

Discussion Document 7 (revised) – Early planning, necessary committees and ongoing participation

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The Expert Panel (the Panel) clearly recognizes the important role of meaningful public participation in ensuring the legitimacy of any impact assessment process. Their report highlights the need for early involvement, for the process to be open to all members of the public, and for meaningful engagement throughout the process. It stresses the need for transparency throughout the process, including analysis and decision-making, and the need for public access to information beyond what has been provided in the past, such as baseline data from previous assessments and monitoring results after project approval. The Panel's focus on collaboration and consensus is encouraging, as it provides opportunities for mutual learning and meaningful engagement. Finally, the Panel acknowledges that

Current practices in Canada situate public participation in federal EA in the “Inform” and “Consult” categories. Current engagement practices, while varied, lean toward information dissemination rather than mutual learning and inclusive dialogue, and information gathering rather than clear integration of this information into project design or approval requirements.¹

To correct these shortcomings in how the public participates in Impact Assessment (IA), the Panel makes three recommendations. Each of these needs to be unpacked to understand how it can be specified in legislated language to reflect the ideas captured in the Panel report, the input that the Panel received and the extensive literature on public participation in IA. In considering the necessary reforms for meaningful participation and the involvement of Indigenous people, attention needs to be paid to the “Layers of Engagement” recommended by MIAC, indicating that engagement occurs Nation to Nation, Government-to-Government, to reach accommodation and to involve individuals. This document begins the consideration of the layer related to involving individuals.

Recommendation 1

The Panel recommends that IA legislation require that IA provide early and ongoing public participation opportunities that are open to all. Results of public participation should have the potential to impact decisions.²

Early and ongoing participation, as well as having the potential for participation to impact decisions, are key principles of meaningful engagement that the Panel has recognized.

¹ *Building Common Ground*, at 38.

² *Building Common Ground*, at 4 and 39.

- The first step to achieving these will be to enshrine the list of meaningful participation principles suggested by the Multi-Interest Advisory Committee (MIAC) in the purposes and objectives sections of the law and/or in other appropriate parts of the Act. These principles include:
 - i. Participation begins early in the decision process, is meaningful, and builds public confidence;
 - ii. Public input can influence or change the outcome/project being considered;
 - iii. Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;
 - iv. Formal processes of engagement, such as hearings and various fora of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;
 - v. Adequate and appropriate notice is provided;
 - vi. Ready access to the information and the decisions at hand is available and in local languages spoken, read and understood in the area;
 - vii. Participant assistance and capacity building is available for informed dialogue and discussion;
 - viii. Participation programs are learning oriented to ensure outcomes for all participants, governments, and proponents;
 - ix. Programs recognize the knowledge and acumen of the public; and,
 - x. Processes need to be fair and open in order for the public to be able to accept a decision.
- The promotion of respectful and meaningful dialogue is at the core of implementing the principles and should also be reflected in the objectives section of the law. Respectful includes responding to the public when they have participated in terms of how the information they provided has been used.
- The legislation must establish that IA processes are open to all interested parties that want to participate. Open to all means that there is no room in the new law for a bias towards those directly affected by a project or undertaking.

Codifying these will create a framework for the overall public participation system established in the new IA regime. At a minimum, meaningful participation needs to be defined in the statute and include early, ongoing engagement and the potential to impact decision-making.

Specific aspects of the principles will, of course, also require their own detailed legislative provisions that establish positive legal obligations (e.g., notice, formal hearing provisions). Such provisions will be vital to creating realistic prospects for achieving meaningful participation.

The new statute must also:

- Include provisions for the involvement of the public in the development of projects lists and the development of any list or criteria for the designation of regional and strategic assessments, as well as other means of determining the application of the Act. Action in this regard should specifically recognize the Panel's recommendation 'that federal IA should begin with a legislated Planning Phase that ... occurs early ... before design elements are finalized.'³
- Provide direction regarding what constitutes early participation. The Panel has made suggestions in this regard, including “prior to large time and financial investments being made” and “before any benchmark decision is made”.⁴ “Early” requires a mandatory statutory foundation in the provision of opportunities for public involvement, including deliberative forums, at what is commonly referred to as the ‘scoping stage’ of project IA. To action early the statute needs to:
 - i. pay careful attention to what is needed to fulfill project description and registration requirements. At this early stage a detailed project should not be required, just basic information on the project/undertaking and its proposed location;
 - ii. provide greater opportunity for interested or affected jurisdictions, organizations, individuals to play a role in the design of the specific assessment process. The IA Authority would lead this early process including the development of any cooperation plans and a public participation program. The goal of this early phase of the assessment is much greater engagement. This could be achieved through the establishment of some form of planning committee as already happens in many Canadian jurisdictions;
 - iii. direct the IA Authority to post notice as required under the Act once a registration/description has been provided by the proponent. The notice would include basic information on the policy, plan, program or region for which the IA will be undertaken.
- Establish that the IA Authority cannot engage with a proponent until it provides appropriate public notice and directly to interested parties. In fact, any federal regulatory agency who has contact with a project proponent would ideally apply the same principle and ask the proponent to contact the IA Authority at the first point of contact. This would serve to encourage proponents to initiate the IA process early in the planning stages of their proposed projects.
- Contain a requirement for any proponent of a project that requires an IA to notify the IA Authority, who will then post notice as required under the Act. At this stage all that would be required of the proponent is a very basic project description that provides information on the type of project and proposed

³ *Building Common Ground*, at 19.

⁴ *Building Common Ground*, at 39.

location. In the case of SEA and REA, early notice would also be provided by the IA Authority. The notice would include basic information on the policy, plan, program or region for which the IA will be undertaken. Additional work is needed to ensure proponents are sufficiently motivated to inform the IA Authority early.

Once notice has been given, the formal early planning phase recommended by the Panel would be initiated. This should involve a Multi-Interest Planning Committee (MIPC). The interests represented will include public interests and potentially multiple authorities (including Indigenous). The committee will participate in setting the assessment agenda, establishing a sustainability framework and scope (including criteria and alternatives), and assigning study responsibilities. It will also be essential at this stage to initiate the development of a public involvement program. The type and character of the MIPC will not be the same for each stream of assessment in the case of project IA, or for each tier of assessment (RIA/SIA/PIA). In the case of project IA, we recommend the proponent be an *ex-officio* member of the MIPC.

- Statutory provisions are needed that require opportunities for public participation, including deliberative forums, throughout any IA process and particularly including follow-up and monitoring on a scale appropriate to the circumstances. Full transparency in decision processes will be a critical pre-condition.

The Panel acknowledges some of the issues that have occurred with participation, such as a lack of focus on two-way dialogue and placing too much emphasis on “more formal, adversarial and intimidating processes than is needed”. The new statute needs to recognize and strongly encourage informal opportunities for participation that involve two-way dialogue and discussion. Achieving this also will need:

- A legislated system for mediation and other forms of alternative dispute resolution (ADR) to help participants work together to achieve mutually acceptable and collaborative solutions when they need some assistance to come to consensus, as the Panel suggests. Strong provisions are needed in legislation so that the full array of ADR’s benefits can be realized.
- The establishment of an option for a public hearing that is smaller and less formal than the panel hearings currently mandated and practiced under CEAA 2012. This would include public meetings, structured roundtables, sharing circles or similar forums for non-adversarial discussion. This should also be considered in the context of increasing demands for the recognition of indigenous knowledge systems from Elders and Knowledge Keepers. The formality of current hearings has largely eliminated opportunities to discuss issues and solve problems during the hearing itself, as the Panel noted.

- Provisions for hearings, when necessary, that follow the model that has been used under CEAA and clearly move away from those undertaken by the NEB and CNSC. The CEAA model is far less adversarial and much more accommodating of public participation. The Panel has suggested the NEB and CNSC approaches to hearings are particularly inappropriate. In particular, hearings should be designed to effectively engage those who are interested in participating. Formal cross examination should be limited to technical experts, and legal representation should be the exception where the need is clearly demonstrated, not the norm.
- The design of culturally appropriate participatory processes. This could be achieved in part through the work of the MIPC at the start of each IA in designing a public participation program and the development of a more standard protocol for such processes developed by indigenous representatives.
- Requirement to strike an MIPC once notice of an SIA, RIA or PIA has been given, if appropriate to the circumstances (i.e., some assessments may not require an MIPC). The success of the overall approach proposed by the panel rests in part on the MIPC, and the ability to start the MIPC's planning process much earlier than EA's have generally commenced under CEAA. We feel that the MIPC is key to helping to solve a host of issues, including coordination. A central role of this committee will be the development of a program for public participation, and while the program should remain iterative, it is critical that the public play a role in its early development. An appropriate level of involvement of Indigenous and non-government organizations as members of the MIPC will be an important, if complex, design issue. Provision for this should be made when referring to the MIPC in the Act. A particularly challenging design and implementation issue will be the selection of non-governmental members of the MIPC, and their status on the MIPC. The role of the proponent on the MIPC also needs to be clearly set out in legislation.
- Mandating that the IA Authority engage with stakeholders, rights holders, and public interest organizations to develop ongoing IA education and training programs to prepare and implement public participation plans. The regulations must make clear the responsibility of the IA Authority to participate, thereby not leaving it to proponents to carry out participation plans. A critical aspect of the work of the IA Authority will be helping individuals and groups navigate the assessment process by having a one-window approach to answering questions, helping people apply for funding, etc.

The Panel underscored a host of capacity issues that impact meaningful participation, such as inaccessible information, lack of access to expertise and short timeframes. Greatly improved access to information (see below) and expertise are critical to capacity enhancement. Other areas such as learning and enhancing literacy of assessment processes need to be recognized in regulation with the establishment of education and

training programs that go beyond a basic introduction to the IA process and that are made widely accessible.

Capacity development will require the enactment of regulation and guidance documents that list and describe collaborative techniques available for use in IA and which support their implementation. A short list of such techniques includes advisory committees, consensus conferences, participatory open houses, mediation, sharing circles and workshops.

Discretion, to the extent that it is required for the functioning of legislative provisions for meaningful participation, should be bounded by a set of legislative principles against which specific decisions can be measured to ensure the appropriate exercise of such discretion. Such principles should include transparency in the decisions taken, reasons for key decisions based on the purposes and criteria of IA set in legislation, inclusive approaches to decision making, culturally sensitive and appropriate approaches, and recognition of the capacity and resources of participants.

Recommendation 2

The Panel recommends that the participant funding program for IA be commensurate with the costs associated with meaningful participation in all phases of IA, including monitoring and follow-up.⁵

Implementation of this recommendation will necessitate at a minimum:

- A legislated requirement that the IA Authority establish mandatory and adequate participant assistance for major and complex proposals for regional, strategic and project assessment processes. Assistance should be discretionary for smaller proposals. In the case of project IA, the distinction could be implemented through a set of project assessment streams that are divided into large, medium and small-scale projects. The legislation should be clear that funding is available for stakeholders, rights-holders, and public interest intervenors to provide them with the opportunity to hire outside expertise and otherwise be prepared to engage effectively in deliberative forums.
- An open process for applying for funding, established through regulation.
- A participant assistance regulation that sets out the types of assessments to which the program applies, procedures for applying for assistance, decision criteria and similar operational essentials. The regulation should also establish the types of assistance typically needed, including hiring subject matter experts, hiring legal counsel, participating in the activities of the MIPC, organizing community meetings, participating in ADR, hearings, etc.

⁵ *Building Common Ground*, at 40.

Regulatory provisions are needed to establish who will pay for the participatory programs undertaken during the assessment and throughout the life of an undertaking, including monitoring and decommissioning. The establishment of a participant funding program does not mean everyone gets funding.

As the panel clearly states, meaningful involvement requires capacity development. Ways and means of enhancing capacity need to be established in regulation and policy.

Recommendation 3

The Panel recommends that IA legislation require that IA information be easily accessible, and permanently and publicly available.⁶

Implementation of this recommendation will necessitate at a minimum:

- Provision for mandatory timely information sharing via a complete and accessible public registry for all Canadian assessment information. The IA Authority should be mandated to develop an easily accessed, well-organized and searchable electronic library (or linked set of libraries) of IA case materials, including documentation of impact predictions and monitoring findings, records of decisions and justifications, and associated cases in law where that information and knowledge can be shared.

By making this available to all, such a resource could be used by parties to inform deliberative involvement and ultimately improve future assessments and decisions over time. The provision should authorize consultations with other Canadian assessment jurisdictions to consolidate information in a national registry.

Lastly, in considering the legislative implications of the Panel's recommendations, the input they received and the literature, these suggested reforms apply to all tiers of IA recommended by the Panel, including strategic, regional and project IA, and to all associated stages from discussion of the need for and alternatives to the undertaking, through to the monitoring, follow-up and decommissioning stages. Meaningful participation needs to be operational at all tiers of assessment and in the ongoing review of the IA law, regulations and policies. A key element of effective implementation and continuous improvement will be a regular review of the new legislative provisions and the establishment of effective mechanisms for encouraging public involvement in this review, such as the establishment of a multi-interest advisory committee providing advice to the IA Authority and Minister.

⁶ *Building Common Ground*, at 4 and 43.