Expert Panel Public Presentation Session

Review of Environmental Assessment Processes

September 26, 2016

Delta Hotels by Marriott City Centre Suites, Edmonton, AB

Expert Panel:

Johanne Gélinas, Chair;

Doug Horswill;

Rod Northey;

Renée Pelletier.

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Johanne Gélinas, Panel Chair
Doug Horswill, Panel Member
Rod Northey, Panel Member
Renée Pelletier, Panel Member
Jason Unger, Environmental Law Center
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OPENING REMARKS

Kelly McGee: Welcome to the Public Presentation Session for the expert panel on the Review of Environmental Assessment Processes.

Bonjour mesdames et messieurs. Bienvenue à la réunion publique pour le comité d'experts pour l'examen des processus d'évaluation environnementale.

My name is Kelly McGee, I am the Executive Director for the Secretariat that is supporting the expert panel. There are other secretariat staff in the room over there if you have any questions.

Please note that the expert panel members and this review are independent of the Canadian Environmental Assessment Agency and the federal government. The panel has just received notice from the Canadian Environmental Assessment Agency that there will be public funding, participant funding available to cover a small portion of travel costs. This is a program administered by the Canadian Environmental

Assessment Agency. At this time, we expect, they've advised us that over the next week, there should be more information with regard to that program.

I would like to provide you with some preliminary information before the panel begins. Please silence your cellphones and any other electronic devices before we begin. The emergency exits are clearly marked with large red exit signs at the back of the room. There's also an audio recording of this afternoon's presentations being created and a written transcript of that recording will be available on the panel's website at a later date.

Each presenter today has been allotted a total of 15 minutes. Please focus your oral presentation on your key messages and speak for a maximum of 10 minutes. This will ensure that the panel has time with each presentation to ask questions and follow up in a dialogue with you.

If you are presenting this afternoon, please be sure to check in with Secretariat staff at the table near the entrance. The panel encourages you to visit the website at www.eareview.ca for a wide range of information related to the review and other opportunities to participate and provide your views.

Mme Johanne Gélinas, Chair of the Expert Panel, will oversee this afternoon's event. Mme Gélinas.

Johanne Gélinas: Merci. Bonne après-midi tout le monde.

Good afternoon everyone and welcome to the expert panel for its first public event in, in Edmonton. I would like to introduce you the panel members. Unfortunately, our colleague that you cannot see who should be sitting here, Doug Horswill, can, cannot be with us right now. He has a delay in flying to, to Edmonton, but he should be there in the middle of the afternoon. My colleague also, Renée Pelletier and on my left, Rod Northey. We are all appointed to go through this independent review panel exercise.

I would like to turn to my colleague, Renée, who would like to acknowledging. [sic]

Renée Pelletier: Thank you. We would like to begin this afternoon by acknowledging that we are on Treaty 6 territory. As well as I understand a traditional gathering ground for many indigenous people. And thank you very much for welcoming us into your traditional territory.

Johanne Gélinas: Thank you, Renée. So the panel was named by the Minister of Environment and Climate Change and directed to consider how to – and I will just read for you what is the mandate. First, to restore robust oversight and thorough federal assessment, environmental assessment, sorry. Second, to ensure decisions are based on science facts and evidence and serve the public's interests. Third, to provide

Canadians with the way to express views and opportunities for experts to participate. Four, require project advocates to choose the best available technology to reduce environmental impact. And finally, how to enhance the consultation engagement and participatory capacity of indigenous groups.

These presentation sessions are an opportunity for stakeholders, organizations to, and interested Canadians to share their views on environmental assessment processes. Over the next 12 weeks, the panel will be travelling across Canada to hold in-person public and indigenous engagement events. In addition, the panel website offers both information on how to register for these events, and several other options for sharing your views with the panel.

No later than January 31, 2017, the panel will submit a report to the Minister of Environment and Climate Change that will include our conclusions, recommendations and rationale with respect to the issues within our mandate.

So without any further ado, I would like to welcome our first participant, who is Mr. Unger. And Mr. Unger is from Environmental Law Center. Right? Welcome, sir.

JASON UNGER, ENVIRONMENTAL LAW CENTER

Jason Unger: I have to push a button here or anything?

Renée Pelletier: No, it's automatic.

Jason Unger: Great. Well, thank you very much for having me and, and thank you for travelling the nation to hear what everybody has to say about EA. And that's obviously the acronym that I will be referring to all the time, environmental assessment or EA and CEAA.

The Environmental Law Centre has been around since 1982 as a non-profit registered charity. Education and law reform are our two main areas of work. I'm currently the Acting Executive Director at the Center, and we have had a variety of involvements in environmental assessment, both provincially and federally over the years. unfortunately, I didn't submit any documents or a presentation for you today, but I, the ELC will be presenting or submitting some materials by December 18th, (inaudible) the date.

To begin with, I think really, environmental assessment over the years, since the omnibus bills of the past little while, we saw a bit of a regression and perhaps a bit of abdication of federal responsibility around environmental assessment. We need to see that not only move back to the former CEAA, but I think we need to evolve even further to have a new generation and a really forward-looking, inclusive and effective

environmental assessment system.

I was toying with the idea that we could say it's CEAA tomorrow. CEAA tomorrow. (laughter) So what does sustainability look like and how do we get there? I think one of the key issues here is really getting back to some core environmental law principles and including those in how we address environmental assessment. So that includes public participation, precaution, the concept of intergenerational equity and more broadly in the federal sphere, polluter pays and pollution prevention in terms of how we approach fisheries, navigable waters and the other spheres of federal roles.

How do we do this? We have to recognize that the federal government has a role, a strong role in environmental matters. We need accountability at the federal level around climate change, species at risk, fisheries, navigable waters and toxics management. Narrowing the scope basically gets us to a point where we're ignoring cumulative effects. In ignoring such things as in situ and SAGD developments in the oil sands.

We're ignoring climate impacts, we're ignoring potential impacts on woodland caribou that have real impacts across the board and these cumulative effects have to be managed.

On the issue of substitution and equivalency, I would say we need to move directly to harmonization with provincial regimes. Substitution and equivalency doesn't offer the notion of responsible federal government and accountable federal government. If you followed the evolution of the Oldman Dam case, you'd recognize that Justice La Forest, in his decision, really saw environment as a broader scope that feeds into administrative decisions and helps foster a broader view.

And just to, just to quote him, case in point, there's a danger of falling into a conceptual trap of thinking of the environment as an extraneous matter and making legislative choices or administrative decisions. Clearly this cannot be the case. Quite simply, the environment is comprised of all that is around us and such must be a part of what actuates many decisions of any moment.

The on-, it goes on to note that the purpose of environmental assessment is to gather information early and then foster an informed decision, whether that's approving or denying a project. The EAs in the provincial realm, I would argue, have been a bit insufficient, so substitution and equivalency for the province of Alberta I don't believe is workable.

Independent review of assessments within government faces huge capacity constraints, resulting in third party reviews. Hearings often doesn't have government representation and if there is attendance, there's limitations on cross examination of, of government witnesses.

So if you look at the one aspect of substitution, I believe CEAA 2012 says meaningful participation has to be reflected in that substitution process. And I would argue that without really defining what that meaningful participation is, we're bound to have some problems.

On the issue of climate change, I would like to cite another case, the Syncrude Canada Limited vs. Canada 2016 Federal Court of Appeal case where Justice Rennie stated it must be recalled that it's uncontroverted that GHGs are harmful to both health and the environment, and as such constitute an evil that constitute an evil that justifies the exercise of the criminal law power.

I think that has been somewhat topical these days with decisions at the federal level and obviously differences among the provinces. We need to move to a framework where environmental assessment is forming a unified and harmonized approach to deal with climate change action.

On the question of mitigation and follow-up, I would advocate both precaution and participation again. We've seen over the years a reliance on adaptive management. We saw CEAA 2012 remove adaptive management, but we have to ask the question whether follow-up is resulting in the same effects of having inadequate or inappropriate follow-up and the ability to follow up on these programs that are put in place to mitigate issues and environmental effects.
Obviously, evaluation of mitigation is an ongoing challenge. I would argue that there needs to be a system in place where public participation has to also transfer to the follow-up process. Perhaps something like a request to the department's relative (inaudible) departments to investigate whether follow-up is occurring, similar to the CEPA investigation powers where public citizens can request that.

In terms of adaptive and inadequate follow-up, I think it has to be recognized that often, these concepts are punts, basically sending it down the road to avoid having to deal with hard decisions. And this is a province where that looms large in the case of woodland caribou. We've seen repeatedly approvals go forward where politicians, scientists, proponents and NGOs know exactly what needs to be done, and yet we don't get there. So there needs to be an engagement process on the follow-up, and there needs to be accountability and conditions on follow-up.

And finally, on the question of investment certainty, I believe it was the third question in one of your context questions. It captured a lot, I have to say. It was investment certainty, treaty rights, all these things, how can we deal with it through federal EA. I'm not certain we can. And it's inherent in a free and democratic society where we have to recognize that investment risk is inherent in the process. There's a lot of environmental uncertainty. There will be investment uncertainty. We have to recognize that.

Some of the tools we could use to address that uncertainty includes nested planning and assessment tools, regional planning, strategic planning assessment, early consultation and again, public participation in all these processes.

Also, I have to question whether, quote, unquote, justified in the circumstances lying with Cabinet provides investment certainty or if it actually provides uncertainty, I would argue. Inherently, it's an uncertain provision and really, we need a different system where decisions aren't purely political. They're contextualized in community needs, socioeconomic factors and really environmental assessment factors as well. Part of this clarity can also be brought forward, I think, in terms of providing clear trade-off rules when making decisions at the panel decision, panel level.

So in conclusion, I think the federal role, I would argue, needs to be stronger. It needs to be harmonized, for sure, but we must evolve the federal EA system to recognize that cumulative environmental effects have impacts on fisheries. Almost any land use has impacts on fisheries. Climate change, species at risk, all these factors have to be brought front and centre, as well as the environmental law principles I outlined earlier.

I think that (off microphone) my statement.

Johanne Gélinas: Thank you very much Mr. Unger. I will start with the first question. Can you talk a little bit about your involvement in different projects as an organization?

Jason Unger: So, right, so under —

Johanne Gélinas: And, sorry – I was going also to ask you at the same time what you have mentioned during your presentation, was it especially or essentially focused on CEAA or also NEB?

Jason Unger: Well, I think —

Johanne Gélinas: Or you would have had different comments and please —

Jason Unger: I would have —

Johanne Gélinas: — put it on the table if you feel like it.

Jason Unger: For sure. I think really I, I'll deal with the last comment first in terms of the NEB and CNSC. I think there has to be a look at government structures as part of the EA review process. The adequacy of participation in processes, for instance, through the NEB process, the ability to cross examine witnesses as a key procedural fairness issue in hearings. I think there has to be a look at governance and the aspect may be rolling into having one entity behind the EA reviewer, as opposed to

three different.

It's more efficient, it should be better on budgets and that type of thing. So there's some value there as well. So I do think that an assessment of governance and the different approaches that the NEB and CNSC have taken is really needed.

On the, on the first question, we haven't really participated too much in terms of CEAA 2012 reviews. My own experience related to some past reviews, for instance, in Suffield national wildlife area, where there was a proposal for shallow infill gas. That was a great example of where the federal government took a strong role in assessing the impacts on species at risk and it was evident in the hearing.

So I think identifying that role, identifying clear criteria and which we're going to trade environment, economic and social issues need to be taking place to do that.

Johanne Gélinas: And will you say that the weight of the three pillars of sustainability are equally looked at in EAs?

Jason Unger: Well, if we take the Cabinet justified in the circumstances quote in CEAA 2012, I think that inherently undermines any notion of balance unless we completely rely on an approval by approval basis of political decisions representing some magical and black box decision of, of how those are being balanced.

I think typically for certain in, in Alberta, we've seen a trend towards attempts to mitigate with not very much effectiveness per se. We learn more and more about air quality concerns, woodland caribou being an issue. So economic drivers have certainly ruled the, ruled the day in general.

Johanne Gélinas: Thank you. Just before I move to my colleagues, so that you know, first we, we are looking forward to get your submission. And also, we are looking at all the processes. So whatever you want to highlight with CNSC or NEB will be more than welcome also.

Jason Unger: Great.

Johanne Gélinas: Thank you. Rod?

Rod Northey: Yes, thanks Mr. Unger. So I was going to follow up on a couple of those questions. So given the background, if you are able to highlight for us as a panel specific working relationships that you have firsthand familiarity in supplementing whatever point you want to make because we've got, you've given us a broad array of things to think about.

Jason Unger: Right.

Rod Northey: We are thinking about all of those. What is really helpful, given there are only four of us, is to get some specific examples to highlight what recommendation you would like us to consider. So if you want us to talk about that shallow gas thing and endangered species, perhaps you could elaborate. I'm aware there's a panel review of that, but perhaps you could take something, give us the panel report or the reference, but then say what does that illuminate? Because we really are trying to figure out practical responses to this.

So one thing I'm just going to ask is are, of the many things were asked you here on expertise and opportunities for people to participate, one of the things is robust oversight. And I thought given the array of things you covered, cause you give us the three things, if I could ask you that, that would be, or – and you can go away and say I've got too many to do that –

Jason Unger: Yeah.

Rod Northey: -- but if, if you are able to give us a highlight, what are those things that we should take away from you as the, you know, the hit list?

Jason Unger: Right.

Rod Northey: Cause you've given us a big list.

Jason Unger: Yes. Excellent question. I'm not sure if I can —

Rod Northey: Well, you can wait.

Jason Unger: Yeah, fair enough. Well, I think a key one from my own perspective, partially driven from our situation in Alberta, is public participation. Issues around limited standing, cost related to bringing expert evidence before the panels, the ability to cross examine experts and witnesses across the board, that being one of them. And public participation, again to the point of follow-up and mitigation as well. Access to information, transparency, systems, whether it's on a registry or otherwise, where people can engage the regulator in question and say I don't think they're meeting their condition X. You need to follow up with that and report back to the public. So I think that's part of the process. That's, that's one.

The other one, (laughter) what else, there's a long list, I guess that's part of the problem. The second is recognizing, I think, a federal role in management of cumulative effects. Now, this is no doubt a complex and difficult manner because it's harmonization times 10 in terms of regional planning in a way that offers us certainty and clarity going into the approvals, but at the same time, recognizing that in a given approval, there may still be the need to deny applications or permits because cumulative effects are just too bad.

Johanne Gélinas: Renée?

Rod Northey: Thank you.

Renée Pelletier: You spoke earlier about, I believe you were talking about mitigation and you started to say something about the caribou and in this province how you have all the various players knowing that there's an issue, yet nothing is, gets done. Could you elaborate on that a little bit?

Jason Unger: Sure. So most recently, there, there's been multiple, over the decades, multiple, multi-stakeholder advisory groups with some scientific support that have pursued planning and arranged management around the different caribou herds in the province. So on the most recent time I sat on the multi-stakeholder advisory group for the Little Smoky and A La Peche woodland caribou herd. And I think some of the major difficulties is that we have a resource allocation process within the province where essentially, forests, mines and minerals, everything is allocated.

So now, to manage, to draw back and manage around linear footprint and other impacts on habitat for woodland caribou, it's very difficult. And the federal role is there as a backstop. They're not going to be right there front and centre right away, but I think there's a key federal role. The Species at Risk Act provides that safety net, and I think it's important to recognize that to really understand the safety net provision and apply it in a rigorous fashion, they have to understand what is the nature of the assessments on given projects.

And an example of that in situ SAGD projects continue to be approved with footprint impacts on habitat. And so, the question becomes where's the federal government under, in upholding SARA?

Renée Pelletier: Thank you.

Johanne Gélinas: I don't know if you have some ideas right now, but for your submission, we will be very much interested also to hear about what will be the ideal design for harmonization at the prov-fed level. I won't —

Jason Unger: Yeah.

Johanne Gélinas: — put you on the spot.

Jason Unger: I, I will.

Johanne Gélinas: So unless, other question, Rod or okay?

Rod Northey: Well, I have lots of questions, but we don't have time.

Jason Unger: Fair enough.

Johanne Gélinas: Thank you very much for your participation.

Jason Unger: Okay. Thank you.

Johanne Gélinas: So our next presenter is Melissa Gorrie, I hope I pronounced your name properly.

Good afternoon.

MELISSA GORRIE, ECOJUSTICE

Melissa Gorrie: Good afternoon. So thank you for having me here to speak to you today on a topic that I feel quite passionate about. My name is Melissa Gorrie, and I'm Staff Counsel with Ecojustice Canada, located here in Edmonton. And as you might be aware, Ecojustice has offices across the country, and we've been working on federal EA law issues in various forms for 20 plus years now. So I would say that we have a lot to contribute to the discussion. And we've been involved in representing clients at environmental assessment reviews and NEB processes, as well as judicial reviews of the EA processes later on. So taking it to the next level, to the court process.

So given our national reach, and the time limit we have to speak, we are going to be, different folks will be talking at different offices about different topics, so we don't, we're not redundant for you and we can focus on our, some particular discrete pieces that each of us care about or have worked on in particular. But I will say hearing Justin, sorry, Jason speak, I would echo a lot of what he said, and I wish I had time to cover off all the topics as well. And I get the sense that you guys are interested in our real life experiences, so I've personally done a lot related to oil sands reviews, like the Shell Jackpine Mine expansion, review representing the Oil Sands Environmental Coalition and now with the Teck Frontier Mine. So I'm happy to answer any questions you have at the end about my particular experiences that I may not cover here in my speaking notes.

Johanne Gélinas: Thank you.

Melissa Gorrie: So the two topics that I'm going to speak about are follow-up programs and enforcement. And I just want to say before I begin that I want to make it clear that our position is that the EA process in Canada is broken and does necessitate a significant overhaul. And we really urge the panel not to limit its review to considering how the existing regime can be tweaked but to really shift the focus towards

a sustainability assessment, a new generation EA law, as it's been termed.

So it's really about not focusing on mitigating averse effects but rather looking at whether a project makes net contributions towards sustainability. And part of that as well, as you know, the government has indicated its mandate to implement UNDRIP and move towards reconciliation and this is an opportunity to make that meaningful.

And so I think the EA summit proceedings at the West Coast Environmental Law produced reflect the thinking of various academics and practitioners, including Ecojustice. So keeping that in mind is the frame for my (inaudible). What I'm going to be talking about here is quite detailed in terms of very specific discrete pieces, but that, I think, should frame all our thinking on all these discrete pieces within EA.

So follow-up and monitoring, so as I'm sure you all are aware, it's concern with what happens after a decision to proceed has been made, and it's really a vital part of the EA process because it provides the information necessary to determine whether conclusions reached in the EA are accurate and whether the mitigation measures are actually doing what they're supposed to be doing.

And comprehensive and ongoing monitoring is a really essential part of the follow-up programs, because without it, how do you have the information necessary to know whether the EA was accurate and whether the mitigation is actually being effective. And on this point, I would say there are a few legislative gaps that exist in relation to follow-up programs.

So one of the main ones is that there's no requirement for the proponents to publicly report on the status and/or the results of follow-up programs. So for example, if there was a website that members of the public could go to and they know, they know where things are at with the various follow-up programs that have been specified. So by way of example, we represented the Oil Sands Environmental Coalition at the Jackpine Mine Expansion Project hearing and to be honest, their clients had a really hard time trying to track down information about the follow-up programs from past oil sands projects. We're trying to prepare for this hearing and we have no idea whether certain measures have been taken with respect to species at risk, water, climate, all these aspects, right?

And we actually had quite a long list. I think it was, like, a five-page document, a listing of the unknowns. And the only way they can maybe find this information was to do an ATIP request or a FOIP provincially, and that's time consuming, it's costly and to be honest, you normally don't get anything. And even if you could, the question is, is really why should the public, why should the onus be on the public to get that information that should be publicly available?

So failing to provide that information also creates a lack of accountability because

without that information, how are decision makers supposed to assess whether the conclusions reached in the EA are accurate or whether the mitigation measures are working. You're living in a little bit of a black box or a void of information. And I'd say that has implications, not just for the specific project, but also for other future undertakings that are similar, because while no two projects are the same, decision makers often consider very similar and sometimes even identical issues or challenges.

And so knowing whether programs were successful in a past project is relevant to a future termination made in other EAs. So for example, let's say EA 1, there's a follow-up requirement to determine whether reclamation of, let's say caribou habitat, cause we're talking about caribou and I'm all about caribou as well, just like Jason, so we're determining whether it's successful. And then, we have EA 2 coming along, and they're also considering habitat reclamation.

Well, wouldn't it be helpful if EA 2 had that information from EA 1 to see whether the reclamation activities were successful? Without that, it's hard for them to figure out what programs and activities are feasible and what should be relied upon or recommended in future EAs?

So that, that I guess, I'm kind of identifying here the second main gap I see with the current regime is that there's no requirement that the results of follow-up programs be considered by subsequent decision-makers, so it can inform the conduct of future EAs or other decision-making processes, for that matter.

So to be clear, my recommendations in this regard are that follow-up programs should be proposed and assessed in the course of the EA process and hopefully by an independent source. There should be a requirement for ongoing monitoring of follow-up programs, and that the status and results of following, follow-up programs should be made publicly available and obviously to future decision makers. And that finally, that the consideration of follow-up programs of similar undertaking should be required for future decision-makers and future EAs.

So that's my whirlwind tour of my thoughts (laughter) from my brain on follow-up and monitoring. So I will just also speak briefly, given the short timeframe, on the issue of compliance and enforcement.

And I feel these are often very related. There are a lot of issues that are related. Adaptive management is also a part of this as well, but with the time constraints, I'm not really going to talk about it. But they all bleed into each other.

So obviously, compliance and enforcement provisions are essential for EA laws to be effective. Unfortunately, the House of Commons Environment and Sustainable Development Committee found that the department compliance with CEAA requirements was "unimpressive", and hopefully moving forward, that's going to

change.

Now, I will say CEAA 22 does have some compliance enforcement provisions and those are, those are good and those are important to build on in the new EA law. However, I would say that the powers to monitor and act on non-compliance should be broadened. For example, where follow-up programs identify issues or impacts that need to be addressed, let's say mitigation measures aren't working as they expected, then decision makers should be authorized to take steps to address those issues or impacts. So maybe amend project conditions, maybe they have to pull an authorization.

I'd also say that whatever the entity is that's charged with compliance monitoring and enforcement, they need to be independent and they also need to be resourced adequately so that they have the capacity and meaningfully exercise their powers. It's well and good to have these provisions or these policies about enforcement, but if you don't have the funding and the people on the ground and the independence to follow through on that, it becomes meaningless.

And I think project conditions in decision statements are good. It's important to have those because I think the way CEAA 2012 is drafted, it makes it clear that they are binding and that compliance is mandatory, and that's important to keep moving forward. I would also note that it's really important that where possible, any kind of follow-up programs or mitigation measures should be, included as binding conditions, not just recommendations.

We've seen this many times. I want to pull my hair out looking through the past oil sands review panel reports and they have a long list of recommendations that are all beautiful and really important, but they don't often get translated to project conditions. And so they're not binding, and so where is the follow-up on the follow-up?

An example I would give is the Yellow Rail, which is a species at risk, in the Imperial Oil Kearl Oil Sands Project Review. The proponent basically said well, we haven't actually done a survey on Yellow Rail cause our incidental reports say that they're not really in the study area, but the panel said well, but we should undertake some sort of study to figure out exactly. Let's do some surveys and figure out what's actually happening.

And so the panel recommended that both levels of government coordinate a regional review of cumulative impacts on the Yellow Rail in the oil sands region, and to determine mitigation measures that are available. So our clients, oil sands environmental coalition following up on that a few years later, wrote to them, the government and was advised that while the provincial government had considered the recommendation, they decided that it was appropriate to let the proponent do some surveys in the study area, but that fell very short of the recommendation to actually have a regional review of cumulative impacts for the species. And it's still an issue that

remains unaddressed, I would say.

And there are other examples of this as well. Most recently, with Shell Jackpine and Caribou, where there's recommendations to do certain monitoring on caribou predators and habitat requirements, but those did not end up being project conditions. And so how are we going to ensure that those recommendations are actually implemented?

So with my remaining minute, I will point out my highlight recommendations for conditions and enforcement. So that follow-up programs and mitigation measures should be binding project conditions, wherever possible. And that the failure to comply with those conditions should be a prohibited offense, subject to regulatory action and I recognize that CEAA 2012 already is getting us, getting us there.

Public access to the monitoring results should be provided. And there should be broad powers to, and resourcing available for monitoring compliance and taking enforcement action.

And that's, those are my submissions on those two pieces.

Johanne Gélinas: Thank you very much. I think your strategy to share the burden among your different region offices is the right one. And thank you very much for your comment.

Have you thought through what might be the ideal structure or the most efficient structure for follow-up in monitoring, for example, having a mandatory, an independent committee put in place to set up which follow-up needs to be done, monitoring and report back?

Melissa Gorrie: Yeah, I think that's probably the best scenario, and honestly, I participated in the Environmental Assessment Summit that, again, I mentioned that beginning, the West Coast Environmental Law hosted and that was one of the topics that ended up coming up a lot. It was funny, we had different topics of conversation to discuss. Like, one was cumulative effects, one was follow-up, one was indigenous rights, and through all of those pieces, we found that the structure, like figuring out the structure of how things should work and whether it should be an independent agency and how, how that should all play out was one of those pieces that was, through all of them, a factor and important in determining how all this would work out.

And we didn't, there was no ultimate conclusion that was reached, and I recognize that that'll probably be a difficult piece for you as a panel to, to figure out and giving specific recommendations. But I do think that that's something that we need the independence and probably the independent advisory committee or something like that to, to undertake that, those practices.

And again, like I said, having that capacity to do so as well, right? I've seen in the provincial government where they just, they just don't have the capacity to go out and do the kind of inspections and enforcement that, that needs to be done, and oftentimes, rely on the proponent just to report out and take that at face value and there's no actual follow-up to ensure that what, what they're reporting is actually accurate.

Johanne Gélinas: If you have examples of best practices that you would like to bring to our attention and also some criteria without coming with the recipe, but some criteria that should be taken into account, that might be very helpful for, for the panel.

Renée? Non? Rob?

Rob Northey: Oh yes. (laughter)

Very interesting presentation, so I think what I'm just going to ask in a general way too, is you've got all the specific experience. It builds on what I said at the, our first speaker on this moments ago. If you could give us – you're giving some examples of materials you've submitted, and I don't want the whole laundry list, but things that illustrate a point where you've made a presentation to a panel, where you've been trying to get access to past data on follow-up or monitoring, and could just give us some specific example where you've made the effort you describe, your clients have made the effort you described, and then explain what it is because that's the kind of thing that would really help us try and get to very specific recommendations, as opposed to general.

And the second is – and this will apply to a few of you in the room – but I'll start with you, next generation EA, it's a great term. I've read as much as I can on it, and we're all trying to figure out what it means. There's a long compendious article on it, which has about 40 different things as far as I can track. What does it mean? Now, you, I said to Jason a minute ago, what are his top three, but I'll just ask you do you have a hit list of what your key things are for that?

You've hit two topics, but before you got to those two topics, you then spoke about next generation EA, and if you couldn't do it today, we're just interested in trying to figure out what that term means and how it lands.

Melissa Gorrie: Yeah. And I think what Ecojustice brings to the table particularly is our on-the-ground experience, and so our focus more so is on discussing what has happened thus far and ways to improve it. When I talk about sustainability assessment, I think there are other people who are far, have thought about this more deeply and have some, like they will be speaking later, today who have thought about this more deeply and have really great broad stroke ideas of what sustainability would look like.

For me, when I think about a sustainability-based assessment, I think about not focusing on just, okay we have this project and let's try to make it as, and this, always

seems to be, like, a presumption that it's going to go forward. And let's try to minimize the impacts as much as we can, massage it as much as we can so that it can still go forward, as opposed to saying okay, there's a project or projects, and taking a more regional view and looking at a cumulative effect, cumulative level of, of everything from a higher level, not just the specific project, and saying from a more sustainable based view, not just how do we get this project ahead, it's should this project really go ahead? What are all the factors, not just, you know, maybe leaning a little heavily on economics, but the, the social, the community involvement, the environmental impacts.

So I guess, when I think about that, that's what I think about as well. The independence, I think, is a really important part of it too because I think one of the things maybe there's pushback on the sustainability piece, is that you have criteria and you have the issue of doing trade-offs. And we've talked a bit about whether justified with circumstances would end up looking a bit like the trade-off system under a sustainability assessment.

But I think the writing that's been done makes it really clear as to how you'd only be looking at making trade-offs after you've gone through and looked at all of the specific criteria. And that also, there has to be that independence there. You can have criteria but you can find ways to massage criteria to get to a particular outcome if you really want that outcome to happen. And so I think I think that's a really importance piece, is having that independence and that accountability for decision-making that may not be, may be happening all the time under the current, current system when you have just Cabinet being able to say, justify it in the circumstances.

And you saw it with Shell Jackpine, for example, the rationale was one line. There was no rationale provided. How do you come to that determination? You have a panel report that said there's going to be significant adverse effects on species at risk, a whole bunch of other pieces, indigenous rights, important stuff, and at the end of the day, Cabinet says it's justified in the circumstances and there's no basis to understand why that conclusion was reached.

And so hopefully, a sustainability assessment would open up that process, make it really clear what trade-offs are being made, if you're making them, and yeah, it's complicated.

Rod Northey: I should, I misspoke, it should have been Mr. Unger, not Jason, but anyway, I'm going to follow up on one further point. Given the background you have on the species topic, one of the things we heard at an earlier presentation from federal authorities to us, Parks Canada in particular, with use of Park Management Plans and a regional framework around the park, do you, I think Ecojustice has some experience with Parks Canada and management plans. If you are able to answer today, but I'm just curious, things like species at risk, whether those are any better managed, differently managed, what your experience as an NGO with Parks Canada's treatment

of species, given that the Species at Risk Act does clearly apply in there and it's not provincial, we'd be interested to know just how successful or unsuccessful they're addressing that topic.

Melissa Gorrie: Well, my answer might be a bit biased since we just went to court not too long ago on the issue of management plans in Jasper National Park and our concerns about, about potential development in Jasper. I would say that an issue with management plans is obviously the lack of the binding nature of them, right. And so, like for example, in our case, there was development that would contradict what's up clear prohibition in the management plan and they were planning to amend that prohibition to allow the development to proceed. And there are also caribou in the area and there's only a handful of caribou actually left in, in Jasper National Park.

So I would say that we, and I can think about that (inaudible), that's a particular thing that you want submissions on, but I would say that I wouldn't look to management plans as the solution for the issue related to species at risk, species at risk definitely. I think what we've seen happen is, and Jason alluded to this very well, is the punting aspect – I love when he used that term – because that's what we see happening as you have these reports that come out and say we're clearly seeing significant impacts to species, to their habitat. And they say well, a biodiversity framework is going to come out. The provincial government's coming out with one.

And it'll have thresholds and frameworks and it'll be all great and, and so they kind of punt it to the next stage or they rely on certain mitigation measures that it's not clear at all how you're, how you're going to reclaim peatlands. We don't know. They have evidence that there's, there's no way right now to reclaim peatlands, but they kind of punt it for another day.

And so I think when we're talking about species at risk, it's having that, at that time, taking a really hard look at what can we actually mitigate? What policies are actually in place that are going to work to protect the species and not just kind of shuffling ah, this isn't an issue we really want to deal with, and shuffling it under the rug for later decision makers to deal with. I think that's in a related problem, is the need for the regional EA, strategic EAs, the policy direction to inform the EA process because often, you have the two working in a separation and an EA, you see these EA panels basically pleading with the governments, create the policies, create the thresholds, do the land use planning to inform our EA processes because without it, it's very difficult for them to make real decisions. So –

Rod Northey: Thank you.

Johanne Gélinas: We will for sure like to see that in writing. (laughter)

Just before you leave, I would like to take this opportunity to mention that you have

other options to express your view through this panel, and one of, one of the options is through the webinars that we will have. And this is open to expert, but not expert in the sense of scientists, but more expert of their area, knowledge of the land. And if you can spread the word, then you know experts who will be willing to come and talk on a specific issue, that will be more than welcome.

And also, we have the choice book that you will be able to see soon on our website, and here again, it's a way for individuals to answer questions and express their views. So the more we will hear from Canadians on this issue and on solutions, the better it will make our final report compelling to what we have heard.

Thank you very much for your time.

Melissa Gorrie: I'll just mention we will have a written submission at the end of the process that kind of has all of these different pieces added in together. So –

Johanne Gélinas: It looks like we will have a lot of (inaudible) between Christmas and New Year's.

Melissa Gorrie: Oh yeah, you'll have lots of fun. (laughter)

Johanne Gélinas: Thank you.

Ms. Diane Connors on behalf of the Council of Canada is our next presenter. Hello.

DIANE CONNORS, COUNCIL OF CANADIANS

Diane Connors: So just so I'm clear, I have 10 minutes to present and then extra for questions?

Johanne Gélinas: Yeah. Five minutes.

Diane Connors: Okay. Great.

Johanne Gélinas: The shorter your presentation is, the longer we have to exchange with you.

Diane Connors: Wonderful. Okay. So hello, my name is Diane, and I'm from Edmonton. I grew up on the banks of the North Saskatchewan. It was World Rivers Day yesterday, and my presentation is about specifically water protections, so I thought that was relevant to bring up, and it's a wonderful river that's been subjected to some environmental harm lately, so I find it quite relevant.

As a settler person who's party to Treaty 6, welcome to Maskwaci, Edmonton. And thank you very much for being here. I'm 28 years old, and pretty much for my entire adult life, I have been living under a government that hasn't necessarily been open to this kind of input and this is my first presentation to a panel of this sort. So it's very, very happy occasion for me to know that my government is starting to care about what people like me think.

So yes, I'm from the Council of Canadians, we're a national organization across the country and this presentation is in coordination with our water campaign called Every Lake, Every River, which our goal is to reinstate protections for the 99% of lakes and rivers that lost protection in the 2012 omnibus budget changes.

So this is not my area of expertise, but I've tried to break down the information in a way that makes sense to me, and that it's quite simple, so hopefully that's useful to you. And of course, if you have any questions, I'll do my best to answer.

So I'll just walk through, you should have received a little bit of a report. I had grand plans of having a PowerPoint. Of course, plans don't always work out. So I think what I'll do is I'll just walk through it a little bit. The first page has most of our pertinent asks, so I'll start there and then see how much time I have after.

So we start out by acknowledging that there were changes made, of course, to the Environmental Assessment Act in 2012 and that resulted in the cancellation of nearly 3,000 environmental assessments at that time. And the scope of environmental assessment was also drastically narrowed. And it was lovely to see Melissa here cause we reference a lot of their work.

Ecojustice notes that under the CEAA 2012, projects that go through comprehensive environmental studies no longer need to include a range of information in their project descriptions pertaining to water and that includes a description on the impact on navigable waters or any unique or special resources, a description of the components of the environment that are likely to be affected by the project and a summary of potential environmental effects and information relating to the terrain, water bodies, air, vegetation that would give federal authorities a more accurate picture of the environment that may be impacted by the activity and even a description of the name, width and depth of any waterway affected by the project and a description of how the waterway is likely to be affected.

So these were all things that were taken out in 2012 from, from CEAA and we would like them put back please.

So another problem that we, that we note in reference to water and environmental assessment is that there are many kinds of projects now that no longer trigger an assessment. So that includes pipelines, transmission lines, mining, things like that. it

used to be that when those projects were being put through the government grinder, they trigger an assessment because they needed a permit from Transport Canada and that was taken out.

So now any project that might have any proximity to a waterway no longer triggers an environmental assessment and we would like to see that put back as well, please. but it wouldn't necessarily have to be through the Navigable Waters Protection Act. That was the mechanism that it was through before. It could maybe be through the Environmental Assessment Act itself. We leave that to you, but we do think it would be pertinent to have an environmental assessment triggered when waterways may be impacted by a project.

So our asks, in short, are to strengthen environmental assessments by reinstating the requirement for assessments to include the above information that I just described that are relevant to waterways and impacts on waters. To respect and protect more waterways by reinstating the definition of navigable waters to its previous definition through the NWPA and that afforded the protection and oversight to every lake and river in Canada, not just the short schedule that it now refers to, which is 97 lakes, 62 rivers and three oceans. That's all that's protected right now. So we'd like to see that expanded.

And reduce oversight on impacts to water by reinstating a trigger for environmental assessment if a project would substantially interfere with water. So however that looks, that, that's, sort of, one of the main asks, and this includes of course pipeline and transmission line projects.

So the rest of the report is, is a bit of a response to some of those questions that you as the panel, put forward in those seven areas. We're only responding to the first three as we see those are the most pertinent to our knowledge and our asks around water. So I have a little bit more time, to I'll just go through some of the ones that I know a little bit about.

So environmental assessment in context, the first question to what extent do current federal environmental assessment processes enable development in Canada that considers environment, social matters and the economy? Well, we posit that the purpose of environmental assessments is not to enable development specifically. Like, that shouldn't be the purpose of environmental assessment, but it should be to protect our natural resources such as water because those are irreplaceable, and if we damage them, that's really bad for us.

Of course, our society and economy depend on clean water and so we see that as a, as a priority that considers environment, social matters and especially the economy, especially economies that communities rely on such as transportation, fishing, tourism and recreation. These are all economies that are important as well as, like, oil and gas

and those things that we think of when we're talking about economy and these questions.

So what outcomes do you want federal environmental assessment processes to achieve in the future? One of the big things, like, foundational things that we believe is important is that we have the ability to say no to a project. So that is an alternative that can be an outcome of an environmental assessment is that we've gone through the assessment and we're turning it down, turning down the project.

So that seems to be something that we shy away from and environmental assessments currently, we sort of seem to go through assessments with the assumption that there will be a yes at the end. And so the idea that being able to say no is really important.

So I'll skip a little bit just cause I don't have too much time left, to overarching indigenous concerns. So I know that there's a stream of indigenous consultations going on in sort of concert with this one, so I'm sure that you'll, you will yield the appropriate recommendations from those, but as an ally, we find it's important to add our voices where we can.

So the beginning, there's a little bit of background, of course, on how the 2012 budget bills actually incited the Idle No More movement, so I find it very relevant to bring up here since we're trying to, sort of, rectify that through these processes. So there's a little bit of a history there, I'm sure you already know it.

And we talk a little bit about the importance of the United Nations Declaration on the Rights of Indigenous Peoples, which of course the panel has taken on as a, as a founding principle of moving forward with environmental assessment. A really important part of UNDRIP is the free prior and informed consent piece, of course. And so, something that we outline is, is that free, prior, informed and consent all must have very clear definitions of what those things mean, and consent in particular because consent must be given by people who are affected by a project and if there is no consent, there really can be no project. Like, I think sometimes we think consent and consultation is the same thing, but consent should have a real meaning and a real process by which to obtain it.

And then of course, free means that there would be no repercussions if they said no, such as pulling federal funding; prior, how far ahead is that; and informed, what does that mean? Is that a one-hour meeting? Is it a whole process of educating? So having those definitions nailed down is important.

As far as indigenous traditional knowledge, I'll just say a short comment that it's really important to remember that traditional knowledge is not a commodity to be used to further the goals of development. It has value far beyond informing our development projects. And those stories and that knowledge can inform the ways that we do things

in really important ways, especially pertaining to climate change, observing its effects now and what we should do in the future.

So I think I'm pretty much rounding out to the end of my time. But we also comment on planning environmental assessment and of course, we recommend that pipelines and other large projects should be one of the circumstances by which a federal environmental assessment should be triggered, and that of course, the current scope and factors should include some of those things I mentioned earlier about, information about water and impacts on the environment that were taken out.

Yeah, I think that's, that's pretty much it. There's a lot in there, but yeah, I'm sure you have a lot on your plate.

Johanne Gélinas: Thank you very much. Renée?

Renée Pelletier: Thank you. I'm wondering with the first part of your presentation on, on water protection measures. In your asks to the panel, you've talked about, you know, three different points that you would, where you would like to see things that were in the old act reinstated. I'm wondering whether you would have any comments about maybe possibly going beyond that? You know, if, if you change anything, would you stick to what was in the previous act or would you possibly make further changes?

Diane Connors: Yeah, I mean, a lot of our recommendations n the first page actually mostly apply to the Navigable Waters Protection Act. CEAA would just refer to that act and say okay, we're going to do it. This act says, and same with something called the, I think the Oil and Gas, Canada Oil and Gas Operations Act. The EA process referred to that as well, to define what a project was. And so, for me, it seems that it might be a good idea to embed some of these things into CEAA itself, as opposed to referring to these other acts, because when those things get changed, then, then CEAA is changed by default.

So yeah, under the Navigable Waters Protection Act, the list of waters that are, I guess, considered water was narrowed drastically. And then under the Oil and Gas Act, the types of projects that were considered projects was also narrowed drastically. And so putting in those definitions into CEAA might be a way to safeguard into the future.

Renée Pelletier: Thank you.

Johanne Gélinas: Rod?

Rod Northey: Oh yes. First question, a lot of these are quite specific. Have you participated in any EAs under the pre-2012 CEAA or the post-2012 CEAA and if so, in any future presentation, if you could give us some examples of where some of this lands? That's my first question. So have you participated in some?

Diane Connors: I have not. No, I have not.

Rod Northey: Okay. So is this theoretical then, or what's the, the landing point for this?

Diane Connors: Sure. This is based on the knowledge and expertise of our water campaigner who's been doing water policy campaigning for, gosh, I think eight years. And so yeah, this is not my, this is not my expertise, I just tried to pull it together so that I could present some of this information to you.

But I did take, I did take some classes on environmental assessment. And so, I there's, they're a complicated process that have, you know, certain triggers and structures and then provincial and federal is all different. So it is something I'm interested in, and –

Rod Northey: Has the Council of Canadians participated in some EAs? I seem to think they have, but —

Diane Connors: Yeah, I imagine we have probably professionally, like staff people, but also, you know, we have a network across the country of, of just local activists and they kind of participate in whatever they want, so -- (laughter)

Rod Northey: Alright. And as you said, and I was curious, so the first page is dealing with Navigable Waters Protection Act, which is one part of the water story, —

Diane Connors: Yeah.

Rod Northey: — but only one part of it. So is there anything more you wanted to say? I mean, for example, the Fisheries Act also had some changes (inaudible) —

Diane Connors: Yeah, of course.

Rod Northey: Are there other aspects to the water piece beyond the navigation that, as Council of Canadians or you want to speak to?

Diane Connors: I think we were trying to focus specifically on water as it pertains to the Navigable Waters Act because we're trying to divide up the work between a couple different organizations. And so Council of Canadians said okay, we'll take the NWPA stuff. So that's sort of what we're focusing on. I feel like we'd have opinions on it, but we're trying for the straight, narrow shot.

Rod Northey: Alright, those are my questions. Thank you.

Diane Connors: Thank you.

Renée Pelletier: Thank you.

Johanne Gélinas: Seems that my colleagues know pretty much what is the Council of Canadians. I don't. (laughter) So would you be kind enough to tell me a little bit more about it?

Diane Connors: Sure. Yeah, we're a national organization that was founded in 1985 in opposition to certain trade deals, I think, that were occurring. So we focus on social justice issues from trade agreements, democracy, health care, climate change and energy, and water is our big one actually. Maude Barlow is our Chairperson and she does a lot of advocacy about water, and has actually just released a new book called Boiling Point, which goes into a lot of this kind of stuff. So, yeah.

Johanne Gélinas: And you have, like, antenna or offices all over the country.

Diane Connors: Yeah, we have five offices and we have, gosh, over 100 chapters, I would say, of local activists across the country and thousands of supporters.

Johanne Gélinas: So I will invite you also to spread the word that we would like to hear your, your colleagues.

I have two questions for you. First one, when you say we should be allowed to say no to a project, who is the we?

Diane Connors: I think from our perspective, it would be local communities, for one, and indigenous communities, for two. That's sort of who we focus on, of course. Basically the people who would be directly impacted by the project.

Johanne Gélinas: My other question has to do with the free prior and informed consent. Don't you think that this should be a kind of basic principle which should apply across Canada regardless of indigenous, non-indigenous people?

Diane Connors: Yeah. Probably. I mean, the reason, I guess, why we focus on free prior and informed consent in terms of indigenous communities is that it's embedded in the United Nations Declaration of the Rights of Indigenous People. And if we accept that declaration, then we accept these principles. And I feel like it would be a good step towards having it for all people, you know, because we're, we accept it for some and then hopefully we accept it for all. Yeah. That's my feeling.
Johanne Gélinas: Thank you. One last thing for you. with your permission, as you know, there is our panel as part of looking at different aspects of the EA processes and one is the Navigation Act, Fisheries Act and Modernization of NEB. Under the Navigable Waters process, would you mind if we send your submission to the

parliamentary committee?

Diane Connors: Yeah, I think —

Johanne Gélinas: They will look at that, or do you want —

Diane Connors: — I think we're —

Johanne Gélinas: — to do it yourself?

Diane Connors: — yeah, I think we were going to try to make something specific for the —

Johanne Gélinas: Okay.

Diane Connors: — for the NPA folks. So, yeah.

Johanne Gélinas: Okay. Thank you very much.

Diane Connors: Yeah, thank you.

Renée Pelletier: Thank you.

Johanne Gélinas: So now it's time for Ms. Anna Johnston, on behalf of the West Coast Environmental Law. And we have received your submission. Thank you very much.

ANNA JOHNSTON, WEST COAST ENVIRONMENTAL LAW

Anna Johnston: Yeah. Thank you. So I, I put together this presentation. I guess I should start, I'm also going to present to you in December, and in December, I plan to focus more on substantive reforms. This one, this presentation was intended to be a setting the stage scope of review thing, but based on the excellent conversations going on, I'm tempted to scrap the presentation and just have a discussion or –

Johanne Gélinas: Just go with your conclusions because we read what is broken, but we're looking for solutions, so —

Anna Johnston: Yeah. I mean, I (inaudible) —

Johanne Gélinas: — share, that's (inaudible).

Anne Johnston: — as long as you get the point that EA is broken, that it wasn't

working terribly well under CEAA before CEAA 2012. The Cabinet directive is not ensuring implementation of strategic EAs. There have been a number of different commission reports that have shown that, that in fact, out of – I can't remember what it was – something like 17,000 proposals that went to Ministers in DFO, Ag Canada, Health Canada and CRA, only four got strategic EAs. So it's just not being done. So, and this is the opportunity to build a legacy on next generation EA, which is maybe the, the fun bit that we can get into . But I haven't, the caveat of course, is that I haven't gotten so far in my, in my thinking that I haven't gone, you know, totally to the specific recommendations. So, it's more the overarching stuff, but you are in receipt of the summit outcomes, the wonderful compendium of 12, not three but 12 key highlights in the next generation EA law.

So that was sort of the summary of the, the, you know, how it's broken.

Johanne Gélinas: Let's start this way. If there was one thing to be fixed, what should it be?

Anna Johnston: The entire law. (laughter) The entire (inaudible). And I think, I don't mean to be cheeky about it, it's, I think probably the most important point to be made is that if we want to get towards environmental assessment that's really effective, then the reforms need to be taken as an integrated package. They can't be cherry picked. They just don't work, the elements of EA, the fundamental elements of EA from, you know, what test we use in making decisions to public participation, to strategic and regional, they're all interconnected.

The focus on learning, I think it was Mellissa mentioned that, you know, we need to be able to learn from previous projects and previous follow-up programs. That's interconnected into good EA and we're not going to get to good EA unless we have a robust package of best practices.

So, I mean, there are some, like if I were to try to pick my, the ones that I thought were most important, I would say a focus on sustainability, using sustainability based decision, making criteria and clear trade-off rules instead of the current test of significant adverse effects and mitigation and justification.

Johanne Gélinas: Can you expand a little bit on this one?

Anna Johnston: Yeah. So, okay, here's an example: the Site C EA, right, mega dam, going to flood an entire river valley, flood out people's homes, flood out a significant chunk of Treaty 8 territory. The review panel concluded that the project was going to have significant adverse impacts and significant impacts on Aboriginal rights and title, and that those impacts could only be justified in light of an unambiguous need for the power.

Both BC and Canada approved the project behind closed doors, in Cabinet, without any real justification. Right? So we have a big problem. First of all, you've got the significance test, which is arbitrary and gets unevenly applied across the board, and then you get the fact that those justifications are done behind closed doors. And Cabinet, the provincial test in BC is the same and the BC Court of Appeal has said that, that the act, and this is where CEAA 2012 is going to, is that the act gives unfettered discretion to Cabinet to take into consideration any considerations outside the EA, including political considerations.

You're never going to get to a decision that people can really trust, or you're never going to have a process that people can trust from the beginning if they know that it doesn't matter what the process is and how good it is if Cabinet can just go away and, and justify the significant adverse impacts. So the two things there are the problem with finding significance and then the problem with justification.

So what has been proposed and what has actually been used in Canada quite effectively before, and there's been about a half dozen sustainability environmental assessments in Canada from the Mackenzie Valley gas pipeline, Lower Churchill, Kemess North where they use sustainability based decision-making criteria. There are two categories of criteria, one set of generic criteria that you would build into the law that asks various questions like, you know, will this project have net benefits for the environment, for communities, for society and for the long-term economy. Will those benefits be equitably distributed across regions, across geographies, across generations, etc.?

And then, during the review, part of the process of the review is that you develop more projects or undertakings specific – I shouldn't say projects cause this would apply to policies, plans and programs as well – you develop more undertaking specific criteria. You know, in the case of a major pipeline, you'd probably have criteria built in around a climate test.

And then, so the decision maker applies these criteria and gets to whether or not the undertaking is going to have net benefits. And in the event that – cause we're in a messy world – you don't have net benefits for all, instead of just doing that balancing act or the behind closed doors justification, there are trade-off rules built into the process or into the law that just make sure that any, any of the trade-offs among the various pillars, we'll say, follow a well thought out plan. And so that people understand exactly how you get to that justification decision, or the trade-off decision, we call it.

So the benefit of sustainability based decision-making criteria and trade-off rules are that the people, the public understands what the process has been. The process follows, or the decisions follow the process or one of the big tasks we've been given is to figure out how to tie EA into, you know, science and, and traditional knowledge and to, you know, make sure that EAs have a better base on science and traditional

knowledge.

So the decision-making criteria would require that a little bit more, instead of the Site C example, where you know, we had a very good report, tons of information, 13,000 pages of BC Hydro information and all of it just got, you know, essentially ignored in the decision. And then it also relieves Cabinet – I mean, I don't want to necessarily speak for Cabinet here – but it relieves that political pressure on the environmental assessment decision-making process.

Johanne Gélinas: Thank you. Rod?

Rod Northey: Yes. So I don't think we need to go into detail about the significance model. I mean, I am quite aware of some of the weaknesses with it, and I would also say most of the assessments that we've looked at to date, even if they consider sustainability, it's still in a significance model. So the question from my end is when you say sustainability, right now, it looks like an ideal move forward because no one knows how to do it and so it looks great.
And my question is are there examples of statutes with your mandate nationally where you've seen sustainability criteria embedded in a statute or some kind of regime with some success because I again, going under sustainability, you put off trade-off rules. All of those are certainly interesting, but who's going to deal with them? And if we're going to try and take this seriously, I think we need to get a little deeper than to say sustainability writ large, even beyond the three pillars.

So we're very interested to hear what is at that next tier of detail that explains how you would make sustainability criterion. So you could go in, give us your best, if you wish, in December, but I was just wondering if there are some examples we should look at now?

Anna Johnston: I think the examples to look at are the sustainability assessments that have been done rather than law, right? So Meinhard Doelle published a very small paper, a brief one, which you'll probably be (inaudible) at, that just outlined how they applied the sustainability assessment model to the Lower Churchill EA. He was on the panel, right, so he was actually —

Rod Northey: It was a big appendix to that panel review that he had a major hand at.

Anna Johnston: Yeah. And this was just, this is just a separate paper that's on, I can't remember if we sent it to you or not, but it's, I might have sent it to you last night. If not, I intended to, so I can send it to you. it's on SSRN, so it's free and it's, it just sets out what decision-making criteria they applied, both the generic ones and then the project specific ones and the trade-off rules.

Rod Northey: Okay.

Anna Johnston: So that's a great example. And then of course, Bob Gibson has a paper on the same deal with the Mackenzie Valley gas pipeline. And so we can, we'll get that.

Rod Northey: Yes, I wasn't aware of Gibson doing a paper on it. I'm aware of the review, but not the paper.

Anna Johnston: Yeah. Yeah. Also an SSRN. I think it's on my computer —

Rod Northey: But, but then —

Anne Johnston: — so I can send that too.

Rod Northey: — to come back to it, no government yet anywhere even outside Canada or any regime, has quite met this model, in your experience?

Anna Johnston: Apparently not perfectly. Let me —

Rod Northey: Okay.

Anna Johnston: — come back to you on that. I'll, we'll, that's something that the MIAC is doing too, is trying to figure out best practices from different jurisdictions on, on different areas.

Rod Northey: Okay. Thank you.

Johanne Gélinas: Anymore questions? Thank you very much.

Anna Johnston: Oh no, I have way more. Do I get to, cause the other 12 pillars, right? So that was just the one. (laughter)

Rod Northey: Keep going.

Anna Johnston: So another key one, I think maybe Melissa mentioned it, is that we need to consider alternatives, right, and alternatives to the project. Maybe a couple of people mentioned it. We can't just be looking at alternative means of doing the project and integrated into that, again, these, these reforms are all integrated, is the need for public participation really early on in the processes, not by the time, not beginning once a proposal is down on the table and drafted.

The public needs to be engaged from the early conceptual stages. And part of that then is identifying general broad alternatives, including the no alternative. Right? We

need to be looking at – environmental assessment really is a planning tool, right, and it can be used to plan, sort of, broader, you know, regional strategies but it also is used to plan proposals. But if the public isn't involved from the very beginning, then it's not working.

Related to that, we really need to move assessments up into the strategic and regional levels. Cumulative effects is not working. That's a map of Northeastern BC. The red are the cumulative impacts with a 500 metre buffer zone drawn around them. cumulative effects aren't worked at all. and the general consensus in the, in the EA, sort of, biologist community is that to be effective, cumulative effects need to be done, there are two fundamental changes that need to be done.

One, they need to happen on a regional basis. And the second is that instead of looking at a project and what the project cumulative impacts are in combination with other projects, is that it doesn't work before her proponents don't like to share information that puts too much of a burden on each proponent.

You need to look at the ecosystem components, the value component. So instead of looking at what are the cumulative impacts of this wellhead, you have to look at what do, what does a moose population need to thrive? What does it need to be healthy? What are the thresholds? And then, what are all the pressures on it and how are they related and how do we make sure that we make decisions that ensure that those thresholds aren't crossed.

Johanne Gélinas: Have you thought through how these regional impact assessments should be done considering fed-prov involvement?

Anna Johnston: Yeah, you know, I actually think that, that given indigenous rights and climate change, the feds have jurisdiction over just about everything. But even if they did, and I mean that, this comes down to the harmonization of the multi-jurisdiction piece, right, so we need to really build a process that first of all, requires harmonization to go upwards to the higher levels. So when two jurisdictions harmonize, you're selecting the best processes, the most robust processes, not the most streamlined processes from both.

We do, of course, want that efficiency in the multi-jurisdiction. This goes for indigenous nations as well, right. So having those multi-jurisdictional assessments harmonize I think is tied to make sure that triggers occurs early. Apparently, one of the problems with harmonization under the old act, I'm from BC, they just substitute everything now, which is going terrible, but one of the problems with harmonizing was that often federal triggers occurred later than, than provincial triggers or listing. And so it was hard to have those timelines work.

So this might tie into the, to the Fisheries Act authorizations piece to try to make sur

that authorizations are required really early if we go back to a triggering approach. But as I said, I think, I'm pretty confident that the feds have jurisdictions over just about everything when you start to think of things in a, in key mode of effects framework. So yeah, so I think the feds could be responsible for, for regional assessments. I think regional assessments need to be more than just information gathering.

Like, right now CEAA 2012 allows regional studies, but there's no requirement to tie project level decision-making into those regional studies that have to happen. We can't just have these information gathering exercises. They all need to be linked together, strategic, regional and project level. And they need to be linked into the regulatory permitting process which is my understanding, is a huge cause of delay, not the assessments themselves, but the lack of real connection between processes and environmental assessments and regulatory permitting.

Johanne Gélinas: Go ahead.

Rod Northey: So again, just to try and get an example, so I, I'll leave out the federalism piece, but what's a good example of a regional EA, or if there is one in Canada?

Anna Johnston: Well actually, BC has just started a cumulative effects framework, which seems to be not bad in, in its information gathering. The problem in BC is that they're not linking it to any kind of decision making.

Rod Northey: Okay.

Anna Johnston: But the actual information gathering —

Rod Northey: And what's that process called there, if you don't mind?

Anna Johnston: The cumulative effects framework.

Rod Northey: Okay.

Johanne Gélinas: So it's more —
Rod Northey: Just —

Johanne Gélinas: Sorry.

Rod Northey: — no, go ahead.

Johanne Gélinas: — it's more to give a portrait on the situation?

Anna Johnston: Yeah.

Johanne Gélinas: Okay.

Anna Johnston: Yeah. It's supposed to, I mean, I think they're saying it's supposed to inform decision-making. It's just you need to have that requirement or else. Again, you don't have trust in the process.

The Bay of Fundy, there was a strategic EA in the Bay of Fundy of, what's it called, tidal energy that I understand was fairly effective and has resulted in a decision to, to begin with a pilot program. So they're starting with just a few title turbines to see what the impacts those are going to have, and then potentially roll it out into a bigger project.

Rod Northey: Okay. (inaudible) be too. I mean —

Anna Johnston: Yeah.

Rod Northey: — it's been touted for a long time. Again, we're just trying to see what examples might be out there.

Anna Johnston: Yeah.

Rod Northey: Thank you.

Johanne Gélinas: Do you know if any provincial approach which will come with a rationale to the decision that was made on a project? I mean, a public rationale which will explain why we have decided to go this way and not that way?

Anna Johnston: Like an actual justify-, clear justification?

Johanne Gélinas: Yeah.

Anna Johnston: No. No, because again, I'm in BC and the BC process is not very transparent.

Johanne Gélinas: For the others, if ever you hear about an approach which is a transparent approach to support the decision, let us know. We will be interested.

Anna Johnston: I'd kind of like to speak to why this is next generation, why it's called next generation. I think it relates to the fact that, you know, CEAA was a good law when it came in, it did a fairly good job. But our thinking has really evolved since then. We've learned a lot from CEAA about what works, what doesn't work. And it's time to implement our, our new thinking, you know. Over the last 30, I think some of the people who were at the summit said that they'd been doing this for 35 years. So we've evolved. This is like EA 2.0. It's time to, it's time to move beyond what we were

doing that was not quite, you know, working well and to, to go into the next generation of environmental assessment.

And as I've said, it's an integrated package of all of these reforms. It really isn't going to be a next generation EA if it, are all these cherry picked bits here and there that do some things better but not other things.

Johanne Gélinas: Thank you very much.

Anna Johnston: Thank you. Great. Thanks. And you have my presentation. I mean, it's very —

Rod Northey: We do.

Johanne Gélinas: Yes.

Anna Johnston: It has nice pictures too. (laughter)

Johanne Gélinas: So our last presenter for this afternoon is Mr. Dean O'Gorman. Good afternoon.

DEAN O'GORMAN, BARR ENGINEERING

Dean O'Gorman: Good afternoon.

Johanne Gélinas: From Barr Engineering. So you will tell us what it is as a starting point.

Dean O'Gorman: Sure. Okay, thanks Madam Chair, members of the panel, for giving me an opportunity to come and speak to you today. I'm probably going to be, well since I've been all afternoon, I can guarantee I'm the only person who will not tell you that the federal EA process is fundamentally broken.

I appreciate the opportunity to comment. I thought that I would offer some perspectives as an individual that's both worked inside the federal EA system as well as outside of it as a consultant. So —

Johanne Gélinas: You don't have – sorry – you don't have a presentation, a PowerPoint presentation?

Dean O'Gorman: I do not have a PowerPoint presentation.

Johanne Gélinas: Okay. Good. I was just wondering if something was coming.

Dean O'Gorman: No.

Johanne Gélinas: Thank you.
Rod Northey: So maybe we should put the slides down then.

Johanne Gélinas: Yeah, please.

Dean O'Gorman: Yes, they're not my, those are not my slides.

Rod Northey: Why, I, (laughter) I'm aware. I thought perhaps you were just going to crib and speak off them, but —

Dean O'Gorman: No. No. (inaudible)

So by way of background, for what it's worth, I previously served as the Director of review panels at the Canadian Environmental Assessment Agency for a couple of years in 2011 to 2013, and before that, worked for a long time in the federal government, mostly at Environment Canada on climate change issues. For the last few years, I've worked as a consultant in Calgary at Barr Engineering and Environmental Science.

And again, for what it's worth, I'm a member of the Qalipu Mi'kmaq First Nation from Newfoundland. But all of those backgrounders being noted, my views represent only my own. They're not my employers or any of my clients or whatnot.

And I'm also not going to speak – and I know Mr. Northey, you've, you've asked for examples repeatedly in your questions – I'm not going to speak to particular projects or clients because I'm not at leave to, to, you know, discuss any, any particular project examples. So I'll speak in general terms without explicit examples. Or obviously my federal government background, that would be telling tales outside of school, so –

So you've asked in your questions, you've given people a wide range of areas upon which they could comment. I picked six issues to offer you just a few, a few bits of input on particular areas that maybe might not be as well touched upon as others. The first one, I thought it's worth nothing that there were a couple of very big improvements in CEAA 2012 from EA used to be done.

The regulations designating physical activities, or the so-called project list, I think was a significant improvement from the pre-CEAA 2012 process of determining whether a project requires a federal EA through the four triggers that existed before. Now there is some level of clarity and certain threshold levels of a project to let you know whether you are in or out. You can find, I'm sure if you speak to people within the federal government, all sorts of stories about the challenges that existed with implementing that old system and how that sometimes compromised time limits and whatnot.

So I encourage you to though, to take, as you think carefully about the thresholds and the project types that are captured within the project list, the current project list, you may want to compare them to the types of projects that are identified as requiring an environmental assessment and various provincial assessments, and ask yourselves, -- to my mind, the question is whether there would be any beneficial federal contribution to reviewing any particular project type that's not currently found on the list. I'm not going to point to a particular examples. Some of them are obviously and have been mentioned here today.

The question to my mind is whether a project that's not currently on the list, or projects at the thresholds that are currently identified, do they potentially impact areas of federal responsibility? That's the criteria that, I think, that looking through what should be on the project list.

A second area, I (inaudible) too, that I thought was a big improvement in CEAA 2012 – again, in contrast to a comment that was made this afternoon, were the elimination of screening level EAs. So I would say quite simply thousands of federal screening level EAs per year for, quote, unquote, smaller projects consumed time and resources that contributed very little, if anything, to better environmental outcomes, particularly when a lot of those projects were already being assessed under provincial EA systems.

That being said, I'm not addressing in my comments, anything to do with changes that were made to the Navigable Waters Protection Act or the Fisheries Act and that set of, you know, of triggers, quote, unquote, that might be considered in that context.

So that was point one. My second point is on climate change. So better incorporation of climate change into the environment assessment process has been raised as an aspect of what you folks need to look at. I'm sure you're aware, hopefully that you're aware, there's a very old set of federal guidelines from 2003 you can find on CEAA's website, the agency's website that provide guidance to proponents on how to address both greenhouse gas mitigation as well as planning for climate change adaptation.

However, I think it's probably fair to say that those guidelines are often not followed carefully by proponents. And at the same time, neither does the review process, in general, carefully assess how closely those guidelines have been followed when it looks at EIS, EISs submitted back from proponents. I'd suggest that a revised and modernized set of guidelines on this issue, along with a commitment from the federal review process, to promote their use and application would be an important step to improving the treatment of both climate change mitigation and adaptation in the EA process.

At the end of day, I'll make by biases clear. The impact on the climate from any particular project will always be minuscule. I would suggest that the correct way to

determine whether a proponent is adequately considered and planned for greenhouse gas mitigation in their project should be an assessment of the degree to which its eventual greenhouse gas emissions will be regulated and comply with an effective greenhouse gas regulatory regime.

If such a system is in place, be it a provincial or a federal GHG management system, I would argue that by definition, the project's GHG emissions are not significant. In a nutshell, managing GHGs belongs with the regulatory, regulators of GHGs, not on the upfront regulatory approval process.

However, I would say that planning for adaptation to a changing climate is actually an area where the review process, if you interpret it as a planning process, which I'll address shortly actually, can be much better incorporated into the federal environmental assess process and really thinking through whether measures to address a changing climate are really incorporated in your EIS.

Point number three, review panels. I make the technical point that it's worth pointing out there's a lack of clarity that exists on when a project warrants a referral to review panel as opposed to being assessed via a standard EA. I have seen both project proponents and interested stakeholders suffer from this lack of clarity and I'd suggest it's a worthwhile exercise for you to suggest that the government take steps to try and reduce this lack of clarity by providing some well thought out guidance on which projects are likely to warrant referral to a review panel.

Point four, environmental assessment as a planning process – in principle, as we know and as it's been said here this afternoon, the key objective of environmental assessment is to act as a planning tool to help ensure better project design. Some will argue that there is a lack of collaboration in the overall process aimed at producing better project outcomes.

For example, I have heard it said, and seen myself, some people criticizing the, the sometimes too many rounds of, and too many, and sometimes arguably, you know, of questionable relevance information requests that will come from reviewers in the process. And often, on areas or topics that could have been better addressed in the early stages of a project and in the terms of reference for the EIS studies that are conducted while, sorry, the studies that are conducted that inform an EIS.

So I think it's worth you considering as a panel, whether there are suggestions you could make to allow the process to take more time on the front end of projects, to foster collaboration between, on the one hand, a proponent and its consultants who are often doing those studies, along with on the other hand, expert federal reviewers who will eventually be reviewing and asking rounds of information request about an EIS, to appropriate scope the studies that are done in the first place, and if you take a bit of extra time on the front end, you might end up with a more efficient review process on

the back end without -- I've seen projects with five rounds of (inaudible) for example.

Is there a way to promote such an enhanced collaboration? I suggest that one approach might be a formal requirement for working groups to be formed at the beginning stages of a project to contribute to, again, scoping the study so that answers are produced that answer and address the eventual concerns federal regulators are going to have later in the process.

And the fifth point, and my fifth and final point actually, is on federal capacity flowing, you know, out of the last point. One way that the federal government could contribute more effectively to this upfront engagement and the process as a whole, I'd argue, would be to think about ways to improve the staffing capacity of federal expertise within the federal system to support these reviews.

This could include both correcting the cutbacks to federal scientific expertise that occurred in recent years as well as making the commitment to support more training and mentoring within the system for the full range of officials that participate in those processes. An example of how that could be done, I would suggest – and again, my particular background as being someone who has worked both inside and outside of that system, is I think that there's great value to that in seeing the perspectives of different participants in the EA review process.

So one could look at, for example, the Interchange Canada program as a, a real opportunity to support temporary secondment of government officials that'll be involved in review processes to go work for a period of time, a year, two years, something like that, in the private sector. Obviously not on projects that they would later review. Working with proponents of consulting firms and seeing the review process from both sides, so to speak, helping to enhance and, I think, add a value perspective on the process as a whole. And that could, for extend, for what it's worth, also to, you know, environmental groups and whatnot, First Nations.

You may want to consider as the panel whether it would make sense to recommend such an approach or such a training and mentoring program really to, to the agency and to other expert federal reviewer departments.

There you go. Nicely concise and I stayed under my 10 minutes, I think.

Johanne Gélinas: Thank you. Will you be willing to share your notes with us?

Dean O'Gorman: I will.

Johanne Gélinas: Okay. Thank you very much. I'll go with one first question. Can you elaborate a little bit more about this idea of putting in place a scoping group?

Dean O'Gorman: Sure. I mean, in a nutshell, all I'm saying is one often sees, in terms of reference for an EIS issue relatively quickly after determination is made that an environment will take place. You, there's opportunities for comment and I know that federal officials be engaged in helping to think about what questions go into that.

But I, I think if you were to take the time to, say, on the front end to the, to that, the proponent and their consultants who are actually doing a lot of the number crunching and analyses and federal expert reviewers to spend some time sitting together in a working group and attempting to agree upon guidelines, you know, and a bit more into the weeds around how these studies will be addressed and what some of the real concerns are, you mind end up with a, an EIS that does not look as, you know, to an expert federal reviewer, doesn't look quite as, why they didn't address something I thought was really important and they should have, and if they had spent the time actually collaborating and talking together up front, recognizing you'd want to be careful not to bias the eventual process and that you don't get regulator capture or buy-in.

You do want to, I think, providing, if you think of it from a planning perspective, forming a working group where they have to sit together and agree on a common scope for some of those studies might be one way to have more efficiencies on the back end.

Johanne Gélinas: So that would be done between the proponent, his consultants and some —

Dean O'Gorman: A key group of —

Johanne Gélinas: — federal representatives.

Dean O'Gorman: — federal expert representatives, expert reviewers, the kind of folks who end up looking at these studies and having to determine whether the areas of federal jurisdiction are adequately considered.

Johanne Gélinas: And that will be added to the actual process, which is also to get comments from general public, right?

Dean O'Gorman: Sure.

Johanne Gélinas: Okay. Thank you. Rod?

Rod Northey: Sure. Just following up on that. So I'm a bit concerned how you would balance the possibility of capture against doing it that way. What, what would you thought be on advancing participant funding and saying that you're going to have two-day sessions one month apart or a couple of weeks apart where everybody can start with the draft EIS guidelines that are presented all sit in a room and the proponent, instead of having a negotiation walk, leaves the room with some idea or the federal

officials, whoever has the pen, says well, we've got all this input, here we go. Would that get us closer to the objective at all? Cause I am kind of concerned how you would have an independent EIS if everyone's negotiated before it even starts?

Dean O'Gorman: Yeah. And I don't disagree that that's something, in my, in my suggestion, you'd need to think about that. Your approach off the top of your head might be exactly the right one. I don't think they've thought about the modalities —

Rod Northey: No, no, I just —

Dean O'Gorman: — of how you'd implement it, but some extra time at the front end. And right now, I mean, I, I have seen certainly lots of examples where I don't see that happening. So I think that there's a way you could do that better and spend more time on the front end. And you're right, would it be a public workshop where you'd invite representatives? But remember, what I'm really focused on with this question is the information requests that come from federal reviewers in the system. And making sure that they, the things they wanted to hear that they definitely had made sure that those were better addressed up front.

Rod Northey: That, that's fair. I'll just say that I, it strikes me that we, if you were looking at efficiency, not to say that's the overarching objective, but right now, you have a process where the EIS guidelines get drafted. They can go then to the federal agencies for months of back and forth and then, it now appears there's a further process where after all, that the public gets involved in as its own, and it, I must say I'm kind of perplexed how that addresses efficiency at any level, but I'm not supposed to make comments.

Dean O'Gorman: You aren't. (laughter)

Johanne Gélinas: Renée?

Renée Pelletier: I'm wondering, your views on where indigenous people fit in the EA process?

Dean O'Gorman: Yeah, I intentionally chose, knowing that you will have many interventions on, on that issue, obviously it's a very important part of the process. Appropriate incorporation and treatment of the impacts from the project on indigenous and treaty rights, I've chosen to, to not make that an aspect of my contribution cause you will hear many views on that issue.

Renée Pelletier: Okay then, so then we shouldn't assume that you not having mentioned it is not you saying that you don't think they have a role?

Dean O'Gorman: It in no way deprioritizes the importance of tackling that issue, and I

would say it's among the most important you need to consider.

Renée Pelletier: Okay.

Dean O'Gorman: Just not one that I chose to weigh in on.

Renée Pelletier: Great. Thank you.

Johanne Gélinas: As a consultant, have you been involved in the different processes like CEAA, NEB or CNSC?

Dean O'Gorman: Yes.

Johanne Gélinas: Without talking about any kind of project, can you tell us top of mind what are the strength that witnesses of each of those processes from your standpoint? And you can get back to us with a written comment on that one.

Dean O'Gorman: The strengths and weaknesses of the, of which, of the —

Johanne Gélinas: The three different processes.

Dean O'Gorman: — NEB process and the – sorry I have, I don't have any background as a consultant with the CNSC process.

Johanne Gélinas: Okay. But with NEB, I guess you have?

Dean O'Gorman: Yes.

Johanne Gélinas: So if you were to compare the two, what would you say are the differences in the strength and weaknesses of each of them? Top of mind? Take, take you're a (inaudible). (laughter)

Dean O'Gorman: That's a challenging question. I'd need to think about it a bit.

Johanne Gélinas: Asking to a consultant, I mean, it's an easy one this. (laughter)

Dean O'Gorman: Well I, no, I can think about trying to incorporate something like that into my written submission.

Johanne Gélinas: I would love to.
Dean O'Gorman: Okay.

Johanne Gélinas: Any other questions?

Rod Northey: Yes. I just wanted to follow on the climate change piece, just want to make sure I understood, I think I understood the first part about really related to how you might assess a test of significance and you were tying it all to a regulatory number, which at the time of 2003, there were very few. So that made things challenging. But is the second part to put it in CEAA as it exists category as opposed to what it might be category, is it adaptation really in your view, the effects of the environment on project piece, which we have been looking at for a while? Is that what you meant by using the CEAA framework to address adaptation?

Dean O'Gorman: Yes.

Rod Northey: Okay.

Dean O'Gorman: Right. And, and —

Rod Northey: And do you think it's going well?

Dean O'Gorman: — there are – well, there are actually some references. There's been some studies, for example, that NR Can has sponsored with some mine organizations looking at how well climate change adaptation is addressed just in that sector in the EA process. If you, if you're aware of those references, I (inaudible) —

Rod Northey: I'm not actually, so —

Dean O'Gorman: — I can point you to them. Yeah.

Rod Northey: So NR Can has done some studies on that?

Dean O'Gorman: Well, NR Can helped, NR Can helped to commission some independent organizations to look at some of that. So I can —

Rod Northey: I'd be most interested.

Dean O'Gorman: — (inaudible). Sure.

Rod Northey: Or we would be, I think. (laughter)

Dean O'Gorman: Follow-up with them. And, and I mean, if I, if I'm to summarize, you know, in a nutshell my recollection of that work, it found the results to be mixed in the degree to which how well adaptation was considered in, in the EA process.

Rod Northey: Okay. Well, thank you.

Johanne Gélinas: Thank you very much.

Dean O'Gorman: You're welcome.
Johanne Gélinas: So we'll take a break and we will be back at 3:25 to hear the Pembina Institute presentation.

Rod Northey: 3:25, a 40-minute break?

Johanne Gélinas: Yeah, because there's nobody else.

Rod Northey: Oh.

Johanne Gélinas: Okay? Hope you will be there. Thank you.

(Break)

SIMON DYER, PEMBINA INSTITUTE

Johanne Gélinas: So good afternoon everyone. We still have two presentations left for this afternoon, and we will start with Mr. Dyer, good afternoon, from the Pembina Institute. The floor is yours.

Simon Dyer: Thank you very much. I appreciate the opportunity to present today. I'm Simon Dyer, I'm Director for Alberta with the Pembina Institute based here in, in Edmonton. Pembina Institute is Canada's sustainable energy think tank. We have offices across the country and I hope that my colleagues from our offices in Vancouver and Calgary and Toronto will also have the opportunity to present to you during your cross-Canada tour.

Johanne Gélinas: Good.

Simon Dyer: I'd like to start by saying that Pembina is fully supportive of the, the Federal Environmental Assessment Reform Summit recommendations led by West Coast Environmental Law and we think these will recommend significant improvements in issues that should be considered in terms of reforming environment assessment.

I thought I would spend my time today focusing on three of those specifically that relate to our expertise here in Alberta and some varied experience around oil sands assessments in Fort McMurray, specifically how climate assessments will help Canada achieve its climate goals, how to ensure equitable participation and just some examples of why public participation is necessary and resourcing for that participation is necessary.

And finally, some issues around ensuring sustainability after the assessment issues

around dealing with uncertainty, adaptive management and the precautionary principle going, going forward.

Johanne Gélinas: I will ask you to speak a little bit louder.

Simon Dyer: Okay.

Johanne Gélinas: Thank you.

Simon Dyer: Maybe I'll get closer to the microphone.

Johanne Gélinas: Yeah. Thank you very much.

Simon Dyer: That will be better.

So Pembina's experience with environmental assessment federally as it relates to the, to the oil sands is long running. Since 2003, we've been involved in at least six federal assessments from the, ranging from the CNRL Horizon project to the Shell Jackpine Mine Expansion project of a couple of years ago, and we're currently preparing for the Teck Frontier Mine hearings in Fort McMurray.

And one of the most significant issues that we think environmental assessment needs to deal with is incorporating obligations to reduce greenhouse gases. Obviously, there are very significant environmental impacts associated with a number of projects, but in the current context, addressing the issue of climate change is really the, you know, the single most significant challenge that we, that we face. And we need an environmental assessment process that deals with this seriously.

Of course, we made commitments to reduce emissions. The Government of Canada has made these commitments throughout time. We have a history of making these commitments and then, neither putting policies in place or using decision-making to follow up on those commitments. It's rare participating in these hearings in the 2000s of, you know, climate change and the, the significant reductions that require to be taken seriously in these hearings.

We hear about attempts to minimize the significance of GHG impacts of projects by framing them as a percentage of international total emissions or Canada's emissions. Obviously dealing with climate change, any project is going to seem as insignificant. You'd never see a finding of significance if you were trying to determine whether an individual project did or did not cause climate change, but taken in aggregate, we see, you know, our emissions continue to increase over time despite targets 2020, 2030.

And then most recently, with much fanfare of course, Canada was, was part of the UN Climate Conference in, in Paris last year, where significant commitments were made do

reduce emissions, to reduce emissions below two degrees and as close, less, sorry, as close to no more than 1.5 degrees of warming as possible. If you do the math about what kind of reductions you'd need in industrialized countries to, to prevent that kind of warming, it would talk about the need for net zero emissions, but if, if you take 80% reduction of emissions as a minimum target by 2050, that really puts a different focus non the kind of decision-making that we need to make.

Alberta of course, under its new climate leadership plan, has said that by 2030, oil sands emissions will not exceed 100 megatons. That was a very significant announcement, but between 2030 and 2050, you would expect those emissions to have to drop very rapidly. If the oil sands still had 100 megatons of emissions in 2050, in a, in a situation where Canada was to reduce emissions by 80%, the oil sands would represent 75% of Canada's total emissions during that, during that period.

If we look at that in a different way, this is the same 2020 and 2030 targets and also includes, you know, a likely 2050 developed country target there. If you just look at significant fossil fuel projects that are being considered by CEAA currently, the, the number of projects, LNG projects being considered in BC and the Frontier Mine being considered here in Alberta, in aggregate, those would represent more than 20% of Canada's total emi-, likely emissions budget in 2050.

So we really just, you know, don't think that, that this issue is being dealt with with the level of seriousness that it deserves in decision-making. I don't think that, you know, we're, these projects the last 30 or 40 years, yet we're not actually making decisions based on the, you know, the likely commitments and situation we're actually going to be in, in 25 years time in, in these instances.

The next issue I want to touch on briefly is just one of ensuring adequate public participation in, in hearing processes. I mean, this is essential for fairness and good decision-making. And I should say that, you know, in Alberta we, we much prefer the federal environmental assessment process to the provincial assessment process given that it is more equitable and more fair.

Certainly, the processes are not, are not comparable. It's much harder to get standing in Alberta processes. There is no money for public participation. The quality of the environmental assessments is much less rigorous. So while, while obviously we will point to gaps in federal environmental assessment, it is far superior to the, the alternative and something that needs to be considered. We can't afford to lose anymore ground.

In the decade that I've been involved in oil sands and projects in Alberta, the funding available for public participation has shrunk every year. This makes it very challenging for not-for-profit organizations like Pembina, which get no core funding, to participate adequately in the, here in the hearing process. The hearing process is obviously set

up to be an adversarial one where the resources of the proponent versus the intervenor, you know, they outweigh us 100 to 1. And the ability to properly review thousands and thousands of pages of complex environmental assessment material and provide significant suggestions, obviously are very, very challenging.

The participant funding that Pembina and, as a member of Oil Sands Environmental Coalition, which is three organizations which intervene in oil sands hearings for the Teck Frontier Project is $29,980, which is, when you consider the number of issues that need to be reviewed, it's simply not enough for us to be able to invest the time in properly reviewing these, these projects.

And I would argue that intervenors have actually demonstrates significant value to the process. We go to these hearings to, to raise serious issues and provide a counter, a counterpoint to some of the work that's done by the proponent and also to address inadequacies. And if we're not there, you wouldn't get the same level of information.

An example of this is in the Shell Jackpine expansion project. Shell submitted a full environmental assessment that took two years to develop while they worked with their consultants to develop a cumulative environmental assessment that proposed that there would be no future forest harvesting on the landscape, even though the, the area where the assessment was supposed to take place was shared by the largest forest company in North America, where they didn't include many disclosed oil sands projects that were on the books and where they didn't include, where they concluded that for the purposes of cumulative effects assessment, there would be no forest fires around Fort McMurray in the, in the future.

And they based their entire environmental assessment on those, on those three assumptions which there, of course, led to a conclusion that the impacts=, the cumulative impacts were modest and no significant impacts on a whole bunch of indicators. The Oil Sands Environmental Coalition and, and Pembina did some significant work to demonstrate that this environmental assessment was, was flawed and inadequate, and based on that submissions to the panel, Shell were required to conduct a completely new environmental assessment, which formed the basis of the assessment that was then considered in the area.

As a result of this, once you actually look at, you know, reasonably foreseeable development, which this figure here in red shows the reasonably foreseeable development in the study area north of Fort McMurray, for the first time ever, the panel found that there were likely to be significant adverse effects as a result of cumulative impacts of development. None of this information would have come to pass if, if Pembina and OSEC hadn't been able to do this assessment using participation funding to actually ensure that rigorous assessment took place. It's essential to have that ability to, you know, provide the necessary quality control to ensure we get a reasonable process.

A couple of other relevant issues I want to speak to as well is around the, you know, the scope of the, which projects are considered by CEAA and what is significant enough for enviro-, federal environmental assessment. CEAA 2012 explicitly removed in situ or deep oil sands projects from consideration from, by the federal government under CEAA. If you actually look at the area in Alberta that's been leased for in situ oil sands development, it dwarfs the area that's going to, going to be mined for oil sands.

Greenhouse gases are more significant in in situ oil sands development than in oil sands mining and cumulatively in situ development has now overtaken mining as the number one form of oil sands development. And from the cumulative effects perspective, you know, the cumulative impact of in situ is much more significant than the impact of oil sands mining so it seems arbitrary that this is not considered under the federal assessment process.

Last point I'd like to address is just the issue of addressing uncertainty and precautionary principle going, going forward. Feels that, feels to us the use of adaptive management has become misused through the Environmental Assessment process to basically mean that even if credible mitigation hasn't been identified, adaptive management is appropriate to say we will learn by doing and you know, we call this phantom mitigation, that the projects that haven't demonstrated an adequate level of proposed mitigation, where there's a lack of track record, of mitigation from any similar projects in the field yet, still we see approvals.

And tailings would be an example of this, though, you know, the risk around dealing with liquid tailings in the long term, the fact that no operator in the oil sands has been able to demonstrate effectively how to deal with tailings, about how end pit lakes whereby tailings will be put in the bottom of mine pits and covered with fresh water is an adequate long-term way to deal with tailings hasn't been demonstrated. To enable one of these projects to proceed is adaptive management to enable a dozen end pit lakes to be proposed without any evidence of effective mitigation is, you know, we believe is reckless and not, not consistent with good environment assessment practice.

So that's the points I wanted to highlight today. As I said, my colleagues across the country will provide supplementary information as you travel across the country. So thanks again for allowing me to present today.

Johanne Gélinas: Thank you very much. Want to start?

Renée Pelletier: Sure. So thank you, first off, for your presentation. I wanted to touch on a comment you made about participating in the environmental assessment process and it being an, set up in an adversarial kind of context. And then you talked about the example of a situation, the Jackpine project where as an intervenor, you really sort of helped develop the, you had an impact on the result of that assessment.

I'm wondering whether you have views on how the process could change, if you think it should change from an adversarial process to something else and if you do think it should change, what, what format should it take?

Simon Dyer: Sure. I mean, one thing that I didn't speak to that I could probably speak to now is that you know, Pembina Institute doesn't always go to hearings and in virtually all of these instances, we actually work with the proponent before hearings and we've actually, we have a long track record of actually negotiating outside the hearing process with, with proponents and in places where we've seen significant evidence of progress in terms of meeting certain environmental obligations.

We've actually withdrawn our opposition to the projects and tabled our non-objection to the project. A specific example I can think of is the original Shell Jackpine Mine, which was a provincial assessment. Shell, through negotiation with Pembina, actually agreed that, that the greenhouse gas footprint of that mine per barrel would be no different than the, than the average barrel of oil produced in North America.

Unfortunately, Shell reneged on that commitment a number of years after the approval was granted and we sought to have that addressed legally through the provincial courts and unfortunately, it was concluded that that agreement had no legal standing and therefore Shell didn't have to meet the commitment. A tough lesson tempers our willingness to deal with companies going forward.

So I think that specifically is one way that you know. But only the credible threat of Pembina actually being able to appear at the hearing actually, I think, you know, contributed to the motivation of companies wanting to engage with us like that. So, I mean, I think the whole issue of regional strategic environmental assessment conducting these assessments on a landscape without, you know, the friction or the conflict associated with the specific project I think is a very significant way to address these projects.

Ideally, you know, it's obviously complicated with the, with the provincial responsibility for resource allocation and leasing, but you know, as in the, you know, federal lands in the US where the environmental assessment occurs prior to leasing decisions, not at the point, you know, when companies expend good money, already being leases and then, you know, have the expectation that a project is going to be, is going to be developed.

Johanne Gélinas: I have a few questions for you. The first one, I would like to first of all, the projects that you presented to us are all NEB projects, under the NEB process or not?

Simon Dyer: None of these were on the —

Johanne Gélinas: So it was CEAA?

Simon Dyer: — the NEB. These were all under CEAA.

Johanne Gélinas: Okay. Can you just explain to us where you intervene in a process and basically, what do you do with $30,000? And how much money realistically an organization like yours with of experts will need to do a proper job?

Simon Dyer: Sure. So I mean, so Pembina intervenes, you know, throughout the process, at the sort of the point of scoping of projects that, you know, reviewing projects and supplemental information requests. And then, you know, preparation and follow-up at a hearing. So, I mean, you just have to, I mean, a way to, you know, sort of frame this would sort of, you know, almost be how much does the proponent spend on the, on developing the environmental assessment? And you know, I'd like to think that the, the experts brings in, the different disciplines in terms of reviewing all that material and properly, it's, I mean, the Shell Jackpine project, I think we probably spent about $150,000 of, you know, which came from donations, some from participant funding, some from cost awards after the hearing with the Alberta energy regulator.

So I mean it's a very, very significant amount of money. But even when you're talking about, you know, six figures, that's still, what would that be, 5% of what the proponent is actually, you know, spending to review those projects. So there has to be some mechanism for, you know, some kind of public interest intervenor to review that. Obviously, you know, the federal and provincial governments could potentially play that role, but in Alberta, we've seen, you know, the, the provincial government hasn't even been participating in federal regulatory process. It's very difficult to get accurate information on the record. So we feel like we have to play that role.

Johanne Gélinas: And if through a process under CEAA and the agency, money was to be given by the proponent to help organizations like yours to do their work, would you consider that as having an impact on your independence?

Simon Dyer: I mean, I think there would, you know, need to be a checks and balances about how that happened, but I mean, and, I mean every organization, you know, would treat this differently, but from Pembina's perspective, I mean, our existing funding mechanism comes from a wide variety of sources, grants and donations, consulting contracts with, with individual companies.
So I don't think so. I mean, the, if the dollars were there, we would, we would use them and certainly our, you know, from Pembina's perspective, I use the Shell, Shell example. I mean, Shell has been a corporate client of, of Pembina's, yet at the same time, it doesn't affect our decision-making when we see a bad project that needs to, needs to be improved.

Johanne Gélinas: And almost everybody here today talked about the, you said it the right way, mitigation measures haven't been proven effective. We heard that in many different ways, but at the end of the day, it's all of the same comment that was made. How can we fix that?

Simon Dyer: I mean, I think that's the, it's the counterpoint between the precautionary principle and adaptive management, right. I mean, if you take the precautionary principle to the extreme, there would never be any development. If you take adaptive management to the extreme, which I think is the current situation where, you know, companies are allowed to propose projects that have got no track record or demonstrated performance.

I think there's a need to have much stronger demonstrated performance, either a trial scale somewhere or through a similar, similar project, right? You know, it's, there needs to be more accountability in the system, you know. I mean, we've raised this in oil sands hearings where we've said you know, if, if you think that this reclamation is achievable, you should be willing to accept these binding reclamation targets as conditions of your approval and your ability to continue to disturb land has to be demonstrated on, you know, existing reclamation.

Obviously, that doesn't happen in year one, but it has to happen by year 20 or year 25, and I think with these large projects, there isn't enough conditional approval or assessments considering that if, if there isn't a demonstrated improvement, then that approval is a risk. If you work for a forest company, if you don't plant trees the year after you cut them, your ability to cut further is limited. But there's been no real attempt to hold companies accountable for their lack of tailings management over the past 40 years, for instance.

So as I said, you know, having a number of test projects where you, where you learn and demonstrate improvement, that's necessary before, you know, new, new projects should be allowed to proceed. There just simply isn't, isn't the track record there to have all these projects proceeding with, with lack of certainty of ability to address these issues.

Johanne Gélinas: And from a governance structure, are you thinking of an independent follow-committee or monitoring committee to look at the impact of the mitigation measures? How do you see it?

Simon Dyer: Yes, I think so. I mean, certainly, you know, there seem to be, I mean, I guess it's human nature, but there is much more rigor in a run-up to a process than, you know, looking backwards and reporting, you know, on actual performance.

Another example from the Shell Jackpine hearing was, you know, before the hearing, we actually requested that the panel get a written follow-up on the performance of every

single previous recommendation and condition that have been made for a previous oil sands mine to determine if there had actually been, you know, the things that previous panels had recommended had actually been followed up on. I mean, it was surprising to us that there wasn't actually a registry of all those recommendations and conditions to begin with.

So, and to their credit, the federal government did provide a summary of action on previous recommendations, though it took, it obviously took some digging. I think it surprised people that we'd asked for this information. The recommendations and conditions that, that applied to the provincial government, they didn't cooperate so we have no idea whether those were met and (inaudible) gets back to my point about the difference between the federal and provincial process.

So yeah, some kind of independent follow-up or some kind of commitment from the federal and provincial governments to actually treat those recommendations and conditions seriously, going forward, I think would improve the process.

Johanne Gélinas: And my last question, you talked about the institute project. Are you of the view that they should be brought back under CEAA?

Simon Dyer: Yes. Absolutely. They're significant sources of greenhouse gases. Some of the, you know, there were proposed projects on the order of 160,000 barrel a day projects that, you know, by, by any definition is as significant as a, as an oil sands mine. Specifically in Alberta, there's a very significant issue around species at risk, particularly woodland caribou where these, these projects occur. So yes, absolutely.

Johanne Gélinas: Thank you. Rod?

Rod Northey: Yes, I'll start with that question, just following up on greenhouse gas emissions. So your slides were illustrating numbers and your position not making a lot of sense. But let me just ask, what would be the way to assess that? We heard previous speakers say it's difficult to do a project-based assessment of numbers. Do you have a different view? And if you do have a different view, what is the way to deal with the numbers?

Simon Dyer: Yeah, I mean, it is really challenging but I think it's essential that our international commitments and our obligations about what Canada's total carbon budget is going to be during the lifetime of these projects is incorporated in decision-making. So as an example of that, I mean, as, I mean, the Teck Frontier project, I mean, I'm just, it's coming up, right, so it's timely, right? I mean, I think that, you know, the decision that the panel will have to consider is not just, you know, are the four megatons a year of greenhouse, CO2, (inaudible) from the Teck Frontier project significant as they relate to, you know, Canada's total emissions or the international total emissions, it's like does the Government of Canada want to assign 2% of its entire

carbon budget in, in 2050 to this specific project?

And when you just do the math about, you know, how, all of the other sectors of the economy, they obviously want, are competing for that si-, same shrinking greenhouse gas pie. If we don't seriously address that in our decision-making, we're going to be in a sort of stranded asset situation very, very quickly where we've made all these commitments and then the science is only pointing in one direction and every time, you know, things, things get stricter and stricter, not, not less strict.

So you know, you know, Pembina Institute, the full name is the Pembina Institute for Appropriate Development and we support responsible development, but you know, it has to be made in the context of those big commitments.

Rod Northey: Alright. So related just to that and taking an example of Jackpine, I'm interested, the background you described was there is a provincial process. I don't know whether it was in EA that was independent and then that was followed by a federal EA. Could you just explain a little how was it there are numerous examples of federal-provincial liaise in Alberta. What happened in the case of Jackpine to keep them separate?

Simon Dyer: Yeah, sorry, we're talking about the original Jackpine project in 2006, which was a provincial process and then the, the, the Jackpine expansion project, which was a federal joint federal/provincial project. So —

Rod Northey: Okay, (inaudible) one was fed/prov?

Simon Dyer: — yeah. Yeah, exactly. So the most recent example I gave was a, was a federal process and it was because of that federal participant funding we were able to do that, the assessment that we did and the, the proponent was required to do a completely new assessment.

Rod Northey: And related to that then, just on we're trying to understand a little bit the role of federal expert departments. So when you were doing, let's say, the most recent one, when you got as an intervenor, you're participating in this, what role are the federal departments with expertise taking, Environment Canada as an example, for the topic you've raised on climate. What are they doing well? What aren't they doing well? I'd like to hear what your views are, if you have them?

Simon Dyer: Well, they show up. They're doing that well. I mean, it's, you know, the fact that the federal government provides experts that participate in panels is positive. And as I say, you know, without having provincial experts there, it's, it's challenging to, you know, I mean, we're often at hearings when, you know, the proponent is being cross examined about provincial policy and Pembina's being cross-examined about provincial policy and there's no one there who has any expertise in provincial policy

from the provincial government to actually provide the perspective.

Rod Northey: Can I just interrupt you? So that, I'm naïve to this, but why the federal panel can subpoena anybody, so where's the province?

Simon Dyer: That would be a question for the, I mean, I would, you know, the, the three most, three or four most recent oil sands hearings I've appeared in, there hasn't been a provincial panel and you know, I've seen letters from the provincial government saying that, you know, they're not sending a panel. They believe the information has been provided in written form, and I don't know why they haven't been subpoenaed, but –

Rod Northey: Alright. And just a last question, sorry, Chair, I just, you describe cross-examination occurring in the hearing. So that's unusual; in most federal panel reviews, there are general hearings and technical hearings, and the technical hearings are not quite cross-examination. So is, could you just explain how is that working? Like, everyone sits at a counsel table and asks questions that way?

Simon Dyer: Yeah. Absolutely. Having the process —

Rod Northey: Is that because the province allows that or requires that or, because it's not typical of the federal process. So I'm just interested.

Simon Dyer: Yeah, all the, all the, I don't have experience in environmental assessment outside of Alberta, but all the, all the joint third provincial processes I've participated in, Alberta has been a quasi-judicial full, full hearings where we've cross examined the, our lawyers have cross examined the proponent and then we've, Pembina or the Oil Sand Environmental Coalition's panel has been cross-examined by the Alberta energy regulator, by the, the lawyer for the federal government and the lawyers for, for proponents.

Rod Northey: Thank you.

Johanne Gélinas: Do you have examples of joint panels? Fed/prov?

Simon Dyer: Examples of those? Yes. So the, the Jackpine Expansion project was a joint fed/prov panel; the Imperial Kearl Project was a joint panel; the Total Oil Sands Mine, those are three of the most recent ones.

Johanne Gélinas: How will you qualify the quality of those joint panels in terms of value added?

Simon Dyer: I mean, I think, in all of those panels, I think, you know, we appreciate the opportunity to participate and to your previous comment, Mr. Northey, I didn't finish my, sort of, train of thought. I mean, we have been impressed by the quality of the federal

expert witnesses. I think they've, you know, answered in, you know, in a frank and value added way. I mean, I think the general imperative seems to be that – and I know this has been talked about by other speakers – that it's, the general sense is that, you know, the project is going to be, is going to be approved. There'll either be a finding of no significant effects and the projects will be approved or most recently, in the case of the Shell Jackpine hearing, a finding of significant adverse effects and the project is still approved.

We actually prefer that result to the previous results that said there were no significant adverse effects. I think we're actually making progress if, you know, we acknowledge their impacts and decide to approve the project for other reasons. But certainly, the ability to present that information publicly, to bring experts to bear, to elevate these issues so that they attract, you know, interest from the media and these issues get, sort of, discussed and the political discourse, I think, is important.

I think there is some improvements we can directly point to in projects where the conditions have been, you know, small, incremental conditions have been applied that relate to things that intervenors have raised. So I think it adds value in that way as well. But in terms of the, the actual, you know, the big decision-making, right, I mean, it seems the, you know, well we haven't, we've never seen an oil sands project turned down, for instance. So I mean, the decision-making is one way.

Johanne Gélinas: And if it's a joint panel, does that mean you have the opportunity to question provincial representatives as federal ones?

Simon Dyer: No. We have no ability —

Johanne Gélinas: No. (inaudible)

Simon Dyer: — to question. If there – we can comment on the terms of reference identified provincially or federally. We can comment on the supplement (ph) information, you know, from the provincial or federal but yeah, no, we have no ability to, to require or cross-examine Alberta representatives. And in many cases, that's where, you know, again, while we talk about, sort of, lack of certainty around mitigation, many oil sands hearings, the, you know, we're told in the conditions that there are issues, but they will be addressed when the Alberta government implements policy X and —

Johanne Gélinas: I see.

Simon Dyer: — when you go to the same hearing two years later and that policy still hasn't been implemented and there's no ability to hold, you know, anyone to account for that lack of progress, you know, we think the project needs to be considered in the policy context of the day. And if those policies don't exist, that needs to be considered in the decision-making, not, you know, this project is acceptable if a policy is, you know,

done. But there's lots of recommendations to that degree, but recommendations aren't binding, you know. Recommendations mean nothing. Condition's the only thing that, that counts.

Johanne Gélinas: Thank you.

Simon Dyer: Thank you.

CYNTHIA BERTOLIN, FORT CHIPEWYAN MÉTIS

Johanne Gélinas: I will invite Ms. Cynthia Bertolin. Bertolin. Good afternoon.

Cynthia Bertolin: Good afternoon. Can you hear me alright?

Johanne Gélinas: You can speak a little bit louder.

Cynthia Bertolin: Like the singers, I'll try to eat the mic a bit.

I was recently in Toronto and typed this up a little bit quick over the last couple of days and with your permission, I'd like to amend some of it and clean it up a bit so it's more clear.

Johanne Gélinas: Easily.
Cynthia Bertolin: And as another proviso, we're famous for provisos, I have some submissions which I filed with the, the Secretariat that I've not included here because they're a little bit cumbersome and you might want to review them later or have the Secretariat review them. but the gist of my presentation, which I was told was five minutes, so it's a little bit of rapid-fire theatre.

Johanne Gélinas: You have 10. So you can breathe. (laughter)

Cynthia Bertolin: Well, thanks very much. We get paid by the word, so hang on to your hat. (laughter)

Johanne Gélinas: We will end this afternoon's session with you, so please take your time. (laughter)

Cynthia Bertolin: Falling all over my words.

Thank you very much. And I bring you greetings from the Fort Chipewyan Métis. My name is Cynthia Bertolin and I'm a Métis lawyer. We are not a common breed of people, kind of an endangered species almost, and I have the pleasure of speaking on behalf of a very old community, one I'm very proud to be associated with, the Fort

Chipewyan Métis.

My colleagues in Fort McMurray have gathered their resources and they will be presenting to the panel in Fort McMurray around more things that deal with regulatory and some of our experience in the EIA, some scopes and you know, more technical problems. But my job here today is to draw a framework around some key principles like Métis rights, the honour of the crown, rule of law, business certainty and colour of right.

Factually, the Fort Chipewyan Métis are the oldest community in Alberta. It was founded in 1788. Confederation occurred in 1867. The NWT became a territory in 1870, British Columbia in 1871. Treaty 8 and the Scrip Commissions rolled through Fort Chipewyan in 1899. And Alberta and Saskatchewan importantly became a province in 1905. The community of Fort Chipewyan has been written about extensively because it is the centre of the fur trade. It has a really unique geological or hydrological fact.

The river flows in four directions from Fort Chip. So from Fort Chip on the river system, you can go to, through to the Mississippi and all the way to James Bay. And some of my Métis ancestors come from James Bay. It goes all the way to the BC Coast and into the Arctic Circle, so it really is, consider it a major interchange if you're talking about river systems. Wood Buffalo, one of the things that I'll allude to or that's part of our supporting document, is, was created in 1922 and that's been in the media the last couple of days around the UNESCO review of the Wood Buffalo Park.

One of the other interesting facts about Fort Chip, in fact, besides the river running in the four directions, even though the map of Alberta shows that Fort Chipewyan is north of Fort McMurray, the river runs from Fort McMurray to Fort Chipewyan. So anything that's happening in Fort McMurray on the Athabasca River, be in from Jasper or Fort McMurray, run into Fort Chip. And it's the same thing with the Peace River.
And unflatteringly so, sometimes it's referred to as sort of the, the back end or the cesspool or the sewer of the river system because whatever is going into the river at some point ends up in Fort Chip. And that's why the water is monitored so closely, because you'll see things like blue plumes or – and there's a rare form of cancer in Fort Chip and things of that nature. But I'm sure my colleagues will speak to that when, when you see them in Fort McMurray. But I think that's a fact that most people don't understand, is that the rivers all run into Chip.

The community has interesting social, economic kinship and mobility ties. One hundred percent of the people who live in Fort Chip are harvesters. They have to be. It's a fly-in community and their other source of navigation is the river. It's about a four-hour boat ride from Fort Chip into Fort McMurray, and they can no longer go all the way to Fort McMurray. They have to beach before that.

And all up and down the Athabasca River, there's historic (inaudible) called Barb Hermanson – Her Story, the Last Woman to Raise Kids on the Athabasca River. She's a trapper and a member of the Fort Chipewyan Métis. She's one of the elders and she talks about life on the Athabasca River on mile marker 63, where her children were born. But what it's like to travel up and down the river and harvest and visit. It's a fascinating heartwarming story and we filed that with you for your consideration.

So they're all harvesters because a turkey at the northern store costs about $100 at thanksgiving. But there's geese and ducks and, and muskrats and they're a lot more affordable. They're not big fans of baloney.

Their kinship ties are to the NWT, Saskatchewan, BC, even as far as Winnipeg and James Bay, as I have said. My people are characterizes quite aptly and most notably by their mobility. In fact, I'm packing up right now and moving south a little bit. For Chipewyan harvest for food, social, ceremonial and commercial purposes. There are still Fort Chip Métis who barge on the river for commercial purposes. And there's a lot of commercial activity, and that will become later when I talk about, a little bit more about the rights.

Fort Chipewyan have historically all over Alberta, because we're dealing with Alberta right now, have harvested ice or water and sold the excess and they've also harvested bitumen, that they've used personally and they've sold the excess to interesting Canadian figures like Peter Pond. They use the bitumen to seal the shingles on their birch bark roofs, on their trappers' cabins or on their residences. And sometimes they use it as the sealant for their boats.

The Fort Chipewyan Métis harvest and continue to harvest to present day. Something that will tweak the lawyers in this room, it's the test for constitutional protection for Section 35. Their kinship networks are extensive as I have said, and we have robust crown consultation in the NWT, more robust than with Canada or with Alberta. By way of explaining the highly mobile nature and the traditional territory of the Métis peoples, the NWT agreement in principle has a trading area that extends from the NWT all the way to Edmonton, documented in their agreement in principle.

Because the Fort Chipewyan Métis have acknowledged harvesting rights in the NWT, they become a part of those agreements with protected trading areas all the way to Edmonton. These are things that aren't commonly known. You'd have to be in the business to know just how extensive our networks are.

We filed the snapshot of the life in Fort Chipewyan. It's by Jumbo Fraser, President Fred Fraser, he's the President of the Fort Chipewyan Métis and I've included a link to YouTube. It'll give you an example of what life is like in Fort Chip Métis, for the Fort Chipewyan. Jumbo himself personally has connections. Just in his first and second ring of his family to Jasper, Lac Ste. Anne, Edmonton, Calgary, Fort Smith, Uranium

City, Fort MacKay, Fort McMurray, Lac La Biche, and that's just the inner circle.

I say this because the nature of the Métis community in western Canada is regional. It's not dots on the map as some people tend to interpret Powley. If I'm Métis in Alberta, the definition of Métis is the same in Saskatchewan and Manitoba and Ontario and BC, and in the NWT. I was born in Ontario, I have relatives in Saskatchewan and in Manitoba and in Alberta. And my mom is descended from James Bay.

The Fort Chipewyan Métis, their organization receives no support from either Alberta or Canada for core funding, core administration or for studies. Periodically we can access a small envelope of CEAA monies but in no way does this reflect the actual cost of the work that we're having to undertake. We've used those monies earmarked for our community members to participate in regulatory matters. So we receive no outside funding from government on a consistent basis. And that's brought up in the Tom Isaac recent report to the federal government. He was Special Representative. We filed that as well.

On to Métis rights. The starting point of all Métis rights in the modern world is Section 35 of the Constitution Act. I won't go into that, you guys -- the Aboriginal peoples of Canada, Inuit, Indian and Métis. In 2003, the Powley decision was decided, and what was interesting for us as Métis practitioners is it was an Ontario case, and Powley's ancestors are actually Treaty Métis. And if you read the Manitoba Métis decision, it's quite interesting Canadian history. There are such a thing as Treaty Métis.

But what was interesting and unique, and I'm going to fire through this rather rapidly is Section 35 confirmed that the Métis people have Section 35 rights that are protected. Our rights are not derivative of First Nations, and that there are no hierarchy of Aboriginal rights. So our rights are not second class, and Section 35 as the universal harmonizer, recognized that the source of any Aboriginal right, whether it's a modern land claim, a treaty agreement, legislation, all are equalized by Section 35 of the Constitution. So when you're talking about First Nations right or Inuit people, Métis rights are on par. No hierarchy, not derivative.

The other thing that's interesting about the Powley decision is that the Supreme Court had to adjust the test, the Van der Peet test of contact didn't work for the Métis because the ethno genesis of the Métis nation was post-contact. So they created a new constitutional test for the Métis, which put crystallization of our Aboriginal rights about 100 years ahead of the First Nations.

So if you look at Canadian history and you compare what happened in Van der Peet, the contact test versus the Powley test, the date of effective control, the Métis nation were already robustly involved in the fur trade and commercial activities. This will become important to Canada at some point, and I'll draw your attention to that later on in my presentation.

Laviolette is a decision out of Saskatchewan that puts the date of effective control in northeastern Alberta. It's a Saskatchewan decision, the regional rights bearing Métis community and effective control of northeastern Alberta is probably 1910 the postulate. So that's five years after Alberta became a province. So effective control is a highly fact-based evidentiary argument, but the crystallization of our rights in northeastern Alberta happened after Alberta became a province.

Johanne Gélinas: Mrs. Bertoli, I will invite you to move on the different points of your presentation.

Cynthia Bertoli: Faster.

Johanne Gélinas: Please.

Cynthia Bertoli: Got ya. Blais is the Supreme Court of Canada's decision that preserved Métis harvesting rights, commercial Métis harvesting rights. there's a legal opinion included in your submission that will detail that. By losing Blais, we actually preserved our commercial rights. The Manitoba Act of 1870, or the Canada Act of 1870 are most recent Supreme, no, not our most recent Supreme Court of Canada decision, proclaimed that descript commissions and the devolution of script to my community was unlawful and it created a new constitutional remedy for the Métis called the Diligent Fulfilment of Constitutional Promises. It also did away with the statute of limitations for us in certain cases.

It also is probably one of the most profound or fulsome discussions with the honour and the crown. And lastly, our most recent Supreme Court of Canada case is Daniels. Harry Daniels started litigation long before he passed that said that we are exclusive federal jurisdiction of the, of the federal government. That's the conference I was at in Toronto. Quite interesting.

So the current state of the law relating to Métis rights; well, we have constitutionally protected rights. We probably have more rights than First Nations because of the adjusted Powley test for crystallization and the fact that we lost the Blais case, our commercial harvesting rights survived.

Courtesy of four Supreme Court of Canada decisions, the Métis all, now has all the constitutional ammunition it needs, including the new International Convention called UNDRIP, an unfortunate name, the Untied Nations Declaration on the Rights of Indigenous People.

The other thing that hasn't been discussed in the case law, but just touched on briefly in Manitoba is the Delgamuukw decision that is the first determinate decision on Aboriginal land rights. The test of exclusivity that I've included in your package of

submissions deals with exclusive jurisdiction over our tract of land. That relates to outsiders, not against indigenous people because our boundaries are fluid with the seasons, but also there's intermarriage and adoption going on between the First Nations and the Métis. So the Métis probably have a robust land claim in addition to settling the claim against Canada for land script issues.

So according to the Canadian Constitution and international law, and the recent decisions, we have the right to harvest what's in, on or under the land. And in some cases, you can make the case for co-management and even sale. We have a constitutionally protected right to self-determination, the right to be self-defining as a people. And according to the Supreme Court, the right of our, we have the right to survive as a people, legally supporting those customs practices and traditions that were historically important to the Métis nation and continue to present day. That's why I drew your attention to the fact that 100% of the people in Fort Chip harvest.

The honour of the crown, the duty to consult and Métis rights – the honour of the crown is a constitutional imperative that must be met. The crown has a legal duty to engage in meaningful Aboriginal consultation whenever it has reason to believe that its policies or actions directly or indirectly might infringe the actual or claimed Aboriginal interest rights or title. The Fort Chipewyan Métis have asserted everywhere, Alberta, BC, the NWT, Canada, the Senate, industry. We have assertions on the record with everybody who has an oil sands application and those oil sands applications cover from Fort McMurray all the way to the, the outskirts of the Wood Buffalo National Park.

The assertion is important because it is the thing that triggers the honour of the crown. The duty to consult – and this is where things get a little squirrelly with the, with the crown, be it federal or provincial – extends not just to the front end of the process, which is the application phase, but it extends all through the life of a project and to reclamation. That is something that's currently not being done in Canada. Right now, it's only happening for First Nations at the front end and with the Métis. In Alberta, not at all. Only sporadic consultation as a result of CEAA.

Alberta doesn't even have a Métis consultation policy. The crown does have one, but there isn't robust consultation happening. Not the kind that would stand a test with the Supreme Court of Canada lining up with the lofty principles in (inaudible) or Teslin Tlingit. It wouldn't pass the smell test to a court.

The rule of law and hierarchy of laws – we all know that the Canadian Constitution is the highest law in our land. The legal principle of the rule of law dictates that all actions must be measured against those constitutional principles that one law must prevail over the application of all of their laws. Your task with the idea or the mandate to examine the Canadian Environmental Assessment Act, come up with changes and all the rest of it, and on behalf of the Fort Chipewyan Métis, we're asking you not to be myopic in your consideration, but in fact, consider the foundations of the law that you're

going to be providing advice on.

There's a whole arsenal of lawyers inside the Department of Justice who do nothing but screen legislation in Canada for constitutionality. We're submitting that much of the legislation that's being passed by the crowns will not pass the constitutional test of constitutionality based on the fact that it does line up with the rule of law and the Canadian Constitution.

So apart from practising law, I'm always, I'm also robustly in business and having been on some really big boards, one of the things that you do as a Board of Directors, you do a SWOT analysis. Business certainty and threats, weaknesses, opportunity and threats is one of the things that you do as a Board of Directors. One of the corporations I sat on was a $10 million one. So I'm not talking about small corporations here.

But if I was somebody on the board of Syncrude or Suncor, I'd be looking at this, going we have a problem. The basis on which Canada has issued these permits is unsecure. Our business certainly is jeopardized because the constitutionality of the decision-making is not lawful. So when they're raising money on the stock exchanges, there's a problem here, and one of the things we have done in our submissions is filed our judicial review against Alberta on the Teck Frontier resources file.

We've now gone to the litigation model. We have tried for the last three years to do the gentlemanly thing, as my boss, Jumbo, instructs, to educate, to talk to different and various parties. We have sat in meetings with industry, we have talked to so many Ministers. I'm on my fourth Minister of Aboriginal Affairs just trying to get crown consultation in Alberta. They've left us no opportunity or not redress. And in my communities, the word is (inaudible). We're done.

They forced us to go to litigation, so we've included our litigation against BC Hydro for $3 billion and our judicial review application against Teck Frontier Resources and the Alberta government. They've left us no choice. It's not the way we wanted to do things. It's the way they chose. The Manitoba Métis Federation was 25 years to the Supreme Court twice, and it cost us $7 million.

Johanne Gélinas: I will invite you to conclude please.

Cynthia Bertolin: So in closing, by any standard, according to law or, or UNDRIP, or even common sense, you know, not obeying or not abiding by the Canadian Constitution is, is a road to disaster, both for business certainty, Canadian Aboriginal relations and it certainly doesn't speak to reconciliation. We've included a number of things and it's, my community is not anti-development but it certainly is anti of being ignored.

I want to thank you for giving us the time to make our submissions, and all I can ask – and I don't know whether this is in your mandate or not – but if I was asked how to back a cake and I wasn't allowed to use eggs to start off with, the foundation of my cake is unstable. Nothing will raise. Not obeying the constitutional law in Canada building a regime which is a house of cards, without the constitutional underpinning is a recipe for disaster. There will be no cake for anyone.

Thank you.

Johanne Gélinas: Thank you.

Renée Pelletier: Thank you. I had a question. You've mentioned that you've been a part of regulatory matters. Were those CEAA or NEB or federal environmental assessments? I think it was in the, when you were talking about funding, you had mentioned that you've applied for funding and, and participated in, in regulatory matters, I think you said.

Cynthia Bertolin: Right. On the provincial side, we were the first Métis community in Alberta to get standing because the directly and adversely affected test is so stringent. But we appeared there. And funding is something you apply for after the fact and it doesn't cover 100%. And on the federal side, with the Joint Review Panels, they play a complex shell game with the duty to consult. Alberta has moved it to three different locations in the last five years, if you didn't know that.

The last Joint Review Panel, they told, the Alberta told the Court of Appeal that the duty to consult was going to come up at the Shell Jackpine hearing. And then the Joint Review Panels for Shell terms of reference, they removed it out of there and then they passed RETA (ph), even without regulations, moving the duty to consult somewhere else. They've been playing a complex shell game and we've been chasing it.

But the CEAA funding is in an envelope called Aboriginal Participation. We've applied for it, but we probably supplement what it costs us for experts, like hydrologists, geomorphologists, etc., maybe 50%, sometimes as high as 75% depending on what the community deems as the most severe impacts. And water is the most important issue in Fort Chip.

Renée Pelletier: So our terms of reference have asked us to look at how to implement the principles in UNDRIP into the federal environmental assessment process, and I'm wondering if you have thoughts on how that can be accomplished?

Cynthia Bertolin: When people go to a doctor and form consent to something that says, you know, if you're going to cut your leg off, you must know all the parameters of what you're signing and be informed about what the ramifications of those actions are and the recommendation of the procedure.

When UNDRIP talks about free, prior and informed consent, that sets into play a whole lot of things. I think the prevailing theory on it is it doesn't give a veto, but free means they have the ability to examine what it is they're looking for. Informed means you've had an opportunity and some time to consider it, and the resources to get the advice you need, whether it's a geomorphologist or hydrologist or a biologist. And then consent.

We have mechanisms to provide consent but right now, even though we're, we're working on this, we really don't know what we're agreeing to. And in the words of one of the oil and gas industry executives, they're going to turn northeastern Alberta into a parking lot.

Renée Pelletier: So —

Cynthia Bertolin: (inaudible) going to be left to sand for three generations?

Renée Pelletier: So what needs to change then in, in the environmental assessment process to get to that free informed prior consent?

Cynthia Bertolin: First, the Métis nation needs the resources to be able to look at what's going on. That's what mitigation is about, having a discussion about what it is we're looking at. We're not anti-development, but how do you build a space to continue to talk about how to harvest (inaudible), or what's the best time to get muskrat? You'll see some of that in a moment of, in the YouTube video about a Métis moment in Fort Chip, about the way of life and the transfer, but they're going to need to understand what it is they're agreeing to and build a space, otherwise, what's unique and special about the Métis nation will not survive.

And in our experience, at the Pembina hearing, I think it was, not Pembina, it was Dover, all the Fort MacKay First Nation and the Métis community were asking in Dover was a buffer zone around their community, which they didn't get. Just a space for them to continue to harvest. The kind of pollution we're seeing is light pollution, noise pollution, residual or brown residue on snow that's supposed to be pristine. You don't think that when you're out on the land that you're going to hear or see these things, but all of those things impact wildlife.

And one of the situations that Jumbo was telling me about, we were out on the delta, when he was younger, there used to be caribou coming through town and when the geese took off in the delta, the sky was so black, you couldn't see the sun just for populations. They're no longer flying through Northeastern Alberta. They're going through BC less likely, but more Saskatchewan because of the noise and the light pollution. Geese are sensitive to that. So one of their primary food sources is now migrating to a different flight path. Pretty soon, the Migratory Conventions Act in

Alberta is going to be moot if we keep this up.

Renée Pelletier: Thank you.

Johanne Gélinas: In your presentation, you mentioned that there was no consultation policy between Alberta and the Métis and in your document, you say that there is one. Is there one or not? Is there (inaudible) —

Cynthia Bertolin: There is, there is no consultation policy in Alberta with the Métis nation.

Johanne Gélinas: Okay. So just, and one of the correction that you have to do here, you say that there is one. Alberta does have a Métis consultation policy. So just —

Cynthia Bertolin: Okay. Yeah, I will —

Johanne Gélinas: — cause if there's one I would have asked you to give us a copy, but obviously there's none.

The other question I have for you, when you get funding under CEAA, essentially you use that money to hire experts to look at the impact assessment?

Cynthia Bertolin: Not at first. They get the community together to talk about the project —

Johanne Gélinas: Okay.

Cynthia Bertolin: — and look at the shapefiles. But because Alberta doesn't instruct the proponents to talk to us, so at the beginning of the process itself, Alberta has jurisdiction until it's bumped up to CEAA and the panel is formed. Alberta does not instruct industry to consult with us. So unless we ask for anything besides notification, we don't get the shapefiles. So we're in a position where we have to ask and they're told by Alberta not to consult with us, but our first avenue is always the community. Show them what it is and try to figure out whose, whose harvesting where. That's the first thing. Then we try to assess what the impacts of the project could be on the community.

Johanne Gélinas: Okay. Thank you. Rod?

Rod Northey: Yes, just a question about participating beyond experts. Do you get involved, do you have a sense of when you are even, is it, I mean, I'll start this better. Do you always get approached by a proponent? Do you have to chase the proponent? What, how does the process work between you and proponents, in your experience?

Cynthia Bertolin: Until CEAA gets involved, up until recently when they hired me, they weren't being notified. They would just get a letter and —

Rod Northey: And would the letter be from the, then the company or is it the crown?

Cynthia Bertolin: A directive 56 notification saying there was going to be an application to the Alberta Energy Regulator. So it stays —

Rod Northey: That would be —

Cynthia Bertolin: — provincial until it's bumped up federal and it would just be a letter. And they had no capacity to deal with it, and they didn't know what to do with it.

Rod Northey: Just so I understand, the they, so we've got the feds, the province and the companies?

Cynthia Bertolin: The feds wouldn't be involved at that point.

Rod Northey: Okay, so the province would notify you that there was a consultation?

Cynthia Bertolin: No.

Rod Northey: No.

Cynthia Bertolin: Province doesn't notify us at all.

Rod Northey: What does this director notification mean then? Sorry.

Cynthia Bertolin: A directive 56 notification is under the regulator —

Rod Northey: Yes.

Cynthia Bertolin: — the Alberta energy regulator.

Rod Northey: Yes.

Cynthia Bertolin: And a proponent is required to send out a notice to people that they think might be interested in the —

Rod Northey: So the regulator informs you.

Cynthia Bertolin: The proponent is instructed by the rules of court of the regulator called directives.

Rod Northey: Alright. And how long has that practice been in play?

Cynthia Bertolin: It's been in play forever, but not all, not all proponents will give us a D56 notification. And CEAA does a different assessment under the Canadian federal policy. They will figure out whether we are category 1 or a category 3 community. So in the Teck Frontier application, they've deemed us as severely impacted. So a different set of parameters. Alberta's not even talking to us about Teck.

Rod Northey: Alright. So just in terms of the evolution that you describe, the legal evolution, can you say whether, just to take the last five years, has there been a sense in your mind of how it's evolved, as these courts have evolved or is there any pattern whatever to what's happening here?

Cynthia Bertolin: I don't want to take the credit for it, it's not my way, but up until then, they were ignored.

Rod Northey: Okay. Up until?

Cynthia Bertolin: Until, until we started asserting and saying we want to know what's happening. And those were strategic letters and meetings and in some cases, challenges.

Rod Northey: So what timeframe? I'm just trying to get a sense of that.

Cynthia Bertolin: Well, we filed our first judicial review, so it's still really recent.

Rod Northey: Okay. So —

Cynthia Bertolin: And —

Rod Northey: — 2015 to now?

Cynthia Bertolin: Yeah. It's recent.

Rod Northey: Okay.

Cynthia Bertolin: Yeah, when you consider Powley was 2003, it's, ignorance is bliss. Imagine if you were being asked to give up voting rights or equality or peaceful assembly? You're talking about my people's constitutional rights. Freedom of religion. What rights are you prepared to give up? These are constitutionally protected rights and I went to your law schools. The rule of law, I have a whole

different view of it through my lens.

Johanne Gélinas: Thank you very much. We're looking forward to hear your people in Fort McMurray, as I understand.

Cynthia Bertolin: You're going to get the technicians at that point. (laughter) You can enjoy. Thank you for your time.

Johanne Gélinas: Thank you very much.

So we will start over tonight at 6:30 with our workshop session. So those of you who want to participate, you are more than, than welcome.

And if I can add one quick thing. Some of you may want to come back later or to present a submission to us, so you have still plenty of time until mid-December to submit a submission to, to us. And you can also participate through our website and the choice book that will be there soon. And also, you can participate to some of our webinars. The detail information is also on our website.

So hopefully we'll see you later on tonight for the workshops and you will see it's a very exciting way to get even more information from you and share views with you. Thank you very much.

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