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Mega - EA hearings:

Thoughts from the front . . .

A report based on the experience of citizens and their lawyers from recent extended Environmental Assessment hearings in Ontario

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Kathy Cooper

About CELA

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. It is also a free legal advisory clinic for the public, and will act at hearings and in the courts on behalf of citizens or citizens' groups who are otherwise unable to afford legal assistance.

Introduction

Ontario's Environmental Assessment Act has long been considered one of the best environmental assessment laws in North America. It requires most public proponents[1] to go through a specified planning process in advance of the preparation of the EA documents they submit for approval. This process requires a thorough review of the environmental effects of the undertaking, the alternatives to the undertaking (including the "do nothing" or null alternative), and the alternative methods of carrying out the undertaking. The EA process also encourages proponents to consult with any affected parties in advance to help anticipate and prevent problems, and document that consultation in their application. Finally, if a hearing is held the law provides extensive rights in the hearing room for intervenors.

Coupled with the 1988 Intervenor Funding Project Act, which requires proponents to fund the public interest intervenors role in hearings, the regime has considerable potential to fundamentally influence public agencies planning processes in favour of less polluting and more sustainable forms of development. And many think its potential is just starting to be realized:

> *These tribunals have the potential of really now being at the centre of decision making, because they are in fact decision makers under the statutes under which they operate ... Not only can they have a great impact, in my experience, on the particular matter that is being discussed before them, they can also have a major impact on future policy and indeed law reform itself.*
>
> - Joe Castrilli, environmental lawyer

However, in recent years a growing number of critics have begun to decry the length of time that certain hearings have taken, voicing conerns about a waste of time and resources and arguing that unwarranted delays are imposed on development as a result. The main change which has led to this criticism is the application of the Act to not only the relatively straightforward and focussed review of proposed structures and facilities, but also to broad-based reviews of public plans and policies.

In particular, the Ontario Waste Management Corporation facility EA, the Ontario Hydro 25 year Demand/Supply Plan EA (D/SP), and the Ministry of Natural Resources Timber Management Class EA hearings have continued for years, and are regarded by some as expensive and unacceptably long. Although the hearings have ended in all three of these instances (with the exception of OWMC, which still awaits final argument), the process has not yet produced final decisions from the panels. Whether the application of the EA

1. While all public proponents are automatically subject to the Act's provisions, the Act allows the Minister to exempt individual projects. Private sector projects are not subject to the Act, but can be individually designated by regulation.

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process in these cases, and the long hearings that resulted, have been of greater benefit than their cost is hard to judge as yet.

The critics of the EA process often point to the few prolonged hearings as evidence of the excesses of EA requirements in general terms. However, this broad-brush criticism is not supported by the facts. An analysis of the history of EA cases in the province has shown that it is much more efficient than it is often portrayed to be. For example, of all EA undertakings subject to the Act, only 1% have gone to a hearing. Of these hearings, the average completion time is one year. If the Hydro D/SP and MNR Timber Management hearings are set aside, average hearing completion time is 9 months.[2]

Nevertheless, all participants in the long hearings, as well as other critics, agree that shorter processes are desirable. The situation has become serious enough that if reforms are not instituted to reduce the length of hearings, many believe that eventually the Legislature itself could turn against the Act. The Ministry of Environment[3] and the Environmental Assessment Board held a number of consultation processes in recent years to consider reforms to the Act and how it is administered. Although considerable effort on the part of all stakeholders has gone into these reviews, only very minor changes have been made to the process. The report of the Environmental Assessment Advisory Committee[4] summarizing the results of the review and containing the Committee's recommendations have been in the Minister's office for over a year and a half and have yet to be publicly released. The Minister himself has stated that, while the government is committed to the EA process, it is not going to introduce amendments to the Act. Rather, internal administrative changes and some regulations may be introduced.

> *And the trick and the task for tribunals—and also the government and all the parties and counsel that appear before these tribunals as well—is to figure out a means by which we can preserve the public aspect of this process without continuing to make these interminable proceedings that place a personal strain on everybody's lives and experience.*
>
> - Joe Castrilli

This report is about the views of participants in the long EA hearings. In 1992 the Canadian Environmental Law Association (CELA) received a grant from the Laidlaw Foundation to

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2. Data from Environmental Assessment--Statistical Summary, Ministry of the Environment, PIBS 1923E, January 1992.

3. The Ministry of the Environment (MOE) became the Ministry of Environment and Energy (MOEE) in early 1993. Both MOE and MOEE are used in this report. Where MOE appears it is where the context is about historic MOE activities. When the subject is current, or refers to the future, MOEE is used.

4. The Environmental Assessment Advisory Committee was established in the early 1980s in response to some of the first efforts at EA Act reform. The Committee advises the Minister on EA matters principally, but not exclusively, on Class EA bump-up requests and private sector designation requests.

hold a workshop for the participants in the long hearings to discuss their experiences. In October 1992 a one day workshop was held of lawyers and the public interest and aboriginal groups involved in the major hearings. Numerous stories were told, and solutions offered, on the theme of extended EA hearings in Ontario. The day's discussions were recorded and transcribed, and provide most of the material for this report. A few additional interviews were conducted during the research of this report with individuals who were not at the workshop.

In a one-day workshop it was not possible to develop detailed recommendations for reform. Although many suggestions for change were made and appear throughout this report, they have not been collected in a set of concluding recommendations. Rather, this report represents an important first step in the thinking of those involved in these hearings about what the detailed package of reforms should look like. Staff at CELA plan to develop a subsequent report setting out reform recommendations building upon the workshop report and drawing upon their own expertise and experience with the EA process. That report will be prepared in the next few months.

Generic issues with Environmental Assessment

Throughout the workshop, participants raised many points (both benefits and drawbacks) that apply *not* to long hearings, but to the EA process *in general* (ie, pre- or post-hearing stages of the process and even to short hearings). While this report will not deal with all of these, a few of them are problems that are aggravated when hearings become especially long. These generic issues, both benefits and drawbacks, are described in this chapter. In some cases, the solutions are simple, and discussed here. In more involved cases, solutions are discussed in future chapters.

Benefit of access to proponent's information

In the workshop, numerous intervenors[5] cited the value that comes of getting more direct access to information from proponents in EA hearings. This information comes both from the EA document and supporting material filed by the proponent, as well as from interrogatory responses and cross-examination.

> *... We have gained a lot of information that we wouldn't have got otherwise, we would never have got the data out of the OWMC in terms of emissions and all those sorts of things, without the hearing. And that is valuable stuff for us in the political lobbying after.*
>
> - John Jackson, Citizen's Network on Waste Management

> *... at the Halton Landfill hearing, without the ability to cross-examine we would not have been able to cross-examine the experts on the site that eventually was rejected. ... the information would not have come to light if there had not been the legal right to cross-examine that expert and find that evidence faulty.*
>
> - Kathy Cooper, CELA

> *I spent from 1985 to 1990 trying to get some straight answers to some of these very basic questions that I was just not able to get. When I was able to ask interrogatories, I could just list bang, bang, bang, and they can't say 'we don't want to answer this.' ...I was able to get answers to questions...*
>
> - Eugene Bourgeois, Intervenor,
> Ontario Hydro D/SP hearing

5. In this report, the words "intervenor" and "client" will be used in place of "citizens, environmental groups, aboriginal groups and citizen's groups", both for purposes of brevity, and because hearings often involve a client/lawyer relationship.

Benefit of consultants' research

The purpose of intervenor funding for expert research is to generate information and evidence that will help the Board hearing the case make its judgements. The panel awarding intervenor funding considers proposals for expert research on the basis of whether the work will be of assistance to the Board in its understanding of the issues.

In addition, the availability of this research after hearings are over also provides benefits to intervenors in the community. Many intervenors are charitable groups with a mandate to carry out public education activities. Information generated by funded research can be a valuable addition to this ongoing educational work in the community, giving even more 'value added' to the funds spent.

> *Make sure that you don't make your case about things that aren't relevant to you in your own community.*
>
> - Brennain Lloyd, Northwatch

Clients not always sure of their basic goal in hearing

The value idea of clearly stating the goal of the intervention at the outset may seem self-evident, but this issue deserves more attention than it is often given.

An intervenor's strategy and approach should be guided by this goal-setting process. For example, a different approach will be taken in a case where the intervenor's basic goal is to defeat a development, than where the object is to reduce its environmental impacts. Many measures may be available which could improve the acceptability of a proposal to an EA Board, but which the intervenor may not necessarily emphasize in making a case to defeat the project. If the proponent amends the project to include those measures, intervenors need to decide how to respond to them. Being able to return to a clear statement of goals will help immeasurably in this process.

Goal definition becomes even more important when hearings become long and change over time, since original goals can seem distant from technical details about a facility under discussion a year or two later. Every change in hearing strategy should be weighed against the original goal.

This issue can be especially important where coalitions of groups are formed to intervene, since member groups of the coalition may have slightly different interests on some issues. Changes in the case may satisfy concerns of one Coalition member, and aggravate concerns of another.

In the Hydro D/SP case, the member groups of the Coalition of Environmental Groups for a Sustainable Energy Future discussed their goals at the outset and agreed upon a written

statement of unity, which was referred to again and again to help guide decisions through that changing hearing.

> *...So I think the client has a responsibility before they even choose a lawyer and that is to decide what it is they want out of the hearing...*
>
> - Lloyd Greenspoon, lawyer for Northwatch in D/SP case

If goal statements are developed, preferably with the groups' lawyer listening in, it gives important guidance to the lawyer, particularly in the day-to-day hearing room decisions where clients cannot always be involved or present.

Lawyers' participation in the goal-setting discussion can also be useful to the clients in setting achievable goals. Without a lawyer's understanding of the law, clients may form false expectations of what can be achieved through the EA Act, or alternatively, may miss opportunities for change that are apparent when the EA process is properly understood.

Hearings are 'foreign' to everyday life

Involvement in politics and social decision making is foreign to many people, even citizens in a democratic society. But when involvement comes in the form of a quasi-judicial hearing, with all the trappings of a courtroom process, it can be a very alienating experience. This outcome is ironic, given that many aspects of this system are intended to protect the rights of all parties involved.

> *The hearing process itself is so very boring and is such a different, bizarre world... It takes on a life that is not like society at all or is not like living out there in the real world at all. As you become totally immersed in a hearing, you become totally separated from the other parts of your life...*
>
> - John Jackson

Given the legalistic nature of hearing processes, a related set of problems sometimes arises: some clients have a difficult time keeping up with all the details of a case, and may eventually let their lawyers increasingly direct the development and presentation of their case. This "losing control" problem is especially an issue for citizen's groups, where the EA process is completely new to them, and they simply do not have the experience or the time to make it work for them. This is not the case with all intervenors. Professional environmentalists, for example, often know the EA process well, and can work effectively with lawyers to maximize their participation and impact in the hearing room.

An outgrowth of the alienation problem is that intervenors sometimes feel their lawyers are

not representing them adequately, and want more influence over developing the case and presenting evidence. At one point, John Jackson went as far as to suggest that he wanted the clients to argue the case, with advice from the lawyers, not the other way around:

> *I feel like the citizens' groups should be the ones that are up there doing cross-examination and leading evidence; that the lawyer should be sitting beside us and whispering advice to us instead of us whispering advice to him -- giving us legal advice, not running the actual hearing. I want that person there as a resource for me. I don't know if it is realistic to think that we can reverse that role or not, but I really think that would totally change the style of the hearing, I think it would make them much more accessible, I think it would probably be in many ways more focused on the issue.*

In fact, there is nothing in the law that requires clients to have legal counsel represent them, and in some cases, intervenors have effectively represented themselves.

If clients are unhappy with their lawyer, however, then it is a problem with the lawyer-client relationship, and not necessarily related to the EA process. Clearly though, where a strained relationship exists, it will be especially hard to live with in a protracted hearing. A good lawyer should be keeping the clients as fully informed as possible, and carrying out the instructions of his clients. If he is not, the clients have every right to find a lawyer they can work with.

A final 'alienation' issue relates to how EA Board members regard different kinds of evidence, and the difference between "expert" testimony, and evidence from other witnesses, like the intervenors themselves, or native elders. Citizens are the ones that live near the proposed facility, and know a great deal about that environment which sometimes consultants do not know. They have felt that when this kind of evidence is brought forward, it is either not welcome, or not taken seriously, in some cases.

Some panels of the Board have been better than others at inviting and hearing lay evidence, and there are no restrictions on hearing lay evidence in the rules of EA hearings.

Role of MOE in hearings

The Ministry of the Environment (now the Ministry of Environment and Energy) is virtually always a party in EA hearings, with a significant presence in the proceeding. (Often, it is a number of Ministries or even the whole government being represented, not just the Ministry of the Environment).

A number of intervenors expressed serious concerns about the MoE's role in these hearings, saying that the government often appears to be a "cheerleading section" for the proponent.

...usually, when the OWMC makes a motion, the Ministry gets up and supports it. You really get the sense they are not there as a neutral party, they don't seem to be there in any way to really support the public, to take care of the public's concerns. And I must say it does not help the Ministry's image with the public when the public goes to hearings, sits there and watches as they seem to be simply going along with the proponent in most cases.

- John Jackson

I really question what the Ministry's role is in the hearings. Supposedly they are representing the public. What the hell are they doing? There is no question that time and time again the proponent blew it with their evidence and the Ministry turned around and said to the Board: 'don't worry about that, we are satisfied'. I really question what the MOEnvironment, what the MOEnergy or any other ministries are doing at hearings if that is their role. I don't think it is in the public's interest.

- Jim Mahon, Intervenor, Victoria Hospital
Waste Incinerator hearing, 1986

In one way, no one should be surprised that the Government would support the proponent in hearings: in most cases, the Ministry has already accepted the EA document as adequate, which is often interpreted to mean the MOE also supports the undertaking. This 'acceptance' was given after all government ministries and agencies reviewed and commented on the draft EA, so the government's concerns have presumably been satisfied. (See, however, page 17 "MOE acceptance of incomplete EAs")

This prior acceptance of the EA document leaves virtually everyone confused about the government's role in the hearing, since it implies that the government's overall approval has already been given to the project. The *ambiguity is the problem*, since in some cases 'acceptance' is treated as meaning full approval of the project, and in other cases it is treated as meaning only the requirements of the Act have been met in the document.

The suspicion that the government is really a cheerleader for proponents in some hearings led one lawyer in the workshop to suggest that the government should be classified as a co-proponent if they are going to be a party in the hearing.

Proponent changing its case

Midway through a hearing, it is common to have the proponent file some new evidence, and indicate that this is an amendment to the undertaking. In addition, proponents, particularly in the big hearings have filed new evidence and claimed that it does not change the undertaking, although other parties have argued that it does. Even if the new evidence does

not change the undertaking, a change in certain pieces of key evidence can significantly change the context of a hearing. This practise is especially common in long hearings, in policy or plan hearings about broad subject areas, and in hearings where an inadequate or incomplete document was referred to the Board. (See section on page 17, "MOE acceptance of incomplete EAs"). This practice affects everyone in the hearing process.

First, all intervenors have to determine whether or not the changes satisfy their concerns. Second, the experts working for the various intervenors may have completed their research in preparation for the intervenor's case. This work may have to be redone, in order to address the "new" undertaking. Third, funding was not granted to have experts do their work twice! In some cases more than one major change in the undertaking occurs in a hearing, possibly requiring the intervenor's experts to redo their work many times over.

> *Joe and I were in glee and delight that we were finally going to be done this hearing and suddenly in the last month of evidence OWMC starts changing its position, and starts saying: well, maybe we should have a deep injection well for some of this stuff. Well, the need is not quite what we described it, we don't even know what the undertaking is any more.*
>
> - John Jackson

> *I just cannot believe how proponents can change the undertaking so significantly. Obviously, at this point in the Hydro hearing, almost every power station is out of the hearing, and we are about to table our evidence in the next couple of months which is a critique of the original D/SP because that is what we were funded to do, and that is what our experts have been working on for the last two years. But Hydro's original "Plan 15", with 12 nuclear power stations in it, and more, is virtually irrelevant at this point.*
>
> - Kai Millyard, Coalition of Environmental Groups D/SP hearing

> *And that is exactly what ended up happening: every time they led evidence and they saw holes in their case, they brought forward new evidence, they brought forward a new proposal, they brought forward something that they hoped would meet that concern, and then it became part of the process. We were left with clients who did not know the case, we were left with consultants who had filed witness statements on a leachate management plan that does not resemble the undertaking.*
>
> - Mark Mattson, environmental lawyer
> discussing Storrington landfill case

> *This is exactly what has happened there now that the case looks nothing like the application. Nobody even pays attention to the EA any more. We can't even figure out what the undertaking is. The experts can't tell because the evidence is all in the [transcript] so we have to try and communicate for the days they*

weren't there and get them together, and as a result the effect on funding is far more than just more days than we were scheduled. You budgeted to do a certain amount of work based on the original EA, and they did all that work. Now they have to go back and they have to do it all over again. Plus it takes more time for them to even get the facts they need to do the work because it's not in a nice little report somewhere that they can read. So the effect there has been - and again that is exactly the problem - the funding Board member couldn't have known all that at the outset, because the proponent said certain things weren't issues at the start, and then in complete contravention of that introduced evidence on those issues. We were left with no funding, no experts on those issues because they had said 'we are not going to present that case anyway' and the Board does not realize ... that we ask for funding on these issues at the start, we were denied funding, we don't have an expert, now here's the proponent putting in the evidence. They just say 'oh yeah that's going to be helpful to us, we'll hear it.'

- Theresa McClenaghan, environmental lawyer
discussing Storrington landfill case

... And constant changes in the application and constant revisions to the evidence. Even in areas where you wouldn't think there was any rational basis for changing the evidence ... I can understand proponents changing evidence on items outside their complete control ... I can understand it to some extent in connection with energy. There are so many changes in connection with the application for the D/SP and of a change in the economy, and a change in the political leadership at the top forcing a change in Hydro's whole case. But there have been so many, the effect of that process is to just absolutely eliminate any expectation that these proceedings can be run expeditiously. And I guess the question that Boards and governments have to contemplate is exactly how much change is going to be permissible in the application and the evidence of the proponent during the course of proceedings before essentially there ought not to be a decision by the Board on that constantly changing application, and the proponent ought to be forced to withdraw the application and be told they should get their act together.

- Joe Castrilli

But the legal problem that I see here is: what are the criteria that should apply to the issue of when a proponent can essentially change the undertaking or produce new evidence and when should the hearing end, go back and be re-designed, and go through the process again.

- Michelle Swenarchuk, CELA lawyer
Counsel to Forests for Tomorrow in Timber Class EA

Clearly, the issue of proponents changing evidence and even their undertaking was of major concern to many parties involved in these hearings. However, in one way, the whole purpose of environmental assessment is to get proponents to change their undertakings. How to solve this contradiction and deal with its disruptive effect on hearings is discussed in the Possible reforms chapter.

Politicians hide behind EA

Intervenors and lawyers alike have complained that governments will sometimes shirk responsibility for policy reform during times when EA hearings are proceeding in a related area. In most cases, EA Boards are not reviewing larger government policy questions, just the acceptability of the agencies' proposed facility. However, in the Hydro D/SP case, the Board was reviewing the utility's expansion plan, and its planning process, within the policy environment that normally affects Hydro. The Board was not reviewing actions that parties other than Hydro (such as the government) could take. Yet the government used the existence of the D/SP hearing as a reason to not impose policy directions on Hydro that would improve its environmental performance.

Even in cases where an EA hearing is directly reviewing government policy, such as the MNR's timber management planning process, there is no legal impediment for government to improve its policies and programs while EA reviews are in progress.

> *I think that this is one of the core problems with the existing process. In cases such as OWMC, municipal solid waste EAs, Timber Management and the D/SP, the Board is asked to evaluate need and alternatives in a policy vacuum... this vacuum is a result of the highly contentious nature of the issues which arise around these questions, which lead to Cabinet level deadlocks... The Board is forced to develop and articulate a policy framework in these areas in order to address need and alternatives... What is required are clear provincial policy frameworks in such areas as hazardous waste management, solid waste management, energy planning and timber management, in the context of which individual undertakings can be evaluated.*
>
> - Mark Winfield
> Canadian Institute for Environmental Law and Policy

A further concern expressed by workshop participants was with political tampering of the EA process.

> *Political tampering can rip at the very foundation of the Environmental Assessment. In the case of the North Simcoe landfill proposal, an EA Board in 1989 actually rejected a proposal following a lengthy hearing finding the EA*

lacked even the minimum requirements of the Act. The appeal process led to the political arena in an election year. The result was what Cabinet called a win-win decision to "adjourn" an already completed hearing and allow the proponent to address the gross deficiencies identified by the Board and then reconvene the process under the guise of an EA hearing. All of this with no time limits and full funding for the proponent and nothing for the intervenors... And four years later we still aren't any closer to a solution to the problem. The politicians have made a mockery of the Environmental Assessment process.

- Sharon Lapham, WYE Citizen's Group

Benefits and drawbacks of long hearings

The establishment of environmental assessment requirements in the mid-1970s imposed a responsibility on public proponents of a facility, plan or policy to go through an examination of the environmental consequences of their plans, and to consider less environmentally damaging ways of carrying them out. Whether the environmental assessment concludes in a hearing or not, this process is more time consuming than not having it. And it has led to environmental benefits.

In some cases improvements have been made to proposals because proponents themselves come to understand better alternatives and incorporate them into their plans. In other cases, the process has simply provided a period of time to inform those who may be affected by the proposal so that their interventions have led to improvements of proposals, or withdrawal of bad proposals.

In many cases these interventions are not in the form of EA hearings. They can occur as a result of informal consultations held by a relatively open-minded proponent. They can occur as a result of more public and sometimes confrontational challenges to a closed-minded proponent. Finally, they can occur because of direct campaigning by concerned parties aimed at the municipal or provincial governments who are the political masters of most proponents. All of these processes can, and often do, lead to reductions in the environmental impacts of proposed projects falling under the Act. When these earlier stages of the EA process do not resolve public concerns about proposals, then unresolved issues will often be referred to hearings before the EA Board for adjudication.

The only benefit of long hearings that participants identified was that they can provide that same delay and time factor as described above, allowing for the debate to continue inside and outside the hearing room, which may lead to a re-thinking of the proposal by the proponent. However, in a case where the undertaking is ongoing, and has been exempted while an EA is proceeding (such as Timber Management), a long hearing only prolongs whatever environmental problems may be occurring and similarly forestalls the solutions to these problems at the conclusion of the EA hearing. In either case, long hearings are not seen as the ideal way to resolve conflicts, or make environmental policy. The *drawbacks* of long hearings include the following.

Changing participants

Any environmental assessment process is complicated, and involves significant learning processes for all participants. When participants change in the middle of a process it is very difficult to effectively maintain continuity. Any number of reasons can lead to changes in participants, as described by people at the workshop:

During that sort of time an awful lot happens and changes... We had members of our organization die, we had a consultant die, one of our Board members has moved on to be a judge. An incredible amount changes in such a long process.

- John Jackson

In some cases, different Board members are appointed to hear particular cases because they represent different areas of expertise, or are even from different Boards, in the case of a Consolidated Hearing.[6] When Board members leave (as happened in the MNR Timber EA for example) the balance can change. The law states that new members cannot come onto a case midstream. In the North Simcoe landfill EA process, which started in 1980, went to a hearing in 1989 and is still continuing, the Board was just one EAB member and one Ontario Municipal Board (OMB) member. The OMB member has retired, and the EAB member wants to retire, but has to stay on to complete the case. In this case, not only the panel has changed, but even the proponent has changed:

The proponent was originally five or six municipalities in North Simcoe. It has since changed: it is now the County of Simcoe who took over the authority for waste management two years ago....The issue is much different for five municipalities than it is for a county of 32 municipalities.

- Sharon Lapham

Looking at civil litigation, if you were in a court on a case and the plaintiff was replaced with a different plaintiff, there would obviously be a problem and everyone would recognize that. But in Environmental Assessments, how we can end up during a hearing with a different proponent for a requested approval is astonishing... I can imagine few things more fundamental to the Environmental Assessment process than knowing at the beginning who the proponent will be for the approvals.

- Constance Marlatt, lawyer for native groups in D/SP & federal EA hearings

It is safe to say that participants' changing does not help the process of decision making in these proceedings. The longer a hearing continues, however, the more likely that participants will change.

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6. In some cases, development proposals require approvals under more than one law, such as the Planning Act, the Environmental Protection Act, the Expropriations Act and the Environmental Assessment Act. The Consolidated Hearings Act allows these hearings to be merged into one, in order to minimize duplication and accelerate decision-making.

Time commitment for some intervenors is intolerable

Citizens living with the threat of having an unwanted facility in their community have unusual stresses in their lives to begin with. For these intervenors especially, prolonged hearings can become unbearable.

> *Just go into the community and see people who are having trouble sleeping, people who are furious and angry on one side, others who are just generally depressed, people who really are partly feeling in limbo because they don't know what is going to happen: is this facility coming to their community or not? They have lived now for five years with the potential of it being there, they still don't know. Should they sell their farms, should they fix them up, how do they plan for five, ten years from now when they don't really know what is going to be there?*
>
> - John Jackson

> *I have had real difficulty with the D/SP hearing, because I have got my own businesses to run, I have got my life to run. How do you do both? This job for me has been virtually full time. I have to run my other businesses at the same time and juggle all these times. I have to come down to Toronto for meetings and hearings. I am four hours away. I have to get back to my farm at night time to do chores. I can get people to do them in the morning but not necessarily at night. I have got a whole business to look after. How do you juggle that time? We have to have people at the hearing, but people also have to live... But how can you make an open-ended time commitment? I can make a commitment if I know this hearing is going to last, say, eight months.*
>
> - Eugene Bourgeois

Stress and fatigue for lawyers

The following quotes speak for themselves.

> *The need for experts in a variety of disciplines, particularly under environmental assessment legislation is absolutely astounding. I have been involved in proceedings where in the course of a week we might deal with macro-economics on Monday, and we might deal with toxicology and risk assessment on Tuesday, and we might deal with hydrogeology the following week. In terms of a lawyer being able to cope with this, or even a team of lawyers being able to cope with this, it is a major drain on your ability to stay up the learning curve.*
>
> - Joe Castrilli

... the most stressful part for us is the volume of evidence that needs be assimilated and turned into useful cross. The longer the hearing goes on, the more irrelevant most of your cross of four years ago was. Given that I did that at Thunder Bay and cared for a five-month old baby away from my home for a year-and-a-half, I really resent [that] ... all the ... sleepless nights are almost irrelevant now.

Really the stress and fatigue level of doing something like this for a long time is very, very considerable. These hearings typically are sitting about twice as many hours in a week as any other judicial proceeding sits. And if you are on your feet cross-examining, it is just about the most exhausting thing I have done in my life. And when you are doing it day after day, and you are working at it all night preparing for the next day, it is really very, very tiring ... It is much harder work than most litigation because of the hours and because of the complexity of the issues. One does not normally ever have a trial that involves more than two or three key issues. And here we are dealing with thousands of issues. We are like you, we are not technical experts, so we have to understand that technical stuff and then get on our feet and turn it around through questions. It is very hard work intellectually and very tiring. So we have a real interest in keeping the hearings shorter too.

- Michelle Swenarchuk

Factors that prolong hearings

First time reviewing big issues

The creation of an environmental assessment law that requires public agencies to review multi-billion dollar activities and fundamental aspects of their plans, policies and programs will inevitably result in a large effort.

> *These proceedings are often matters of first impression for the tribunals deciding them. Timber Management is the first logging case in Canada that has ever experienced a major intervention before an administrative tribunal. The OWMC case is the first hazardous waste proposal before an EAB in this country and perhaps before any tribunal whatsoever. The Halton case was the first regional government landfill disposal case to have been dealt with by the EAB under the EA Act, and the D/SP case is the first electricity system planning case before the EAB as well. None of these matters have ever been dealt with by the tribunals that are dealing with them now... To some extent, I think, and perhaps to a great extent, the fact that these are all matters of first impression for these tribunals has contributed to their hearing length. In terms of the Boards not knowing exactly how to streamline the process in terms of procedural issues. In terms of the proponents not knowing either what their application is about or indeed the evidence they need to call in relation to the approvals they are seeking. What that also has the effect of doing during the course of the proceedings is to expand the length of the hearing as the application changes, or the evidence changes or both. It's a very serious problem in terms of making already complex matters more complex.*
>
> - Joe Castrilli

As some of the fundamental issues which are debated in the early hearings are settled, and as the participants learn 'the ropes' in the process, it is likely that equally large topics will be dealt with more efficiently in the future. A good example of this process is Environmental Protection Act Part V landfill hearings. The Board and counsel now have years of experience and can handle many of the issues that arise quite quickly.

However, a factor that will not diminish is that megaprojects, whether facilities or plans or policies, will almost inevitably lead to megahearings.

MOE acceptance of incomplete EAs

Before any EA undertaking goes to a hearing, all proponents are required to go through the EA planning process, and prepare an EA document, which is submitted to the EA Branch

of the Ministry of Environment & Energy for review. This 'government review' leads to two different decisions. The first decision, "acceptance" of the EA document, says that the proponent has followed the EA planning process correctly. The second decision follows, and is when the Minister either "approves the undertaking" (with or without conditions attached) as environmentally acceptable without a hearing, or at his/her discretion, refers the EA to a Board for a hearing, in order to allow intervenors who have requested a hearing to challenge the proposal.[7]

There is extensive confusion about the need for a two stage approval, and about the meaning of the first decision. In theory, the first decision only concludes that the proponent has completed the planning process according to the rules. It is not meant to imply that the MOEE considers the undertaking to be environmentally acceptable. However, in many cases, it has been clear that the MOE, the proponent, EA Boards, and intervenors are all operating with the understanding that the initial decision does constitute, to some extent, the MOE's overall stamp of approval. (See "Role of MOE in hearings" on page 7)

In some cases, the EA Branch has allowed an EA document that is not "accepted" to go forward to a hearing, on the grounds that the proponent will have an opportunity to fill in the holes in its document with additional evidence filed during the hearing. Two important examples of this are the Hydro D/SP case and the MNR Timber Management EA. The confusion caused by this double approval situation was described in the workshop:

> *And just the fact that it got sent for hearing in the assessment phase is totally bizarre. [The government review] reads: bad, bad, bad, bad, but good enough to go to hearing. And then the Ministry rep. gets up and gives his evidence and says: 'just because we say it is good enough to go to a hearing, that has nothing to do with approval, we just highlight our concerns'. So you hear all that and still the Board says: 'well, the MOE said it was good enough to go to a hearing'.*
>
> - Theresa McClenaghan

A similar problem for intervenors occurs when the EA is referred for a hearing, and a hearing commences before the proponent has provided copies of the supporting evidence to the other parties. For example, by the beginning of the Timber Management EA hearing, the proponent had not filed all of its evidence and witness statements. This led to a motion by intervenors to compel the Ministry of Natural Resources to produce the materials, which then led to an adjournment to allow all parties to review the new information.

Inevitably, referring an inadequate and incomplete EA document to a hearing imposes more work on the hearing process itself, and contributes significantly to prolonged hearings.

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7. Some critics have stated that this two-step process causes problems and should be collapsed into one approval. See discussion under "Role of MOE in hearings" above.

This happened in the D/SP because Hydro's initial EA document was appalling. They did not meet the terms of what is supposed to be in an EA. They listed what the emissions would be if they did a few different things. But what the emissions would be is not what the environmental consequences would be. A bunch of us made this point during the initial review and the Ministry basically agreed, the Branch agreed with that but said: 'well this whole thing is going to a hearing anyway, we will let them bring their proper evidence during the hearing. And whatever comes out during the hearing can supplement it. We will see if they can make up for it then.' It is a bloody requirement of the Act that you evaluate a document that is adequate to begin with.

- Kai Millyard

A third example of this problem occurred when the MOE allowed the Region of Halton, which could not make up its own mind which landfill site it preferred, to refer two different candidate sites to an EA hearing, and asked the Board to decide between them. This kind of practise led one lawyer at the workshop to observe that the hearing process was being used improperly to compensate for irresponsibility in the regular planning process.

Many parties are involved

The listed participants for Timber Management was some 50 or so parties. In terms of day to day involvement it was still probably four to six parties who were involved on a fairly regular basis. The OWMC case between six and seven major parties, some 50 plus registered parties. The D/SP case has probably between 10 and 15 major parties and I think there are somewhere in the order of 200 listed parties or participants who are involved on either a part-time basis or an occasional basis. All of that has a major impact on length of proceedings and in terms of the complexity of making even simple decisions like who is going to cross-examine first and in what order. We have had numerous wranglings about that in every one of the proceedings I have been involved in. A fact of life unfortunately.

- Joe Castrilli

Boards allow excess evidence

Most of the concerns expressed have been about proponents' behaviour or structural limitations of the EA process itself, but Board members themselves are also cited as contributing to prolonged hearings. Concerns come in a number of forms, but Joe Castrilli put it most succinctly at the workshop:

...the longer the proceeding lasts, the greater the possibility of the tribunal making an error that may go to jurisdiction, which may raise the question of whether at some point down the line the entire proceeding may collapse like a house of cards. Tribunals live in fear of that and sometimes bend over backwards in terms of admitting evidence in order to avoid that possibility.

He is referring to the chance that a proponent (or another party) who feels unfairly restricted in a hearing may seek judicial review of the EA Board's decision. This review theoretically could lead to a court judgement that the EA hearing had been unfair, striking it down, and requiring a partial or complete re-hearing.

Other lawyers raised similar concerns, all of which amount to a concern that the hearings are not run effectively. In some cases this was attributed to a poor understanding of legal matters, such as the rules of evidence, and in other cases there was concern that there is too little understanding of environmental matters among the panelists. The dominant concern was about Boards exercising too little control on parties' evidence.

I used to say that their case was like powder snow but enough of it is an avalanche. And that was right: they had 17 panels - and they could really have reduced that to five - and they had pages and pages, and sometimes they would put six guys on a panel as witnesses and they would sit there and read for days, I mean literally days, they would basically read these 1,000 page witness statements.

- Michelle Swenarchuk

Proponent ignoring pre-hearing consultation advice

Numerous intervenors lamented frustrating experiences with pre-hearing consultation. Most of the complaints concern proponents who carry out the mandatory consultation exercise, and faithfully document it, and then proceed to ignore the advice and preferences of the public, proposing the facility, unchanged, from what they had planned to start with.

Ontario Hydro went all over the province, and asked: what should we do with the electricity system, and everybody said: energy efficiency. And they transcribed these comments faithfully. We did not go to these meetings because we knew they were going to come up with 15 more nukes. So then they did ignore everybody...they went ahead and came up with 15 nukes, and that is what I meant when I said that "it would be a meaningless process".

- Kai Millyard

In the long run, while this charade is frustrating for the citizens, later to be intervenors, it increases risks and costs to the proponents. Where good suggestions have been given early in the process, and there is a record of it, it will come up again. When a final EA document does not respond to issues or possible alternatives raised by concerned citizens, they will have to answer for it before a Board, often with citizens present in the hearing to continue pressing their concerns. If the Board accepts the concerns and suggestions of the intervenors, the proponent will have only succeeded in prolonging the process for everyone, and paying out significantly more money to support intervenors participation in the process.

Policy/plan EAs don't work well

It is argued that the EA Act was largely written to deal with proposals to build site-specific facilities. The authors of the Act showed great foresight in making provision for the application of the Act to government policies or plans of government agencies. However, plans and policies involve a different kind of environmental assessment.

As mentioned earlier, the longest EA hearings have been those evaluating policies and plans. And some intervenors at the workshop were becoming hostile even to the idea of having EAs for policies or plans. Their focus was on trying to prevent the construction of facilities, and they had a great deal of trouble with the continuous withdrawal in their hearing to abstractions about planning and principles, rather than about the specifics.

> *Some of our hearings have now in some ways become almost policy hearings rather than simply a site specific thing and even the OWMC hearing is a hearing on "what's hazardous waste, how are we going to deal with hazardous waste in Ontario?". But is this the most effective forum to make those kinds of policy and strategic decisions in? I am not convinced it is and we need to hear more about that during the day.*
>
> - John Jackson

Others countered that government policy and plans should definitely be subject to environmental assessment, but perhaps in new forms, not in the format designed for facilities.

> *... and I wonder if the EA Act and its process the way it is now set up in the hearing is really the right vehicle to deal with those kinds of broad policy questions, or whether the Act is better suited to individual facilities -- if that is the case, then how do you deal with those other bigger issues?*
>
> - unidentified participant

> *[Without EAs on policy...] You really cut out big, big areas of decision making. It is one thing to say there should not be a hearing on it, but to say that you can't*

environmentally assess government policy or government plans is cutting out environmental input into decision making in a whole lot of areas ... We probably need new and quite different rules and proceedings within the hearings for dealing with that range of questions.

- Michelle Swenarchuk

I think the question is: are we better off with it or without it? My response to that would be that we are better off with it, and try to work to make the changes and modify the law on the way. To have the ability to bring things to the table and make people be accountable and take responsibility I think is a lot better than what we have had in the past. But there need to be some changes made.

- Sharon Lapham

A problem results in these hearings due to the mixture of broad planning decisions and site specific issues. We may well want to continue to have planning hearings but it must be clear exactly what it is that the Board is approving. Is the Board hearing evidence about site specific issues in order to make better planning decisions, and, if so, how does that evidence and any approval received prejudge the result at the site level?

- Constance Marlatt

We probably need new and quite different rules and proceedings within the hearings for dealing with that range of questions.

- Michelle Swenarchuk

In the past, critics have suggested that the EA Act should provide for many different types of EA processes for different types of undertakings. This means having a different set of rules and procedures for each, rather than expecting them all to follow the same procedure. Currently there are the basic facility hearings, the Class EA process, and increasingly the policy/plan hearings. The latter two categories are the ones where new rules and procedures are needed.

Possible reforms to shorten hearings

Introduction

There is increasing pressure to ensure that EA hearings are not endless marathons that drain the energy and resources of all those participating in them. This does not mean that there is a weaker commitment to environmental assessment in Ontario. But the form of both hearings and of the non-hearing parts of EA are clearly going to change.

> *... what is likely to occur in the future is that we are going to see far more hearings but of shorter duration, because I think the reality is that the public will not accept a return to the bad old days of decisions such as these being made behind closed doors without any kind of public forum providing opportunity to review it.*
>
> - Joe Castrilli

The challenge is to find ways of ensuring that planning and development decisions are made with environmental accountability, and that democratic access to the decision making process is preserved.

It is important to recall that the EA Act creates a review of the proponent's planning process. In short, it is trying to accomplish a change in the proponents' way of thinking, so that they come up with the right environmental answers themselves. A key point of the EA process is to change undertakings from what they would be without an EA process. However, one of the key complaints heard from participants in the workshop was that of proponents changing their case midway through a hearing. The problem here is that proponents are waiting until the hearing stage to make it clear what it is they want and why. Many of the reforms described below are intended to accomplish a clarification of the proponents' case sooner, delineate the concerns that others have as early as possible, work out as many problems among the parties, if possible, early in the process, and then only go to hearings with a short list of issues, and ensure that the cases are clearly developed to maximize the effectiveness of the panel's role.

Many of the reforms described below are practised in other decision making processes. Others are simply a matter of ensuring that mechanisms that are already in place or available are used effectively.

> *We don't have four years of litigation trials - we don't even have one year of litigation trials - because it bankrupts groups, because it is so expensive that there is an entire set of legal processes that come into play under the rules of practice - boring as they are - to limit the issues that go on trial, to limit the time that*

Better pre-hearing consultations

The EA Branch encourages proponents to consult the affected public early in the planning stages specifically to anticipate and prevent more serious conflicts further down the road.

> *I think if it is done in a meaningful way the hearings will be a lot shorter and a lot more effective. This is the clincher: How do you get that? That meaningful participation. Because there are lots of ways you can do it and have just a pretence.*
>
> - Sharon Lapham

The adequacy of pre-hearing consultation is the key to shortening EA hearings. Thus, it is important to: 1) spell out clearly what is expected of proponents in consultations, and 2) make it clear to proponents that they are expected to respond to public concerns seriously. If, as recommended below, proponents also understand that it will be more difficult to modify their proposals during hearings, they will have a stronger incentive to respond effectively to public concerns in advance. Beyond this, proponents may have to learn from experience that they will prolong the exercise and pay more in the form of intervenor funding and cost awards by ignoring public comments.

> *... we talked about what can we do to improve the process in early planning stages, pre-consultation stages, at the hearing and post-hearing. So in the early planning stages the group felt we need more access to the planning process. There has to be a better balance in providing information. While the proponent is off spending millions of dollars on their consultant, the public is waiting to then have that information thrown at them and we have to come up with somehow a balanced playing field and give the public better access to the consulting process and getting that information. One proposal to deal with that was to give good rigid guidelines for the consultation that we need.*
>
> - Mary Simpson, facilitator for workshop sub-group

Earlier funding

While some proponents are holding lengthy pre-hearing consultation processes, a new problem arises. In order to participate most effectively, most citizens groups need the support of experts, but don't have the resources to hire them.

> *There are problems around how extensive these pre-submission phases are becoming. Some of them are lasting for years and there has not really been intervenor funding for that stage even though you may require expert help just for that phase. And it seems like public involvement in the pre-submission phase is*

people spend in the court room. And I have always wondered what would happen if we looked at EAs as trials.

- Michelle Swenarchuk

Some reforms are discussed to minor problems or generic EA problems in the sections above where the issues are reviewed. The more significant reforms are found in this chapter.

There are really three sets of solutions discussed in this chapter. The first is to customize procedures for different types of EA processes. The second is to improve the various EA planning stages, such as better consultation and earlier funding. And the third is to reform the hearing-stage, such as pre-hearing conferences for various purposes including discovery of experts and settlement discussions, restricting proponents ability to change their cases, and better training for Board members.

Customized procedures for different EA types

As discussed above, there is a need to develop appropriate procedures for different kinds of EAs, rather than assuming that a process geared to approving the construction of facilities will also be useful and efficient in evaluating government policies. Unfortunately, few specifics were discussed in the workshop for the different kinds of EAs. This is clearly an area, like many here, where a deeper exploration of options needs to be done.

Many workshop participants commented that there was a link between problems with policy/plan EAs and the adversarial nature of traditional hearings. It may be that a key ingredient of any customized process for policy/plan EAs is a less adversarial forum for parties to seek solutions. See "Pre-hearing conferences" at page 29 below.

Our legal system is based upon a win-lose mentality. A guilty/innocent paradigm may be appropriate for a "did she kill her husband" scenario, with two parties. Such a simplistic adversarial system is not well suited to a process which may involve dozens of stakeholders, and many possible outcomes, some of which are hopefully a win-win for everyone.

If we want to find those win-win solutions, if we want to balance the needs of all stakeholders, if we want to control the exploding costs and if we want environmental assessment to work, then we must find alternatives to lawyers and legalistic, confrontational court-like processes.

- Bruce Hyer, Member, Environmental Appeal Board
Uniroyal/Elmira appeal hearing

pretty random and it is only selectively encouraged. It does not seem to be across the board.

- Michelle Swenarchuk

... we need participant funding because the Minister's office [is] not ready to go up against Hydro ... They respect what we are saying about it but we need to have really technical documents and we need to have technical staff and we need somebody who really can comb through it ... so we need participant funding to be able to even make an argument that a document should not go to a hearing.

- Brennain Lloyd

We need funding earlier in the process than at the pre-hearing stage so that intervenors are not forced to become involved in this process for the first time at the eleventh hour in terms of being able to examine the proponent's case.

- Joe Castrilli

The benefits of earlier funding will not only be that proponents will hear earlier what the public's concerns are, but also that potential intervenors will have to delineate their concerns sooner on, accelerating the whole process. When the issues are delineated earlier on, it will also tend to reduce the related problem of proponents' changing their undertakings later on during the hearing itself:

I think it goes back to the real reason they changed the undertaking, it's because people get funding at the last minute. So then they figure out what the issues are, and then the proponent starts to figure out what the issues are too, as they start to hear from the intervenors, start to hear the cross-examination and so on, and then they are scurrying to fill those gaps or changing their case so that they are not going to see it go down the tubes because of this devastating cross-examination that keeps on. So, if you have the funding early so that the issues could be defined before it started, then you might have the ability to say: that's your test, these are the issues, and, like a pleading, if you go outside these issues ...

- Theresa McClenaghan

Without participant funding, the potential to resolve issues at the review stage, and potentially avoid a (long) hearing may not be realized. In cost-benefit terms, expenditures for participant funding in the consultation stage might well reduce intervenor funding needs at the hearing stage, reduce the time and expense of hearings themselves, and even result in more cost-effective undertakings.

MOEE now recommends that participant funding be granted to potential intervenors, and some proponents are planning such grants. However, the procedure is voluntary.

MOEE should reject incomplete EAs

On pages 17-19 above we described some of the exasperation felt by many participants at the government's practise of sending inadequate EA documents to hearings. Extensive discussion in the workshop led to many participants becoming adamant that the Ministry simply should not allow inadequate documents to go to hearings under any circumstances.

> *Kai Millyard: Is there any rationale for allowing an inadequate document to go forward into a hearing, that does not meet the requirements of what is supposed to be in a document? ....*
>
> *... That's what I'm saying: would anyone argue in favour of allowing inadequate documents to go forward? Because an automatic recommendation, it seems to me, is to not allow inadequate documents to go into a hearing. Period.*
>
> *Sharon Lapham: There can be no rationale for the decision of the Ministry which allowed a North Simcoe landfill proposal to proceed to a hearing in 1989. When the Environmental Assessment Board rules that a proposal was "seriously flawed" and fails to "meet even the minimum requirements of the Act." How could such a proposal ever have been allowed to reach the hearing stage in the first place? The Ministry must be held accountable for its own policies and legislation.*
>
> *Jim Mahon: I think if it is inadequate it should not go forward.*
>
> *Kai Millyard: If it does not fulfil the basic requirements of what is supposed to be in one of these things, how are you supposed to have a reasonable debate about its quality?*
>
> *I think something that has to happen on the Ministerial level a lot more, is that they need to send them back ... lousy documents? - send them back.*
>
> - Brennain Lloyd

The Ministry is seen as having a key responsibility in administering the EA process and preventing abuses of that process. When they do not fulfil that role, not only does it result in an aggravating hearing for the parties involved, but it damages the reputation of the EA process itself.

> *And that's what the Ministry should be doing. They have a tremendous role to play here in ensuring the Environmental Assessment document is ready for a hearing. When the proponent fails to clearly identify and describe the undertaking and the approvals and how the Environmental Assessment document meets the*

requirements of the Act, then lengthy and expensive hearings are inevitable. Certainly more effort by the Ministry together with the Proponent could result in less guesswork for the intervenors and the Boards once the Environmental Assessment document is at a hearing.

- Constance Marlatt

Pre-hearing "discovery" of experts

In civil court cases, there is a pre-trial stage called 'examination for discovery', in which primary witnesses and evidence are examined by both parties. This process allows participants to determine the strengths and weaknesses of their cases, and decide whether there is even sufficient evidence to proceed to a trial. It also fulfils the purpose of 'scoping', which is to limit the list of issues to be resolved. In EA hearings, inadequate scoping, and an extremely long issues list is a major contributing factor leading to extended hearings.

The environmental assessment process has used the process of interrogatories - an exchange of written questions and answers, to try and fulfil the 'discovery' purpose. However, it has not been getting high marks:

The current system of interrogatories, in my view has been a complete and utter failure. Interrogatories are supposed to be paper discovery where you learn what the proponent's case is so that you don't have to find out about it when you are on your feet during cross-examination. It has not worked out that way in the cases I have been involved in. The interrogatory process has usually ended up generating more paper and using up more time and has not resulted in any clearcut resolution of issues, which is what the discovery process in a civil context is meant to do.

- Joe Castrilli

These proposals would simply be to borrow or adapt procedures and ideas from existing courtroom processes that are designed to clarify the parties' cases, and narrow the issues early, and develop them for a pre-hearing stage of the EA process.

... the hearing process is a very unsophisticated kind of trial process relative to other legal proceedings. It seemed to me for a long time that inserting into this process some of the kind of controls that exist in other legal trials, in order to shorten it, could go a long way to reducing these intolerable lengths that we are experiencing. So in other trials there is a real emphasis on keeping the trial short because it is long and exhausting and expensive. In civil trials, parties have to exchange pleadings at the beginning, they set out the issues, they set out what they are going to prove, the proponent would set that out first, intervenors would

respond, the proponent would get another reply and then you would have the issues scoped at the beginning. That is one way of doing some scoping. I think we all agree that scoping in the hearing process now is completely ineffective, none of the methods that have been tried are actually limiting the length and the expense of the hearing. But as a lawyer I have watched this thing and I keep thinking 'why don't we do it here a little bit the way it is done in the rest of the court system?'. There are legal reforms that could be imposed on this that could make it shorter and more manageable.

- Michelle Swenarchuk

To take the elements of, for example, something that forces delineation of issues at the outset is very, very helpful in my view, but that would depend on there being enough information available to the intervenors from the proponent in order to properly do that. Otherwise you are going to end up with very general, vague issues and nobody is going to want to narrow things too soon until they figure out what the issues are. So that ties again into that early funding situation.

- Theresa McClenaghan

Again, no specific model of the ideal process was ventured by participants at the workshop. However, the message is clear, and future investigations should examine the various mechanisms available to achieve both discovery of experts and scoping of issues.

Pre-hearing conferences

In addition to a pre-hearing session for discovery and scoping, other pre-hearing meetings could serve to streamline decisions on procedural issues.

In some cases, pre-hearing conferences without Board members present may be useful as a forum to negotiate settlements of some issues. Broadly described as Alternative Dispute Resolution (ADR), many forms of this are practised in legal, and other conflict resolution situations, and go by many different names. An early "mediation" experiment was tried in a landfill case in 1984. In energy utility regulatory hearings "collaboratives" are increasingly being used to hammer out agreements on energy conservation programs before hearings. The Ontario Energy Board is increasingly using "technical sessions" (meetings of experts), to facilitate parties' meeting to accomplish discovery, scoping, and settlement discussions.

Even where parties do not agree on the resolution of an issue in advance, the process people go through will mean there is a much better understanding of the issue, which provides for a clearer presentation of the debate in the hearing itself.

I have been involved in one case - not an EA case - where we actually mediated 98 per cent of the issues to resolution and turned a two-month hearing into a nine-day hearing.

- Joe Castrilli

Whatever it is called, many parties agree that there should be provision created in the EA process to facilitate these settlements. Participants shared the various experiences they have had with settlement discussions and came up with a number of conditions that need to be satisfied before settlement discussions are likely to be possible.

1) It takes (at least) two to tango. Of course, settlement discussions can only occur when parties are willing to undertake them - they cannot be forced upon parties unwilling to negotiate in good faith.

2) A specific mechanism should be created in the EA process to provide for ADR talks. While nothing prevents ADR talks in the current process, it is not encouraged either, and there is no formal process to facilitate it. In some cases, a mediator or facilitator is helpful and, if appointed, should be an individual mutually agreeable to all parties.

3) ADR talks are not likely to be useful where the conflict over the undertaking is a fundamental one: environmentalists fundamentally opposed to new nuclear power plants are not likely to get anywhere talking to a utility that wants to build one.

... The whole idea of mediation, I think has some merit for that exact kind of thing, but if I take that and apply it to a landfill issue where fundamentally you are opposed to the whole idea... I don't think there is room for mediation when you have a fundamental difference of opinion. I don't think there is room for mediation in that particular situation ...

- Sharon Lapham

4) ADR talks are more likely to be useful where the undertaking will continue and the environmental objective is about *transforming or improving* that activity, rather than stopping it. Examples are timber management policy, utility planning principles, energy conservation program design, etc.

5) ADR talks will work more effectively if the proponents case is laid out clearly, and the issues list is clear. Experience in the recent Ontario Energy Board hearing over energy conservation planning rules for Ontario's gas utilities is an example:

And that was one of the other advantages of this: the issues in that hearing were scoped very clearly. There were ten questions put forward. "If the utilities are going to do conservation, should their profits be linked to their sales? If not, how

do we decouple them and how do they make profits instead?", "No. 2. How do we measure ..." They were all spelled out really, really clearly. So that clear, narrow scope and then the ability for us to sit down and off the record work out agreement, has resulted in an 85 per cent agreement on these things. And last Friday we filed with the Board this consensus statement with agreements on most of the issues.

- Kai Millyard
OEB Gas Integrated Resource Planning hearing

6) Finally, intervenors must have intervenor funding approved, and be able to have the support of their experts for the ADR talks. Otherwise, the traditional imbalance of power, expertise and resources in the talks renders the effort fundamentally unfair.

Clearly, not all of these conditions will be satisfied in all EAs. In both the D/SP and Timber Management EAs the goal was transformation of a continuing undertaking, which is favourable to ADR, and there were efforts to hold ADR talks. However, the cases of the proponents were not clearly laid out, the issues were not well scoped, and the lack of a proper framework for the talks meant that these efforts were not very successful.

With a proper framework in place, settlement discussions can offer many benefits to the EA process. Nobody believes that they are a panacea. There will be many EAs where the issues will be hotly contested and disputes will need to be resolved by EA Boards. However, the creation of a mechanism which is designed to empower public interest parties and then encourage all parties to work out issues in advance in a less courtroom like environment will lead to public policy with stronger public support and fewer expensive, protracted hearings.

[Kai Millyard] really wanted us to consider that there was some good news ... his involvement in an OEB hearing on natural gas utility policy where all of the parties got together and asked for time to work out what they agreed on, and what they did not agree on and he found that a highly successful process. At the end of that exercise they have come out with reducing their issues to about 15 per cent of what they really disagree on and what they will have to deal with in the hearings. So it has been an effective scoping exercise and one that he found a lot of hope in compared to the Demand/Supply hearing. We then discussed mediation and its pros and cons and where you would use it and where you couldn't and we really concluded that in a lot of the hearings, like landfill hearings, where there are fundamental disagreements mediation just really would not be applicable,...

- Sarah Miller, facilitator for workshop sub-group

Board staff

Other Boards and tribunals often have staff members who have responsibilities that can

streamline the cases moving through their agencies. Various agencies were described as possible models to learn from: the Ontario Municipal Board, the Ontario Energy Board, and the Ontario Labour Relations Board.

Staff can play a number of roles, including convening ADR talks and working with parties to scope issues.

> *So the Labour Relations Board has Board members and then it has staff and the staff meet for example ... with you and with the employer, and every effort is made to either settle completely - and 95 per cent of them are settled - or narrow the issues that go to the Board, but that functionary's work remains confidential, it is never reported to the Board in any way. So this is a mediation and conciliation settlement process which deals with the vast majority of their cases. And only things that really need to get litigated go to the Board. Now, I think EAs are not the same kinds of cases, so I am not saying you can transfer directly, but there is a lot of room ...*
>
> - Michelle Swenarchuk

> *... the OEB staff are there to work out the issues, they do much of the work that the Labour Relations Board does, and then what they do at the hearing, is they are on their own, they are independent, and they basically have certain standards that they would take with them, whether it's Consumers Gas, or Ontario Hydro, whoever is before the Board, to get out there and ... they would ensure that those requirements are met. And I think that is very helpful. They are always looking for ways to improve the process, they are always bringing forward new ideas to the parties. This year maybe we could try this...*
>
> - Mark Mattson, counsel to Energy Probe

> *We also talked about mechanisms that are used at the OEB and the role of the staff there to narrow the issues that go before a trial and also my experience at the Ontario Labour Relations Board where there is a whole mediation and conciliation branch that handles various kinds of cases so that again only what needs to go into a hearing room gets there. We did not of course - in two hours - come up with "the model" for the EA process but basically we see that the Board needs to become a much more sophisticated and multifaceted agency with staff that help to narrow issues, that perhaps help to settle disputes that don't really need a whole trial. Then we need to go into that hearing room with the issues clearly delineated and limited so that we will have a much more expeditious process.*
>
> - Michelle Swenarchuk

'Canned' evidence-in-chief

We have described in a number of places above the lack of discipline which has resulted in extended periods of time being devoted to hearing routine information from witnesses in the hearing room.

> *We have talked about 'canned' evidence in chief: nobody needs to hear, as we heard interminably in the Timber Management case, five days of evidence in chief about Forestry 101. That was completely unnecessary and I think contributed to probably about a 30 per cent increase in the length of the case for the proponent than was otherwise necessary.*
>
> - Joe Castrilli

In most cases, parties can review pre-filed written evidence in advance, and where the information is simply background material, for example, may agree to accept it as not contentious, thereby avoiding the need to present it in the hearing room:

> *But to the extent that there was any meat at all in that stuff, most of it could have been reduced to an agreed statement of fact. ... There is lots of room for narrowing the issues.*
>
> - Michelle Swenarchuk

Restrict proponent's ability to fundamentally change the undertaking

Perhaps the single most aggravating factor for intervenors and their lawyers in the hearings discussed at the workshop was the proponents' frequently changing their evidence and undertaking during the hearing. It can make the work of experts for other parties virtually irrelevant, requiring them to rebuild their cases and do their work again, increasing costs. It creates, as the lawyers lament, "a moving target".

The obvious solution is to prohibit changes in evidence or the undertaking once the hearing has started, comparable to an actual trial.

> *... we need to end the ability of proponents to cooper up their case as the hearing proceeds, by the production of massive amounts of new evidence which only has the effect of extending the proceedings interminably and also compounding the problems for the Board in terms of making a decision about what actually is the application before it for approval. My understanding is that in California for example, if a proponent decides that it has made some serious problems in its application, the application does not proceed to hearing, the proponent is required to withdraw the application, until it can get it right. We don't have that process here. We try and make it right through the hearing process. And all that does*

is make the process longer, and it goes from months to years.

- Joe Castrilli

... the proponent has to be penalized ... if they are changing the undertaking they are penalized by basically starting the hearing over again.

- John Jackson

We need some clear criteria for when a hearing stops as opposed to just continuing because the proponent is changing the undertaking. In any other kind of trial, if you change your case you are going to be in trouble. You would have to justify to the judge what kind of changes you are going to make and you just do not get the right to keep on refighting your case in a new way endlessly.

- Michelle Swenarchuk

However, this solution is not as straightforward as it may seem. First, EAs are not trials, they can be between many parties, and the final judgement is not a question of guilty or not guilty, but can include a wide range of changes to the initial proposal. In many cases, restricting a proponent's ability to change its case may not offer benefits to environmental intervenors:

I'm not sure that environmentalists would find that to be in their interest. It would mean the proponent would defend its case rigidly right to the end, even if obvious improvements became apparent in the course of the hearing, and the panel's decision would have to be more of an 'all or nothing' kind of decision. Environmentalists may achieve less incremental success, and lose more cases outright.

- David Poch, Counsel to the Coalition of Environmental Groups, D/SP EA and OEB Gas IRP cases

However, there must be reforms to deal with the disruption caused by frequent changes in a proponents case.

If a proponent brings such a significant change, either to the undertaking itself or to important evidence, there should be a provision that triggers a review of the status of all parties' cases, including a pause for parties to consider the consequences. This would include the way the changes affect experts' work, the need for supplementary funding for experts to repeat their work in light of the changes and so on. If such a review is not automatic, there should at least be

provision for parties to make a motion to request this kind of review.

- David Poch

As the situation is now, there is little incentive for a proponent to clearly define its case early on. Indeed, there is an incentive for proponents to hold back what they really want, and let it come out gradually through the hearing, because it puts all intervenors at such a disadvantage, especially if the change does not trigger a delay for intervenors to adjust their cases, and obtain further funding. However, these changes create just as much of a headache for the Boards as they do for intervenors. Part of the solution must be for Boards to exercise far more discipline on proponents, even if this increases the risk of parties seeking judicial review.

Supplementary funding as a response to frequent changes

Intervenors should not be timid about requesting supplementary intervenor funding when proponents change their cases and Boards should not be timid about granting it. Intervenors should increasingly make it clear that they will not allow significant changes to occur without requesting funding to deal with the changes. Such funding requirements will become an additional cost that proponents will expect to have to bear if they want to make changes. A clear disincentive would exist for proponents who want to make frequent changes.

Supplementary funding will certainly not be granted automatically. However, it was created specifically to provide for situations where the case has changed significantly from that foreseen at the time of initial intervenor funding. And this burden of proof would not be difficult to meet in cases like those discussed in the workshop.

One of the techniques that has been used with success is just keep hammering away, applying for supplementary funding. As John was saying, at OWMC they have gone back and asked for funding three or four times and you just have to keep it up, because the rules change and as the undertaking shifts and the issues change, you go back and get more money.

- Mary Simpson

Workshop participants did not suggest that supplementary funding for intervenors is an EA reform to avoid prolonged hearings. However, until proper reforms are instituted which do accomplish this goal, intervenors should not let their interests in hearings be hurt by trying to cope with a case that changes regularly without adequate funding support to participate.

Better training for Board members

Little detailed discussion occurred in the workshop on this theme, but its importance was made clear.

The most important area felt to be lacking is the ability to run the hearing fairly, according to the law, and to control the submission of excessive evidence. There was some discussion about whether or not lawyers should be appointed to the Board in order to help with this problem, and the lawyers in the workshop said not necessarily - just appoint people who have the skills to run the hearing well. It is likely a matter of special training and continuing education for all Board members. Formal qualifications were not considered to be necessary.

With a better understanding of the law and the rules of natural justice, it was felt that Board members will be in the position to make rulings that keep a hearing on track, while minimizing the chances of triggering judicial reviews.

A related concern was that Board members need to have some knowledge about environmental issues. Knowledge and understanding of the law is not enough, given the often technical nature of the evidence and complexity of issues that often arise in EA Board hearings.

Intervenor funding-role and adequacy

The availability of intervenor funding, on a formalized basis, is widely acknowledged as a key step forward in basic fairness, and a beneficial component of the environmental assessment process. It has allowed intervenors to gather evidence, conduct original research, participate professionally, and contribute to public policy decisions in a manner that was possible only on a limited and *ad-hoc* basis prior to passage of the Intervenor Funding Project Act (IFPA).

> *When we got involved in the D/SP back in 1989 there was a $60 billion dollar spending plan that Hydro was ramping up to get into. We were saying it doesn't matter if the intervenor funding is $20 million, $30 million, $40 million: if it can avoid just one billion of that crazy spending plan it will have been dramatically cost-effective. No one will ever know exactly how much of which factors have caused Hydro's situation to plummet to the situation where it is today. There is no question that the election and the NDP's nuclear moratorium had something to do with it, there is no question that the major recession that has slowed down growth in demand has had something to do with it. But we think that this hearing has also had something to do with it. Hydro has been under constant scrutiny. We think that the hearing has had a lot of value in terms of pulling all of these power plant proposals out of the D/SP, and avoiding the billions of dollars in spending that Hydro has now cancelled.*
>
> - Kai Millyard

Despite the significant benefits already produced by the IFPA in Ontario, improvements are always possible, and a number of problems were identified with intervenor funding at the workshop. While most relate generically to problems with the IFPA itself and its administration, some arise from, or are exacerbated by, prolonged hearings. In some cases, addressing problems with intervenor funding could well aid in alleviating some of the problems associated with long hearings.

Supplementary funding

With the multitude of significant changes to the proponents undertakings or evidence presented during the course of the hearing, intervenors are left with research and evidence which is no longer relevant. (See page 8, Proponent changing its case)

Not only has time and money been wasted, but additional efforts are required on the part of the intervenors to determine what their new case should be and prepare a submission for supplementary funding.

One of the events that always has the effect of compounding the problem of supplementary funding is the extent to which the application is changed during the course of the hearing and the proponent as a result - or sometimes even if they are not changing their application - will then change their evidence. All of that has had, or does have, a major impact on the ability of intervenors to continue to be able to respond to the case the proponent is putting in front of them and inevitably results in the need for supplementary funding to happen sooner and in greater amounts than might otherwise have been expected. Tribunals have not always been attuned to the fact that when the elephant burps everybody else is going to feel the impact.

- Joe Castrilli

... it's very difficult at the best of times for the funding Board member to figure out what, how much time is reasonable, and so on - even if nothing changed it is sometimes difficult to do a proper job with the funding given, never mind things changing. And then the EA Board, I think, does not have that perspective, that "wait a minute, these people only got this much and these are radical changes, and there is a direct impact on what they can do ..."

- Theresa McClenaghan

In addition to the disruption and effort of making supplementary funding requests, the process itself has come under criticism. First, the intervenors and their lawyers find it objectionable that the same panel members that are hearing their case (and who should be open to all evidence) are entertaining requests for supplementary funding; these are individuals who may have already formed opinions about the value or legitimacy of the intervenor's case and because of their preconceptions, may preclude certain evidence from being developed and presented by denying funding. Second, it is felt that the act of requesting funding within the context of the hearing places the intervenor at a disadvantage relative to the proponent and other, commercial intervenors.

... I really object to the hearing Panel hearing our arguments for supplementary funding. We should be able to appear before that hearing Panel as equals to the proponent. And if you do go in and argue for money then you are unequal immediately. ... so the hearing Panel should not become the Funding Panel.

- Brennain Lloyd

... it creates a problem when the same people that are hearing the whole thing are the ones that are giving you your money and there is kind of a conflict of interest there. The group felt that the funding panel should be a neutral body that was different from that hearing Panel.

- Mary Simpson

Funding disclosure by all parties

The requirement of accountability for large sums of public money, provided by the proponent, is considered reasonable by all recipients. However, intervenors have identified a double-standard at play -- the proponent is never required to disclose the money it spent on preparing its case, putting forward evidence, and hiring experts. While the role of the proponent is much different and their expenditures cannot be directly compared (ie: primary preparation vs. criticisms or analysis of selected components), disclosure of a proponent's spending would provide some perspective on the level of intervenor funding dedicated to improving or refining the undertaking. Perhaps then the public, media, and politicians might see the intervenor funding as a small price to pay for some independent analysis of the proposal.

> *That point was also made in our group in terms of what the capital cost would be of the proposal, and relate that to the amount of funding that is being asked for. Even though it appears to be a lot of money to be able to intervene, it is minuscule compared to the cost of what is being proposed.*
>
> - Kathy Cooper

> *One idea was that we need a formula for limiting the amount of dollars [they] could spend, that would be one way of limiting or balancing the playing field. As part of that proponents need to disclose the amount of money that is spent. So if we know how much money they have spent when the intervenors go asking for their paltry $3 million dollars it sounds like a lot of money, well it is not a lot of money if the proponent spent $100 million.*
>
> - Mary Simpson

Funding for other steps in the process

In addition to extending intervenor funding to the pre-hearing stage, some intervenors talked about intervenor funding being needed for post-hearing activity. This would be especially valuable if a decision includes terms and conditions which the proponent must meet and if the undertaking significantly changed because of the interventions.

> *After the hearing the terms and conditions need to be enforced. A tremendous learning curve is immediately lost when all the bureaucrats and reviewers and people who are involved in all the preparation disappear from the scene...*
>
> - Mary Simpson

Broader application of intervenor funding

One way in which intervenor funding could facilitate the intervenors' desires to be more involved in the hearing process, especially long ones, is if it were available to support the participation of staff or volunteers of the public interest groups in the hearings.

> *If we succeed in making these hearings shorter ... then it is possible for an NGO to hire someone to replace whoever on your staff who is going to go off and work on this hearing, bring them up to speed and then let them go after a year or whatever.*
>
> - Brennain Lloyd

Since the funding criteria and eligible disbursements are determined under the IFPA, this may require amendment or broad interpretation of the rules.

A final observation regarding intervenor funding relates to one of the most strongly advocated EA reforms -- application of the Act to the private sector.

> *When we start dealing extensively with private proponents, there is not going to be the open purse that there is for funding or supplementary funding matters with a [public] proponent like Hydro. Or even in the Timber EA, where the funding has come through Orders-in-Council. That's not going to be the case when you are dealing with private proponents.*
>
> - Michelle Swenarchuk

Addressing issues such as availability of funding for post-hearing activity, disclosure and supplementary funding is equally important when intervenors are involved in reviewing private undertakings, especially if they are large, long-range projects.

First Nations Peoples in EA hearings

Native intervenors have been key participants in some of the recent large hearings (eg: D/SP and Timber Management) and projects which involve northern development. Many of the issues and problems that native participants face in the EA process are identical to those encountered by other intervenors. These include access to funding for research, changes to the undertaking requiring changes to the case and additional funds, demands on volunteer time, struggles with the experts and lawyers to convey the appropriate perspective, and a particularly heightened frustration with the process being so expert dominated.

> *The belief on our part is that basically there is little chance for us to participate, it has become a lawyers' ball game, it has become a consultants' ball game, one that is run by experts, and people from the community, rarely if ever, have any direct input in terms of the Board ... in essence what is still happening is that professionals and legal experts end up interpreting for us what it is we want to say and transferring what they believe to the Board in terms of the information that was presented. In some place in that continuum I would say that there is a lot that is lost.*
>
> - Keith Lewis, North Shore Tribal Council

Several concerns and problems with the EA process which are unique to native communities were identified at the workshop, but unfortunately were not explored in great detail. A similar workshop dedicated to more thoroughly exploring the issues and problems which native people face with the Environmental Assessment Act would be useful to expand on these and likely identify others.

Native people see the adversarial nature of hearings as a fundamental barrier to effective native participation, or even any participation at all. The potential cross-examination of elders, the physical set-up of the room, the bantering language, all contribute to a culturally alienating experience.

> *So in terms of participation, I would say that places where lay people can interject and become real participants in the process would be in opening and closing statements where there is an opportunity to speak at length about the concerns as we see them and to present our views in a situation where the environment is one of a non-adversarial nature. The reason why I use the term non-adversarial is because in our experience one of the - especially with the elders from anyone of the First Nations or groups that we represent - there is I guess violent opposition, I guess that is not even strong enough to describe how people feel in terms of participating in the courtroom setting at the hearings if they are given the opportunity. They are greatly intimidated by the fact that they are going*

to sit there in front of people who they don't know, who basically are of a different culture, different society, who dress different, who speak different, who understand differently, and then try to come across with feelings from their heart about what it is that they perceive in terms of the proposals that are being initiated or spoken in the context of the hearings.

... not only from an individual sense - I guess psychological sense, but society - there is a great feeling of vulnerability on the part of aboriginal people in terms of these developments or proposed developments. In the hearings process, because of its adversarial nature, because there are situations which to us are culturally inappropriate - like bantering, or interrogating elders, that kind of thing as an example - our vulnerability is then something that puts us at a disadvantage and puts the proponent at a definite advantage. And something which is supposed to be overcome or circumvented by the use of lawyers and experts and consultants for our site. But that doesn't happen because we don't get a chance to present our own views the way that we want to from our people's perspective. It's got through this indirect sort of channel to the EAB and it is lost, like I said before, it is lost in that continuum.

- Keith Lewis

Socio-cultural differences between the average hearing Board member and many native participants were identified as being major barriers to effective participation and communication.

We go to Court about this and we ... mention the sacredness of the site but the judge rolls his eyes, rocks his head back and forth. And then we have to adjourn from Court last Tuesday so that Jewish people can have a holiday, because they would not be able to appear. They respect certain religious sacred undertakings in this province but not all.

- Mary Laronde, Teme-Augama Anishnabai

One of the biggest - aside from the adversarial nature and the fact that it has become a lawyers' and professionals' ball game - is that of the geographical distance that separates the hearings and the Board from what actually happens on the ground in the rest of Ontario. As an example the Board sits down here in downtown Toronto, it listens to lawyers who are also for the most part from Toronto, and other consultants who are also from Toronto. They are geographically dislocated from Indian communities. from small white communities, from Métis communities, from the trap lines, from the fishermen, and from the people who actually live in these places and feel and live the impacts or the negative affects of their decision making and they come to

understand, or come to believe I guess in some sort of way that their view of the rest of Ontario is the same as the view that they have in the hearings room, and the same as what they see in Toronto. So their frame of reference, their yardstick is based on Toronto and not on what happens in practice in the communities or with the people.

- Keith Lewis

And even beyond the offensiveness of the process and the incompatibility of contexts of the representations, is the basic ability to communicate.

Then there are language barriers that enter into that but essentially it is the adversarial nature of the hearings that is one of the biggest barriers that must be overcome.

- Keith Lewis

For these reasons, the choice of Panel Members was seen to be almost as important as the process itself.

... there is a perception on our part also that Board members, the decision makers whose decisions impact so greatly and so often negatively on our lives, are chosen - and we know it - for their own beliefs, for their own values that they espouse, and for the decisions that they have made in the past. So favouritism is rampant. There is not any choice of Board members made by people whose lives are affected by the decisions that are made in the hearings.

- Keith Lewis

Since it can be taken as a given that knowledge about the environment, depending on the undertaking in question, lies within the native community and may not be documented or amenable to packaging by experts, the importance of facilitating native participation becomes critical and the elimination of barriers to their participation of critical importance.

The aboriginal people on their own land are the experts.4

- Mary Laronde

... our clients and the other aboriginal parties involved in D/SP were successful in at least getting the Board to recognize they might have to treat the evidence of elders, or at least become educated to the issue of how to treat elders' evidence in these proceedings before they receive it. I guess it remains to be seen how the Board will in fact do that, but the Board has at least been receptive to recognizing that elders' evidence and the evidence of aboriginal communities generally is

going to have to be treated differently than the way a "lay witness" would have to be treated, or indeed an expert witness.

- Joe Castrilli

The various jurisdictions and agreements which affect native people, their communities and activities add to the considerations which must be given within the EA process to matters affecting native people and land.

... see another context and that is between Indian and non-Indian and this put us I guess on opposing sides of the table many times but it is something that has grown to be reality in Ontario and in Canada. Not only because of the racial and social or cultural differences but because of the legal and legislative, constitutional differences that prevail at this time in the country. Many times in Ontario I have heard people say that because of the unique status of Indian people under the Indian Act - which is federal legislation - and because of provincial policy in the statement of political relationship, that Indian people have gained a status which is a little above that of the ordinary citizens in Ontario, and in many cases have experienced some authority, some sense of empowerment in terms of those policies and legislative developments.

- Keith Lewis

There was a lot of discussion about how decisions made in EA actually affect Treaty and aboriginal rights and land claim negotiations but very seldom is that evidenced and very seldom are those influences brought to bear on those cases.

- Sarah Miller

And beyond the legal regimes stemming from both the federal and provincial governments, the native peoples' claims to sovereignty and initiatives towards self-government remain largely unexplored within the context of the EAA.

Perhaps some of the difficulties arise simply because of the kinds of undertakings the EAA was designed to address, namely 'bricks and mortar' projects and technology.

It is a situation where I don't think the EA Act applies ... you go into a township, you have maybe two or three communities in that township, you have farming, you have whatever undertakings in that township ... you will have a variety of activities upstream in that river and a variety of activities downstream in that river. But up in the North you don't have townships. There might be areas occasionally used as part of somebody's trapline or hunting ground or for berry picking or something like that but there is a definite relationship between the people and the land.

*All these environmental things, I can see where it talks about waste and all that kind of stuff and some of these more urban kind of issues, you know. Where there might be some kind of chemistry or something, you have to have a chemist to tell you some of these things. ... In our, for most of the province anyway, it's somebody's traditional land that has intimate knowledge of every acre of that land. There is no wilderness out there, contrary to popular belief. It is somebody's home you know.*The aboriginal people on their own land are the experts.

- Mary Laronde

Having efficient processes for guidance of lawyers and experts by intervenors appears to be integral to effective participation in the large hearings, but poses a special challenge for native intervenors.

... It is much more difficult with respect to aboriginal clients ... Number one you have the problem of geographic distances to deal with. Secondly you have a much wider basis for decision making. In the case of the D/SP we act for some 70 First Nations, encompassing Treaties 3 and 9, and it is a much more difficult and daunting task.

- Joe Castrilli

... how do you get your group together to make a decision, when it has got to be done in a fairly quick fashion? That presents particular problems for aboriginal people because we make decisions in a wholly different way from what is made in say the Town of Massey for instance, which is a northern Ontario town south of Elliot Lake. The town council can get together and make a decision on behalf of the whole town and it can be binding. In our case what happens is that you get people who are understood to be decision-makers on the part of aboriginal people or aboriginal groups or aboriginal coalitions into a room and they are expected to make a decision right on the spot on behalf of thousands of people. Maybe in some cases, a lot of communities in Ontario in any case, big part of Ontario, and they can't. And what they have to do is to go back to the community to do their own sort of public consultation whether it means in a public forum or whether it means to go to sit down in somebody's kitchen or somebody's living room what it is that they have been talking about and to get from the people some sense of which direction to go. Whether to oppose or not oppose, whether to compromise and eventually to take that back, and it is time consuming and I imagine very frustrating for people in the hearings process who are lawyers, consultants, who have to face deadlines that are being imposed say by the EA Branch, by the Board themselves, the funding panel, that sort of thing. It just does not work in the case of aboriginal people and that is another barrier and another consideration that should be taken into account.

- Keith Lewis

While many of the rights and protections for intervenors in the EA Act are not available in the federal EA process, native people cite elements of the federal Environmental Assessment Review Process (EARP) as offering advantages when it comes to facilitating the involvement of native people.

> *In the federal context, the disposal of radio-active waste, the panel there has gone out of their way to some extent to try to understand, come to grips with, and to try to integrate or incorporate some of the - at least in their decision making - cultural and social differences that Indian people present. To that extent what they have written into their terms of reference - the Guidelines for the Federal Assessment - is special considerations that ought to be made in reference to Indian people when they are participating in hearings.*
>
> - Keith Lewis