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Expert report on environmental assessment gives rise to more uncertainty

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In this Update

On April 5, 2017, the Expert Panel for the Review of Environmental Assessment Processes in Canada released its Final Report entitled *Building Common Ground: A New Vision for Impact Assessment in Canada*. This Update outlines the Expert Panel's recommendations and their potential impact on environmental assessments and the regulatory process. It also examines the implications of the recommendations on the competitiveness of Canada's resource industries.

Background

On August 15, 2016, the Minister of Environment and Climate Change established an Expert Panel (Panel) to review federal environmental assessment processes in Canada. This review was predicated on the Liberal government's belief that the Canadian public had lost confidence in the environmental assessment process under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). Among other things, the Panel was tasked with considering how public confidence in environmental assessments could be restored.

The Panel consisted of four individuals: Johanne Gélinas, an environmental consultant and the former Canadian Commissioner of the Environment and Sustainable Development; Doug Horswill, a former executive at Teck Resources Ltd.; Rod Northey, an environmental lawyer at Gowling WLG; and Renée Pelletier, the managing partner at Olthius Kleer Townshend LLP, a firm well known for its representation of Aboriginal groups in Canada.

Between August 2016 and April 2017, the Panel visited 21 cities across Canada, received 520 written submissions, held workshops and dialogue sessions with 1,035 individual participants and heard 397 in-person presentations. It released its report *Building Common Ground: A New Vision for Impact Assessment in Canada* [PDF] on April 5, 2017. The public has been invited to submit comments on the Panel's report until May 5, 2017.

Panel's recommendations

Despite the Panel's belief that it is "not proposing the creation of something entirely new," the Panel has proposed fundamental changes to the way that environmental assessments are conducted in Canada. Among other things, the Panel has recommended changes to the

following:

- the purpose and scope of environmental assessment (which the Panel believes should be changed to "impact assessment" to reflect a broader consideration of all positive and negative impacts of a proposed development on the well-being of Canadians);
- the process for assessments (which the Panel believes should commence very early in a project's development before most important decisions have been made, and should involve collaborative multi-stakeholder committees that seek to achieve consensus on all procedural and substantive issues that arise during the assessment);
- who is allowed to participate in the assessment (essentially, anyone who expresses an interest in the project);
- who conducts the assessment (a new Impact Assessment Commission or "IAC");
- who makes the ultimate decision on the project (the new IAC, with a right of appeal to the Governor in Council); and
- the test for a project to proceed (instead of the current "significance" test, the Panel proposes that a project should be assessed against "sustainability criteria" to ensure that the project will result in a "net benefit" to sustainability).

In our view, many of the Panel's specific recommendations are sound and would improve environmental assessments. These include the following:

- increasing the capacity of federal agencies to ensure that they participate effectively in environmental assessments;
- expanding the informal options for the public to participate in environmental assessments, such as through open houses and workshops;
- requiring all information generated during environmental assessments to be accessible to the public through an online registry, and also posting information about post-construction monitoring and enforcement to the registry;
- allowing the regulator to compel expertise from federal scientists and retain external scientists to provide technical expertise;
- requiring all environmental assessment decisions to include clear reasons that allow members of the public to understand the rationale for the decisions;
- encouraging more collaboration between the proponent, governments and interested parties early in the regulatory process through collaborative multi-stakeholder committees;
- revising the legislation to allow conditions in Decision Statements to be amended; and
- encouraging greater use of regional and strategic environmental assessments, which could help focus project-specific assessments on the specific impacts of the project being

considered.

Some of the Panel's other recommendations, however, are unworkable in our view and would introduce considerable uncertainty into the regulatory process. These recommendations include the following:

- Changing the ultimate approval test from "significance" to "sustainability," combined with a transfer of decision-making responsibility from government to independent Commissioners, would introduce considerable uncertainty into the outcome of the environmental assessment process. As the Panel itself notes, "sustainability" is a term that means different things to different people. For example, the Joint Review Panel for the Lower Churchill Falls project interpreted sustainability to mean that a project should result in net environmental, social *and* economic benefits.[1] For most projects, that is an impossible standard as there are trade-offs between environmental impacts and social and economic benefits. In fact, the entire concept of sustainability, as first enunciated in *Our Common Future*,[2] understood sustainability to be a balancing of social, economic and environmental interests. The Panel recommends that "objective" sustainability criteria be developed for each project, considering matters such as "Are the benefits and costs of the project fairly distributed?" In our view, these types of questions are inherently subjective. Especially given that project proponents will not know who will make the ultimate decision on their projects, or what specific criteria will be considered, adopting a "sustainability" test for project approval would create considerable uncertainty regarding the outcome of any environmental assessment.

- The Panel supports the current objective of "one project, one assessment," but recommends determining the specific approach to federal-provincial co-operation on a case-by-case basis as part of the planning process for each project. In addition, while the Panel recommends keeping "substitution" of a provincial review process as an option for co-operation, it suggests that the requirements for substitution should be strengthened to ensure that the federal government's principles are upheld (and federal regulators and experts are involved), and that Indigenous groups should be actively involved in any substitution decision. This approach would make it more difficult to predict the nature and extent of the environmental assessment process in advance of developing a project.

- While the Panel recognizes the importance of time limits in imposing discipline in the environmental assessment process and providing certainty to proponents, it recommends that project-specific timelines be developed for each stage of the project review process based on the individual circumstances of each project. This approach would reduce the ability to predict the timing of the environmental assessment in advance of developing a project.

- The Panel makes extensive reference to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and recommends that in order to reflect UNDRIP, all Indigenous peoples who are affected by a project should have the right to provide or withhold their consent. If consent is withheld, a review panel will then determine whether that decision was "reasonable." If an Aboriginal group withholds consent and a review

panel finds that decision to be reasonable, the project will not be allowed to proceed.

This recommendation is inconsistent with Canadian law, which is that Aboriginal groups do not have a veto over project development.[3] While proponents and governments should consult with Aboriginal groups with the *objective* of obtaining the group's consent, Aboriginal groups should not have the power to veto projects that are in the overall public interest of Canada. Adopting this recommendation would introduce considerable uncertainty into any resource development in Canada, particularly for linear projects that have the potential to affect hundreds of Aboriginal groups (like some major pipelines and transmission lines). In addition, the practical result of this recommendation would be to significantly and disproportionately increase the leverage of Aboriginal groups in negotiating Impact Benefit Agreements.

While 100% consensus is a goal that parties should strive towards, failure to reach consensus should not mean that a project cannot proceed if it is otherwise in the Canadian public interest.

- The other issue with the Panel's recommendations from an Aboriginal law perspective is the Panel's recommendation that the IAC should be an agent of the Crown responsible for substantive Crown consultation and accommodation with Aboriginal groups. At the same time, the Panel recommends that the IAC should be a quasi-judicial tribunal. These two functions are likely incompatible. As a quasi-judicial tribunal, the IAC would be required to treat all parties impartially and fairly, and it would need to ensure that it complies with all requirements of procedural fairness. Consistent with *Taku River*,[4] the regulatory process may be sufficient in some cases to satisfy the duty to consult. To the extent that the IAC is also responsible for conducting direct consultation with Aboriginal groups, however, the IAC may owe Aboriginal groups a fiduciary duty and would need to treat them differently than other stakeholders. In our view, it would likely be impossible for the IAC to adequately fulfill these two different roles.
- The Panel recommends transferring responsibility for preparing the Environmental Impact Statement from the project proponent to the IAC. While the Panel notes that this would reduce the perception of bias in environmental assessments, it would introduce further uncertainty into the environmental assessment process from the perspective of project proponents. Today, the proponent has control over the timing of environmental studies and can ensure that the consultant it selects has sufficient capacity, resources and qualifications to conduct the work. It would lose this control under the Panel's proposal. In addition, the Panel's approach would only work if the IAC was sufficiently resourced, which would require significant funding from the federal government. If that funding were to be cut in the future, or if the IAC's actual costs were to exceed its funding, the IAC would be unable to perform its functions and all projects subject to environmental assessment would be jeopardized.
- The Panel recommends eliminating the "standing test" in CEAA 2012 because it believes that excluding individuals or groups from the assessment process erodes any sense of justice and fairness. This is one of the common criticisms of CEAA 2012, and arguably one

of the main reasons that members of the public have lost confidence in the environmental assessment process. In our view, however, allowing expanded opportunities for participation in environmental assessments does not require eliminating the standing test. For example, the Panel suggests including new processes into the early phases of environmental assessments such as open houses. These should be open to anyone who wishes to attend. However, if a hearing is required at the end of the process (as the Panel contemplates for any issues that cannot be decided by consensus of the parties), some form of standing test is needed to make the hearing workable. For example, if all 15,000 individuals who submitted letters of comment in the Shell Jackpine Mine Expansion hearing (some from as far away as Belgium) had been allowed to cross-examine Shell's witnesses and present witness panels, the hearing would still be in progress. That outcome is not feasible, nor is it in the public interest of Canadians. In addition, parties with genuine interests in a project should not be drowned out in a hearing by allowing too many parties to participate that do not have a genuine interest in the project. In our view, there needs to be some form of standing test in hearings to make the process work as it is intended.

The Panel's recommendations misconstrue the purpose of environmental assessment

Canada's regulatory process, including environmental assessments, must reflect the objective of *regulation*, as opposed to *prohibition*, of resource development. Resource development is perfectly legal in this country, and is a significant part of Canada's economy. Before any project proposal can be developed, most resource projects require mineral rights which the developer must acquire from the government (often at a significant expense). It is a well-established common law principle that a right to mines and minerals includes the right to do all things necessary to work and recover the minerals.[5] As a result, once mineral rights have been acquired, the developer has a legitimate expectation that it will be allowed to develop the resource. All Canadians should similarly have an expectation that once mineral rights have been issued, the resource will be developed for their benefit. This does not mean that the mineral rights can be developed no matter the consequences, but absent extraordinary circumstances the focus of the regulatory process should be on *how* the resource is developed, not *whether* it is developed. Similarly, environmental assessments should be about informed decision-making in furtherance of good regulation.

The Panel's approach to consensus-based decision-making and evaluating projects against sustainability criteria does not give meaningful consideration to the legitimate expectations of mineral rights' holders (and those of the Canadian public) and the purpose of environmental assessment.

Implications of the Panel's recommendations on Canadian competitiveness

In our experience, many of the companies that propose resource developments in Canada also have investment opportunities in foreign countries and must evaluate their Canadian projects against other investment options. To do so, they need to understand the "rules of the game" in each jurisdiction to understand what is required and how long it will take to obtain regulatory approvals, and the ultimate risk that approvals will be denied at the end of

that process. Canada needs to ensure that its environmental assessment process is robust and can be relied upon by the Canadian public. But any reforms should also consider the impacts to the competitiveness of Canada's resource industries, which are a significant part of the Canadian economy. Ignoring the economic leg of the sustainability stool is not helpful to informed decision-making.

In our view, many of the Panel's recommendations are sound and would improve the current environmental assessment process. Others, however, create unacceptable risk because of the level of uncertainty they inject into a process that is already thought to be broken in international markets.

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[1] Lower Churchill Hydroelectric Generation Project Joint Review Panel, Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project (August, 2011) at 354.

[2] Brundtland et al., *Our Common Future, the Report of The World Commission on Environment and Development*, (Oxford University Press: Oxford, 1987).

[3] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, at 48.

[4] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550.

[5] *Borys v. Canadian Pacific Railway*, [1953] A.C. 217 (P.C.).