

Substitution in Action – Case Studies from British Columbia

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Introduction

Due to the structure of Canada's constitution, there is significant overlap between federal and provincial jurisdictions with respect to the regulation of environmental matters. This means that environmental assessments (EAs) are often required at both the federal and provincial levels for a single project, which can result in duplication of efforts and process inefficiencies. As a means of addressing the challenges of multiple assessment processes, British Columbia (BC) has been a long standing advocate for the one- project-one-assessment principle, defined by the following characteristics: a single project description provided by the proponent; a single comprehensive terms of reference/information requirements for the EA; a single engagement process for the public and government experts; a fully integrated engagement process for Aboriginal groups; a single application by the proponent; a single comprehensive assessment report; and, a single set of timeline requirements. Rationale for the one-project-one-assessment principle is well documented, and its most compelling benefits are experienced by the public, Aboriginal groups and proponents. It ensures a single contact point for the public when obtaining information, participating in the process, and understanding how input has been considered by all jurisdictions. Similarly, a single process allows Aboriginal groups to focus their efforts and resources, and not be repeatedly required to engage multiple agencies at both federal and provincial levels for the same project.

Events of recent years have allowed BC to implement the one project-one assessment principle. In 2012, the federal government introduced the *Canadian Environmental Assessment Act* (CEAA 2012), granting the Federal Minister of Environment authority to approve, where both a federal and provincial EA is required and a province requests it, substitution of the provincial EA process for the federal one¹. A 2013 Memorandum of Understanding (MOU) between Canada and BC sets out the administrative framework for BC to request a substituted EA process, and for facilitating the implementation of the CEAA 2012 substitution provisions in an efficient and timely fashion². Building on earlier BC-Canada agreements that facilitated cooperation between the jurisdictions in conducting EAs, the MOU delegates certain procedural aspects of the federal government's duty to consult with First Nations³ to BC, and outlines the contribution of relevant expertise by federal agencies to a substituted EA process.

¹ CEAA12 substitution provisions, Ss. 32-36: <http://laws-lois.justice.gc.ca/eng/acts/C-15.21/page-5.html#h-18>

² Link to 2013 Canada-BC Memorandum of Understanding: http://www.eao.gov.bc.ca/EAO_CEAA.html

³ First Nations is a term used to describe Aboriginal groups that are not Metis or Inuit.

Each jurisdiction retains its EA decision making authorities at the completion of the provincial EA process.

BC's Environmental Assessment Office (the EAO) is the body responsible for the neutral administration of the *BC Environmental Assessment Act* (BCEAA)⁴ and oversight of EA processes in the province. From the EAO's founding in 1995 until the end of 2016, 298 projects have entered BC's EA process, 59 of these after the introduction of the CEAA 2012. Since CEAA 2012, 58 percent of all BC projects have required both provincial and federal EAs, and 37 percent of all projects that trigger a federal review in Canada have been located in BC.⁵ This paper reviews BC's experience with substitution to date, how the substitution process has developed, and what has been learned from early experience.

BC's Experience with Substitution

The Substitution Process

BC's history of cooperating with the federal government on EAs placed it in an ideal position to pilot the EA substitution process that was authorized under CEAA 2012. So far, the EAO has successfully sought permission for substitution from the federal Minister of Environment for 14 projects, three of which have completed the assessment process. This early experience with substitution has led to development of the following model for the process.

The 2013 MOU was successful in establishing an operational framework for substitution, and out of this three distinct phases have developed to guide the process. During the first phase, **pre-substitution**, which occurs before substitution is requested, the EAO and the Canadian Environmental Assessment Agency (the Agency) work together to determine whether a project is suitable for substitution⁶. This early dialogue helps the agencies reach agreement on a number of issues, including: the scope of project, the scope of assessment, and the extent and type of Aboriginal consultation required. Best practices have been established to ensure that a decision to substitute an EA coincides with the Agency's determination that a federal EA is required. The pre-substitution phase also allows the Agency and EAO to discuss whether there are potential transboundary effects, or if a project is more suitable for a panel process. (Under CEAA 2012, substitution is not an option when a federal panel is required⁷).

⁴ Link to BCEAA: http://www.bclaws.ca/civix/document/id/consol14/consol14/00_02043_01

⁵ Source: BC Environmental Assessment Office Project Information Centre (e-Pic)

⁶ Under CEAA 2012, substitution is available only for designated projects where the responsible authority is the Agency. Designated projects where the National Energy Board or the Canadian Nuclear Safety Commission is the responsible authority are not eligible for substitution. In addition, CEAA 2012 specifically disallows substitution for projects undergoing a panel review. Substitution may also not be appropriate when: a proposed project is located primarily on federal lands, or considerable trans-boundary effects are anticipated. However, the fact that a proposed project is located on federal land or has potential transboundary effects does not mean substitution cannot be granted.

⁷ The Minister of the Environment may refer an EA to a review panel (a group of independent experts appointed by the Minister to conduct the EA) if the Minister is of the opinion that it is in the public interest to do so. <http://ceaa-acee.gc.ca/010/type5index-eng.cfm>

Requests for substitution are made public by both the EAO and the Agency, and the Agency uses its initial public comment period to seek input on the substitution request⁸.

The second phase is **conducting the substituted EA**. Once substitution has been approved by the federal minister, the EAO conducts the assessment following its standard process. A key feature of all EAs in BC is the use of a technical working group (WG). Representatives from Aboriginal groups and federal, provincial and local governments are invited to join the WG to provide technical advice to the EAO. The WG also comments on the information requirements for the EA, the proponent's application, the draft assessment report prepared by the EAO, and the Certificate conditions proposed by the Province. Once substitution is authorized, federal agencies remain actively involved in the assessment process and participate in the WG. While the Agency itself does not normally have representatives on the WG, it is kept well informed throughout the process and is well positioned to assume its role in the decision-making phase. The Agency also provides guidance, as needed, throughout the EA, a role that was particularly important during the early days of implementing the substitution process, coinciding as it did with CEAA 2012, the then new federal act.

The third and final phase of a substituted EA is the **referral and decision-making** phase. Following the EAO's completion of the assessment process, the Agency takes final steps to complete the referral for decision. As discussed, both organizations recognize the importance that coordination and information-sharing throughout the assessment play in the Agency's ability to successfully fulfill its role. A fundamental characteristic of the model is that, while the EA follows the provincial assessment process with the Agency's support, there is recognition throughout that the federal minister makes an independent decision when the EA is completed, and that the substituted process must meet all federal requirements. The broad scope of BC's assessment process enables the EAO to ensure that all matters of federal interest can be incorporated into a provincial assessment.

Under the current substitution model the federal government's consultation obligations are delegated to BC, with two important exceptions. The federal government, through the Agency, determines who should be consulted during the EA process and, at its conclusion, determines whether the consultation has been adequate. The EAO continually seeks to improve its methods and processes for engaging with First Nations and Aboriginal groups and, as indicated in the discussion below, substitution has so far played a positive role in achieving this goal.

Assessments Completed and Lessons Learned

The following are overviews for the first three projects to have successfully completed the substituted assessment process.

⁸ During its initial public comment period, the Agency posts background information for the project on its website, and invites public to provide input on whether a federal EA should be conducted and, if substitution has been requested, whether substitution should be granted.

LNG Canada Export Terminal Project⁹: LNG Canada is a proposal to develop a Liquid Natural Gas (LNG) plant and associated marine terminal in Kitimat, BC, to export LNG to Asian markets. BC requested substitution for this project under CEAA 2012 in March 2013, and was granted this request in May 2013. Canada and BC both reached a decision on the project on June 17, 2015

LNG Canada represented a test case for the substitution process in Canada, with the EAO and the Agency navigating both the new CEAA 2012 and federal and the provincial substitution processes for the first time. While developing the substitution model, both governments were able to identify opportunities for improving their own EA processes. All federal and provincial legislated timelines were met during this assessment, and the EAO engaged directly with the appropriate federal departments to ensure that all requirements for the federal decision making process were met. BC consulted with First Nations and Métis¹⁰ (the latter on behalf of Canada only), and assessed the impacts on current use of lands and resources by all Aboriginal groups.

Woodfibre LNG Project¹¹: Woodfibre LNG is a proposal to construct a small-scale LNG processing and export facility near Squamish, BC. A request for substitution under CEAA 2012 was granted for the project in February 2014. BC issued a certificate for the project in October 2015, and Canada, in March 2016.

The proposed project site is located within Squamish First Nation's asserted traditional territory. Squamish First Nation and the proponent signed an agreement in 2014 allowing the First Nation to conduct its own review (also known as the Squamish Process). Upon completion of the Squamish Process, the company committed to the 25 conditions imposed by Squamish First Nation, and design changes were made to the project to satisfy these.

The Woodfibre EA process demonstrated that the substitution model is able to not only ensure that all federal and provincial obligations to engage and consult with Aboriginal groups are satisfied, but that it has the flexibility to adapt to alternative approaches to engaging with First Nations, as they arise. It also enabled the current federal government, for the first time since introducing its interim principles¹², to assess greenhouse gas emissions from a proposed project.

Kemess Underground Mine Project¹³: Kemess Underground Mine is a proposal to construct and operate an underground gold-copper mine, located approximately 250 kilometres (km) northeast of Smithers and 430 km northwest of Prince George, BC. The EAO's request for substitution for the project

⁹ Link to EAO webpage for LNG Canada project: <https://projects.eao.gov.bc.ca/p/lng-canada-export-terminal/detail>

¹⁰ The Métis are an Aboriginal group recognized in the *Constitution Act* of 1982. British Columbia currently does not recognize a legal obligation to consult with Métis people in BC.

¹¹ Link to EAO Webpage for Woodfibre LNG: <https://projects.eao.gov.bc.ca/p/woodfibre-lng/detail>

¹² "...The following principles are intended to provide greater certainty as to how the Government of Canada will be guided in the application of its discretionary decision-making authorities for projects being assessed during the review of environmental assessment processes: ... 5. Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed..." *Government of Canada Bulletin: "Government of Canada Moves to Restore Trust in Environmental Assessment"*, January 27, 202

¹³ Link to EAO Webpage for Kemess Underground Project: <https://projects.eao.gov.bc.ca/p/kemess-underground/detail>

was approved by the federal Minister of Environment in April 2014, and both Canada and BC reached a decision for the project in March 2017.

During the Kemess project EA, the EAO invited the public to comment on the draft assessment report and the draft conditions for the Certificate, making this the first ever public comment period to be held for a draft BC assessment report. Consulting on draft assessment reports is consistent with the CEAA approach to conducting EAs, and the introduction of the practice into the BC model is an example of how substitution is promoting innovation across government levels. The EAO also worked collaboratively with the Tse Keh Nay First Nations¹⁴ throughout the EA, and Tse Keh Nay representatives participated in drafting sections of the project's assessment report that specifically discuss impacts on Aboriginal interests.

Conclusion

Since it was introduced with the CEAA 2012, substitution has proven to be an effective tool in BC. It achieves all the characteristics of the one-project-one-assessment principle identified above. Substitution strengthens the rigour of the EA process by integrating federal and provincial requirements, and addresses all issues in one process while retaining separate decisions. It creates a single conversation with the public, agencies at every level of government, and Aboriginal groups, while enhancing their consultation opportunities and reducing their process burden. It reduces duplication of process and the resulting administrative burden on all participants. It also increases the certainty of timelines by minimizing delay between federal and provincial decisions. An added benefit is that it supports innovation within both the federal and provincial processes and, as the substitution process matures, more opportunities for future innovation will likely be identified.

¹⁴ Kemess Underground Mine project is located within the traditional territory of the Tse Keh Nay First Nation.