

## **Toward Next-Generation EA — Presentation to Expert Panel, Review of Environmental Assessment Processes — Montreal, QC 26 October 2016**

Thanks for opportunity to speak.

lawyer in Ontario and Nova Scotia; member of national caucus on environmental planning and assessment of réseau canadien de l'environnement / Canadian Environmental Network; participated in May 2016 EA Summit; and co-author / author of some EA papers over the years. Caucus plans to submit more detailed written submissions.

have glimpsed inside real-live EAs over the years,; am long-time observer of federal EA especially, with experience with the legislative process in the environmental area including CEAA.

Slide 2 - Can't go back

know from both direct experience and familiarity with the record, the obstacles to putting in place a strong federal EA regime.

but simply must take advantage of this opportunity to suggest fundamental changes to a fatally flawed system.

while cannot continue with current regime, also cannot simply go back to older regimes built on some of the same principles. as Professor Tollefsen wrote in *Policy Options*, CEAA 2012 is “a tear-down, not [merely] a reno” of federal EA. But must also consider a serious renovation of parts of the basic structure of federal EA that go back to CEAA 1992 and amendments to it.

example from “established centre” of federal EA law: in 2001 and 2002, worked to establish new purposes and a new “central test” for the CEAA:

Slide 3 — Purpose (2003 amendments)

success in convincing Parliament to make an amendment, adding a new, first-listed purpose of the Act:

“to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects.”

no such purpose statement had been in the Act previously.

it took public interventions to add this rather basic statement of purpose to the Act for the first time (the amendment did not come from the government of the day)

however ... perhaps the amendment was allowed to succeed because it was operationally harmless. The government would not allow another more fundamental, operational change to take place — a change that would have set us on a different course.

Slide 4 — Government not willing ...

proposed change was inspired by the work of Bob Gibson, University of Waterloo.

would have fundamentally altered the “central test” for the acceptability of a project — from allowing it to proceed as long as any “significant adverse environmental effects” could be “justified in the circumstances,” taking into account mitigation measures, to new test **requiring that projects make positive contributions to sustainability**.

But government of the day was not willing to accept this kind of change — in fact, it was averse to it, to say the least.

today, largely still stuck with approving projects that are, at best, *incrementally* adverse (with all of the cumulative damage that entails)

— so the basic structure, and not merely the newer walls of CEEA 2012 — still needs work.

Slide 5 - From your mandate

[projected: From your mandate: “consider the goals of and purpose of modern-day environmental assessment”]

now we have that opportunity to renovate.

In light of your mandate to consider as a starting-point the very purpose of EA, let’s talk about purpose.

you are familiar with “Fulfilling the Promise” paper by professors Gibson, Doelle and Sinclair

authors lay out foundations for next-generation EA, starting with this core purpose of next generation environmental assessment: [also projected] “to **ensure that ... undertakings ... deliver the strongest feasible positive contributions to lasting wellbeing** (while **avoiding** significant adverse effects) ...”.

while there is much more to this new approach, suggest to you that can’t get it right if don’t get this core purpose right.

paper continues with an **integrated package** of necessary reforms to fulfill that purpose.

Slide 6 - New structures

Continuing with analogy of re-building foundation:  
consider challenges that your recommendations need to address head-on.

one is federal funding: how to ensure that new processes and bodies that will be needed in the shorter and long terms will be resourced through the system in Ottawa? question should not be left unaddressed in your report to government.

related challenge: federal processes and structures.

need strong recommendations in order to ensure that necessary machinery of government changes are made, for example to ensure authorities dealing with critical stages and functions of next-generation EA are **at arms-length and truly independent** of departments, agencies and the Cabinet. Such authorities must have authority — a recommendation that has been made again and again over the years — as well as being strongly-resourced and well-staffed.

If any question about need for arms-length relationships with other departments, note this:

second slide of Major Projects Management Office (MPMO) slide presentation to you begins with headline “Major Resource Projects are an Important Driver of Economic Growth.”

we also learn from that slide presentation that the same MPMO is “leading the interdepartmental work to support coordination of” the four reviews, including this one.

given that we have industry and growth promoters within the government, such as an office like MPMO that ought to be playing a neutral, coordinating role but apparently is not, then we need even more a legitimate arbiter that public can trust.

on another note about accountability in the federal government, the Commissioner’s regular reports on compliance with the Cabinet Directive on the Assessment of Policy, Plan and Program Proposals are helpful, but clearly that mechanism alone is not going to ensure that strategic EA is performed.

last week, following a webinar with CESD staff, a participant posed the question “what is your advice about ensuring better compliance with the Cabinet Directive?”

best (only) available staff reply was “apply the Directive.”

merely illustrates problem of status quo — unenforceable “rules”; no authority willing/able to enforce them

Slide 7 - Are we ready *now* to meet the challenges of sustainability?

A few points in an effort to link strategic and other levels of environmental assessment, the need for deliberative processes, and building trust, all in multiple jurisdictions:

badly need deliberative processes that start at an earlier stage, at a “higher tier” as it were, than project-level assessment.

perhaps in no policy area is deliberative democracy needed more than in decision-making about lands, resources and belonging. Much more than just “social licence,” it is about equity, fairness, reconciliation, need to build trust in the legitimacy of our institutions —>  
all of these things are about sustainability.

Mark Winfield, in paper submitted to you, emphasizes importance of legitimacy and trust. Peter Usher also writes about legitimacy in his submission on project-level assessment: “Without independent,

rigorous, fair, and transparent review, and without the necessary follow up actions and enforceable commitments, major projects struggle for legitimacy in the public eye.”

supportive of Peter Duinker’s submission that “Workshops, field exercises, and informal but semi-structured meetings are by far the best forms of public engagement in EA.” The modes of engagement he proposes will be particularly useful as we implement more deliberative processes at the strategic level in next-generation systems.

there is also role for an arms-length, quasi-judicial tribunal making project-level and perhaps other decisions, that are largely insulated from reversal at the political level.

a role for all of these mechanisms at different EA levels and at different stages of the process.

haven’t time to address assessment at multiple jurisdictional levels at length but might begin with notion that people want and need and aspire to similar things, regardless of jurisdiction;

their governments thus need to work together to provide the best assessment processes. maybe that helps give content to “upward harmonization.” Professors MacLean, Doelle and Tollefson paper on “Polyjural and Polycentric Sustainability Assessment” begins to address the legal issues; is now on-line.

Slide 8 - Next generation EA for the next generations

while we may have the *luxury* of not having to make the ultimate decisions about the structures we need and the conversations that must be held in order to create the most hopeful and substantial new EA regime possible, we all share the *responsibility* to recommend to the federal government the best reforms that will inspire those decisions.