ESSENTIALS OF
CANADIAN LAW

ENVIRONMENTAL LAW

THIRD EDITION

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questions about inconsistencies and overlaps between Canadian jurisdictions, for, as discussed later in this chapter, the ambiguities of federalism have affected several major development proposals.

The concerns of industry and investors should be placed in context. Saskatchewan's Environmental Assessment Review Commission (SEARC) re-examined the files on 636 proposals that had been considered by the Department of Environment and Public Safety during an eleven-year period. A full environmental impact assessment (EIA) was requested for 80 of these (13 percent), although only 35 EIAs were completed. Only one board of inquiry was established (Rafferty/Alameda) and only two proposals were denied approval to proceed. SEARC concluded that "the existing EA process has not been a major roadblock for those proposals it has affected."[11] Apart from occasional exceptions, that evaluation is applicable across the country.

In terms of costs, some early estimates suggested that hearing costs for projects considered under the federal environmental assessment and review process ranged between 0.026 and 0.5 percent of total project costs.[12] A subsequent survey carried out by the Economic Council of Canada suggested that the average cost of environmental assessments on major projects approximates 1 percent of the overall capital cost, with major projects understood to be those involving more than $3 million.[13]

On the other hand, certain benefits have been claimed for environmental assessment. For example, it has been asserted that by providing timely opportunities for reflection and public input, environmental assessments often serve to eliminate potential problems. Along with the avoidance or reduction of environmental damage, benefits include opportunities for public input into design and operational features, as well as cost savings resulting from the downscaling or cancellation of ill-conceived and unnecessary projects.[14] Negotiations over conditions of approval have often been central elements of environmental assessment. In the sense that these produce consensus or agreement on the means of resolving difficulties, they, too, have a positive impact.[15]

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11 *Report of the Saskatchewan Environmental Review Commission: Environmental Challenges* (Regina: The Commission, 1991) at 83.

12 Gibson & Savan, above note 7 at 411.

13 G.E. Neufeld, *A Preliminary Survey of the Impact of Environmental Assessments on Competitiveness* (Ottawa: Economic Council of Canada, 1992). Roughly comparable findings have been reported in other jurisdictions. See John Glasson, Riki Therivel & Andrew Chadwick, *Introduction to Environmental Impact Assessment*, 3d ed., (London: Routledge, 2005) at 233–35.

14 Gibson & Savan, above note 7 at 409.

15 M.I. Jeffery, "Accommodating Negotiations in EIA and Project Approval Processes"

B. THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

Procedures first adopted as Cabinet policy in 1973 and then reissued in 1984 as the *Environmental Assessment and Review Process Guidelines Order* (*EARPGO*) set out the original basis for federal environmental assessment.[16] Though treated by government officials as discretionary, the Federal Court of Canada eventually determined in litigation concerning Saskatchewan's Rafferty-Alameda dam proposals that the *EARPGO* was legally binding and that compliance with its procedures was required.[17] By this time, preliminary legislative efforts were well under way to provide formal statutory authority for the federal environmental assessment process and to address uncertainties that had arisen in connection with the *Environmental Assessment and Review Process* (*EARP*). Enacted in 1992 and proclaimed in 1995 on the completion of supporting regulations, the *Canadian Environmental Assessment Act* (*CEAA*) reformulated the federal environmental assessment regime.[18]

By way of introduction, the scope of application of federal environmental assessments under *CEAA* proved to be remarkably problematic. Some insights may be gained from the Supreme Court of Canada's discussion of a similar issue in the context of the *Oldman River* decision under the *EARPGO*. After emphasizing the importance of first linking the exercise of legislative power in relation to the environment to the appropriate head of constitutional power, La Forest J. remarked that "the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another."[19] Accordingly, he observed that the exercise of Parliament's jurisdiction over fisheries, a resource, and over navigation, an activity, will each involve "a somewhat different environmental role."[20] He also offered a hypothetical example suggesting that, once the constitutional basis for federal action had been established, the scope of an associated environmental assessment might indeed be quite extensive:

Approval Likely to be Imposed by the Environmental Assessment Board in Granting Project Approval" (1988) 1 Can. J.Admin. L. & Prac. 21 ["Consideration"].

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

17 *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309 (T.D.), aff'd (1989), 4 C.E.L.R. (N.S.) 1 (Fed. C.A.).

18 Controversies surrounding the transition between *EARPGO* and *CEAA* persisted for some time. See *Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board)*, 2004 FCA 218.

19 *Oldman River*, above note 1 at 67.