies. This added a significant number of EAs to the 6,000 per year already required. This had the tendency to exacerbate earlier capacity and quality issues, further straining the resources applied to EA administration.

Legislative changes since 2005 include amendments to the *Law List Regulations* and *Exclusion List Regulations*, and the *Navigable Waters Protection Act* aimed at minimizing the number of EAs required for inconsequential projects. This has had a tendency to reduce the number of inconsequential assessments. In addition to these permanent legislative initiatives, more recent changes include temporally limited exemptions (2009-2010) to facilitate projects under the recession stimulus package "Build Canada Plan" for infrastructure deemed inconsequential. Ironically, the implementation of the latter had its challenges in that it required additional resources and bureaucratic effort to consider whether exemptions applied to specific projects, although the measures are avoiding some EA of inconsequential projects. A bill has very recently been introduced to Parliament that will make these changes permanent. Overall, it is believed that there has not been a significant decline in the number of inconsequential assessments required.

Policy Change

A key policy initiative of the government was the issuance in late 2005 of a "Memorandum of Understanding for the Cabinet Directive on Implementing the *Canadian Environmental Assessment Act*." This directive provided direction on matters pertaining to federal coordination and discretionary decision making regarding the scope of the project for EA, an issue challenged in the courts repeatedly since 1997.

Although the policy guidance has been very helpful to responsible authorities and proponents alike, efficiency of federal coordination remains problematic and the determination of scope of project continues to be a subject of challenge with tens of cases before the courts. A Supreme Court of Canada decision in January 2010 has recently overturned the scoping policies of the Cabinet Directive, namely, to avoid duplication with other jurisdictions conducting EA, responsible authorities were encouraged by the policy to use legislative discretion to limit the scope of the project to the triggering mandate. This Court decision apparently quashes this efficiency related policy and will likely result in a reversal of previous achievements in minimizing duplication and improving efficiency. Very recently, the federal government has introduced legislation that would, if passed, enable responsible authorities to limit the scope of the project as contemplated in the policy overturned by the Courts.

Establishing the Major Projects Management Office

In 2007, the Government of Canada established the Major Projects Management Office (MPMO) in Natural Resources Canada to facilitate efficiency in large natural resources projects. The MPMO supports the Government of Canada in its implementation of *CEAA* and its approach to the regulatory review of major resource projects, an approach that aims at ensuring a more effective, accountable, transparent and timely review process. The MPMO's mandate is to provide overarching project coordination, management and accountability for major resource projects within the context of the existing federal regulatory review process, and undertake research and identify options that drive further performance improvements to the federal regulatory system for major resource projects. It is still early in the mandate of the MPMO and it is not yet clear if it is achieving tangible improvement in effectiveness and other objectives.

The Persisting Problems

The legislative and policy changes made since 2005 target key issues with *CEAA*. They are positive in addressing concerns for process uncertainty, efficiency and effectiveness. In Canada, despite what some critics may say, EA of larger projects are comprehensive and well done. They are exemplary and support Canada's reputation as a nation that does EA well, and a credit to all involved. EAs of such projects involve thorough consideration of alternatives, environmental effects, mitigation, and follow-up, and involve extensive public, Aboriginal and regulatory engagement. However, despite these efforts and the quality of EA for large projects, there remains a high level of uncertainty in process and timing, costs are very high, and regulatory authorities are often doing a less-than-good job of managing scope and efficiency due to the distraction (from making technically sound decisions) of process administration. Central to this is a capacity and resource issue. The Government of Canada does too many assessments of inconsequential projects by a diffuse and changing roster of responsible authorities. This draws resources from important projects and issues.

Self-Assessment and Triggering

Self-assessment is a key aspect of *CEAA*. This and the "triggering" mechanism for EA remain a fundamental problem with *CEAA*. For each assessment, there is a complex federal coordination process that involves the determination of which federal authorities are "responsible authorities" (decision-making authorities) that must conduct the assessment for each project. An EA under *CEAA* is triggered by one of four mechanisms, wherein the federal authority is responsible to undertake an EA if: it is the proponent; will transfer land to facilitate its implementation; provide funding; or issue a permit or authorization pursuant to a variety of legislation under the *Law List Regulations*. This process results in a gross waste of resources and contributes immensely to process uncertainty and efficiency problems. The so called "federal coordination process" takes weeks, months and even longer, to determine who has the responsibility to undertake the assessment. There is no value added in respect of what needs assessment or how to better plan a project to meet sustainable development objectives. Self-assessment itself does raise the question of potential conflict of interest. The assessment of projects by different agencies can lead to inconsistency in application of the law.

Scoping Practices

Once the responsible authority is determined, the administration of an EA involves a complex scoping process that is ill defined, with little or poor guidance. Responsible authorities must determine the scope of the project to be assessed, whether any additional factors need to be considered beyond the

very broad requirements of *CEAA*, and then, if it chooses to limit consideration, determine the scope of the factors to be considered, including whether, and the extent to which public consultation occurs. These decisions beyond the broad mandatory requirements are discretionary. There is little effective guidance or policy. The diffusion of responsibility for and coordination of decision-making among responsible authorities results in capacity issues and a lack of consistency in scoping decisions.

Another recently exposed phenomenon is the complexity and capacity of responsible authorities to undertake scoping that is effective and efficient. A recent study (Jacques Whitford Stantec 2009; Barnes *et al.* 2010) has pointed to a plethora of issues related to the administration of scoping in energy and mining projects that has broad applicability to EA in general. There is a need for improved scoping and capacity building in the administration of EA. Evidently, resources focus on the administration of the complex process rather than on the quality of scoping decisions. The study identified that the objective of "Good Scoping," effectively focusing the EA on environmental issues and concerns that are relevant to a proposed project is elusive, and that problems of "Broad Scoping," unclear or non-specific direction or requests for more information than may be reasonable or necessary, are pervasive.

Duplication, Equivalency, Substitution and Reciprocity

The federation of Canada involves a complex division of jurisdiction among federal, provincial, territorial and Aboriginal governments. These all have EA legislation and processes. While they have similar goals, they are generally different processes reflecting the different jurisdictions. This is a complex matter but it suffices to observe that there are few mechanisms for equivalency, substitution and reciprocity among jurisdictions. Consequently, federal EA is frequently duplicative of that of other jurisdictions. There are agreements or efforts to harmonize between jurisdictions but it remains that parallel assessments of the same project, sometimes with a differing scope of assessment, is the norm for many projects.

The resulting duplication is a rallying point for industry and proponent lobby, and efforts for substitution or limitation of scope in federal EA in deference to other jurisdictions, a rallying point for environmentalists or motivated interveners. The latter is often the basis for legal challenges around matters of scope of project and scope of assessment. A recent Supreme Court of Canada decision has overturned policy regarding the authority of responsible authorities to exercise discretion to limit the scope of the project for EA. This will have the tendency to encourage duplication where federal EA overlaps with that of other processes. A recent bill before Parliament may establish the overturned policy in law.

Alignment with Project Planning Cycle and Other Tools

The birth of EA was associated with the awakening of society in the 1960s and 1970s to the need for environmental considerations when planning projects. Since that time, society has passed environmental laws, developed environmental standards and codes of practice, and developed a range of tools that included EA, strategic EA, environmental management systems, environmental protection plans, and environmental guidelines. With that has come some four decades of experience. Initially, EA was the quick fix for project planning in the absence of other tools. However, in many jurisdictions, including Canada, the role and need for EA has diminished, not eliminated, but rather replaced by other tools like laws and associated standards and permits. It is argued that in Canada, the administrators of EA and legislators have not recognized that the need for and scope of EA has diminished.

The Road to Recovery

Parliamentary Review

In 2010, *CEAA* will be subject to a parliamentary review. As of January 2010, the government of Canada has been silent on how and who will do the review, and whether there will be any engagement of the public and stakeholders. The current government has been less communicative with stakeholders. For example, the Regulatory Advisory Committee on *CEAA* comprising stakeholders that has functioned since *CEAA,* passed into law in 1992, has not been invited to its semi-annual meeting with the Canadian Environmental Assessment Agency for two years. Clearly, the government will need to engage stakeholders to discuss and hear of the problems associated with the implementation of *CEAA*.

It is the considered view of the author that the government must persist in its effort to improve the administration of *CEAA*. At the same time, it should not squander the opportunity afforded by the parliamentary review to consider the fundamental flaws of the legislation and set the course for a complete overhaul of EA legislation in Canada. The author recommends the following for consideration.

Establish a National Framework

There needs to be a national framework for EA in Canada. The federal government needs to work with provinces, territories and other jurisdictions to establish a national framework for EA that has equivalency and reciprocity between jurisdictions, and allows for substitution. The fundamental objective will be that EA will be the same irrespective of the jurisdiction and authority conducting it. The framework must facilitate the achievement of "one project, one assessment." It should enable jurisdictions to adopt the national framework applied universally in the country.

Fundamental to this, the federal government should make every effort to get out of the business of assessing projects that are the jurisdiction of others. To that end, it should only conduct EA when the federal government is the proponent, where no other jurisdiction has authority, or perhaps where international trans-boundary environmental effects may occur. The success of this approach will require a change in triggering of environmental assessment. The federal government should not trigger an EA when it is issuing a permit or authorization, or providing funding or transferring land to facilitate the project.

A simple list-based approach to deciding which projects require assessment and at what level, analogous to the approach of World Bank, is a simpler approach to this decision. Governments should waste no effort on determining whether there is a trigger for an EA or on who should do the assessment of a project—this practice is of no benefit. The list must include projects that warrant EA and should be respectful of the existence of other tools for the achievement of sustainable development including policy, strategic EA, legislation, guidance, environmental management systems, codes of practice, and best management practices.

Deponents of the suggestions herein will argue that in a complex federation like Canada, this is not possible to achieve. There are particular complexities related to jurisdiction and the un-extinguished rights of Aboriginal people as protected by the *Constitution Act*. The key to success will be in the adoption of a national framework that will consistently lead to the one assessment irrespective of who administers it. The federal government will need to play a leadership role by stepping back from

duplicating the efforts of other jurisdictions and stepping forward to negotiate a national framework that will limit duplication, and readily adopted by all.

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Disclaimer

The views expressed in the paper are solely those of the author.

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