

ENVIRONMENTAL LAW CASES AND MATERIALS

First Edition

by

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plies its own judgment to provide advice to the project decision makers. Furthermore, the role of intervenors is very different.

On the one hand, an intervenor is, subject to resources and capacity, an equal participant in the mediation process, whereas its role in a panel review is to provide information and take positions without any control over how that information is used. On the other hand, panel reviews can accommodate very different levels of involvement from intervenors, whereas mediation can only accommodate full participation. This means that, practically, opportunities for public engagement are limited to those who can commit to the level of engagement necessary to make a mediation process work.

Finally, there is no guarantee that there will be any result from a mediation process. In a panel review, the panel will make its recommendations regardless of whether participants can agree on whether and under what conditions a project should proceed.

Notes and Questions

1. Do you think the process for determining whether CEAA applies is effective? Assuming you have to operate within the existing constitutional structure, is there a better way to decide which projects trigger the CEAA process? What about a "list" approach as is used in many provinces?

2. A critical term in the definition of project is the term "physical work", yet there is no definition in the Act. Consider whether the following are physical works and the implications for the application of the two branches of the definition: an air plane, a vessel, a mobile incinerator, a beaver dam. Based on this, can you come up with a working definition of "physical works"?

3. Carefully consider the strengths and weaknesses of the four process options under CEAA. Is there one that you think should be applied to all projects? Why? If not, which process is best suited for what type of project? How would you legislate the selection of the appropriate process for the appropriate project?

4. Assuming that screenings are intended for small and routine projects, comprehensive studies for medium size projects and panel reviews for large and controversial projects, how can each process be improved to achieve greater efficiency, greater effectiveness, or both?

5. When do you think the mediation process should be used? How can its use be encouraged?

6. The design of the four process options is based in part on the assumption that federal decision makers who have decision making responsibilities for a project, such as those set out in Section 5, are not always in the best position to make process and substantive decisions on the EA process. Do you agree? Would you distinguish between the four categories of federal decisions identified in section 5? Explain.

Part II — The Evolution of Scoping under CEAA

Scoping is a critical step in any EA process. It is also likely the most contentious aspect of the federal EA regime due to the perception that, in some cases, the scoping power has been manipulated by responsible authorities (RAs) to shield projects from meaningful public review. Likewise, some have argued that courts have compounded this problem by being overly deferential when called upon to review RA scoping decisions.

It is at the scoping stage that decisions are made about what is assessed during the course of an assessment under CEAA, and in how much detail. These decisions are central to the capacity of the process to deliver on the principles and purposes set out in the Act, most notably to deliver an effective and efficient process that informs decision making consistent with sustainable development.