

Presentation to the Expert Panel
Review of Environmental Assessment Processes
Kamloops, BC

Monday, November 28, 2016

Brad Armstrong, Q.C.

Speaking Notes

Table of Contents

I. Personal Experience	1
II. Introduction.....	1
III. Scope of Environmental Assessment – Federal.....	3
IV. Scope of Environmental Assessment – Provincial and Territorial	5
V. Statutory Review of CEAA – 2011	5
VI. Significant Amendments in CEAA 2012	5
VII. Conclusion	10

I. Personal Experience

- Resume – attached as Schedule 1
- Representative list of experience on environmental assessment of projects – attached as Schedule 2

II. Introduction

- Origins and history of environmental assessment legislation in Canada
 - EARPGO – Environmental Assessment Review Process Guidelines Order, 1984
 - Brundtland Commission Report (1987)
 - *Friends of the Oldman River* decision of the Supreme Court of Canada, 1992

- In that case the Supreme Court of Canada said as follows:

“Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D.P. Emond in “Environmental Impact Assessment”, in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:

“The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent’s development desires with

environmental protection and preservation.”

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M.I. Jeffery, *Environmental Approvals in Canada* (1989), at p. 1.2 § 1.4; D.P. Emond, *Environmental Assessment Law in Canada* (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.”

- In a later case involving the interpretation of the “scoping” provisions of CEAA, *MiningWatch Canada v. Canada* (2010), the Supreme Court of Canada reconfirmed the above passage from the *Oldman River* decision and said CEAA establishes “a process for integrating environmental consideration into planning and decision making.”
- I represented the mining company proponent, Red Chris Mines in that Supreme Court case.
 - *Canadian Environmental Assessment Act* (January 1995) (CEAA) – came into effect
 - Amendments to CEAA (June 2003)
 - *Canadian Environmental Assessment Act, 2012* (CEAA 2012)
- Environmental assessment legislation in British Columbia
 - *Environmental Assessment Act* (1996, amended 2002) (BCEAA)
- Environmental assessment legislation in Yukon
 - *Yukon Environmental and Socio-economic Assessment Act* (2003) (YESAA)

- Environmental assessment legislation in the Northwest Territories
 - *Mackenzie Valley Resource Management Act* (1998) (MVRMA)
- Environmental assessment legislation in Nunavut
 - *Nunavut Land Claims Agreement* (1993)
 - *Nunavut Planning and Project Assessment Act* (2015) (NuPPAA)
- Comprehensive, thorough and effective environmental assessment processes
 - CEEA 2012 processes and BCEAA processes are among the best in the world
 - Comparison with the *National Environmental Policy Act* (NEPA) in the United States
 - Comparison with the United Nations Convention on Environmental Impact Assessment in a transboundary context, 1991 (in force 1997) (known as the ESPOO Convention)

III. Scope of Environmental Assessment – Federal

1. CEEA 2012, Section 5 – Environmental Effects

- Includes:
 - (a) Environmental effects to components of the environment within legislative authority of Parliament
 - (b) Changes that may be caused to the environment that would occur:
 - (i) on federal lands,
 - (ii) across provincial boundaries (interprovincial effects), or
 - (iii) outside Canada (international effects).

- (c) With respect to Aboriginal peoples, effects occurring in Canada of any change that may be caused to the environment on:
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes, or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

2. CEEA 2012, Section 5(2) (the following is a summary of the Section 5(2) provisions)

- (a) If the project requires federal authorization (licences, permits, authorizations) under a federal Act, the scope increases to include changes to the environment that are directly linked or necessarily incidental to the exercise of the federal power; and
 - (b) in addition to the effects referred to above in Section 5(1)(c), the effects of any change in the environmental directly linked or necessarily incidental to a federal authority's exercise of a power on:
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage, or
 - (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.
- Accordingly, where some form of federal approval is required by a project, the scope of the environmental assessment will include a very broad range of

environmental, socio-economic, cultural, archaeological, etc. effects, going beyond federal jurisdiction.

- These distinctions in the scope of federal environmental assessment are appropriate, and recognize the Constitutional boundaries between the federal government and provincial governments.

IV. Scope of Environmental Assessment – Provincial and Territorial

- Legislation establishing requirements for environmental assessment in jurisdictions such as British Columbia, Yukon, NWT and Nunavut is comprehensive and thorough in its identification and consideration of environmental and socio-economic effects.

V. Statutory Review of CEEA – 2011

- CEEA included provisions for review every 5 years. The last review was in 2011.
- Intention of proposed revisions:
 - Make process more predictable and timely
 - Focus on major processes
 - Reduce duplication
 - Enhance consultation with First Nations

VI. Significant Amendments in CEEA 2012

1. Triggers for Environmental Assessment

- Transition from requirement, under the previous CEEA, for environmental assessment of any and all projects which required federal licences, permits or

authorizations to a list of Designated Projects under the *Regulations Designating Physical Activities* (CEAA 2012 (Sections 13 and 14))

- This was a positive transition to focus environmental assessment processes on projects of a certain type and size.
- The Minister retains discretionary authority to designate, by order, a physical activity not listed in the regulations – as requiring an environmental assessment.
- Smaller projects which require any form of federal authorization would still have to meet the requirements of the federal authority. For instance, a small project that might harm fish habitat cannot proceed without the necessary Department of Fisheries and Oceans (DFO) authorization.
- Establishment of timelines
 - This was a positive amendment to provide a degree of certainty with respect to the time to be taken by the environmental assessment agency or review panels to complete environmental assessments
 - Timelines – one year for standard environmental assessments; two years (24 months) for a review panel. Time limits are “government time” – the clock stops when the proponent is working on providing information.
 - These timelines are reasonable and provide some degree of certainty in predicting when a decision will be made on a project.
- Responsibility for environmental assessment
 - Under the former CEAA, the federal Ministry responsible for the issuance of federal permits, licences or authorizations was generally designated as the “responsible agency” for conducting the

environmental assessment. Where more than one federal agency was engaged, working agreements were reached between the federal agencies to allocate responsibilities and to specify which agency or agencies would take the lead.

- Under CEAA 2012, it is the Canadian Environmental Assessment Agency that takes responsibility for the environmental assessment process – looking to and relying on federal government Ministries to provide assistance and expertise.
- This was a positive change. Under the previous structure, a Ministry such as DFO was often burdened with the responsibility for undertaking the environmental assessment of projects such as mining projects and oil and gas projects, where the expertise and responsibilities of the Department were focused primarily on issues relating to fish and fish habitat.
- Conduct of environmental assessments by the CEAA Agency provides for the establishment of a team of officials with broadly based experience in the conduct of environmental assessments which address the full range of environmental and socio-economic issues.
- The National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) are responsible for carrying out environmental assessments of Designated Projects within their respective jurisdictions. This is an appropriate allocation of responsibility to the federal agencies with regulatory oversight of these types of projects. And it reduces duplication of processes.
- Again, this was a positive amendment. Previously, agreements had been required to establish joint reviews by the NEB or CNSC, jointly with responsible authorities under CEAA.

- Clarifying the process
 - Under CEAA, there were three types of processes, which overlapped and were not subject to timelines:
 - Screening
 - Comprehensive study
 - Review panel
 - Under CEAA 2012, this is reduced to two types of review:
 - Standard environmental assessment; or
 - Review panel
 - The screening process remains, but as a speedy process (45 days) to determine if an environmental assessment is required
 - This simplifies the processes, with a view to making them more understandable, timely and predictable
- Substitution and equivalency
 - CEAA 2012 provided for the Minister to approve the substitution of a provincial process for the federal process where appropriate.
 - See the submissions on the issue made by the B.C. Environmental Assessment Office (BCEAO) on November 28, 2011, under the five year review of CEAA. The BCEAO strongly recommended substitution as a means to avoid necessary duplication.
 - Under these provisions, the CEAA Agency and the B.C. Environmental Assessment Agency signed a Memorandum of Understanding on substitution of environmental assessments in 2013.

- This substitution agreement was founded on the recognition that the B.C. process would be an appropriate substitute.
- Substitution has enabled many projects in B.C. to proceed with a “one window” process of environmental assessment. At the end of a substituted process, the report of the environmental assessment must be reviewed and approved by both the federal Minister and the provincial Minister.
- Equivalency – CEAA 2012
 - Also includes provisions for “equivalency” by Cabinet Order, to exempt the application of CEAA in favour of a provincial process.
 - I am not aware of any equivalency orders under CEAA 2012 in B.C.
 - However, the B.C. *Environmental Assessment Act* allows the B.C. Minister to declare federal processes as equivalent. There are examples of equivalency going in this direction.
- Public Participation
 - There are extensive provisions for the public and “interested parties” to participate in the environmental assessment proceeding, particularly where the party is directly affected and has relevant information or experience. Funding is available. Websites posting all materials, information and submissions in relation to the environmental assessment of each project provide for both public notice and transparency in connection with the process. There are numerous avenues for the public and interested parties to participate in the process and to make submissions and express their views.

- Evidence of science-based decision making
 - The CEAA 2012 process is designed to provide a foundation of evidence and science-based information and assessment for decision making. Environmental assessments are also required to consider Traditional Knowledge supplied by First Nations. The CEAA process is comprehensive and effective in meeting these objectives.

VII. Conclusion

- CEAA 2012, and environmental assessment in Canada, is comprehensive, thorough, and effective.
- Before proponents bring project proposals forward, they give careful consideration to design, location and mitigation measures to reduce or eliminate significant adverse environmental effects and to address socio-economic benefits and effects.
- After thorough assessment, projects may be denied, or may be approved with conditions to ensure potential environmental effects are reduced or prevented.
- The process meets the planning objectives outlined above, and the objectives of CEAA 2012 itself.

Schedule 1



Brad Armstrong, QC

Brad has extensive experience in civil litigation, aboriginal law, administrative and constitutional law, and environmental law. He represents clients involved with land use issues, project development, regulatory approvals, environmental assessments, First Nations consultation, and litigation, in a range of natural resource industries including mining, forestry, agriculture, aquaculture, energy, independent power projects, oil and gas, and transportation. His practice extends through Western Canada and the North (including Yukon, Northwest Territories and Nunavut).

Brad acts as counsel in court hearings and in public review hearings, in all levels of the British Columbia Courts and the Federal Courts, and before federal, provincial and territorial boards, panels and commissions.

Brad also has extensive experience in corporate and commercial litigation, injunctions, and environmental prosecutions, as well as competition law.

Brad was the firm's Managing Partner from 2000 through 2003.

Brad is also a regular contributor to the Project Law Blog, a resource that updates proponents on developments in the law and policy that applies to the development of major projects in Canada.

Brad also teaches a course at the University of British Columbia – Natural Resources Law (2010, 2011 and 2017), Oil and Gas Law (2013-2016).

Bar Admissions

- British Columbia (1981)
- Northwest Territories (1998)
- Nunavut (1999)
- Yukon Territory (2006)
- Queen's Counsel, British Columbia (2002)

© 2016 Lawson Lundell LLP. All rights reserved. Lawson Lundell LLP is a British Columbia Limited Liability Partnership.



Brad Armstrong, QC

Partner

Vancouver

P: 604.631.9126

F: 604.669.1620

E: barmstrong@lawsonlundell.com

Debbie Modien

Legal Assistant

604.408.5392

Practices

- Aboriginal Law
- Administrative, Constitutional and Public Law
- Climate Change
- Environmental
- Environmental Prosecutions
- Litigation & Dispute Resolution
- Mining
- Project Permitting
- Regulatory Compliance



Schedule 2

Environmental Assessment Experience

Some examples of environmental assessment experience include providing legal advice on the environmental assessment and regulatory processes in connection with the following projects:

Agnico Eagle Mines Ltd.

- Meliadine Gold Project in Nunavut (2015) – Nunavut Impact Review Board hearings and Nunavut Water Board hearings.

Alcan Aluminum Limited

- Kemano Completion Hydroelectric Project (1992) – Environmental assessment hearing conducted by the B.C. Utilities Commission.

AREVA Resources Canada Inc.

- Kiggavik Uranium Mine Project in Nunavut (2015) – Nunavut Impact Review Board hearings.

Baffinland Iron Mines Corporation

- Mary River Iron Ore Project in Nunavut – Nunavut Impact Review Board (2012 and 2014), and current expansion proposals.

Capstone Mining Corporation

- Minto Mine Project in Yukon (2013-2015) – Mackenzie Valley Environmental Impact Review Board and Yukon Water Board.

Casino Mines Corp.

- Casino Copper Mine Project in Yukon – Currently in environmental assessment before the Yukon Environmental and Socio-economic Assessment Board.

Chevron Corp.

- Kitimat LNG Project (current) - Environmental assessment under the *Canadian Environmental Assessment Act* and the B.C. *Environmental Assessment Act*.

Diavik Diamond Mines Inc.

- Northwest Territories (1999) - Environmental assessment under the *Canadian Environmental Assessment Act*.

Fortune Minerals Limited

- Nico Mine Project in the Northwest Territories (2014) – Represented Fortune Minerals in judicial review of the environmental assessment process of the Mackenzie Valley Environmental Impact Review Board.

Imperial Metals Corporation

- Red Chris Copper Mine Project in British Columbia (2011) – Environmental assessment and litigation culminating in a decision of the Supreme Court of Canada, addressing the issue of “scoping” under the *Canadian Environmental Assessment Act*. This is the only case heard by the Supreme Court of Canada with respect to the *Canadian Environmental Assessment Act*.

New Gold Inc.

- Blackwater Gold Mine Project in British Columbia – Ongoing environmental assessment under the B.C. *Environmental Assessment Act* and the *Canadian Environmental Assessment Act*.

Newmont Mining Corporation

- Doris North Gold Mine Project in Nunavut (2006) – Environmental assessment hearings before the Nunavut Impact Review Board and Nunavut Water Board.

Northern Cross (Yukon) Limited

- Eagle Plains Oil and Gas Project in Yukon – Ongoing review under the *Yukon Environmental and Socio-economic Assessment Act*.

Sabina Gold & Silver Corp.

- Back River Project in Nunavut (2016) – Hearings before the Nunavut Impact Review Board.

Teck Coal Limited

- Advice in connection with the environmental assessment of a number of coal mining projects in southeast British Columbia.

Westcoast Transmission

- Vancouver Island Gas Pipeline Project – Environmental assessment by the B.C. Utilities Commission in the 1980s.

Western Coal Corporation

- Wolverine Project in northeast British Columbia – Advice relating to environmental assessment under the B.C. *Environmental Assessment Act*.

Western Copper Corporation

- Carmacks Copper Project in Yukon – advice in connection with the environmental assessment of the Yukon Environmental and Socio-Economic Assessment Board and the Yukon Water Board.