

April 10, 2017

The Expert Panel mandated by the Minister of Environment and Climate Change to review federal environmental assessment processes has now delivered its report, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Report). The Report proposes major changes to the existing environmental assessment process. This bulletin highlights key aspects of the Report and identifies some unanswered questions raised by the Report.

From "environmental assessment" to "impact assessment" and from significance to sustainability

As a starting point, the Panel would shift the focus or purpose of an assessment in two main ways. First, the assessment process would move beyond the bio-physical environment to encompass all impacts likely to result from a project, both positive and negative. As such, what is now "environmental assessment" would become "impact assessment" (IA).

Second, the Panel would make sustainability central to IA. IA would provide assurance that approved projects, plans and policies contribute a net benefit on five pillars of sustainability: environmental, social, economic, health and cultural well-being. In doing so, IA should be evidence-based and contain the best science.

Overall, the Panel finds that "an effective environmental assessment process should achieve two essential outcomes: pave the way for regulatory approval of accepted projects, and facilitate a proponent's acquisition of social license."

An entirely new decision maker and consensus-based process

To remove what the Panel considers to be perceived notions of bias that currently exist with the National Energy Board (NEB), the Canadian Nuclear Safety Commission, and project proponents, the Panel would create a single, new Federal IA authority – called the Impact Assessment Commission (IAC) – to be empowered to decide whether a project would make a positive contribution to Canada's future well-being and, on that basis, approve or deny a project's application. This quasi-judicial tribunal would encourage a culture of consensus and cooperation. Members of Indigenous groups would play a central role in the IAC.

One of the Panel's most significant changes would be to implement a three-phased IA process consisting of: a Planning Phase, a Study Phase and a Decision Phase. Notably, each phase would be led by the IAC (not the project proponent) and would be conducted through a multi-party in-person engagement process led by an appointed Commissioner, and structured around a "project committee" and a "government expert committee". The Federal

Government would fund the IA process (including providing generous capacity and participant funding) and details on timing would be developed in each phase – not in advance, and not in totality.

- The Planning Phase would be a major change from current practice and is intended to bring parties to face-to-face meetings and open up discussion on proposed activities early, before critical elements are decided.
- The Study Phase would resemble the assessment process of today, but the key IA document – the Impact Statement – would be prepared by the IAC using a team of consultants and experts retained by the IAC using data and studies provided by the proponent, Indigenous groups and others and verified by the IAC's Chief Science Officer. At the end of the Study Phase, any important issues of non-consensus would be referred to a Review Panel for a hearing. The Review Panel's responsibility would be to "make a conclusion on each issue, and to make a decision on the overall net benefit of the project for present and future generations, taking into account all information on each pillar of sustainability."
- In the Decision Phase, the decision on the overall contribution of the project to sustainability would rest with the IAC (where there is consensus) or a Review Panel after conducting a hearing on important issues of non-consensus. Because "elected officials must have the ability to provide a final say" decisions made by the IAC could be overruled on appeal to the Governor in Council (GIC).

Facilitating reconciliation

In the Panel's view, it is in Canada's national interest that IA facilitates reconciliation between Indigenous and non-Indigenous people. Indigenous peoples should be included in decision-making at all stages of IA, in accordance with their own laws and customs and IA should assess impacts to asserted or established Aboriginal or treaty rights and interests across all components of sustainability.

With regard to impacts, the Panel acknowledged a role for private Impact Benefit Agreements (IBAs) between proponents and Indigenous groups. However, Indigenous groups should be aware of the full impacts of a project through the IA process before negotiating an IBA.

The IAC would be accountable for the duty to consult and accommodate, for conducting consultation and for assessing the adequacy of consultation. The fulfilment of this duty would occur under a collaborative framework developed in partnership with impacted Indigenous groups. The duty to consult would be integrated into the IA process starting at the beginning of the Planning Phase.

Indigenous consent

The Panel believes that the new IA regime should be fundamentally based on collaborative consent, with Indigenous peoples on par with other levels of government and that "all Indigenous peoples who are impacted by a project have the right to provide or withhold consent. While Indigenous peoples have the right to say no, the Panel believes this right must be exercised reasonably." However, "the absence of appropriate accommodation measures should be deemed an acceptable reason for the withholding of consent." A Review Panel would determine the reasonableness of withholding consent.

Under this new process, it appears that Indigenous consent would be requested after a project has passed the sustainability test, but before approval is granted. The Report does not discuss whether Indigenous consent is required, or should be requested, for the IAC to deny a project supported by one or more Indigenous groups.

Enhanced public participation opportunities

While acknowledging that it is "vitaly important" for proponents to have guidance on how long assessment processes will take, the Panel also finds that it is essential that IA processes "not sacrifice inclusiveness in the pursuit of efficiency." The Panel found that the adoption of the "standing test" by the NEB has greatly hindered trust in the assessments the NEB conducts.

IA should reflect more inclusive processes that "do away with questions of standing or interest while still allowing those most affected to have a great deal of say." Public participation opportunities should include more in-person engagement, held in potentially affected communities, and must be supported by adequate funding, time and information. Standing should only be considered, by some measure, on appeal to the GIC.

In all cases, participation should begin early in project planning, before any benchmark decision is made, and should continue throughout the process into the monitoring and enforcement phases.

Unanswered questions

How much will it cost and is the Federal Government prepared to pay for it?

While the Panel acknowledges that the proposed IA process "will cost more" than is spent today on environmental assessment, the question is how much more and is the Federal Government prepared to pay for it? For example, the Report quoted an annual capacity cost of CA\$4.8 million to CA\$5.4 million for the Athabasca Chipewyan First Nation and Mikisew Cree First Nation's consultation staff. If that figure is conservatively applied to hundreds of Indigenous groups in Canada, the funding required for Indigenous participation in IA alone would run into the billions of dollars. Layered on top of that would be increased funding for public participation and the expense of having the IAC lead each phase of the process for hundreds of IAs each year. The proposal appears to recommend a massive shift in costs from project proponents to the Federal Government. Establishing public trust will come at immense public cost.

How long will it take?

The Panel concludes that "the time from project concept to final decision could and should be shorter than what is experienced today." Time estimates and budgets would be set at each phase of the process, but proponents would not know how long the overall process might take at the outset. When combined with the uncertainty of the result, compounded by a political review by way of appeal to the GIC, proponents of major projects may be reluctant to risk hundreds of millions in project development costs on this type of IA process.

What does this mean for the NEB?

A separate Expert Panel process has been carried out to consider the NEB's structure, role and mandate. That Panel's report is due to the Minister of Natural Resources by May 15, 2017. The process envisioned in the IA Report does not discuss what the NEB's ongoing role might be, but to achieve the IA Panel's vision, the NEB's public interest and oversight role would likely have to be significantly diminished or eliminated. The answer to this question may become clearer when the NEB Expert Panel report is released.

What does the transition process look like?

It would take time to develop and implement the Panel's vision for the new IA process resulting in a potentially lengthy transition period. The Report does not address whether or how projects that start under the existing assessment process could be transitioned to the new IA process. As recent legislative and policy changes have demonstrated,

transition provisions must be carefully considered and fairly applied. Proponents of existing projects may want to get through the existing assessment process and commence construction to avoid being subjected to the sea change proposed by the Panel.

Next steps

The public is invited to provide comments on the Report to the Minister of Environment and Climate Change by May 5, 2017. The Federal Government will engage with Indigenous groups and stakeholders during the spring and summer of 2017 and then consider options for potential legislative, regulatory or policy changes in the fall of 2017.

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