Environmental assessment for the 21st century

Harry Swain,
Expert Panel on Environmental Assessment,
Nanaimo, December 14 2016

Greetings, Panel, and welcome to Vancouver Island. I'm sure I speak for many in thanking you for taking on this task, and all the travels, in the middle of a Canadian winter.

I bring you some comments from the front lines, as one who has chaired a joint federal-provincial panel. I have a number of observations on the process. These are summarized in the written memorandum earlier submitted, which is an edited version of some notes I made for the President of CEAA following the Site C Joint Review Panel. It focuses on some of the practical issues a panel faces when doing this kind of work. Needless to say, the memo and my comments today are my own, not those of colleagues on a long-defunct panel, or its sponsors.

Today I would like to focus on two topics: the way in which the Section 35 rights of First Nations were treated in the environmental assessment of Site C, and ways in which public participation can be better accommodated in these processes.

A preliminary comment. Our political servants (not masters) should never again allow important legislation to be buried in a thousand-page annex to a Budget bill. Among the critical things lost in 2012 were the requirement for proponents to be up-front about the need for, and alternatives to, the project at hand. Reinstating this would properly return project economics to the center of the debate. In the case of Site C, as well as the Lower Churchill and Conawapa projects, a good examination of costs and benefits would have obviated the need to study First Nations and environmental impacts at all, as these projects were financial stinkers from the start. I note in passing that all 3,500MW of hydropower under construction this month are seriously uneconomic, yet Environment Canada has published an astonishing paper calling for the rate of construction to be quadrupled between now and 2050.[1] The paper seems unaware of the Section 35 rights of indigenous peoples, as well, as they are nowhere mentioned.

I

And that leads to my first main point: it has been clear for years, most recently since the Supreme Court's decision on *Tsilhqot'in*, that indigenous peoples have extensive land rights that cannot be ignored, and that the tests for infringing on these rights are onerous.[2] A central part of environmental assessment must therefore be a consideration of any collision with the constitutional rights of native Canadians. In this respect, it would be more than useful if Parliament would play its neglected role in the "respectful dialogue" between the legislative and judicial branches of our government and set out some

[1] Environment Canada, *Canada's mid-century long-term low-greenhouse gas development strategy*, Gatineau, November 2016

[2] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257 and *R. v. Sparrow*, [1990], 1 SCR 1075 are leading but far from the only cases that have laid out new constitutional law.

ground rules for dealing with these issues.[3] It was shocking to me that in two applications for judicial review of the Site C decision, counsel for governments argued, and judges agreed, that these issues could not be considered and that recourse should be via civil suit—long after the transgressions happened.[4] Gosh, Ministers are not bound to observe the Constitution! It was equally shocking that the federal government, in publishing its decision in favour of Site C, did not give reasons for decision. This is something that you might recommend for inclusion in revised legislation.

Long before the courts dismissed the applications for judicial review, the Department of Indigenous Affairs declined the Panel's invitation to testify. Did the federal government, acting through the Department, consider it had a fiduciary obligation to defend aboriginal rights, and if so, what was its view of the claims of infringement that were being made by Treaty 8 adherents? If not, how was this important piece of evidence going to surface? As a former deputy minister of that department, I was dismayed to receive no answer. They declined to explain the federal government's views. Perhaps it was because they did not want to foreshadow a disgraceful argument that they knew they would be making in court; perhaps they were simply forbidden by the central agencies to take part. I do think that, along with all other federal line departments whose professional help was in general outstanding, including in laying out relevant public policy, DIA has an obligation here. Perhaps revised legislation could make it clear that all departments, including central agencies, have obligations to assist the EA process, and to answer questions from inquiries.

As a further comment on s. 35 rights and other aboriginal interests, it has become apparent that the present procedures are so rigid as to effectively prevent a proponent from making an amendment to his proposal in the middle of the process. When the problems of navigating the Douglas Channel became so apparent in the NEB hearings on the Northern Gateway pipeline, the possibility of accommodating native interests by switching the port from Kitimat to Prince Rupert was not picked up by the proponent. In the case of the Kinder-Morgan Expansion project, with its coastal terminal three bridges into Burrard Inlet, and all three local First Nations united in dismay about the risks entailed, the possibility of re-routing its final miles to Deltaport or Cherry Point was passed over. Now, there may have been other reasons for the corporate decisions. But for either, a change at that stage would have required starting the environmental assessment process all over. This is nuts. When the EA process identifies a better alternative, a proponent should not be penalized for taking it up. Law and regulation should not stand in the way of improved solutions, especially when they contain strong elements of accommodation and reconciliation.

The Panel has asked for views on the United Nations Declaration on the Rights of Indigenous Peoples, or UNDRIP. I have published skeptical comments on this high-minded, aspirational document elsewhere. Together with comments from Gordon F. Gibson, they are available on the University of Toronto Public

[3] Harry Swain, "Paths to reconciliation in a post-Tsilhqot'in world," *Can. Bus. Law J.* 58 (Dec. 2016): 313-24

[4] *Prophet River First Nation and West Moberly First Nations vs. Minister of the Environment and Minister of Forests, Lands and Natural Resource Operations and British Columbia Hydro and Power Authority*, 2015 BCSC 1682; *Prophet River First Nation and West Moberly First Nations v. Canada (Attorney General),* 2015 FC 1030

Policy website.[5] Suffice to say that, taken literally, its recommendations would be difficult to translate into Canadian law, would conflict with the Charter rights of other Canadians, and would endow one set of Canadians with rights ("free, prior and informed consent") not available to others. Electoral commitments aside, it is not a statement that leads toward reconciliation.

II

My views on participation stem from the essentially advisory remit of environmental assessment studies. I say essentially because although an arm's length panel, or group of officials, can be trusted in even less than ideal circumstances to array the facts about a particular project in a comprehensible way, they have no legitimacy to make final regulatory decisions. These properly belong to accountable people: to elected officials.[6] EA panels cannot observe, given the time and resources available, all the rules of administrative fairness of an independent tribunal like the NEB or the CNSC.

This means that the procedures used in public hearings can be a good deal less formal than those that lawyer-driven formal hearings apparently need to be. For example, the judicial inquiry into the Walkerton water fiasco, chaired by the Hon. Dennis O'Connor, was divided into two parts. One dealt with the facts of that particular case under rules of evidence, and with cross-examination by accredited interested parties, that were closely analogous to those used in a court of law. Who did what to whom and when? The second part dealt with the much more open-ended policy question of what should be done to prevent such catastrophes from happening again. Justice O'Connor dealt with this through an appointed Research Advisory Panel. [As Chairman, I had the best acronym of my career.] Policy issues were approached by commissioning expert background papers on each of the key questions, followed by their discussion at public meetings to which experts and the public were all invited. Everything was on the public record, no special interests were allowed to meet privately with the RAP, and in consequence a remarkable thing happened. All participants moderated their tone, dealt civilly with each other, and found a remarkable degree of consensus on many factual and some policy matters, thus allowing for concentrated attention on the most difficult and important issues. No time limits were imposed; discussions continued until all interested parties had their say.

Aside from commissioning issue papers, which we did not have time to do, we adapted O'Connor's procedures to the Site C hearings. No rigid time limits were imposed, and issues were pursued until all attendees had an opportunity to get their views on record. The Panel wound up with a rich record of testimony which informed its final report, and participants seemed to appreciate the opportunity to be fully heard.

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[5] http://www.atlas101.ca/pm/concepts/united-nations-declaration-on-the-rights-of-indigenous-peoples-undrip/.

[6] I disagree with Brian Lee Crowley, who argued last week in the *Globe and Mail* (9 December 2016 p. B3) that politicians should always content themselves with setting the rules and letting independent expert bodies make the decisions. Major project decisions are, as judges likes to say, "polycentric," requiring a balancing of many complex factors, and should therefore rest with politically accountable actors. But the balancing must always be within the bounds of the law and the constitution.

This is not a substitute for the detailed presentation and challenge of expert opinion and scientific reporting, where some form of cross-examination by contending parties is necessary. The challenge is to make this happen in less than geological periods of time, as the NEB discovered to its discomfiture. Their attempts to meet deadlines, whether self-imposed or not, were seen as cutting off debate on issues that various interest groups felt were important, either by limiting the agenda or the ability to cross examine.

For this part of a panel's hearings, the tactics employed by Justice O'Connor also merit examination. The number of parties allowed to cross-examine was kept low by requiring parties with similar points to coalesce, a matter that was enhanced by giving the inquiry decision power over possible cost contribution. The details were left to the sponsoring ministry, but that ministry would not act without a signal from the inquiry that such a subsidy would be in the public interest.

Thank you, Panel, for your attention. Immodestly, I recommend you read the brief earlier provided. It's even more fun.

WHAT I LEARNED FROM THE *SITE C* JOINT REVIEW PANEL:
Notes for the Environmental Assessment Review

Harry Swain
December 2016

This is an edited version of a memo prepared for the President of the Canadian Environmental Review Agency six months after the Joint Review Panel's work on Site C was concluded. The work of the Panel is long over and governments have rendered their verdicts on the Site C project. What follows are personal reflections. Although I have discussed these notes with a select few others, they are my notes, my conclusions, and no one else should be asked to wear them.

1 Context for environmental assessment

Environmental assessment as part of decision-making is barely two generations old. The contrast between today's punctilious and exhaustive, or at least exhausting, process and its complete absence when the first dam was built on the Peace was with us throughout. BC Hydro suffers from the reputation it gained in the 1960s for being high-handed, aloof, a servant of southwestern BC interests, and unforthcoming even with the most basic information. It is an item of faith in the Peace that many promises were made and none kept. It is certainly true that the Indian peoples of the Rocky Mountain Trench and the upper Peace valley were scandalously treated by Hydro and by both levels of government. Climbing out of this reputational swamp probably caused BC Hydro to cross every T, real or imagined, several times over in the present case.

In the decades since environmentalism first burst upon the country, around 1970, EA processes have become more and more baroque. Until very recently, it took years to hold hearings and come to decisions, in part because the EA process had become festooned with all sorts of non-environmental (unnatural?) considerations. Time, costs, and expectations ballooned; NGOs and lawyers feasted on the grants. In 2012, a federal government with little patience for environmental considerations or other peoples' views radically streamlined the process. In *CEAA 2012*, a complete statute hidden in the dark recesses of a Budget implementation bill despite having nothing to do with matters fiscal, radically cut back on the matters that could be discussed and the time available to do it. Critical chapters, such as the need for a project and alternatives to it, were deleted. The good news was that the feds were finally acting as if they had read the *BNA Act*. But its one-size-fits-all design meant that a large and complex project like Site C would be viewed through the same federal optic by the same-sized team and in the same number of days (225, including 30 for hearings) as a much smaller, less contentious project.

The government of BC shared a pro-development view with the federal government of the day. Neither had much patience with participatory democracy, nor evinced much interest in evidence when making important decisions. But Victoria is slower than Ottawa: it still has on the books the kind of expansive legislation that characterized the late 20th century. These two competing views of what EA is all about were awkwardly composed in a federal-provincial agreement that squared the circle by incorporating both sets. In consequence, in addition to the specific requirements of *CEAA 2012* which relate strictly to federal laws mandating specific management responsibilities for the biophysical environment, the Panel had to consider the "environmental, economic, social, health and heritage" effects of the project, as well as its purported effects on "asserted or established treaty rights and aboriginal rights." Short of settling the Palestinian question, it is hard to imagine some topic that could not be shoehorned into the process by an ingenious and passionate participant.

2 Conflicting expectations of governments and participants

In consequence of this history, there were differing expectations of what the Panel would do. The terms of reference were clear: governments wanted to have all the arguments for and against the project laid out and appraised in a way that would allow governments to take reasoned, or at least fairly safe, decisions. The public and to a degree the media seemed to feel, in contrast, that the Panel was a decision-making body; that at the least it would make sweeping overall recommendations that would heavily constrain the choices available to governments. In the initial press commentary there were complaints that we had not recommended the project proceed, or not. In fact we had been quite scrupulous in laying out the facts and arguments, and making recommendations on individual matters while refraining from usurping the proper domain of elected representatives.

Less clear was the policy view of the provincial government. Its *Clean Energy Act* of 2010 is a high-minded attack on greenhouse gases and state-owned enterprises, quite at odds with the present government's development-at-any-cost view. The Act required BC Hydro to meet specific GHG numbers, refrain from developing (or even doing research on) any energy source except large hydro dams, reserved all other supply possibilities to the private sector on grounds of its presumed greater efficiency, banned reliance on imports in supply forecasts, exempted Site C from review by the province's own Utilities Commission, and initially required BC Hydro to develop 3 GW for export. These nonsenses severely and unnaturally restricted BC Hydro's choices, and meant that the province would be making multi-billion dollar decisions in the face of seriously incomplete information. The province also forbade the rational inclusion of a tranche of gas-fuelled electricity on GHG grounds while pursuing like a moose in heat the dream of a vast LNG export industry.

The Panel was forbidden to conclude that provincial policy was self-contradictory, economically inefficient, or delusional. We did, in fact, manage to raise several of these issues en passant, and even made a few recommendations that might ameliorate their effects in later projects while avoiding direct attacks on legislation. These recommendations were of course rejected, but in one or two cases the provincial Environmental Assessment Office allowed as how they made sense, sort of.

More than a few participants were drawn to question BC's policies—about the use of natural gas, the *ex cathedra* prohibition of using the existing Burrard Thermal plant even for peaking, the so-called mandate to develop the full head of the Peace River, stripping the Utilities Commission and the Agricultural Land Commission of their legislated roles, not allowing our Columbia River Treaty entitlements to be counted as firm supply, and so forth. Opportunities to defer large new expenditures, to avoid the specific environmental damages that were in our conclusions (and indeed for the most part in Hydro's Environmental Impact Statement), even to buy time for key events to crystallize the costs and benefits, were systematically lost.

The interesting question for federal policy is what to do when the provincial policy within which they are called to assess environmental impacts is so nutsy that federal objectives and legislative requirements are necessarily compromised; but perhaps BC is uniquely attracted to the irrational.

3 Organizing the work

The Panel came into being on August 2, 2013, the day after officials from the two governments, who would constitute our professional support, declared the EIS to be "satisfactory." In fact, several of those officials had been working with the proponent and interested parties for more than two years, defining the content of the EIS (the "Guidelines") and acting as a broker on information demands from opponents and the willingness or ability of Hydro to fulfill them. From the record, these were not uncontentious negotiations. Guidelines had to be agreed and Hydro had to do, or commission, the work on a timetable externally set. Many interveners, of course, could not have been satisfied by any set of

guidelines. Hydro, though determined to deal with some of the reputational consequences of the 1960s, nonetheless had an interest in keeping the time involved, if not cost, relatively low. And as holders of the pen, they had a large advantage. After many meetings, a rough and ready set of Guidelines was, if not agreed, at least declared, and Hydro set to work.

Panel members had no part in the development of the Guidelines and had no loyalty to its content and compromises.

By the summer of 2013, by no means all the EIS work had been done to a uniformly high professional level. Some of it was excellent: the work on dam safety and design, hydrology, the Peace-Athabasca Delta, heritage resources, climate change, lands affected, and more was fine. Some of it was contentious, if accurate: the work on local government and community impacts, for instances, was nothing if not a spur and a goad to those local governments who feared large unpaid costs or saw an opportunity to fund their ordinary capital requirements for a decade or two at someone else's expense. And some of it was not up to scratch. But time was running out on the legislated timetable. On August 1, 2013, officials declared the 14,500 pages of the EIS satisfactory, even though they later admitted there were huge gaps, and the 255-day clock for the Panel's work started ticking.

Even Hydro knew the edition of August 1 was incomplete. On September 13, Hydro submitted an Evidentiary Update—another 4,000 pages (!) of material. In retrospect, perhaps the Panel should have said that the intervening six weeks should not have been on the clock. In the event, we didn't, and continued with our reading of the material, divided into three roughly equal piles depending on the interest and experience of the Panelists. Not surprisingly, we found many areas where we felt the information provided was inadequate, and issued 94 Information Requests, in three tranches. And wished we could have done more, especially with respect to wildlife, rare plants and the use of land for traditional purposes by First Nations. These would have required more field work, however—at least a year—and we judged it best to work with what we had in those instances.

Some of our IRs went well beyond what officials and Hydro were accustomed to do in big projects, notably with respect to economic impacts. Their view was that the relevant questions had to do with local employment markets, local government finances, and local business opportunities. In our view, these were relatively trivial distributional questions, while the big ones related to the financial feasibility of a (then) $7.9 billion project, the costs of alternatives, the effects of increased prices on demand, the costs and risks to ratepayers, and the effects on the credit rating of a province whose record at restraining the growth of debt was unspectacular. The province, for reasons of expediency, had decided to exempt the project from review by the only entity designed to do so and experienced in the field, its own Utilities Commission. We therefore felt a special responsibility to do what we could on these major questions which were so central a part of our mandate. In the pre-Panel stage, Hydro had brushed aside a question from BCUC on these macro effects as being outside the mandate, and officials had let them get away with it. When we raised these questions in our first set of IRs, we anticipated resistance—but the real resistance came only from those of our own officials, who had been part of setting the Guidelines and felt it was out-of-bounds for the Panel to rewrite history. Hydro may have gritted their teeth privately, but nevertheless turned to and performed the work.

The same occurred with some of our IRs related to wildlife and vegetation, where it was apparent that some of Hydro's work did not meet accepted methodological standards. The real resistance came one official, who felt that it was improper for us to go beyond the flawed "evidence" that had already been accumulated.

One area where the work by the proponent was inadequate was in cumulative effects. They argued that the baseline should be the present, not some date before the construction of the Bennett Dam or the commencement of widespread agriculture, industrial forestry, coal mining, road and rail corridors, seismic lines, oil and gas exploitation, and pipelines. No data, they said, though they did

produce a brief qualitative overview of the settlement of the region.[1] In point of fact, the Peace River region of BC is one of the most human-affected landscapes of the province, and the matter is crucial to the First Nations' arguments about whether the promises of Treaty 8 had been infringed. However, it is not fair to lay the whole burden of cumulative effects analysis on a project proponent. Much of the relevant information is not in their hands, studies usually take more time than is available in the context of active resource development, and a proponent's incentive to minimize cumulative effects can be strong. Governments ought to lay the groundwork, through baseline studies, for all parties in advance of development proposals, at least in those regions where development pressure is mounting. Provinces have the principal responsibility for lands management under the *Constitution Act 1982*, but the BC government has for years been systematically withdrawing investment from this area of its responsibility.

Governments have also been unhelpful in failing to settle some basic methodological issues that all environmental assessments face. Of these the most important are rules for financial and economic analysis. In cost-benefit analysis, the choice of a discount rate is crucial. Make it too high and almost nothing can be built; too low and capital-intensive projects which transfer benefits to distant generations win. The published guidance by both governments is seriously outdated; once reviewed, it should become guidance for all analysis of social costs and benefits. In the case of Site C, the proponent mixed economic (social) costs with corporate finance. In fact, the proponent and its owner have recently taken to tilting the table by using differential rates for Site C and its alternatives, and by proposing a financing scheme—zero equity, financed by province-guaranteed borrowing for 70 years—that seems to be without precedent in order to justify their choice.

4 Staff assistance

The workload involved, the stilted procedures, and the meager assistance available all but guarantee errors. In our case, there were nominally eight staffers available to assist the Panel members with procedures, hearings, research and writing. The federal Panel co-manager, an able and energetic person, was parachuted into the job on August 2, 2013 with no experience of the lengthy pre-Panel stage. She was, in fact, still engaged in finishing another contentious file. A provincial official, who had been with the file since inception, had developed a great loyalty to the process, the decisions taken, the wisdom of every measure taken by the BC government, and even to the proponent. This loyalty did not extend to the federal government, which he persisted in seeing as overbearing, irrelevant and incompetent.

The federal side was insistent that Panel members should attend a three-day session in Ottawa on the principles of natural justice. As all three Panel members had considerable experience in holding hearings, we pushed back. It turned out that the reason we were all to be summoned to Ottawa was that the Department of Justice person who did the briefing found it inconvenient to travel so far. So did we. Tant pis.

Of the other six staff researchers, one departed for another federal department. One very good person departed on maternity leave a month before the final report was due. Neither was replaced. None of the staff researchers had any training or experience in economics, which was central to our terms of reference. Not all were particularly good at drafting, or in one case, drafting in English.

[1] There is reasonably comprehensive airphoto coverage going back as far as the 1920s, as well as comprehensive local government records. Elsewhere the airphoto coverage was used to demonstrate that moose populations had fluctuated but on average not fallen since the 1960s.

BC was to supply office space, and did, but it took two weeks to get the computers hooked up. The systems were peculiar to BC and took some time to learn. Staff issue summaries arrived only on Day 16.

The Panel drafted hearing procedures and asked Ottawa to vet them. Forty-eight hours before scheduled publication, nothing had been heard from the federal Department of Justice. We published them anyway. We were obliged to publish rules for accepting confidential testimony, but made clear our preference for openness. Counsel was especially helpful in narrowing the amount of confidential testimony to a bare minimum.

Our terms of reference made it clear that we could hire specialist expertise as needed. Naturally their work all had to be exposed to the public and available for challenge as needed, but there was no question that such persons could be brought on. The first hint that this was not entirely true came with the appointment of independent counsel to the Panel. First we were told that there was no need, that the BC Ministry of the Attorney General would provide any advice we needed. We said this was a non-starter on conflict of interest grounds. Then we were told that the maximum price that could be paid was $250 an hour, as all such costs would be passed on to the proponent, and there was only so much they could stand. We said this was a deal-breaker, developed a short statement of qualifications, identified two well-qualified people, and said we required one of them. The federal side then said that they had to approve, and that they could not accept our initial choice, a local partner in a well-known national firm who had once been a director of EAO. As such, he had been insufficiently worshipful of all the reasons Ottawa had put forward for not running joint review processes. Since the other chap was also exceptionally well qualified we decided not to make a fuss. But three weeks went by, with possibly a week of the Chair's time wasted on an unnecessary squabble.

By the end of August it was clear that the Panel could benefit from the advice and analysis of a specialist in utility economics. When the Chair (the Panel member who was responsible for the economic side of the work) suggested some names, he was told that the Panel would be required to develop a statement of qualifications, a statement of work to be done, to advertise this on MERX, and to select the least expensive qualified candidate following a formal evaluation of bids and interviews with candidates. This was preposterous, especially in light of our legislatively imposed deadlines. We gave up, with the result that all of the Panel's work on economics rested on one somewhat rusty individual.

A fundamental concern for CEAA ought to be the avoidance of prejudice and conflict of interest in the officials assigned to Panels. To work on the pre-Panel stage and insist its conclusions could not be questioned, assist a Panel while deeply committed to a proponent's viewpoint, consult with aboriginal groups about s. 35 rights after the report is submitted, and then draft the referral or decision document is a set of monumental conflicts. The considerations apply to federal and provincial officials.

5 Hearing procedures

Little guidance beyond maximum length and the need to visit communities near the Project was provided on hearings procedures. The Panel had to make up its own procedures and publish them before the hearings began, and could draw on a wide variety of models that have been used in similar matters before. At the one end are the formal, legalistic processes characteristic of the NEB and most judicial inquiries, where witnesses' prepared statements are cross-examined by Panel counsel as well as counsel for parties who have been granted intervenor status. This can produce well-tested evidence but is at the heart of the complaints about lengthy and high-cost inquiries. At the other end of the spectrum are informal meetings of various kinds, such as the university-based, open-to-all topical seminars arranged by the Walkerton inquiry for the policy part of its mandate. Well set up, such all-interests meetings often produce remarkable ranges of consensus, efficiently isolating points of difference for special attention.

The imposed time constraints did not allow for classic cross examination at all, an early disappointment to a number of lawyers for First Nations, and only occasionally did Hydro's lawyers get a chance to call attention to some point on which they seriously disagreed. Hydro had an advantage in that they were allowed a summary rebuttal at the end of each day's session, but they were not aggressive or disrespectful in doing so.

The Panel adopted the approach used by other EA Panels in having three kinds of sessions: general, at which anyone could say pretty much what they wanted within the time available; topical (nominally expert witnesses, though that term was interpreted elastically); and community, a euphemism for general sessions held on reserve. These latter were both repetitious and well appreciated. Although Panel staff and counsel did their best to limit windiness and repetition, there was a great deal of it in all sessions.[2] Some technical areas were inadequately served, in part because the Panel was unable in the time allowed to arrange for expert critical witnesses, although some, like the dispute about the Peace-Athabasca Delta, were exceptionally well covered. Altogether, no party seems to have left the hearings unhappy that their point of view did not get into the record.

Our time limit was 30 days, but it was unclear whether this meant a calendar month or thirty hearing days. We chose not to ask, and scheduled 26 hearing days in two sessions, before and after Christmas. We kept a few days in hand, expecting that the Peace River winter would cause some disruptions which in the event did not occur. The consequence is that we did not respond to a fairly widespread demand to hold hearings in other parts of the province. Had we spent a few days in Vancouver, we would have heard from more NGOs, and been able to plumb further the interregional distributional questions that bothered so many people in the Peace.

Another useless expenditure was the rent-a-cop that Panel staff strongly recommended we hire and the security person brought along by BC Hydro to protect their witnesses and staff from the pitchforks of the angry mob. In point of fact, even the most emotionally distraught opponents did not disrupt proceedings in any way. A demonstration was held outdoors one cold day. One witness, a former chief, spoke of taking up arms but when admonished by the Chair broke into tears and apologized. At the end of one session in Fort St. John, Treaty 8 people arranged a skit, followed by some dancing and drumming during which Indians, Hydro staff and the Panel held hands and shuffled in a circle. This is anything but hostile territory. There is no need for "security."

Bottom line: Even if the general and community hearings were repetitious, they allowed all to be heard and the Panel to grasp a little of the human consequences of distant decisions, a substantial value. We could have gotten more from the topic-specific hearings, however, by having a few extra days' time for the Vancouver area, and the practical ability to bring on expert witnesses of our choice who could challenge some of the assertions of BC Hydro, especially about project economics.

6 First Nations rights and evidence

Our terms of reference betrayed the nervousness of our political masters. We were to record "asserted or established treaty rights or aboriginal rights," note any claims of interference with those rights (but not to call them "infringements"), and catalog any suggestions for mitigating their impacts. We were explicitly told not to comment on the adequacy of "consultation," a new constitutional right invented by the Supreme Court in *Haida* and *Mikisew* which is not shared by other members of society, or to make any conclusions or recommendations regarding possible infringements. The nervousness of authorities

[2] In the Walkerton Inquiry, commission counsel had latitude to recommend participant funding to the Attorney General, or not—depending on whether, for example, groups with overlapping views agreed to cooperate with each other: highly effective. In the Site C hearings, the Panel had no say in funding, and the distant bureaucrats who did had no interest in celerity.

showed up in the clumsy phrasing—"Section 35 rights" would have done—and in the prohibition against assessment or commentary.

We didn't object to this easing of our work burden, not at all. But to spend seven of our precious hearing days listening to repetitive testimony from community residents, plus a day of more formal hearings listening to lawyers repeat what they had already told BC Hydro, was not an efficient use of time. True, we did give First Nations community leaders, citizens and kids a generally appreciated chance to be heard, and they did have concerns that went beyond even an elastic view of treaty rights, but still.

The restricted terms of reference made sense in another way, however. The definitions of treaty and aboriginal rights, as well as a judgment of what constitutes adequate consultation, accommodation and compensation in particular cases is, to say the least, a work in progress. Moreover it's a work being undertaken piecemeal by the courts, who shine narrow beams of light into a darkness that Parliament has refused to illuminate generally. The consequence is an administration that is always reacting to what it thinks the courts may have said, or may yet say. To have unchurched outsiders on a Panel, no matter how expert they might be, pronounce on these matters would be foolish. We contented ourselves with summarizing without comment or challenge the testimony we heard, even when it seemed to stretch the established norms some distance. One consequence is that First Nations begin to believe, as items of faith, the ingenious arguments of their leaders and lawyers, since they were unchallenged by the Panel, proponent or public. This is not necessarily conducive to convergence on some common ground, or to the Supreme Court's overriding goal of reconciliation.

Much more important, there needs to be a connection between the huge amount of work done by proponents, First Nation groups and Panels on s. 35 issues and the ultimate decisions. We were content to summarize the evidence in a form easily grasped by distant experts in the Department of Justice and the Ministry of the Attorney General, expecting that their learned conclusions would be critical parts of the eventual memoranda to cabinets. It was shocking to hear, in the arguments for judicial review that inevitably followed the decisions to permit the project, that neither government gave these matters any thought nor considered them relevant to their decisions. So much for the honour of the Crown.

7 Reasons for decision

When the provincial government published its decision on an overall environmental certificate, it also released a commentary on each of the Panel's recommendations. They accepted most minor, specific recommendations, but turned down important procedural recommendations, notably improvements to cumulative effects work and to referring the project's key economic questions to the BCUC. They said nothing about s. 35 issues. The federal government said nothing at all, simply publishing their decision. This is inadequate. The Government owes people some explanation for why an important matter of public interest is decided on one way or another. To bring it down to cases, none of the First Nations and environmental NGOs who participated, at their own considerable expense, in the applications for injunctions and judicial review in the BC Supreme Court or the Federal Court of Canada would have argued their cases the way they did had they known the governments had simply declined to consider s. 35 issues. They were kept ignorant, and they lost.

Matters for the Review to consider:

(1) CEAA 2012 needs, at a minimum, revision to allow the need for, and alternatives to, a project to be examined. Even with the strongly restricted scope of *CEAA 2012*, joint efforts with provinces will

continue to be necessary in one form or another, and provinces may have a broader filter than do the feds. CEAA should make sure that available staff include a few people with qualifications in economics.

(2) One Panel member lived 1.5 hours from the Halifax airport. A three-time-zone mix for a Panel is too much; four is ridiculous, especially when regulations impose extreme time pressures. Try to keep people working together. If that means that, for a BC project, you have to move people out here temporarily, do it. It's part of being a big country.

(3) If a report is to be drafted in French, make sure all staff are competent in that language. If in English, ditto. Translation of a finished text can be done after the fact, but it's no good assigning people with dubious drafting skills to a high-pressure, time-compressed exercise.

(4) Make practical arrangements for hiring or seconding specialists. We badly needed a pro in the demand management/forecasting world (and were promised we could hire one), but the hoops of federal contracting are impenetrable given the time frames the feds force on Panels. Ensure that Panels have the advice, as needed, of an unconflicted administrative law expert.

(5) Publish some examples of hearing procedures used by other Panels and inquiries, with pros and cons, to assist Panels in setting their own procedures. Move to a model of *vox pop* plus experts, the first open to all, the second much more restricted and open to cross-examination by Panel-selected interested parties. Give Panels a role in deciding on whether specific intervenors need public funding.

(6) Figure out whether you're punched or bored on s. 35 issues. If Panels cannot express a view on these issues, even with good legal advice, they cannot ever give recommendations on a project *in toto*. More importantly, make sure these considerations are brought before the ultimate decision makers.

(7) Invite the Treasury Board Secretariat to disinter their dusty advice on cost-benefit analysis and bring it into this century.

(8) Publish reasons for decision, much as judges do.

(9) Deal with the conflicts inherent in assigning the same people to the pre-Panel, Panel, and post-Panel stages of an EA. Insist on the same standards from your provincial partners. Check staff, as is done for Panel members, for potential personal conflicts of interest.

(10) For Panels (and in-house studies), make the time and resources available a little more a function of the complexity and environmental/social importance of the case. An extra two weeks would have made a difference in our case. One size fits few.

(12) Stimulate, with the provinces perhaps, some good baseline studies in areas that are obviously going to be the focus of large-scale resource development. Governments ought to be looking at pipeline routes, the Ring of Fire, and the western Arctic offshore now, before there's a project on the table. You can't rely on proponents to set the stage for serious cumulative-effects assessment.

(13) Convene an expert workshop on the practicalities of cumulative effects analysis. It's important stuff, but current theology is unhelpful. Updated federal guidelines would have a salutary effect on errant provinces.