Submission to the Expert Panel for the Review of the Federal Environmental Assessment Process

Alan Harvie

First, thank you kindly for the opportunity to make a submission to this Expert Panel.

I am Alan Harvie, a senior partner with the global law firm of Norton Rose Fulbright. I have practiced environmental and energy law since 1989 from our office in Calgary. I have worked with both proponents and interveners in federal and provincial environmental assessments.

I wish to be very clear that none of my comments represent the views of Norton Rose Fulbright, our lawyers, staff or especially our clients. Today's comments are only my own.

The Panel's Mandate

Before I get into my core comments on the environmental assessment process I wish to remind everyone about what the Expert Panel's mandate is and is not.

As I understand the mandate it is "to regain public trust and help get resources to market".

And to introduce new fair processes that will:

- restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while also working with provinces and territories to avoid duplication;
- ensure that decisions are based on science, facts, and evidence, and serve the public's interest.

- provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and

- require project advocates to choose the best technologies available to reduce environmental impacts.

On this mandate I have two comments.

First, there appears to be a presumption that the federal EA process is somehow broken and the public's trust needs to be repaired. While I agree that some recent NEB decisions are troublesome, I disagree that the federal EA process is wholly broken and that there has been a complete loss of public trust.

In my view some people who claim it is broken, and who do so loudly, are the ones who were unsuccessful in convincing a CEAA panel of their side of the case. I urge this panel to not be swayed by people who have lost and then claim that the process is broken. I think the process works well, if not very well, in many respects and it has done so in the vast majority of cases for many years.

I also question the loss of public trust. Although some Canadians in some cases may feel that they cannot trust the CEAA process, such as those who were denied the right to cross examine witnesses in the Kinder Morgan review, I think that many Canadians respect our EA laws and process.

These two preliminary points do not mean that the current process is perfect or that there are no improvements that can be made. I will get to some of those suggested improvements in a minute.

Back to the panel's mandate, I also do not see anything in that mandate about this Panel reviewing when a federal environment assessment is triggered.

I expect that this Expert Panel has received and will receive submissions to restore the previous CEAA triggers which triggered a federal environmental assessment, such as those in the former Law List Regulations. Environmentalists and ENGOS loved that process because it offered a way to get the feds involved in reviewing projects that were otherwise only subject to a provincial process.

It changed the nature of environmental assessment, and therefore changed project planning and development, in several ways. It led some persons opposed to a project to suddenly become fish lovers and to raise fish habitat issues to trigger CEAA so that they could eventually have opportunities to question the proponent and government departments about climate change or some other issue that has little to do with fish. It turned the Navigable Waters Protection Act into an environmental statute when, I submit, the original intention of Parliament was for the *Navigable Waters Protection Act* to protect the rights of navigation.

But realize the old CEAA process also indirectly led, in my view in some cases, to non-optimal environmental planning and decisions.

A common mandate for an environmental lawyer such as myself working for a proponent was to figure out ways to avoid the federal EA process altogether. Hence, to avoid federal EA triggers, projects were reconfigured and redesigned, not to make them better projects but to avoid the old CEAA triggers. For instance, longer circuitous roads were used to access a project site for the sole purpose of avoiding to have to build a bridge over a small fish bearing stream, and thereby avoiding CEAA, but causing a potentially greater disturbance to the environment.

I recommend that an assessment of when a federal EA is required be left to another forum as I do not see such an assessment in this Expert Panel's mandate.

Topics to Address

I have five main comments.

The thrust of my comments deal with the Canadian Constitution, the role of science, the role of a CEAA panel, the vetting of interventions, alternatives to projects and the choice of the final decision maker.

1. Constitutional Issues

I want to stress the importance of constitutional issues. Canada's Constitution cannot be thrown out of the window by CEAA. The federal EA process must respect the federal role in Canada and not encroach upon areas of provincial jurisdiction. The federal EA process can and should only look at federal issues.

Prior to reform in 2012, CEAA panels regularly and thoroughly crossed into areas of exclusive provincial jurisdiction. CEAA does not change the Canadian Constitution no matter how much some people want it to.

2. The Best Science

I submit that the federal EA process should be designed around generating and using the best science to aid decision makers. It should be a risk-based approach, where potential consequences and the probability of those consequences materializing are assessed.

The existing core process of asking the following questions should be retained:

(1) What are the effects of the project?

(2) Is an effect adverse?

(3) Is it significant?

(4) Is it likely?

(5) Can it be eliminated or mitigated?

I submit that these questions are only answerable by good science.

How can we get the best science?

I suggest that instead of just relying on proponents to bring the science forward that the CEAA process involve a much more inquisitional review panel. This could be done by the panel having its own experts who effectively peer-review the proponent's science and have the role of bringing any relevant information to the decision maker that is not brought forward by the proponent, government departments and agencies or interveners. Some models that I am familiar with that can do this well are the Alberta Natural Resources Conservation Board (the NRCB) and the Alberta Energy Regulator (the AER).

These bodies have a staff of scientists who, with the aid of other experts and their own lawyer acting as an amicus curiae, or friend of the Court, cross-examine and present evidence in a hearing to bring out any evidence that has not hit the record. It can be effective as in my experience it makes a proponent work much harder to get the science right, to fully disclose that science and, very importantly, install public confidence in the process.

What the public sees is the panel's experts and lawyer grilling the proponent with tough questions. Its effective in installing public confidence.

The inquisitional model can also directly focus more on the key, controversial issues compared to a more passive processes when

the focus is more often on the key issues that the proponent wants to be in focus.

The inquisitional model also improves on the role of government departments and agencies as they may be resource constrained. By providing CEAA panel's with their own staff, decisions are not subject to constrained government department budgets.

An inquisitional panel can also challenge the so-called "science" of some interveners. I have seen proponents who would love to challenge so-called evidence brought up by some interveners but for strategic or reputational reasons do not do so.

3. The Consideration of Alternatives

Alternatives to the project being assessed must be thoroughly considered. In my view, this has not always been well done, especially by interveners, who only rarely present alternatives to a project other than the alternative that the project not proceed.

A valid alternative is that the project does not proceed at all. But the consequences of a "no" alternative must then also be assessed, such as what the carbon emissions will be elsewhere in the world if a project does not proceed in Canada.

4. Vetting of Interventions

The CEAA process has broken down where through organized campaigns CEAA panels have been overwhelmed with interventions. For instance, in Northern Gateway there were about 9500 public submissions, and I would guess over 95% of them basically said the same thing.

A way to avoid this tactic of trying to overwhelm our legal system with something similar to some sort of denial of service campaign is to have a much more rigorous process prior to a public hearing whereby people who wish to intervene must register and have an opportunity to explain what evidence or knowledge, insight or

experience that they will bring to the attention of the decision maker that will not otherwise be before that decision maker.

This could be accomplished by the holding of thorough pre-hearing meetings where an assessment is made of the connection of the intervener to the project, the relevance of their evidence and whether such evidence will already be before the Panel. In short, a test is needed where an intervener has to bring something new to the table in order to sit at the table.

Further, interventions should be required to focus on the project in question. CEAA should not be a forum where broader government policies are debated.

5. The Decision Maker

My last submission is get these important science-based decisions out of the hands of politicians. In my view, public confidence in a process is lost when some politicians hold the final decision and then make that decision in a non-transparent, secretive process, behind cabinet doors and without any reasons explaining their decision.

Why can't we have a CEAA panel make the final decision? Other bodies that hear the evidence make the decision. The CRTC and the Alberta Energy Regulator are examples, as is the Canadian Nuclear Safety Commission under CEAA.

I am very disturbed by the current apparent idea that decisions need to be taken away from an expert tribunal. For instance, some are calling for the National Energy Board to have less of a role in decisions involving pipelines. I think that is ludicrous. Who else has more expertise on pipelines? Some MP who has never seen a pipeline? The Mayors of Montreal or Burnaby? CEAA should be about getting the best science in front of an expert body and the expert body making the decision.

The decisions about the science surrounding a project should be made by persons qualified by training and experience to make such decisions because, in my view, that will result in better decisions.

Above all, there needs to be transparency in the decision. Having cabinet make a decision behind closed doors and providing no reasons is wrong. If anything is going to destroy public trust in the federal EA process, it will be having Mr. Trudeau, at the end of a lengthy CEAA process before the National Energy Board, make a decision in secret to deny a pipeline and provide no reasons and with the public wondering if he even read the NEB's report.

Thank you. Those are my submissions.