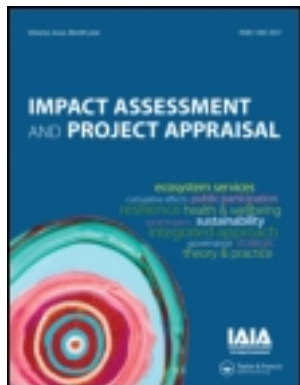


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Environmental impact assessment process substitution: experiences of public participants

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This paper explores policy action taken by the federal government in Canada to test the potential for substitution of the federal process to regulatory bodies as a means of encouraging environmental impact assessment (EIA) efficiency. Our purpose is to present the experiences of people who participated in the EIA of the Emera Brunswick Pipeline in order to gauge the impact of such process substitutions on meaningful public participation. Our approach included document reviews and a focus group session with some of the public participants in the Emera Pipeline hearings. We find that the National Energy Board hearing process substituted in the case did not meet many of the key requirements of meaningful participation and left some public participants feeling disrespected and marginalized.

Keywords: substitution; efficiency; streamlining; public participation; Canada

Introduction

Many jurisdictions are currently trying to find ways to streamline both planning and regulatory processes to reduce potential burdens on economic growth. Environmental impact assessment (EIA) has not been immune to this trend, which has in fact served to add fuel to the long-standing debate about the efficiency of EIA processes. Middle and Middle (2010) note that one of the many tensions currently surrounding EIA is the tension between process efficiency and effectiveness and Sinclair and Doelle (2010) establish this tension as one of the enduring challenges that has dominated the implementation of EIA since its inception. Snell and Cowell (2006, p. 361) highlight this as ‘the conflict between those that wish to streamline the system to reduce the perceived burdens on economic growth, and those that would extend the capacity of the system to promote environmental sustainability’. In fact, it is often very difficult to untangle EIA process effectiveness from efficiency, as many of the books and papers written on EIA effectiveness attest (e.g. Sadler 1996, Cashmore *et al.* 2009).

In the literature, the debate about EIA as a planning tool is mainly about the limits of project EIA, and the need for integration of project EIAs with strategic EIA, planning processes and integrated decision-making (Elling 2009, Sinclair and Doelle 2010). In practice, however, the debate revolves around how best to harmonize EIA with regulatory processes in an effort to achieve more efficient reviews. The result of such harmonization has often led to processes that focus on regulatory approvals (e.g. should the proponent be allowed to disturb a watercourse) rather than considering the broader planning implications of the project and alternatives to it (e.g. is the project the best way to meet the identified need). Joint assessments and substitution are examples of harmonized processes that have eroded the use of project EIAs as a planning tool (Doelle 2008).

This paper explores policy action taken by the federal government in Canada to test the potential for substitution of the federal process to regulatory bodies such as the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) as a means of streamlining EIA towards efficiency. We review the first true substitution, the Emera Brunswick Pipeline Project. Our purpose is to present the first-hand experiences of people who participated in this EIA, in order to gauge the impact of such process substitutions on meaningful EIA public participation.

Meaningful EIA public participation is grounded in the fact that public participation has long been recognized as a cornerstone of EIA (e.g. Wood 2003, Petts 1999, Devlin *et al.* 2005, Sinclair and Diduck 2009). The basic legitimacy of an EIA process is questionable if the process does not provide for meaningful participation (Gibson 1993, Roberts 1998). Sinclair and Diduck (2009) indicate that the term *meaningful* is used in referring to participatory processes that incorporate all of the essential components of participation, from adequate notice and information sharing to education, including the active and critical exchange of ideas among proponents, regulators and participants. The CEA Agency (2008a) and Stewart and Sinclair (2007) identify additional essential elements of meaningful participation, such as the ability to influence final decisions, adequate timing in the decision cycle, fair and open dialogue, and participant support.

Substitution

In the EIA context, substitution occurs when an aspect of a legislated EIA process, such as public hearings, or the entire EIA process, is substituted or replaced by another process. This could take the form of substituting another legislated regulatory approvals process, or part thereof, or allowing for the use of an EIA process carried out by a

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lower authority, such as a province or a state in the case of substituting federal EIA process. Currently at the federal level in Canada the Canadian Environmental Assessment Act (CEAA) only allows for the Minister of the Environment to substitute processes under subsection 43(1).

The Minister can either initiate substitution or respond to a written request, with approval given in writing. A substitution may be carried out by a federal authority, or any body established pursuant to a land claims agreement that has powers, duties or functions relevant to an EIA (see paragraph 40(1)(d), CEAA). Federal authorities include a Minister of the Crown, any body established by federal statute and accountable through a minister such as a federal government agency or crown corporation, and federal government departments (see section 2, CEAA). In the Emera Brunswick Pipeline Panel Review, the NEB was the federal authority that was substituted for a CEAA Review Panel. Other bodies that are federal authorities and may be considered for substitution purposes include the CNSC, the Canadian Transportation Agency, and the Canada-Newfoundland Offshore Petroleum Board or the Canada-Nova Scotia Offshore Petroleum Board.

Paragraph 58(1)(g) of CEAA provides regulation-making authority to develop criteria for making a substitution. There were no such criteria developed for the Emera Brunswick Pipeline hearing. CEAA does not define the term substitution and is silent on the role of the CEA Agency in a substituted process.

The push for the use of provisions that allow for this sort of process substitution in Canada has largely been driven by industry in order to eliminate what they refer to as 'duplication and overlap', which, they argue, impacts the efficiency of the EIA process (Fitzpatrick and Sinclair 2009). For example, during the Five-Year Review of the CEAA, the Canadian Energy Pipeline Association mentioned substitution a number of times in their brief (see Schneider *et al.* 2007). The Association has a long history with the NEB, and indicated in their brief that:

We also believe improvements in process efficiency and timeliness would occur if the NEB process is automatically substituted for pipeline projects requiring panel review. This would eliminate the time needed to establish the panel and recognizes the synergies between the NEB legislated obligations and the obligations under (the Act).

The NEB moved the substitution issue along by requesting that its process be substituted for the CEAA requirements, as provided for under sections 43 of the Act in the case of the Emera Brunswick Pipeline (National Energy Board 2005, Schneider *et al.* 2007). The Board noted that both agencies have an obligation to 'optimize environmental assessment', and the federal EIA process duplicated aspects of its own review. It argued that with a decade of experience working for inter-jurisdictional coordination of EIA through harmonized, joint hearings processes, there was an opportunity now to 'be responsive to the need for efficient, effective EIA of federally related energy infrastructure' (National Energy Board 2005). No public consultation was undertaken prior to the decision by

the Federal Minister of the Environment to substitute the NEB process for the CEAA process.

One of the concerns that has surrounded decisions about attempting such substitutions is the differing mandates of the authorities involved (e.g. Fitzpatrick and Sinclair 2009). In this case, for example, the CEAA is meant to 'achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality' through EIA. The NEB, conversely, exists to 'regulate international and inter-provincial aspects of the oil, gas and electric utility industries'. The differing mandates underscore the planning versus regulation responsibilities of the organizations (Doelle 2008).

Approach

We followed a qualitative approach to carrying out our research in order to understand the case and to elicit the stories of people who participated in the Emera Brunswick Pipeline hearings. This involved a thorough document review, including consideration of hearing transcripts and a focus group. We selected the focus group approach to allow people to share their stories with one another and so that we could meet personally with the participants. We consulted the participant list created by the NEB to recruit participants for our work. This involved contacting public participants from the list and then using a snowball sampling technique, enlisting the help of people who participated in the NEB hearings to identify other active participants. At no point was our sampling purposeful, other than its focus on public participants, and the authors were not involved in the hearing process.

Thirteen people attended the focus group, held on 15 January 2009 at the public library in Saint John, New Brunswick (NB). In terms of their profile, our discussions with them indicated that each had been an active participant in the hearings process through familiarizing themselves with application material, learning about and participating in the hearing and seeking out support. They had attended information sessions, applied for participant funding, and filled out many forms and applications. We were told that, as volunteers, they spent hours tracking down experts who might be able to help and sought support from the NEB.

Data was collected at the focus group meeting through direct note taking and through the use of notes collected on flip charts. While a guide had been established to help facilitate discussions at the focus group, participants were given time to discuss points that they deemed important. Our goal was to keep the session as open as possible allowing participants to focus on the aspects of the NEB hearings that stood out for each of them. Data analysis was done through transcribing meeting notes, followed by each of the authors doing an iterative search for themes grounded in the data. In the results that follow we have not quantified the focus group data, but have given an indication of the level of support for the themes we present by indicating if a majority ('all' or 'most') or a minority

(‘a few’) agreed. When we do use direct quotations from the focus group participants in the results, these have been selected to ensure they capture the views of the participants that supported the point.

Emera Brunswick Pipeline Project

The Emera Brunswick Pipeline Project proposed to construct a 145-km natural gas transmission pipeline from a liquefied natural gas terminal in Saint John, NB, to the US border in St Stephen, NB, which was subsequently approved by the NEB with conditions in 2007 and the pipeline began carrying natural gas in 2009 (Brunswick Pipeline 2010). The proposal triggered a comprehensive study under CEAA and required a Certificate of Public Convenience and Necessity under the National Energy Board Act. Public concern over the proposed pipeline’s 31-km route through the city of Saint John was significant and was demonstrated in a petition signed by over 15,000 people. Citing this public concern and the support of other Responsible Authorities, the Chair of the NEB made a request to the Minister of Environment to have the assessment referred to a Review Panel. This request was accepted by the Minister of Environment. The NEB Chair made a second request in the same letter, to substitute the CEAA Panel Review with the NEB Regulatory Hearing Process. The NEB Chair recognized that this would be the first exercise of the CEAA substitution provisions and indicated that this might serve as a ‘test’ of the substitution process.

The substitution decision came to the attention of the public through a generic public announcement issued by the Minister of Environment in May 2006. The CEA Agency chose not to provide any public opportunity to comment on the decision. As well, the public was not given any explanation of substitution or direction on how it would differ from a regular CEAA Review Panel process. Our research indicates that most members of the public who engaged in the Emera Brunswick Pipeline hearings entered into the process with little or no understanding of either the CEAA Review Panel process or the NEB regulatory process. The NEB held four public information sessions prior to the hearings, but substitution was never emphasized or explained during the public information sessions and the CEA Agency staff did not make themselves available at those sessions to answer questions.

Focus group participants and subsequent documentation (CEA Agency 2008b) indicated that during the course of the NEB hearings there was considerable misunderstanding around the final decision-making process. The fact that the substitution provisions apply only to the Review Panel and not any other aspect of CEAA was never explained to the public. Adding to the confusion, we were told that the NEB staff members who attended public information sessions did not appear to understand the role of CEAA in the decision-making process and therefore could not answer questions about how decisions would ultimately be made. Questions were referred to the CEA Agency, which was not represented at

the public information sessions. The fact that Agency staff did not participate in public information sessions and that there was no information readily available on the substitution process made it particularly puzzling for intervenors in the NEB hearing to learn that the CEA Agency was responsible for the provision of participant funding. The CEA Agency did not participate in any of the public information sessions to explain the role of participant funding or how to apply for participant funding, or to answer questions from members of the public on participant funding.

The final deadline for submission of evidence for the hearing was 13 September 2006, a mere 12 business days after funds were received. Documents show that several intervenors sought an adjournment of the proceedings to allow them time to prepare evidence after their funding was received. The NEB denied this request and provided only a seven-day extension to certain intervenors for the submission of evidence. This meant that rather than having only 12 business days to hire experts, brief the experts, obtain a report, review the report and submit it to the NEB, intervenors had 18 business days to complete these tasks. Relative to other review panels and joint CEAA/NEB hearings, this timeline appears to be unprecedented. Intervenors in the Sable Gas hearings raised concerns over the four-month timeline between receipt of funding and submission of evidence (Fitzpatrick and Sinclair 2003). Participants in the Whites Point Quarry Review Panel received funding almost one year before comments on the environmental impact statement (EIS) had to be submitted.

Focus participants indicated that they were aware and concerned that the NEB has the ability to refuse to recognize a party as an intervenor if the party is unable to show it would be affected by the Board’s decision. The NEB accords intervenor status to public groups, such as environmental associations, at its discretion. This limitation does not exist in a regular CEAA Review Panel process and is in fact one of the key reasons why EIA legislation was created (Doelle 2008).

Results of a pilot substitution for public participants

Our data shows that there were a number of impediments to meaningful public participation as it is described above and in the EIA literature (e.g. Roberts 1998, Petts 1999, Palerm 2000, CEA Agency 2008a, Sinclair and Diduck 2009) in the Emera Brunswick Pipeline hearing process. This case study will focus on five of those impediments: (1) deficient pre-hearing consultation, (2) the need for legal representation, (3) fair notice and time to prepare, (4) participant support and (5) the quasi-judicial process and open dialogue.

Deficient pre-hearing consultations

Consultation during a review panel process can vary. However, it is generally standard practice to consult members of the public on the scope of the assessment and the guidelines for the environmental impact statement (EIS Guidelines) (Petts 1999, Lawrence 2003, Fitzpatrick 2006). In the case of the Emera Brunswick Pipeline

process, the public was given an opportunity to comment in writing on the scope of the assessment, although the NEB made no amendments to the scope following the consultation.

The NEB did not provide members of the public with an opportunity to review or submit comments on the EIS Guidelines. The NEB regulatory process does not require the applicant to develop a specific set of guidelines for the project but rather relies upon the generic NEB Filing Manual to direct the applicant on all aspects of their application. This is a clear departure from the regular CEEA Review Panel process and focus group participants felt that it limited early opportunity for members of the public to be engaged in the planning process for the development of the EIS. In the regular CEEA Review Panel process, panel members and the public become very involved in the review and refinement of the EIS Guidelines.

Another important pre-hearing consideration in this case was the provision of information about how the NEB hearing would proceed, since participants' understanding of process is a critical on-ramp to effective participation (Sinclair and Diduck 2001, Fitzpatrick 2006). The NEB held four public information sessions in Saint John in preparation for the hearings. The first session was to explain the regulatory process and was very well attended (over 300 public participants). Most focus group participants indicated that, following the session, they found the explanations provided to be 'confusing, wordy, bookish and too formal'. Many also indicated that they did not come away from the session with a solid understanding of what the process entailed.

This was followed by three more sessions run by the NEB on how to be an intervenor, including the screening of an NEB video on how to participate in a hearing. Despite these efforts, the dominant feeling expressed by focus group participants was that they did not have enough guidance to prepare themselves for what happened in the hearing room. The nature of the proceedings and the strictness in how 'rules' were implemented surprised people. Our own viewing of the NEB video, which is publicly available and applies to any of their hearings, underscores the input we received. The 11-minute NEB video and some supporting documents are quite clear on how burdensome it may be to participate in a public hearing. In stark contrast to the input of focus group participants, as outlined below, the video shows Board members who are always interested, taking notes, asking questions and not interrupting the presenter. As well, the adversarial nature of the hearings described by focus group participants is absent from the video. It was clear that our focus group felt that although the sessions and information provided by the NEB outlined the basic elements of the process, it in no way informed them of the reality of what was to take place.

The need for legal representation

One focus group participant said that the process was designed for lawyers in the oil and gas industry. 'We had no legal training. No oil and gas company would ever send

a new lawyer, untrained, to something like this.' The Friends of Rockwood Park (FRP), a local citizens group, received \$50,000 CDN under the federal Participant Funding Program. They were interested in hiring a lawyer to provide them guidance during the hearings. They were told by the CEA Agency that lawyers were discouraged and may not be funded. It seemed as though the CEA Agency did not recognize that the NEB hearing was markedly different from a regular panel review under the CEEA. Focus group participants and others felt that the CEA Agency should have recognized that the NEB hearing process does not engage public participants in the way that the CEEA hearing process encourages. Participants felt that some balance could have been achieved if they had been given access to a skilled lawyer who understood and had experience with NEB hearings.

Participants also reminded us that the process begins formally in that members of the public who wish to fully participate in the process must register as intervenors. An intervenor is required to file motions, prepare and submit affidavits and evidence, cross-examine witnesses, be prepared for cross-examination by lawyers, produce rebuttals and offer final arguments. The NEB public information bulletin recognizes that the hearing process favours legal representation. Information bulletin #4 states, 'Because of the complexity of legislation involved and the quasi-judicial nature of NEB hearing, intervenors may wish to be represented by legal counsel'. It goes on to say that, 'it is by no means necessary'. Participants told us that, as they became more familiar with the NEB process, they were not alone in recognizing that it would be difficult to effectively participate in the hearing without legal representation. However, the NEB provides no funding for legal representation at the hearings. The only funding available to the public was the participant funding through the CEA Agency. Legal advice is categorized as a low priority in participant funding applications, and legal representation is not mentioned in the funding application.

When a law firm agreed to represent the intervenors in this case, the intervenors requested permission to use some of their participant funds for that purpose. In reply, an email from CEA Agency staff discouraged the hiring of a lawyer, particularly as a representative at the hearings, indicating: 'The costs for legal advice are eligible under the program, but legal representation at public hearings and other public participation events is not encouraged' (S. Osborne, personal communication, Participant Funding Program, Canadian Environmental Assessment Agency, 2006). We were told that one of the intervenors ultimately convinced the Agency to fund the participation of a professional geologist who had some experience with NEB processes to serve as their agent during the hearings. The message participants took from these interactions was that an intervenor will not be funded to hire a lawyer but will have to participate in the quasi-judicial process with lawyers.

As the hearings proceeded, focus group participants said they understood that in order to adequately represent themselves at the hearings, they needed a lawyer. This realization was particularly upsetting, since the

information sessions had painted a very different picture. It was clear from the focus group session that participants found the fact that a lawyer was needed meant that the NEB process failed to effectively engage the public in a meaningful way. Most participants said they would prefer to engage in the process directly, but in order to do so ‘the process must engage them and not create barriers to their participation’.

Fair notice and time to prepare

Notice and time to prepare have long been noted as key elements of EIA public participation (e.g. Petts 1999, Sinclair and Doelle 2010). The NEB regulatory process establishes narrow windows of time for review of and response to documentation, as compared to CEAA. Such an approach may be very efficient, but only intervenors with full-time staff members available to prepare and submit information can work effectively in this environment. In an effort to make the timelines more generous for public participants in the Emera Brunswick Pipeline hearing, one of the intervenors submitted a motion to have all information requests and responses to information requests carry a preparation period of not less than 15 business days. The NEB denied this notice of motion. Although the NEB’s quasi-judicial process appears to be highly structured, intervenors said they learned during the pre-hearing process that evidence could in fact be submitted after the deadline. The evidence would be accepted by the Board unless it was challenged by the applicant or another intervenor. This loophole in the NEB process encourages participants to risk valuable participant funding when narrow timelines cannot be met.

Participants told us, and the hearing transcripts show, that the NEB regulatory process uses a standard daytime hearing schedule that generally does not accommodate the fact that most public participants are volunteers with careers and occupations. In the case of the Emera Brunswick Pipeline, hearings were scheduled to run for three weeks. We were told that public intervenors asked that sessions run during the afternoon only to allow them an opportunity to prepare in the morning, given they had no staff support. This request was not met and the hearings were scheduled from 9:00 am to 6:00 pm each day, with the exception of a half day on Saturday and no hearings on Sunday.

We were told that a few days into the hearings, the NEB determined that they were not progressing quickly enough. To deal with this, they chose to extend the daily schedule rather than extending the period for the hearings. They also decided that it would be appropriate to hold hearings on the afternoon of Remembrance Day (a statutory holiday in New Brunswick). Many of the hearings days were then scheduled to run from 9:00 am to 9:00 pm, with brief breaks for lunch and dinner. Intervenors complained on the record and several asked why the hearing dates could not be extended. The Board’s only response was that the hearings were to end on 20 November, and that was when they would end. By the middle of week two of the hearings, the Board determined that they would be able to complete the sessions within the

expected time frames so they amended the schedule once again, taking the hearings back to a 9:00 am to 6:00 pm schedule. Intervenors were left to accommodate to the Board’s mid-hearing changes.

Focus group participants told us that trying to ‘build everything from scratch’ in a short period of time created many difficulties. They struggled to find qualified experts in a hurry, especially when there was little money for reimbursements. As volunteers, participants found it difficult to meet the short timetables. It was nearly impossible for the public to attend all meetings. ‘If you missed a meeting, you’d be in the dark and wouldn’t know what had gone on’, a situation regularly faced by participants. The common result of a participant asking questions at the hearings was to be told by the Chair that ‘the question has already been asked and dealt with at the last meeting’.

Participant support

Given the resources available to the proponent and government decision-makers, the provision of funding to participants in EIAs has long been promoted as critical to good decision-making (Canadian Environmental Network 1988, Lynn and Wathern 1991, Gibson 1993, Wood 2003, Rutherford and Campbell 2004). Support can take many forms, but in the case of hearings, financial support for the activities of participants is common. In the Emera Brunswick Pipeline hearings, the public was given notice of the availability of funding support through the CEA Agency Participant Funding Program, as noted above. While focus group participants indicated that they welcomed the opportunity for support, they noted many issues related to getting and using the funding.

Many participants noted confusion around the CEA Agency being the vehicle for funding, since it had virtually no presence or visible linkages to the NEB hearings process for the Emera project. Many also noted that the money arrived ‘far too late’ for them to even think about hiring the experts that they wished to engage. We were told that one of the intervening groups received a first instalment of funds from the CEA Agency on 25 August 2006, while the deadline for submission of information requests on the Emera Application was 10 days earlier (15 August 2006). As a result, the intervening group had no funding available to hire experts to assist them in review of the Application. Furthermore, the final deadline for submission of evidence for the hearing was only 12 business days after funds were received. One person indicated that they tried to ‘hire people to do studies and called all over Canada and the US but just could not do it in two weeks’. Another person noted that the money arrived so late they were not able to spend what they had been allocated.

There were also comments at the focus group about the inadequacy of the funding received. There was a strong feeling among all participants that the NEB pitted a well-funded proponent against a very poorly-funded public. The public was also portrayed as ‘the opponent’, instead of having everyone work together to ensure that the EIA

process did what it was supposed to do – protect the environment. Sound administrative support is also critical to ensuring that a hearing process runs smoothly. In this situation, participants indicated generally that they were pleased with the level of support that they had received from NEB administrative staff.

The quasi-judicial process and open dialogue

Dialogue and learning are viewed by many as central to our collective achievement of sustainability gains (Keen *et al.* 2005, Täbara & Pahl-Wostl 2007). As Rutherford and Campbell (2004, p. 11) note in their review of CEAA panel process, one of its real strengths is ‘an informal hearing process rather than a quasi-judicial process’, since this approach provides a unique opportunity for a public discourse of issues. Further, in their review of the Sable Gas Project hearings led by the NEB, Fitzpatrick and Sinclair (2003) conclude that one of the strongest criticisms expressed by representatives of the public related to the quasi-judicial process of the hearings since it: (1) discouraged participation by the general public; (2) affected the ability of the panel to level power relations among participants; (3) fostered an environment where not all evidence was given equal consideration in the assessment decision; and, (4) most importantly in terms of learning, decreased opportunity for open dialogue about potential solutions to the project issues raised.

Focus group participants told us that full participation as an intervenor in an NEB hearing is all-consuming, complicated, cumbersome and does not encourage discourse among participants. Rather, they described a formal hearings environment that did not include dialogue. In fact, they said the panel was rarely engaged, asked few questions of public participants and took little in the way of notes when hearing from the public. They felt intimidated by the panel Chair and by cross-examination. The Chair set the tone of the hearings on the first day by indicating the types of communications that would be supported during the hearings:

We are concerned that the hearing time be used as effectively and as efficiently as possible. We remind parties in this regard that the principal purpose of cross-examination in our proceedings is to clarify and test the evidence that has already been filed. Parties should not reiterate their own evidence nor repeat cross-examination questions that have already been asked (S. Leggett, Chair, Order GH-1-1006, Volume 1, item 17).

At this point, I would like to remind everyone that the Panel is here to listen to the evidence, not to engage in debate or answer questions from parties (S. Leggett, Chair, Order GH-1-1006, item 20).

Participants in the focus group spoke frequently about the strong sense of intimidation that pervaded the pre-hearing and hearing process that acted to effectively stifle any dialogue. The following points summarize the things that created this atmosphere:

- The setting, with the three members of the panel seated on a raised platform, and the resulting atmosphere of formality.

- The potential for cross-examination by lawyers in suits.
- The number of lawyers present to support the panel and the proponent, given that the community members had no legal representation.
- Armed police officers, some in plainclothes, who attended the hearings gave participants the sense that there was some level of threat.
- The location of the project and hearings presented overwhelming problems, with people being afraid to sign petitions, appear as intervenors or help as expert witnesses because of their direct or indirect connection to the primary employer in the city.

Many participants in the focus group commented on the role of one of the lead Emera lawyers, who sat directly across from the intervenors, along with two associate lawyers. They found the situation to be very intimidating because the lawyer, who had previously been an NEB lawyer, appeared to play such a key role in directing the three panel members. Focus group participants commented on how frequently he made suggestions to the panel Chair on how to proceed with the hearings. As one participant concluded, ‘If this is being tolerated, an intervenor should also be permitted to make suggestions to the Chair on how to proceed’.

In the end, the applicant’s lawyer surprisingly never cross-examined an intervenor or their witness. Many intervenors did, however, attempt to cross-examine the applicant’s witnesses, though only the government participants were represented by a lawyer. The result was a long, drawn-out process requiring numerous interventions by the Board and objections from the applicant’s lawyer. Participants felt strongly that providing an opportunity to ask questions of, or comment on, information provided during a public hearing can add value to any EIA process. Members of the public, technical experts and project proponents can ask relevant and useful questions. However, applying the rigours of cross-examination to the completely uninitiated is intimidating and, in the view of participants, not very effective.

One of the conditions of substitution under the CEAA is for the panel to ensure that the public will be given an opportunity to participate in the assessment. As described in the purpose section of the CEAA, participation in this context includes ‘meaningful’ participation. Members of the focus group did not describe a meaningful and positive communication environment during the hearings. Some examples of the environment described by the focus group members include:

- The process for expert panels was confusing. Frequently, when community intervenors attempted to ask questions of the expert panels, they were interrupted by the Chair and told ‘You have to ask that of another panel’, or ‘That question was asked yesterday’.
- Many focus group participants had stories about questions not being answered. One participant asked about the pipeline going by the hospital area and

never received an answer.

- One participant told of hearing powerful interventions during one of the sessions but no questions were asked, nor was there any cross-examination.

Focus group participants all expressed concern about the make-up and behaviour of the panel members. Interactions between panel members and public intervenors ranged from none to expressed frustration from the panel at the inability of public participants to follow the rules. Focus group participants could not recall one directly positive interaction with the panel. As a result, they were left feeling that their comments and those of their experts were not being given serious consideration. Many participants continued until the very end to hold out hope that their comments would be appropriately weighted by the panel. Yet they all sensed from the beginning of the process that panel members were not impartial towards them and their evidence and the ability of the community intervenors to participate in a meaningful way and influence the decision did not really exist.

Discussion

Many of the issues with the NEB hearing process we have outlined in this case study have also been documented in an evaluation of this substitution carried out by the CEA Agency. The overall objective of the evaluation carried out for the CEA Agency by Ipsos-Reid was 'the examination of the substituted process that took place for the Emera Brunswick Pipeline, with findings to be used to inform the Minister in future consideration of whether, when and how to use his or her discretion under the substitute provisions of the Canadian Environmental Assessment Act'. This evaluation was done via telephone interview, each lasting about 30 minutes, and included a variety of participants in the NEB hearing, including public stakeholders, Aboriginal parties, government agency representatives, and oil and gas company employees. Many of the themes outlined above are addressed in the evaluation. For example, the evaluation notes that 'Many members of the general public had noted discomfort with the quasi-judicial nature of the NEB hearings. This view was supported by some professional respondents who preferred the NEB process, but noted that this process could be less conducive to public involvement than a review panel under the "CEAA" (CEA Agency 2008b). The evaluation also notes that 'participating in cross-examination brought to the forefront the imbalance issue for many respondents ... the {proponents lawyer} perceived ability to utilize that knowledge {of process} to "manipulate proceedings" in favour of the proponent was seen to give the proponent an unreasonable advantage'. They noted the words of one intervenor, who said 'Yes, we did it and we did a great job, but it would have been much more effective to have had a lawyer with experience in these boards' (CEA Agency 2008b, p. 27).

The CEA Agency (2008b) evaluation found two main viewpoints on the success of the substituted process: approximately half of the respondents interviewed were broadly satisfied with the overall process, while the

remainder were dissatisfied with the process. This overall finding is of course much different to that expressed by our focus group participants, but not surprising in that the mix of participants in the study was very different in that it included regulators in that it proponents. This report also draws some interesting conclusions in terms of process efficiency. The CEA Agency notes that through using substitution, potential duplication was minimized, but goes on to indicate that the potential for such duplication was very unlikely since there would have been a joint CEAA/NEB hearing called and not two separate hearings. So the real savings in this regard amount to the time it would have taken to train NEB members in the CEAA hearing process or visa-versa. The report also deals with the issue of timing and notes that this panel took 342 days. This is compared with eight CEAA panels that had completion times anywhere from 258 to 1532 days (CEA Agency 2008b). The report notes that some of these panels took less time than the substituted process. There is no comment on the comparative complexity of the cases or participant satisfaction.

Looking back on the NEB hearing process, the focus group participants gave many examples to illustrate how most elements of meaningful participation were not satisfied. They noted that the whole process was in trouble from the outset when the panel made no amendments to the scope of the assessment following written comments from the public and provided no opportunity to comment on the guidelines for the EIS, which is required in many EIA laws (Petts 1999). Focus group participants also felt that they were clearly disadvantaged by not having legal representation at the hearing, as evidenced by the number of times they were reprimanded by the panel Chair for being out of order (i.e. asking questions that had either already been asked or that were not within the scope of the hearing).

Even for elements such as participant support, where actions were taken to help participants, the stories of participants indicate that poor implementation and minimal funding weakened what should have been a positive outcome. The lack of dialogue at the hearing itself also clearly undermined any attempt to develop solutions to the problems that were raised. The way in which the panel and lawyers for the proponent handled themselves further undermined the public's ability to participate in a meaningful way. The NEB video on how to be a participant indicates in one of its final statements that the public hearing process 'ensures that the board decision will be made in the public interest'. Many of our focus group participants were left questioning who the NEB thinks the public actually is. If the ability to participate is so hindered by the overwhelming and judicial nature of the process that the public has great difficulty participating or will not participate, as our findings and even those of the CEA Agency review show, one wonders how their decisions actually reflect the public interest.

Conclusions

There was a strong sense from focus group participants that the NEB hearing process favours business and government and that this is not just a slight advantage, it is insurmountable. In their view, the NEB substitution for the Emera Brunswick Pipeline Project did not come close to satisfying the basic components of meaningful participation in an EIA hearing. In fact, many participants came away feeling bitter, disrespected, marginalized and wasted. 'If you lose in a fair process, you can be devastated but still not hate the process because it was fair,' said one participant. 'In this process, everyone felt it was unfair.' That was a common theme heard throughout our focus group discussion. Participants were not complaining about the results of the hearing, though they obviously would have preferred a different outcome. Most of their complaints were directed at the process, how they felt it was stacked against them from the beginning. The process also took a toll on the intervenors. During our discussions, they reeled off quotes from the NEB Chair as though they were still fresh in their minds. It was obvious that they had put a lot of effort into the hearings process and in the end felt somewhat betrayed.

Despite the findings in this case, the federal government in Canada is still looking to substitute EIA process for other federal regulatory processes and with provincial processes to gain process efficiencies. In support of this stance, both the NEB and CNSC took some action in early 2011, with the NEB holding a one-day meeting with members of environmental non-governmental organizations about the environmental and socio-economic section of their 'filing manual' {instructions to proponents filing and application} and with the CNSC announcing that they had established a participant funding programme in support of public participation in their hearings process. It has also been reported that in March 2011 the CEA Agency released the final version of MOUs (memorandum of understanding) with the NEB and CNSC for substituted hearings process (CERC News 2011). Further support for substitution came in early 2012 when the Federal Standing Committee on Environment and Sustainable Development issued their report reviewing the CEAA. In this report the Committee supports the practice of substitution, to the NEB and CNSC in particular, and recommends that these agencies should carry out environmental assessments under CEAA if they are the "best-placed regulator" (House of Commons Standing Committee on Environment and Sustainable Development, 2012).

As Sinclair and Doelle (2010) note, the main efficiency concerns in any EIA process are the time and cost involved. Rightly or wrongly, these two concerns surface repeatedly, limiting the ability to incorporate requirements, measures or steps into the EIA process that would otherwise improve its effectiveness. As Schneider *et al.* (2007) point out, there are solutions other than substitution to issues of efficiency that have been discussed by practitioners and academics but not fully tested. In the Canadian context, as with some other jurisdictions, first

and foremost would be improving and completing harmonization agreements with provinces and other jurisdictions to ensure EIAs are properly scoped and avoid duplication (e.g. Fitzpatrick and Sinclair 2009, Kwasniak 2009). Secondly, in a previous review of CEAA there was extensive discussion of enhancing the coordinating role of the CEA Agency, designating the Agency as the 'single window' for joint federal–provincial reviews etc., which has not been fully followed up on. Finally, as outlined by many authors who have contributed to this journal (e.g. Noble 2008, Harriman Gunn and Noble 2009) there are efficiency gains to be had by implementing strategic environmental assessment (SEA) processes, which are still not a robust part of the Canadian EIA framework federally. After reviewing the participation component in this case, we feel that it would be in the public's best interest to test and pursue some of these other alternative policy approaches rather than implementing substitution. The quasi-judicial nature of the substituted NEB process, combined with the lack of sufficient and timely intervenor funding, make it difficult, if not impossible, to ensure meaningful public participation.

Both efficiency and effectiveness are important design criteria for EIA. The idea, however, that decision-makers can either generically or on a case-by-case basis decide when to trade off effectiveness for efficiency is a fallacy. If all parties knew up-front the benefits of a thorough EIA, involved parties of any EIA could avoid problems when going through the assessment process. The final result would be a project implemented with maximum benefit and minimum risks.

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