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Issues and Options for Intergovernmental Cooperation in Environmental Impact Assessment

*by Steven A. Kennett**

Introduction

Environmental issues are inherently difficult to contain within geographic and jurisdictional boundaries. This situation is particularly evident in Canada, where provincial and territorial borders bisect ecosystems and environmental jurisdiction is divided between federal and provincial governments. The recent focus of attention on environmental impact assessment (EIA) has, predictably, highlighted interjurisdictional pitfalls. Conflict surrounding the Oldman River and Rafferty-Alameda dams and Hydro-Quebec's Great Whale project has demonstrated the political, constitutional and administrative complexity of intergovernmental relations in the area of EIA. As governments in Canada revise and formalize their EIA processes, coordination in situations of overlapping jurisdiction is increasingly necessary.

Résumé

Cet article analyse les questions soulevées par la collaboration intergouvernementale en matière d'évaluation des incidences environnementales. Le besoin d'une telle collaboration s'avère de plus en plus évident. Les conflits concernant les barrages de la rivière Oldman et de Rafferty-Alameda de même que le projet de la Grande Baleine d'Hydro-Québec ont permis de faire ressortir la complexité politique, constitutionnelle et administrative de l'évaluation des incidences environnementales dans le contexte intergouvernemental. La décision de la Cour suprême du Canada relativement au barrage de la rivière Oldman et la promulgation de la *Loi canadienne sur l'évaluation environnementale* ont fait de la collaboration intergouvernementale une priorité en matière d'évaluation des incidences environnementales.

Par ailleurs, cet article explique brièvement les objectifs de la coordination interjuridictionnelle et fait état du cadre législatif nécessaire à cette collaboration. Par la suite, nous étudions neuf domaines pour lesquels l'évaluation des incidences environnementales posera des difficultés particulières. Cet article en arrive ensuite à la conclusion que la collaboration intergouvernementale en matière d'évaluation des incidences environnementales mettra à l'épreuve, encore une fois, le fédéralisme coopératif.

Two events in the first half of 1992 add impetus to interjurisdictional concerns. First, the Supreme Court of Canada's decision in Oldman[1] confirmed that environmentally significant projects will frequently trigger both federal and provincial EIA jurisdiction.[2] Second, enactment of the *Canadian Environmental Assessment Act* moves intergovernmental cooperation towards the top of the EIA agenda. A Canadian Council of Ministers of the Environment (CCME) Communiqué dated March 19, 1992, stated that "the focus should now be on negotiating bilateral federal-provincial agreements as soon as possible to ensure effective joint environmental assessment procedures."[3]

This article briefly reviews the objectives of interjurisdictional coordination of EIA, comments on the legislative framework for cooperation and identifies the principal issues to be addressed.

Objectives

The Oldman River and Rafferty-Alameda dam controversies demonstrate that the involvement of multiple jurisdictions may increase costs, delays and uncertainty for all participants in the EIA process. Project proponents want to know from the outset what EIA requirements must be met and how the process will unfold. For proponents, duplication of procedures and interminable litigation are unacceptable. Environmentalists want a credible, accessible and comprehensive review of interjurisdictional projects before irreversible decisions are taken. The completion of the federal EIA of the Oldman River Dam after the dam's construction is a paradigmatic example of EIA failure. Finally, governments want to preserve authority over resource management and avoid politically embarrassing conflict and litigation. Achieving these objectives requires adapting generally accepted EIA principles to the interjurisdictional context.

A starting point is the CCME statement of "Cooperative Principles for Environmental Assessments".[4] These principles contain general objectives such as the minimization of uncertainty and duplication, the encouragement of cooperative action and the assessment of environmental impacts prior to irrevocable decisions being made. Included is a catalogue of "common elements" for EIA processes, addressing such issues as public participation, the scope of the review, and innovative procedures. The CCME statement also identifies the need for federal-provincial and interprovincial cooperative mechanisms to ensure effective and early determination of the scope of EIAs, to permit the use of another jurisdiction's process, to facilitate administrative cooperation, to establish clear lines of communication, and to provide for public participation in EIA.

Another source of guidance is the United Nations *Convention on Environmental Impact Assessment in a Transboundary Context*, of which Canada is a signatory.[5] This convention sets out a general duty to minimize transboundary pollution from proposed activities and outlines a series of obligations and procedures reflecting general EIA principles and particular transboundary requirements. Parties are obliged to provide early notification and share information regarding activities likely to have transboundary effects. The preparation of environmental impact assessment documentation and consultation on that basis is required. Provision is made for post-project analysis. The convention also includes an inquiry procedure and dispute resolution mechanisms. While the convention applies to EIA in the international context, its approach is relevant to transboundary EIA within Canada.

The CCME statement and the UN convention provide general principles and goals but they do not resolve the practical issues raised by overlapping EIA jurisdiction in Canada. Solutions will be found in EIA legislation and intergovernmental agreements.

Legislative Framework

EIA legislation establishes the legal framework within which cooperative arrangements will operate. Statutes may authorize and place restrictions on intergovernmental cooperation and integrating the statutory regimes created by different jurisdictions will be a major focus of EIA agreements.

The *Canadian Environmental Assessment Act* will be a dominant force in shaping interjurisdictional arrangements for EIA if the federal government asserts its environmental

jurisdiction and uses the Act's provisions relating to intergovernmental cooperation and transboundary issues. Section 12(4) allows cooperation with other jurisdictions when a screening or comprehensive study is to be conducted. Screening, comprehensive study and the design and implementation of follow-up programs may be delegated, but not decision-making authority (s.17(1)). Delegated duties or functions must, however, be carried out pursuant to the Act and regulations (s.17(2)). The Act also allows for joint review panels, so long as statutory conditions are met (s.40). These conditions concern the factors to be considered by the panel, the ministerial role regarding panel appointment and terms of reference, the qualifications and impartiality of panel members, the power to call witnesses, public participation, and the submission to the Minister and publication of the panel's report (s.41). Finally, the federal EIA process may apply to activities having transboundary effects (ss.46-48).[6] The compatibility between these provisions and provincial requirements will be a principal determinant of the extent and nature of intergovernmental cooperation on EIA.

Treatment of interjurisdictional arrangements for EIA in provincial legislation varies considerably. Manitoba's *Environment Act* sets out a general "equivalency" standard and specific requirements for joint assessment processes.[7] More commonly, provincial legislation contains little or no explicit mention of intergovernmental agreements and joint assessments. The Saskatchewan legislation, for example, merely gives the Minister authority to enter intergovernmental agreements.[8] In New Brunswick, there is no statutory reference to interjurisdictional cooperation on EIA. The absence of statutory guidance does not, of course, preclude administrative cooperation or intergovernmental agreements, particularly given the extensive discretion frequently found in EIA statutes. It may, however, result in an *ad hoc* approach to joint assessments and it necessitates a careful consideration of whether legislated EIA requirements are satisfied in a joint process.

The next generation of EIA statutes will probably address interjurisdictional issues directly. British Columbia's legislation discussion paper entitled *Reforming Environmental Assessment in British Columbia* recommends that the EIA process "should enable the province to work cooperatively with the federal government, neighbouring jurisdictions (provinces, states and territories) and local government" and should provide for "cooperative or joint technical and/or public hearings with the federal government" and interjurisdictional agreements on a range of EIA issues.[9] Ideally, new EIA legislation should anticipate and facilitate intergovernmental cooperation. In practice, increasingly complex legislated procedures may make coordination more difficult.

As the legislative framework develops, so too will the reliance on intergovernmental agreements to establish cooperative EIA. The remainder of this article identifies issues to be addressed in negotiating these agreements.

Principal Issues

The negotiation of intergovernmental EIA agreements will encounter difficult issues in nine principal areas. First, political and jurisdictional stakes may be high, as illustrated by Quebec's hostile reaction to the *Canadian Environmental Assessment Act*.[10] Since EIA frequently involves major resource development projects, provinces may characterize federal involvement as a resources grab. Provincial sensitivity can only increase when, as with the Oldman River Dam, the province is the project proponent. On the other side, the federal government has clear environmental jurisdiction under the Constitution and faces political pressure to ensure that EIA figures in its decision-making. In cases of transboundary effects, federal, provincial and territorial governments may have very different perceptions of the environmental and socio-economic consequences of projects. EIA will be unable to avoid the contentious politics of Canadian intergovernmental relations.

Second, the structure of EIA agreements must be determined. Four alternatives are: (1) a multilateral agreement establishing interjurisdictional EIA procedures across the country; (2) bilateral umbrella agreements which leave specific

arrangements to be settled on a project-by-project basis; (3) detailed bilateral agreements which establish EIA procedures for all projects subject to jurisdictional overlap; and (4) an *ad hoc*, project-by-project approach. The flexibility afforded by umbrella agreements must be weighed against the risk of protracted negotiations over each joint assessment.[11]

A third area is the harmonization of EIA. One of the CCME principles is that: "To avoid jurisdictional or 'forum' shopping, it is important that there be consistent application of the environmental assessment process."[12] The need for intergovernmental cooperation could encourage the harmonization of EIA in Canada. While harmonization may result in a lowest common denominator approach, interjurisdictional cooperation could raise EIA standards. For example, Manitoba's legislation requires impartiality and special expertise for joint panels, while no such standard is part of the purely provincial process.[13] Harmonization with federal requirements may also improve EIA in certain respects. Along with this potential benefit, however, is the risk that harmonization may limit innovation in EIA processes over the long term.

Fourth, the involvement of multiple agencies and decision makers raises the single window issue. To minimize confusion and delay, one department or agency within each government should take the lead in the EIA process to coordinate responsibilities and establish priorities. Long a concern of project proponents, the single window is also a precondition for effective intergovernmental cooperation. Consequently, governments may feel obliged to put their own houses in order, and a single window requirement might be included in intergovernmental agreements.

A fifth area of concern for EIA agreements is the substitution of another jurisdiction's EIA procedures. Provincial governments criticized the *Canadian Environmental Assessment Act* for not providing for the use of provincial procedures except at the screening, comprehensive study and follow-up program stages.[14] The provinces recommended that "comparable or equivalent" provincial review processes should be permitted "where there is minimum federal jurisdiction or interest."[15] Equivalency raises two problems. First, unless it means identical procedures and standards, monitoring other jurisdictions and determining whether procedures are equivalent may be difficult. The second problem concerns the circumstances when substitution is appropriate. Even "minimum" jurisdiction may entail a veto power over a project and governments engaged in this type of decision-making may be reluctant to delegate complete control over the EIA process.

Sixth, intergovernmental agreements may provide for cooperation early in the EIA process. For example, in certain provinces, federal officials have participated in the provincial screening process[16] and the new federal legislation permits delegation at this stage (s.17). Early cooperation might be formalized through agreements. Note, however, that this type of coordination is possible only for jurisdictions having similar screening procedures.

A seventh area of potential controversy is the scoping or terms of reference for joint EIAs. The CCME principles call for early issue identification and state that the EIA should address public comments and concerns, the biophysical environment, socio-economic considerations, project need and justification, alternative means of carrying out a project, cumulative effects, follow-up requirements, sustainable development and mitigation measures.[17] Setting the terms of reference may raise political and constitutional issues in the interjurisdictional context. Provincial governments stated that provisions in the *Canadian Environmental Assessment Act*[18] specifying the factors to be considered by review panels "would allow any federal or joint review of a project that is primarily within provincial jurisdiction to include in the assessment, the need for and alternatives to the project, cumulative effects and the capacity of the renewable resources involved."[19] According to the provinces, these sections "would allow the federal government to assume a decision-making role in the provincial management of natural resources, provincial sustainable development strategy, and the implementation and orientation of provincial economic policy on a project by project basis."[20]

The scoping of joint assessments

is complicated by constitutional considerations, illustrated by the Oldman River Dam. The project is largely within provincial jurisdiction, but federal authority is triggered by the dam's effects on fisheries,[21] navigation[22] and Indians and lands reserved for Indians.[23] In these circumstances, provinces may see a joint panel as opening the door to federal government involvement in reviewing matters beyond its jurisdiction. However, restricting the joint panel's terms of reference to the subset of a project's effects which are subject to overlapping jurisdiction is inconsistent with a holistic evaluation and may lead to duplication in EIA procedures if excluded topics are reviewed through a provincial process.

Panel selection is an eighth area of concern for joint EIA. One option is for each government to name the same individuals to legally distinct panels, which would then meet the statutory requirements of all applicable EIA processes. A second possibility is the appointment of a joint panel as part of a distinct interjurisdictional process. Third, separate panels might cooperate in collecting information and holding joint public hearings. Under any process, the politics of panel selection may be a source of contention.

Ninth, coordination on specific statutory requirements may be necessary. Cooperating jurisdictions will have to ensure that requirements regarding time limits, public participation and participant funding, for example, are respected in intergovernmental processes.

Many of these areas raise a general tension between flexibility and certainty in intergovernmental EIA arrangements. Flexibility is desirable for integrating legislative schemes and policy priorities and for adapting the EIA process to different circumstances. However, it carries the risk of an *ad hoc* approach which may lead to lengthy negotiations and unsatisfactory EIA processes. As provincial and federal EIA regimes become increasingly complicated and subject to legislated requirements, *ad hoc* coordination will be more difficult.

Conclusion

Interjurisdictional cooperation in EIA has both perils and promise. The perils are that jurisdictional rivalry will lead to complicated and litigation prone processes or to vaguely worded statements of principle with little practical effect. Intergovernmental arrangements could also compromise the effectiveness and integrity of EIA if not subject to legislative standards and public scrutiny. The promise is that intergovernmental agreements may strengthen and harmonize EIA procedures and minimize delay, duplication and uncertainty. The only safe prediction is that EIA will put cooperative federalism in Canada to yet another test.

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Notes

1. *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 2 W.W.R. 193 (S.C.C.).

2. See: Steven A. Kennett, "*Oldman* and Environmental Impact Assessment: An Invitation for Cooperative Federalism" (1992) 3 *Constitutional Forum* 93; Judith Hanebury, "The Supreme Court Decision in Oldman River Dam: More Pieces in The Puzzle of Jurisdiction over the Environment" (1992) 37 *Resources* 1.

3. Canadian Council of Ministers of the Environment, Communiqué (19 March 1992) 4. This issue had already received some attention. The Western and Atlantic Accords on Environmental Cooperation, signed in 1991, placed the "harmonization of environmental assessment procedures and the development of bilateral environmental assessment agreements" at the top of the list of priorities for action.

4. Canadian Council of Ministers of the Environment, "Cooperative Principles for Environmental Assessment (6-7 May 1991).

5. *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 30 I.L.M. 800.

6. The Act also contains a deemed substitution provision, stating that: "Where the Minister establishes a review panel jointly with a jurisdiction referred to in subsection 40(1), the assessment conducted by that panel shall be deemed to satisfy any requirements of this Act and the regulations respecting assessments by a review panel".

7. *The Environment Act*, S.M. 1987-88, c. 26, s.13.1(2), as amended by *The Environment Amendment Act*, S.M. 1990-91, c. 15, s.2.

8. *The Environmental Assessment Act*, S.Sask. 1979-80, c. E-10.1, s.5(f).

9. Ministry of Environment, Lands and Parks and Ministry of Energy, Mines and Petroleum Resources, Province of

British Columbia, "Reforming Environmental Assessment in British Columbia: A Legislation Discussion Paper" (April, 1992) 30.

10. The Minister of the Environment of Quebec stated that the act was "totalitarian" (Globe and Mail, June 24, 1992).

11. Some guidance may be found in Canada's limited experience with EIA agreements. See, for example, the *Agreement Concerning Environmental Impact Assessments of Projects in Alberta with Implications for Canada and Alberta* (15 May 1986), which expired in 1989. For a discussion of project-specific agreements, see Monique Ross, "An Evaluation of Joint Environmental Impact Assessments" in Monique Ross and J. Owen Saunders, eds., *Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts* (in press).

12. *Supra*, note 4 at 2.

13. *Supra*, note 7 at s.13.1(2)(v).

14. Canadian Council of Ministers of the Environment, "Review of Proposed Amendments to Bill C-13" (14 November 1991).

15. *Id.*, at 6.

16. For example, the practice in Newfoundland is to have federal participation in the assessment committee which conducts screening. See Nfld Reg. 225/84, s.6. The Steering Committee for the Major Project Review Process in British Columbia includes provincial, federal and, where appropriate, municipal officials. See, Ministry of Development, Trade and Tourism and B.C. Environment, "Major Project Review Process Guidelines" (March 1991) at 5.

17. *Supra*, note 4 at 1-2.

18. Ss. 16(1)(a), 16(2)(b), (d).

19. *Supra*, note 14 at ii.

20. *Supra*, note 14 at ii.

21. *Constitution Act, 1967*, s.91(12).

22. *Id.*, s.91(10).

23. *Id.*, s.91(24).

One More Look at the Oldman Dam

by P.S. Elder*

Since both the Supreme Court of Canada[1] and the federal Environmental Assessment and Review Panel[2] have spoken on the now completed Oldman River dam in southern Alberta, it is timely to weigh the success of the federal Environmental Assessment and Review Process (EARP) in this cause celebre. Although the decision-making process was unusual in this case (both here and in the Rafferty-Alameda project in Saskatchewan a federal permit was quashed in the courts after construction was well along), some general lessons do emerge.

This article also briefly considers whether the new *Canadian Environmental Assessment Act*[3] would correct the deficiencies identified.

It will be recalled that the Oldman River dam in southwestern Alberta was built as a water storage and management facility for a region to the east which is subject to drought. In 1987 the Province of Alberta, the proponent of the dam, obtained from the federal Minister of Transport the necessary permit for construction under the *Navigable Waters Protection Act*[4]. At that time the Ministers of Transport and Environment rejected the claim by the Friends of the Oldman River Society that no such permit could be issued without the environmental screening or assessment required by the *Environmental Assessment and Review Process Guidelines Order*.[5] Although the Society successfully argued in the Federal Court of Appeal[6] that the Ministers of Transport and Fisheries and Oceans were both bound by the *Guidelines Order* and that the former's failure to follow the EARP rendered void the necessary federal permit for the project, the Government of Alberta continued to construct the dam pending an appeal to the Supreme Court. The Society's attempt to force a halt to construction failed.[7] Neither the Court of Queen's Bench nor the Court of Appeal of Alberta was persuaded that the rule of law was endangered by the

Résumé

Bien que le barrage de la rivière Oldman en Alberta revête un caractère particulier puisque la province n'a pas interrompu les travaux de construction après que les tribunaux ont rejeté le permis fédéral nécessaire et avant d'obtenir les résultats de l'évaluation environnementale fédérale, il en ressort diverses leçons générales relativement aux évaluations environnementales. Cet article traite d'un certain nombre de ces leçons, y compris le besoin pour les approbations de travaux d'être liées beaucoup plus étroitement au processus d'évaluation environnementale et d'être situées dans un cadre de planification général et proactif. La nouvelle *Loi canadienne sur l'évaluation environnementale* ne corrige que partiellement les imperfections de l'évaluation environnementale dont il est question dans cet article.

Province's illegal continuation of its construction. The Society is seeking leave to appeal this decision to the Supreme Court.

Although the appeal of the quashing of the *Navigable Waters Protection Act* permit was argued in the Supreme Court in February 1991, no decision was rendered until the dam had been completed. On January 23, 1992, the Court affirmed the Court of Appeal's holding, except that the federal Minister of Fisheries was held not to be a decision-making authority under the *Guidelines Order*. Therefore, that Minister had no duty to initiate an environmental assessment (EA).

Specifically, the Supreme Court held that:

1. the federal legislation authorizing the promulgation of the Guidelines Order is constitutional;
2. the Guidelines Order imposes mandatory duties;
3. the Minister of Transport erred in failing to order a full assessment of environmental (and socio-economic) impacts within **all** areas of federal jurisdiction (including inland fisheries), not just those related to transport;
4. the Government of Alberta was bound to obtain a federal licence before proceeding with the project.

The Supreme Court did not, however, advert to possible remedies the successful respondents might now have, given that the project is complete. Nor did it say whether future proposals needing federal EAs must await the report's completion before federal permits can be issued. In earlier cases, the Federal Court had backed away from the implications of making the *Guidelines Order* binding, by defining an initiating department's obligation very narrowly. Although no licence for a project may be issued before a hearing panel is named (if one is required), the appointment of a panel seems to end ministerial obligations under the EARP. It is permissible for federal decision-makers to issue a licence before the panel reports! The Court held that the report on the project's environmental effects need not be awaited because the *Guidelines Order* creates no obligation for any decision-maker to implement the report, no time limit for a panel to report (thus raising the possibility that a panel opposed to a project could prevent it from proceeding by never submitting a report) and gives no power to anyone to issue a "stop order" on construction.[8]

This failure to link EA to decision-making is by far the most serious flaw in EARP and, as argued below, it has only been partially resolved by the new Act.

The Government of Alberta justified its illegal completion of the dam by pointing out that it had originally obtained a federal licence and therefore had commenced building in good faith. It had been the federal government which misinterpreted the EARP requirement and safety considerations were said to dictate finishing the structure. Furthermore, environmental assessment reports had been done by Alberta, both levels of government had cooperated in reviewing the proposal and federal Fisheries officials had been working with provincial counterparts in addressing fisheries concerns.

Having appealed the legal decisions (that EARP was binding) on the basis that the *Guidelines Order* was unconstitutional and that the Province was not bound by the *Navigable Waters Protection Act*, Alberta refused to participate in the EARP review. This review was, not surprisingly, hampered by the unavailability of proponent officials for public questioning.

The EARP Panel report, which was highly critical of the project, was not well received by Alberta. Ministers used terms like "technically adolescent" to express their frustration at the negative review of the dam. The first recommendation of the Panel was that the dam be de-commissioned by allowing the unimpeded flow of the river.[9] Failing this, "stringent conditions" were recommended for federal approvals, including

> the proponent reaching an agreement with the Peigan (Indian band whose reserve is located downstream from the dam) and making a long term commitment to mitigating the many environmental impacts of the project.[10]

If the proponent failed to satisfy these conditions, the panel proposed that its first recommendation be implemented.

According to the Panel, the economic cost-benefit analyses prepared by the proponent in 1978 and updated in 1986 used techniques explicitly contrary to "Treasury Board and other accepted guidelines":[11]

> On the basis of this assessment, the Panel's technical specialist concluded that while the dam may be justifiable on other grounds, it could not easily be justified in economic terms.[12]

After considering all factors;

> [o]n balance, the Panel concludes that the social, economic and environmental costs of the project outweigh the social, economic and environmental benefits,

even with the construction cost ($450 million in 1992 dollars) as sunk costs.[13]

The Alberta government's ineptitude was not the only target of the Panel. Federal officials were also excoriated, particularly for their failure to protect the interests of the Peigan ("[t]he Peigan were not treated fairly"[14]):

> The absence of any assessment of native use and entitlement by these departments (Fisheries and Oceans and Indian Affairs and Northern Development) is inexcusable and their passive approach to meeting their fiduciary responsibility is seen as unacceptable ... .[15]

Furthermore, the commitment of various departments to the EARP was questioned and Indian Affairs and Northern Development was again singled out.[16] The Panel pointed out that the review was carried out six years too late and that the failure of the proponent to appear and of the Peigan to provide full information had handicapped the review.[17] Finally, the panel regretted that the federal government had not called a halt to construction.[18]

In spite of its lack of a federal *Navigable Waters Protection Act* permit, the Alberta government scheduled a gala public opening of the dam for July, but this was cancelled for fear of civil unrest. Hon. Ralph Klein, Alberta Minister of the Environment, has also manifested a lack of concern for the law by stating that the Province can operate the dam without obtaining the permit.[19] This attitude by the provincial government seems especially provocative, given that Peigan activist Milton Born With a Tooth, already convicted in connection with his earlier actions protesting dam construction (he has appealed), has said he is willing to die trying to open the gates of this illegal structure. Not being a lawyer, Born With a Tooth must be perplexed about why the government is entitled to disobey the law and block a river sacred to the aboriginal people but a citizen cannot disobey the law and unblock it.

Six conclusions can be drawn from the Oldman River Dam story. First, the breadth of federal EA coverage over provincially initiated and funded projects, as established by the EARP cases, was not intended by the federal government. (The new Act's retrenchment proves this point.) Second, intergovernmental coordination of EA processes is essential and the Supreme Court has made it clear that past provincial attempts to minimize federal involvement in decisions on mega-projects rested on a misreading of the constitutional position. The approval of both levels of government is necessary. Third, and most importantly, approval decisions must await completion of EA reviews and must be strongly linked to the findings thereof. Fourth, no EA process can succeed without strong commitment both by Ministers and responsible bureaucrats. Governments determined, for ideological reasons, to build mega-projects will not be deterred by adverse environmental and socio-economic analyses. Fifth, EA analysis will be most effective as a mitigation tool if it is done during the planning phase of a proposal. Sixth, the Supreme Court has confirmed that Canada has moved, however inadvertently, toward one of the key recommendations in the Brundtland Report; that the best way to integrate environmental and economic decision-making is to give all agencies environmental responsibilities rather than to hive off environmental jurisdiction into a separate department.[20]

To what extent does the new *Canadian Environmental Assessment Act* address these points? The vexing problem of coordinating federal and provincial jurisdiction in this area is dealt with in two ways by the new Act. First, s. 5(1) limits federal involvement in EA to projects proposed by a federal authority, or to those involving federal expenditures, the transfer of an interest in federal lands (this provision is narrower than the EARP and than an earlier draft of the bill, which covered projects on and perhaps affecting federal lands) or the exercise of such powers by federal authorities as are prescribed by regulations. (This latter provision is far narrower than under EARP, which binds all permitting authorities.) Other projects which could involve significant adverse environmental effects across boundaries or on lands in which Indians have interests **may** also be referred for assessment (ss. 46-48). Thus, it is not certain that even such a large project as the Oldman River dam would have to be assessed at all - unless the Governor in Council (Cabinet) promulgates a regulation under s. 59(f) or (g) listing specific powers, duties or functions under named acts the exercise of which would then require an EA. Nowhere does the Act specify types or sizes of projects or magnitude of impacts which will trigger compulsory assessment.

Second, when provincial or other authorities also have jurisdiction over aspects of a project, interjurisdictional coordination is to

be achieved through cooperation in the preliminary screening of projects and by the establishment, on certain conditions, of joint panels when full Environmental Impact Statements and public hearings are required. All joint review, however, will have to meet the core requirements of the federal review process.

Linkage of the EA and approval processes is somewhat improved in the new Act. None of the relevant federal actions can be carried out until the necessary assessment has been completed and appropriate mitigation measures required (ss. 20(1)(a) and 37(1)(a)). Furthermore, the results of either screening reports or EA reports have to be taken into consideration before a project is implemented, although "significant adverse environmental effects" are acceptable if they can "be justified in the circumstances".[21] Section 58(1) allows the Minister of the Environment to establish criteria about both of the just quoted phrases. The strength of Canada's political commitment to using EA to decide on the acceptability of projects, instead of using it as a mitigating device, would have been more evident if stringent, legislated criteria had been provided.

As for the timing of the assessment, federal authorities are to "ensure that the environmental assessment is conducted as early as is practicable in the planning stages... ."[22] EA processes invoked as a result of public concern (s. 25(b)), however, will probably not be initiated very early in the planning process.

Given doubts about political and bureaucratic commitment to approval-relevant EA, the Brundtland Report's idea of decentralizing the duty to integrate environment and economy may be premature. There is a case for creating at least an interim central environmental veto over proposals (not just projects), in order to educate all agencies about appropriate standards of analysis. Elsewhere, I have suggested a legislatively based, binding procedure supervised by an independent Environmental and Sustainability Assessment agency. The agency would use rigorous decision criteria, while preserving political accountability through ministerial power to reverse agency decisions.[23] Difficult judgments would still have to be made, but the empowering legislation would list the issues to be addressed and the consequences of conclusions thereon.

Overall, it seems that EA of proposals is not enough. Before any specific proposal comes forward, regional environmental audits and plans are needed so that areas important for ecological and social sustainability are reserved from the beginning. To choose a Calgary regional example, when specific golf resort plans come forward for the Bow River Corridor, prior land use classification decisions, perhaps combined with class assessments, might result in a fairly quick answer: for example, that only two of these developments would be environmentally acceptable, on three or four possible sites. With this sort of prior information, developers would be in a much better strategic position to achieve their goal of environmentally sustainable and yet profitable undertakings.

Without some overall environmental planning process, however, project-specific EA, even if improved, could continue to allow "death by a thousand cuts". It would be surprising if isolated, self-interested economic decisions which explicitly discount the long term did consider inter-related ecosytemic impacts.

In a future issue of *Resources*, it is intended to examine the extent to which provisions in the new Yukon *Environment Act*[24] exemplify this innovative planning approach.

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Notes

1. *Her Majesty the Queen in right of Alberta, the Ministers of Transport and of Fisheries and Oceans v. Friends of the Oldman River Society and Interveners*, [1992] 2 W.W.R. 193.

2. *Oldman River Dam Report of the Environmental Assessment Panel* (Ottawa: Federal Environmental Assessment and Review Office, May, 1992).

3. All references in this note are to the text of Bill C-13, as passed by the House of Commons on March 19, 1992. The final text, as passed by the Senate in June, was not available.

4. R.S.C. 1985, c. N-22, s.5.

5. S.O.R./84-467.

6. *Re Friends of the Old Man (sic) River Society and Minister of Transport et al* 68 D.L.R. (4th) 375 (1990).

7. *Friends of the Oldman River Society v. Regina (in right of Alberta), Minister of the Environment et al.* Action #'s 9001-04254, 9001-04256, 8901-03684, Alberta Court of Queen's Bench,

May 25, 1990, affirmed by the Court of Appeal, Appeal # 11942, Mar. 5, 1992.

Forsyth J., in rather perplexing oral reasons for judgement, seemed to take the view that, since Parliament had given the necessary powers to the Minister of Transport to issue stop or removal orders (in s. 6 of the *Navigable Waters Protection Act*) and he had decided not to do so, it would be inappropriate to consider the Society's application. He therefore adjourned the application *sine die*. In March, 1992, the Court of Appeal affirmed this decision and glossed it by suggesting the Society had not exhausted its remedies. (The Society had commenced at least four actions by this time.)

8. E.g., *Naskapi-Montagnas Innu Association v. Minister of National Defence* (1991), 5 CELR (NS) 287 Fed. T.D. *per* Reed J. (approved in *Tetzlaff v. Canada (Minister of the Environment) and Saskatchewan Water Corp.* (1991), 121 Nat. Rep. 385 (Fed. Ct. App.).

9. *Supra*, n. 2 at 6.

10. *Ibid* (word in brackets supplied).

11. *Id.*, at 28.

12. *Ibid.*

13. *Id.*, at 31, words in brackets supplied (W. A. Ross, Panel Chairperson, pers. comm., emphasis added).

14. *Id.*, at 26.

15. *Id.*, at 21 (words in brackets taken from the previous sentence).

16. *Id.*, at 33.

17. *Id.*, at 33.

18. *Ibid.*

19. Calgary Herald, June 12, 1992.

20. The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 313-314.

21. Ss. 20(1)(a) & 37(1)(a).

22. S. 11(1).

23. P.S. Elder, "Environmental and Sustainability Assessment" (1992) 2 J.E.L.P. 125.

24. Yukon Stats, Bill 20, assented to May 29, 1991.

PRELIMINARY ANNOUNCEMENT
6th CIRL Conference on Natural Resources Law

"Law and Process in Environmental Management"
May 13 & 14, 1993 - Ottawa

The Institute's sixth conference on natural resources law will be held May 13-14, 1993 in Ottawa. The theme, law and process in environmental management, reflects the growing importance of innovative legal and institutional arrangements for environmental management in Canada. It also focuses on the wide range of contexts where environmental decision making and conflict resolution are essential. As environmental and resource management issues become more contentious and permeate all aspects of private and public sector activity, designing effective and legitimate processes for addressing the entire spectrum of these issues is of primary importance. This conference will review recent experience and chart the course for the future in this rapidly changing area.

The conference will include papers on process issues raised by environmental impact assessment, environmental litigation, international environmental management, Canadian interjurisdictional matters, access to decision making, and aboriginal and northern approaches to environmental and natural resources management. It will be of particular relevance to lawyers, business people, government officials, public interest advocates, environmental consultants and academics with an interest in the complex and multidisciplinary area of environmental management.

Speakers will include: Yvon Duplessis (Faculty of Law, University of Ottawa), Phil Elder (Faculty of Environmental Design, University of Calgary), Stewart Elgie (Faculty of Law, University of Alberta), Robert Gibson (Department of Environment and Resource Studies, University of Waterloo), Lorne Giroux (Faculty of Law, Laval University), Janet Keeping (Canadian Institute of Resources Law), Steven Kennett (Canadian Institute of Resources Law), Alastair Lucas (Faculty of Law, University of Calgary), Paul Muldoon (Pollution Probe), Stephen Owen (British Columbia Commission on Resources and Environment), William Ross (Faculty of Environmental Design, University of Calgary), Owen Saunders (Canadian Institute of Resources Law), Donna Tingley (Environmental Law Centre, Edmonton), Marcia Valiante (Faculty of Law, University of Windsor), and Toby Vigod (Commission on Planning and Development Reform in Ontario).

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Recent Developments in Canadian Mining Law

*by Susan Blackman**

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Reservation of Land from Staking--Yukon

In *Halferdahl* v. *Whitehorse Mining District*, [1992] F.C.J. No. 44 (F.C.A.) (QL Systems), the plaintiff attempted to stake claims under the *Yukon Quartz Mining Act*, R.S.C. 1970, c.Y-4 (YQMA) in an area that had been withdrawn from staking under the *Territorial Lands Act*, R.S.C. 1970, c.T-6, pending a native land claims settlement. When the mining recorder refused to record the claims, the plaintiff took the case to the Federal Court Trial Division where he was successful. On the basis of statutory construction, the trial judge held that the order made under the *Territorial Lands Act* did not affect procedures under the YQMA.

On appeal, the decision was reversed. The Federal Court Appeal Division decided that the YQMA itself did give effect to orders of the kind made under the *Territorial Lands Act* in this case. The court interpreted the following words in s.13 of the YQMA:

> There shall be excepted from [staking] ... any land on which any church or cemetery is situated, and any land lawfully occupied for mining purposes, and also Indian reserves, national parks and defence, quarantine, or other like reservations made by the Government of Canada, ...

The court characterized all the things listed in the section and found that the lands reserved are required by the Government of Canada for a "broadly stated public purpose". Therefore the words "other like reservations" must also be for a broad public purpose. Lands which facilitate the settlement of native land claims were found to be lands set aside for a broad public purpose and therefore came under the "other like reservations" language in s.13.

Mineral Claims Divided into Separate Parcels--B.C.

British Columbia has created a mineral reserve over all tidal waters in the province. The plaintiffs had staked a two-post claim which included a tiny island separated from the remainder of the claim by tidal waters. The defendants took jade from the island. The issue was whether a mineral claim in B.C. can be separated into two or more parts. At trial, the plaintiffs won.

In *Karup* v. *Rollins*, [1992] B.C.J. No. 278 (C.A.) (QL Systems), the unanimous court upheld the trial judge's decision. An old B.C. case, *Dart* v. *St. Keverne Mining Co.* (1899), 7 B.C.R. 56, held that mining claims cannot consist of two strips of land unconnected with each other. However, the court found that the *Mineral Act*, R.S.B.C. 1979, c.259, and Regulations allowed for such a situation though not in the specific circumstances found in this case. Nevertheless, there "is nothing in the language of the *Mineral Act* or the Regulations thereto which prohibits the excising of a portion of the grid which may fall into mineral reserve, even if this breaks the claim into two separate parts." The *Mineral Act* was repealed in 1988 and replaced by the *Mineral Tenure Act*, S.B.C. 1988, c.5. The *Mineral Tenure Act Regulation*, B.C. Reg. 297/88, permits claims containing more than one parcel of land (s.15).

Claim Staking Disputes--Substantial Compliance--Eskay Creek--B.C.

A number of decisions of the B.C. Gold Commissioner in relation to the cloud of staking disputes in the Eskay Creek area have been appealed, and are producing interesting law. One of these is *Ecstall Mining Corp* v. *British Columbia*, [1992] B.C.J. No. 40 (S.C.) (QL Systems), a mineral claim was cancelled because of failure to stake a portion of it. Although the locator had provided information on the Legal Corner Post that 4 of the required 14 posts were missing, and also noted this on the registration form, the Gold Commissioner decided that the locator simply did not allow enough time to complete the staking.

On appealing the Gold Commissioner's decision to the B.C. Supreme Court, Hamilton, J. held that the issue is not how much time was spent on the staking, but whether the appellants made a bona fide effort to comply with the staking requirements, and to the extent that they failed, whether that failure would mislead other free miners (s.34, *Mineral Tenure Act*,

S.B.C. 1988, c.5). The judge stated:

> Throughout the legislative and judicial history of what is now section 34 of the Act strict compliance in both the locating of claims and in the recording of them has been excused where a good faith attempt was made in circumstances that were not likely to mislead other prospectors.

In this case, the notations of the missing posts on the LCP, and the notation on the registration form about missing posts, were enough to alert any free miner to the problem. The court ordered the appellants' claim reinstated.

Susan Blackman is a Research Associate with the Canadian Institute of Resources Law and is the Canadian oil and gas and mining law reporter for the Rocky Mountain Mineral Law Foundation Newsletter.

Institute News

- Owen Saunders spoke on "Private Interests and the Common Good: The Environment" at a Round Table Seminar on "Civil Society and the Establishment of Democratic States" for members of Moscow's Gorbachev Institute, held at The University of Calgary in June, 1992.

- The Board of Directors of the Institute held its annual spring Board meeting in Yellowknife in May. This was accompanied by a reception for the Yellowknife community with an interest in natural resources law and policy.

- The Institute, in conjunction with the Faculty of Law, University of Calgary, recently convened a one-week course on environmental law for practitioners. The course attracted approximately 35 participants from across Canada.

Canadian Forest Management Project

The Institute will be commencing a two-year research project on Canadian Forest Management. The general purpose of the project is to consider the extent and the means by which our political institutions and legal practices are responding to the increasingly complex and conflicting demands being placed on our forests. The principal researcher for the project will be Monique Ross.

The project sponsors to date are: The Alberta Law Foundation, the British Columbia Law Foundation, Alberta Forest Products Association, Fasken Campbell Godfrey, Lang Michener Lawrence & Shaw, and Blue Ridge Lumber (1981) Ltd. Additional sponsors will be announced in future issues of *Resources*.

Companies, firms, and foundations interested in obtaining information about sponsorship of an Institute project or conference may contact the Institute's Executive Director at (403) 220-3200 or write to: Canadian Institute of Resources Law, 430 Bio Sciences Building, The University of Calgary, Calgary, Alberta T2N 1N4. All donations are tax-deductible.

New Board Member

The Institute has a new Board member effective May, 1992.

David Oulton is the Assistant Deputy Minister of the Energy Sector in the Department of Energy, Mines and Resources Canada. He has responsibility for the federal government's energy policy and programs. Over 1987 and 1988 he served as Co-ordinator of the Department of Energy, Mines and Resources' activities with regard to the Canada-U.S. Free Trade Agreement.

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