Making Federal Environmental Assessment Work for the Public and the Planet

Submission to the Expert Panel Reviewing Environmental Assessment Processes

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Introduction

MiningWatch Canada was created in 1999 as a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat, and community interests posed by irresponsible mineral policies and practices in Canada and around the world. It is supported by twenty-seven Canadian environmental, social justice, Indigenous, and labour organisations.

MiningWatch has worked on environmental assessments of dozens of mining projects, directly or in collaboration with other groups and affected communities. We have been very active in trying to improve environmental assessment law, policy, and practice, working with administrative and legislative bodies and even resorting to litigation when it proved necessary to do so to protect the public interest and the integrity of the EA process, with a significant – but Pyrrhic – win in the Supreme Court of Canada in 2010.[1]

We have been very concerned by the limited effectiveness, the inefficiency, and the inequalities of EA in Canada — and since 2012, the erosion and dismantling of the aspects of the process that did work in the public interest, and in the interest of sustainability. MiningWatch is a member of the Canadian Environmental Network's Environmental Planning and Assessment Caucus, and had an active role in developing the recommendations that the Caucus recently submitted.[2] We will refer to those recommendations in this submission. MiningWatch also participates as an environmental public-interest representative on the Multi-Interest Advisory Committee (MIAC) appointed to advise this Panel, and we endorse and support the MIAC's recommendations.[3] We also endorse and support the proposals developed through the *EA Reform Summit* in May of this year.[4] Based on our work, we would like to focus on four areas within those collective recommendations.

1. The need to extend assessment beyond biophysical impacts to look at sustainability more inclusively and holistically, including economic, social, and cultural aspects that are currently excluded – or applied as decision-making criteria without having been subject to review and public scrutiny; this has also been discussed as "next-generation EA".

2. The need to assess the environmental impacts (and sustainability) of regional development plans (regional EA) and policies, plans, and programs (strategic EA) as well as individual projects, and to ensure that there are effective linkages between these different 'tiers' of assessment to allow issues arising in project assessments to be brought into regional and strategic EA, and for regional and strategic EA to provide effective guidance for project EA.

3. The need for a coherent national approach to EA, underpinned by a strong federal role to ensure transparency, consistency, and accountability to the extent possible within Canada's constitutional division of powers and the recognition and protection of Indigenous jurisdiction and authority, both through negotiated agreements with Canada and in a nation-to-nation relationship between Canada and Indigenous peoples. The rationales for provincial EA processes to be substituted for federal ones, and for multiple federal processes under different EA authorities, are not compelling.

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[1] *MiningWatch Canada v. Canada (Fisheries and Oceans)*. [2010] 1 SCR 6 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7841/index.do

[2] Environmental Planning and Assessment (EPA) Caucus. "Achieving a Next Generation of Environmental Assessment". December 14, 2016. http://rcen.ca/sites/default/files/epa_caucus_submission_to_expert_panel_2016-12-14.pdf.

[3] Multi-Interest Advisory Committee (MIAC). "Advice to the Expert Panel Reviewing Environmental Assessment Processes". December 9, 2016. http://eareview-examenee.ca/view-submission/?id=1481330791.1676.

[4] West Coast Environmental Law(WCEL). *Federal Environmental Assessment Reform Summit – Executive Summary*. August 2016. http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum%2Bapp_fnldigital.pdf. The full Summit proceedings and background readings are available at http://www.envirolawsmatter.ca/easummit

4. The need to ensure that the public has a meaningful role in EA processes, including sufficient time and resources to gather and analyse information as well as to share and discuss information. The EA process must be capable of meaningfully changing the project or plan depending on public input, including rejecting unacceptable or unjustifiable ones.

1. Impact assessment processes must be aimed at producing a positive contribution to sustainability.

Much work has been done to describe sustainability assessment or "next generation EA."[5] The EA Summit affirmed the importance of taking the opportunity presented by this Review to adopt this direction, and the Caucus submission provides considerable detail on how to configure the EA process to allow decision-making to be based on sustainability, including the kind of indicators and criteria that would need to be used. It's important to note that this is not just theoretical, but has already been implemented in practice. Mining, for example, is not a sustainable activity in any sense, but it is possible to construct a framework that assesses mining development in terms of its environmental, economic, and social impacts.

In some cases, the assessment may find that the project can help diversify the local economy and build capacity such that there should be overall long term positive results. The Voisey's Bay nickel mine provides one example. The mine was proposed as a 15-year project, but was recommended by the Joint Panel for approval as a 45-year project, to mitigate its environmental impacts, but principally to allow for its social and economic effects to be better managed and optimised, allowing time for workers to train into better jobs and hold them for a number of years, and for economic linkages to be built and diversified to build a base that could outlive the mine.

In other cases, it may find that the negative impacts on the environment and on other existing and planned activities are more important and long-lasting than the project's benefits. The Whites Point quarry provides an example of sustainability analysis showing that the overall effect of developing a massive quarry and port facility would be unavoidably detrimental to the community's long-term economy and well-being, and the project was rejected by both the federal and Nova Scotia governments. Similarly, a review panel found that the proposed Kemess North mine in Tahltan territory in northern B.C. would not provide sufficient benefits to justify its environmental impacts, given that many Tahltans were already working in the region's other mines.

Essentially, the shift to sustainability assessment means an end to the current approach of either mitigating and externalising environmental destruction to conclude that a project will have "no significant effects" (no matter how ridiculous that conclusion is), or using untested, arbitrary, and often secret factors to decide that a project is "justified under the circumstances." It means exposing economic and "national interest" justifications to the same kind of public and expert appraisal that are applied to biophysical impacts. Final decisions rest with the government, whether at the ministerial or Cabinet level, but in order to make better decisions — that is, to allow those decisions to benefit from broader expert and public input, and thereby regain public confidence — the information those decisions are based on, as well as the criteria and priorities that are used, must be taken out of the black box of Cabinet confidentiality and exposed to the daylight of a public assessment process. The justification – 'need and alternatives' – for the project (or plan or policy) itself must be open to evaluation, not just alternative designs or alternative means of implementation.

[5] For example, Robert B. Gibson et al. "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment". 2015. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670009.

It has been proposed that sustainability assessment should include an ecological 'backstop', a sort of safeguard to prevent economic interests from overwhelming environmental concerns. Certainly, there is a need for clarity and certainty that ecologically sensitive areas will be protected, and an emerging global consensus that this be extended to culturally and spiritually sensitive sites.[6] Designating such areas should be a priority in any planning process. Everywhere else, however, this should not be necessary if sustainability principles are properly applied: the purpose of sustainability assessment is to maximise net contribution to sustainability across all its dimensions, and to apply trade-offs only where necessary, as detailed in the Caucus' submission.

At the same time, sustainability assessment is essential to beginning to tackle the really big problems we are facing as a society – like climate change, the cumulative effects of industrial development, and materials use – especially when it is used at the strategic and regional level.

2. There must be effective mechanisms to assess policies, plans, and programs, with strong links to project assessments.

MiningWatch has long advocated for a more coherent, comprehensive and planning-based approach to assessment, including strategic assessment as well as regional assessments and land-use planning processes. Individual projects do not affect the environment or communities in isolation. Decisions should be based on the best information and analysis available, including regional and cumulative impacts, but we have watched as even the inadequate tools that are available, like the Cabinet Directive on Strategic EA, or panel reviews of proposed projects, have been underused and even ignored.

One obvious example would be how development in Ontario's "Ring of Fire," valued at up to $60 billion, has been side-lined by the absence of a regional assessment or even a Panel review that would allow the affected communities, governments, and proponents alike to understand how the various proposed projects would combine to affect the region's environment, economy, and cultural life.

Less well known is the impact that mining *exploration* has already had in north-western Ontario. We know it has been extensive, but we have no idea how significant it has been, especially for sensitive species like caribou. Thousands of kilometres of seismic lines have been cut, thousands of test holes have been drilled, and dozens of work camps set up, without any assessment and without any environmental monitoring, so that any future assessment will not have a useful baseline to measure and predict impacts on wildlife and the First Nations of the region. The same could be said about many other regions in Canada, particularly during mining 'boom cycles' and near new discoveries. In fact, the Mackenzie Valley is the only region of Canada that subjects mineral exploration programs to assessment, through the Mackenzie Valley Environmental Impact Review Board, and it does so in a context of regional planning processes that allow First Nations to establish development priorities.

Mining development is not just about developing mines; it starts with prospecting and exploration and ends with decommissioned mines and immense piles of toxic wastes, some of which may be stable enough to not require careful monitoring for the rest of time. Individual project assessments are extremely important, but many of the really important issues around the need for and alternatives to the project, compatibility with community needs and priorities, and so on can only be dealt with by starting with land

[6] The IUCN (International Union for Conservation of Nature) recently passed a motion declaring all land and seascapes classified under any of IUCN's categories of protected areas off limits for damaging industrial activities – such as mining, oil and gas, agriculture – and infrastructure developments – such as dams, roads and pipelines. Previously, only World Heritage sites have been formally recognised as no-go areas. See World Conservation Congress Motion 2016-026. "Protected areas and other areas important for biodiversity in relation to environmentally damaging industrial activities and infrastructure development". IUCN 2016. https://portals.iucn.org/congress/motion/026

use planning and strategic assessment processes. Less-intensive assessment options should available for smaller projects or initiatives that fit within known parameters, but they still need to be included. CEAA 1992 actually did provide for mechanisms like class assessments, but there was little incentive to use and develop them, and outside of Parks Canada, they did not prosper.

The MIAC report provides helpful detail on the relationship between the different 'tiers' of assessment, as described in the EA Summit report,[7] while the Caucus report provides more concrete proposals on how it could be made to work. This is one area where all sectors represented on the MIAC – Indigenous peoples, civil society, and industry – agree very broadly, if not on all the details. Several points are worth emphasizing:

- The need to be able to move higher-level policy issues, including regional development questions, out of project-level assessment and into a regional or strategic assessment – even if it means putting the project proposal on hold;
- The utility of being able to use regional or strategic assessment to describe regional and policy directions that provide useful guidance on project assessments – even setting out limits on where or what kind of development is appropriate and therefore worth evaluating at the project level; and
- The need for a cooperative approach to regional and strategic assessment across various jurisdictions, but relying on one jurisdiction or level of government to take the lead on funding and conducting the assessment and making decisions within its own powers – even if it can only make recommendations and requests to other jurisdictions.

This last point is especially important to emphasize as making regional or strategic assessment work is a question of motivation, facilitation, and coordination more than it is a question of jurisdiction. The purpose is to better inform decision making at all levels, to provide useful integrated analysis; other jurisdictions don't need to participate or use the results, but they are more likely to join in if it is to their benefit and the resources have already been committed by the federal government. This approach obviously has funding and capacity implications for the federal government, but we are confident that it is worth it both in terms of a cost/benefit analysis that would include savings in coordinated, sustainability-enhancing, policy implementation and regional development, and in terms of being able to constructively address larger topics like climate change.

It is worth noting that Quebec is one jurisdiction that has been using strategic EA relatively successfully over the last 20 years, which has helped it to develop more appropriate policies, regulations, and guidelines for emerging industries or regions subject to new broad development proposals, for example on uranium mining,[8] on water,[9] and on shale gas development.[10] Important lessons can probably be learned from this experience in terms of implementing strategic EA at the federal level, though we have not attempted to take this on.

[7] See "Pillar 2: Integrated, tiered assessments starting at the strategic and regional levels" in WCEL, *Federal Environmental Assessment Reform Summit – Executive Summary*. August 2016. http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum%2Bapp_fnldigital.pdf.

[8] Quebec, Bureau d'audiences publiques sur l'environnement. "Rapport 308: Les enjeux de la filière uranifère au Québec". May 2015. http://www.bape.gouv.qc.ca/sections/rapports/publications/bape308.pdf

[9] Quebec, Bureau d'audiences publiques sur l'environnement. "L'eau, ressource à protéger, à partager et à mettre en valeur". August 2000. http://www.bape.gouv.qc.ca/sections/archives/eau/index.htm

[10] Quebec, Bureau d'audiences publiques sur l'environnement. "Rapport 142: Les enjeux liés à l'exploration et l'exploitation du gaz de schiste dans le shale d'Utica des basses-terres du Saint-Laurent". November 2014. http://www.bape.gouv.qc.ca/sections/rapports/publications/bape307.pdf

3. The federal government must play a strong role in impact assessment.

Sound planning and decision making require the greatest possible scope and depth of information and analysis, and while federal authority to make regulatory decisions is limited and shared with other jurisdictions, the federal government clearly has the ability – and duty – to consider issues and decisions beyond that authority. This is especially true if, as we urge, federal decisions are to be based on a positive contribution to sustainability at all levels, from strategic to regional to project-specific. Federal leadership is also required to provide rigorous information and analysis and sustainability-based criteria for provincial, territorial, and Indigenous decision-making, and to provide a framework – and standards – on which harmonized and joint assessment processes can be developed and implemented.

This is a complex task, but it is possible to take some lessons from the approaches and experiences of other federal systems around the world, as per Bob Connelly's work for the Forum of Federations.[11] It is also important to use clear principles of transparency, consistency, and accountability to build a coherent national approach to EA, and to exercise federal leadership based on a constructive approach – including assuming responsibility for funding and capacity building, so that it is easier for other parties to join a collaborative process. Especially in areas of shared jurisdiction, whether at the project level, in policy, or in regional planning, a cooperative approach can provide opportunities for more positive engagement between the federal process and provincial and Indigenous authorities.

At the same time, any assessment process needs to respect the *sui generis* processes and protocols of Indigenous peoples that are expressions of their sovereign right of Free, Prior, and Informed Consent. These take different forms depending on the philosophies and laws of each people or Nation,[12] and are properly considered on an equal footing, "nation to nation", as part of Canada's three-dimensional jurisdictional jigsaw puzzle. We do work extensively with Indigenous organisations and communities, and we support their processes and express our solidarity with their initiatives. We also support the near-consensus observations and recommendations of the MIAC regarding Indigenous rights as an "overarching policy issue".

A single federal authority

Federal reviews should be conducted by a single authority. This would provide improved consistency, accessibility and predictability for proponent and public alike. It would also facilitate institutional and public learning from EA experience, building on practice and experience and facilitating comparison by using consistent methodology and standards. Under the current arrangement, the Canadian Nuclear Safety Commission (CNSC) and the National Energy Board (NEB) apply their own processes, with different decision-making authority, different standards of public access and involvement, and different EA procedures. Intervenors in reviews under CNSC rules, for example, are not allowed to ask questions, while the NEB may allow cross examination of witnesses by intervenors – or not; in panel reviews under the Canadian Environmental Assessment Agency, intervenors may ask questions. Even if the processes were standardized, they would still require skills and capacity in areas like public outreach that the regulatory agencies do not possess and are unlikely or even unable to acquire.

[11] Robert Connelly, "Environmental Assessment in Federations". Forum of Federations report, 2010. http://www.forumfed.org/wp-content/uploads/2016/02/Report_Environmental_assess.pdf. Annex I, "Environmental Assessment Processes in Each Jurisdiction as of December 31, 2010" and Annex II, "Transit/Transportation Case Studies" are available at http://www.forumfed.org/post/environmental_assessment_dec2010.pdf.

[12] One such example is the Stk'emlúpsemc te Secwepemc Nation's *Project Review Process*, also presented to the Expert Panel at its Kamloops session. http://stkemlups.ca/process/

It has been argued that having the regulatory agencies run the assessment process allows direct access to their knowledge and expertise, but more importantly, allows for conditions of approval to be monitored, enforced, and adjusted through the project's whole life cycle, since they have the regulatory tools to follow up on commitments made or imposed through the assessment. While this may be true, this situation also invites incomplete assessments: projects are approved with serious gaps in their assessment on the assumption that problems can be 'fixed through regulation' or dealt with using adaptive management without actually establishing that this is even possible, much less how it would work in practice. Uranium mines are now allowed to operate without a closure plan, as closure is treated as 'ongoing site remediation' within a licenced operation. An improved assessment regime would build that linkage into a permanent process of monitoring, enforcement, learning, and adjustment, with both as-needed and periodic reviews of EA approval conditions, for example, as part of a quality assurance program. At the same time, having reviews done under an independent authority would help alleviate the problem of regulatory 'capture' by maintaining independent perspectives and oversight.

That authority should also coordinate and perhaps even house much of the research needed to undertake strategic, regional, and project assessments. An important function of the authority would be to direct much of the research and analysis currently commissioned by project proponents; proponents would still submit their feasibility plans etc., but in order to build independence and public credibility, the EA authority should take the lead. In the case of regional and strategic EAs, that coordination would probably relate more to other government agencies with an interest in the policy or plan under discussion. The EA authority would need to urgently build its own capacity, but it could also support and help build sorely-needed additional capacity in the relevant federal "science" departments (eg. Fisheries, Natural Resources, Environment) and Indigenous governments and institutions.

'Triggering' and 'scoping' – The *Fisheries Act* and the *Navigation Protection Act*

Federal jurisdiction also needs to be carefully referenced with respect to the determination of what projects, plans, or policies undergo EA (triggering) and what aspects of those proposals are included in the EA (scoping). We support the hybrid triggering approach developed by the Caucus, combining a mandatory assessment list with a restored and updated federal decision-making trigger mechanism. We have also provided comments on the *Fisheries Act* and the *Navigation Protection Act* to the respective Parliamentary Committees charged with their review. The exercise of federal power in these areas is closely connected and interdependent, as the government clearly understood when it initiated the reviews of environmental assessment processes, the NEB, the *Fisheries Ac*t, and the *Navigation Protection Act* as a package deal. (We will not comment further on the NEB as we have little experience with it.)

In the case of the *Fisheries Act,* we observe that Section 35 of the pre-2012 *Fisheries Act* provided a critical link to the environmental assessment process. Logically enough, any action by the government to allow such activities triggered an environmental screening. The pre-2012 *Canadian Environmental Assessment Act* "self-assessment" screening process had serious flaws, but there clearly needs to be a mechanism to identify and register "any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat," in the words of the old Section 35(1), and to allow it to be subjected to an environmental assessment where appropriate, whether by decision of an environmental assessment authority or by designation as part of a list of undertakings with potentially serious environmental consequences. That linkage is only possible if the *Fisheries Act* "trigger" exists.

With respect to the *Navigation Protection Act,* we focus on the critical relationship between the protection of navigable waterways and protection of the environment, specifically through the environmental assessment of projects and activities that may harm those waterways. As pointed out by Ecojustice in its

2012 *Legal Backgrounder*,[13] "The interrelationship between navigation and the environment is such that the protection of the former consistently promotes the health of the latter." Ecojustice goes on to observe that the *Navigable Waters Protection Act* (NWPA) had "consistently served as a federal tool to achieve environmental protection" and that the Supreme Court of Canada, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*,[14] affirmed the constitutionality of this application of the NWPA. A fundamental aspect of the NWPA's role in protecting navigable waterways – not just navigation – was as a "trigger" for environmental assessment. This needs to be restored.

This is not a theoretical problem. While mining projects often do undergo environmental assessments, many do not. For example, of 91 Ontario mining facilities we reviewed in 2014,[15] less than a third had undergone a federal environmental assessment (including less than one tenth undergoing a joint federal-provincial assessment process). Even where a mining project is subject to assessment, the existing federal process cannot be relied upon to review the full suite of environmental or social issues associated with it, especially since the *Canadian Environmental Assessment Act* (CEAA) was amended in 2010 to allow the Minister of Environment to limit an assessment to one or more components of a project,[16] and in 2012 to narrow the scope of review to areas of narrowly defined federal jurisdiction. The current federal process is also limited in application to mine of certain types and of a certain size – excluding many smaller gold mines and industrial mineral mines. Mines also often include ancillary facilities – roads, airstrips, electrical transmission lines – that need to be included in assessment if it is to meaningfully address the project's effect on local and regional ecosystems and sustainability, including cumulative impacts.

Substitution is an empty promise

The idea that provincial EA processes could be used in place of the federal one was introduced in CEAA 2012. Experience with substituted processes has validated the reasons it had previously not been endorsed by the Regulatory Advisory Committee for CEAA 1992, nor implemented by the federal government. While the timelines and restricted application of CEAA 2012 essentially lowered federal EA standards to make it easier for provincial processes to be substituted, the British Columbia process (the only one substituted so far) demonstrates that it still cannot meet the federal standards for public accessibility – or assessment, as investigated by Mark Haddock with respect to the Prosperity mine proposal.[17] As mentioned above, our work on EA of mines in Ontario shows a patchwork with gaping holes, where both federal and provincial EA application needs to be greatly improved. A cooperative approach would require more investment from the federal government, as previously described, but would create a much more robust assessment process and decisions that are both better informed and more likely to inspire public confidence.

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[13] Ecojustice. *Legal backgrounder: Bill C-45 and the Navigable Waters Protection Act (RSC 1985, C N-22).* November, 2012. https://www.ecojustice.ca/wp-content/uploads/2015/03/NWPA_legal_backgrounder_November-20-2012.pdf

[14] *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 SCR 3 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/829/index.do

[15] MiningWatch Canada, *The Big Hole: Environmental Assessment and Mining in Ontario*. Report prepared by MiningWatch Canada for the Canary Research Institute, December, 2014. http://miningwatch.ca/sites/default/files/the_big_hole_report.pdf accessed Dec. 6, 2016.

[16] The previously-referenced 2010 Supreme Court of Canada decision in *MiningWatch Canada v. Canada (Fisheries and Oceans),* regarding the assessment of the Red Chris Mine, determined that responsible authorities could not split a project into components and "down scope" it beyond the scope of the project as proposed by the proponent. More generally, it meant that an assessment of a project had to consider the whole project as proposed, not just a component that required federal regulatory approval. The decision was rendered irrelevant by amendments to CEAA a few months later giving the Minister of Environment the discretion to set the scope of the assessment as s/he wished.

[17] Mark Haddock, *Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine.* Northwest Institute for Bioregional Research, Smithers, B.C., 2011. http://northwestinstitute.ca/images/uploads/NWI_EAreport_July2011.pdf

Transboundary impacts and international obligations

The federal government has jurisdiction wherever environmental assessment touches on international issues or is subject to international agreements, either globally as with climate change and air emissions (eg. chlorofluorocarbons) or bilaterally with the United States of America or Greenland. A progressive and comprehensive assessment regime is a critical element in meeting Canada's climate commitments under the Paris Agreement, the Biodiversity Convention, and so on; this is a clear area of federal jurisdiction that may also help assert a clear federal role in EA. Any new EA legislation should help implement existing international benchmarks such as the Espoo Convention,[18] the Aarhus Convention[19] and the Akwé: Kon Guidelines[20] as well as allowing for referrals to and from the International Joint Commission, etc..

When it comes to actual assessments, we expect the federal government to uphold the highest standards of behaviour and the highest standards of application of international agreements – not least because we want to be able to claim similar treatment from our neighbours. Just as Canada should be seeking standing with respect to proposed copper mines in Michigan and Wisconsin in order to ensure that boundary waters (and the communities that depend on them) are protected, Canada should be ensuring that there is mandatory federal EA of proposed mines in northwestern B.C. – and that Alaskans downstream have standing in those assessments. The provincial government does not have the capacity or the ability to shoulder federal responsibilities and should not be left to do so on its own.

At the same time, EA and EA-based decision-making needs to be shielded from international investor-state dispute settlement mechanisms like chapter 11 of NAFTA, including other agreements like the Canada-China FIPA (Foreign Investment Promotion and Protection Agreement) and the not-yet-ratified Trans-Pacific Partnership (TPP) and Canada–EU Comprehensive Economic and Trade Agreement (CETA). The recent tribunal ruling under the North American Free Trade Agreement (NAFTA, chapter 11), challenging the EA of the White's Point Quarry in Nova Scotia,[21] is an extremely worrying precedent, potentially restricting the ability of government to undertake any meaningful environmental review and make any kind of informed decision that does not conform with proponents' expectations – or at least do so without risking compensation payouts of hundreds of millions of dollars.

In order to protect EA processes and decisions from investor-state dispute settlement, it is critical that decision-making criteria and trade-off rules be implemented in legislation, while preserving sufficient flexibility to allow them to be adapted and fine-tuned through guidance. Ultimately, such investor-state dispute settlement mechanisms must be curtailed and eliminated in order to free governments to govern for the best interests of their people, rather than foreign investors, but in the interim EA legislation must be carefully crafted to avoid potential marginalisation.

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[18] United Nations Economic Commission for Europe (UNECE). *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo, 1991) http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf

[19] United Nations Economic Commission for Europe (UNECE). *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus, 1998) https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

[20] Secretariat of the Convention on Biological Diversity (CBD). *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.* (CBD Guidelines Series). Montreal, 2004. http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/akwekon.pdf.

[21] Janet M. Eaton. "Digby Neck Quarry Bilcon Case, Tribunal Decision and Dissent". May 11, 2015. http://www.sierraclub.ca/sites/sierraclub.ca/files/JANET201505.pdf.

4. The role of the public is critical.

The role of the public in EA is generally acknowledged as important, but in different respects: as participants, providing information that proponents or government agencies don't have access to and identifying concerns, values, and information gaps or errors that decision-makers need to take into consideration — or as individuals and communities with rights, interests, and responsibilities trying to gather information and make their own decisions about activities and projects that will affect them. Beyond the important but technocratic function of better-informed decision-making, the role of communities in making informed decisions about their own futures has generally been illusory. In too many cases, people have participated in assessment processes, at considerable personal and collective sacrifice, only to have their concerns dismissed and their interests betrayed. This was a serious problem under CEAA long before its 2012 revision restricted people's ability to participate even further.

Meaningful public participation depends not only on the assessment process offering appropriate opportunities, accessibility, and support for the public and public interest intervenors; it also hinges on that involvement having a real possibility of affecting the outcome of the process: not just improved designs or mitigation measures, but major changes in project design and execution, including the rejection of inappropriate or irredeemable proposals. Furthermore, public participation must be built into post-assessment monitoring and enforcement processes, to contribute to their management and their content, but also to ensure accountability.

It is worth noting that the recommendations of the MIAC and the Caucus regarding public participation are very similar and are consistent with the EA Summit's principles,[22] indicating a strong consensus among all sectors. The Caucus' recommendations are summarized in the ten points that make up its *Recommendation 23*:[23]

EA law and policy must be updated to apply the following ten overarching principles to ensure meaningful public participation actually occurs through EA processes:

1. *Participation begins early in the planning and decision making processes, is meaningful and builds public confidence;*
2. *Public input can influence or change the outcome/project being considered;*
3. *Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;*
4. *Formal processes of engagement, such as hearings and various forums of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;*
5. *Adequate and appropriate notice is provided;*
6. *Ready access to the information and the decisions at hand is available and in local languages spoken, read, and understood in affected areas;*
7. *Participant assistance [funding] and capacity building is available for informed dialogue and discussion;*
8. *Participation programs are learning oriented to ensure outcomes for all participants, governments, proponents, and participants;*

[22] WCEL, op. cit., "Pillar 8: Participation for the people".
[23] EPA Caucus, *op. cit.,* p. 52.

9. *Programs recognize the knowledge and acumen of the public; and,*
10. *Processes are fair and open in order for the public to be able to understand and accept decisions.*

It is important to note that this does not address Indigenous peoples' involvement in assessment processes. As collective rights-holders and authorities in their own right, they may be part of the public participation aspect of EA without prejudicing their own decision-making authority or their own processes, as discussed above.

Conclusion

Sound and testable public policy can only be developed with specific objectives in mind; the objective here must be to create a credible, rigorous, and effective assessment regime that will ensure development is in the best long and short term interests of the community, the country, and the planet – and that will meet Canada's commitments and obligations to the international community and to Indigenous peoples.