Environmental Impact Assessment

Practice and Participation

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Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions

A. John Sinclair and Alan Diduck

Introduction

As observed by Devlin et al. (2005), Petts (1999, 2003), Wood (2003), and others, public participation has long been recognized as a cornerstone of environmental assessment (EA). In fact, for some, the basic legitimacy of an EA process is questionable if the process does not provide for meaningful participation (Gibson 1993, Roberts 1998). Consistent with this, most Canadian EA legislation establishes participation as an essential element of the process. For example, the preamble of the Canadian Environmental Assessment Act 1995 (CEAA) states: "The Government of Canada is committed to facilitating public participation in the environmental assessment of projects ... and providing access to the information on which those environmental assessments are based."

In addition, all EA legislation, whether at the provincial or federal level, includes at least some practical measures for participation. For these reasons, it is essential to have an understanding of key theoretical and practical aspects of participation. This chapter provides an introduction to these subjects. The first section summarizes the benefits of participation, the second provides an overview of basic Canadian legislative provisions, and the third reviews enduring concerns. The fourth part examines promising future directions, with the final section discussing the implications for sustainability objectives. Throughout the chapter, we refer to illustrative Canadian EA cases.

We use the word participation to mean the active involvement of the public in the EA process through various means, ranging from open house to panel reviews, as outlined later in the chapter. Reference is also made to meaningful public participation. This term is used in referring to participatory processes that incorporate all of
the essential components of participation, from informational sharing to education, including the active and critical exchange of ideas among proponents, regulators, and participants. Some scholars, such as Roberts (1988), refer to this as public consultation. We prefer to use ‘meaningful public participation’ because consultation is often used to describe a single event, such as an open house, that is the sum total of the participatory efforts in a particular situation. In our view, an open house alone would not constitute meaningful public participation.

The Benefits of Participation

The benefits of public participation in EIA have been described in both theoretical and practical terms. A key theoretical argument is that participation actualizes fundamental principles of democracy and strengthens the democratic fabric of society (Paxton 1988; Sinclair and Diduck 1995; Shepard and Bowler 1997; For-
ey 2006). This argument situates EIA as a key channel through which the public can choose to participate directly in the decisions that affect them, thereby con-
tributing to a more participatory democracy. A related point is that EIA provides a vehicle for individual and community empowerment (Fitzpatrick and Sinclair 2003). This recognizes that meaningful participation in decision-making enables individuals and organizations to adapt to environmental change and also to generate change through the expression of human agency. It has also been suggested that participation is conducive to broad-based individual and social learning that could enable the transition to sustainability (Webler et al. 1998; Palerm 2000; Sin-
clear and Diduck 2001; Diduck and Mitchell 2003; Fitzpatrick and Sinclair 2003; Sinclair et al. 2008; Sims and Studlar 2008). Such a view clarifies the link between learning in multiple levels of social organization and the achievement of sustainability goals.

In practical terms, the benefits of public participation are numerous and touch on ecology, law, politics, conflict resolution, planning, and decision making (e.g., Sussex and Gristhank 1988; McHillen and Nieson 1991; Smith 1998; Mer-
edith 1995; Webler et al. 1995; Shepard and Bowler 1997; Jett 1999; Usher 2000), reflecting this interdisciplinarity, the literature suggests that public participation in EIA

- provides access to local and traditional knowledge from diverse sources;
- enhances the legitimacy of proposed projects;
- helps define problems and identify solutions;
- permits a comprehensive consideration of factors upon which decisions can be based;
- ensures that projects meet the needs of the public in terms of both purpose and design;
- brings alternative ethical perspectives into the decision-making process;
- broadens the range of potential solutions considered;
- furnishes access to new financial, human, and in-kind resources;
- prevents ‘regulatory capture’ of EIA agencies by project proponents.
encourage more balanced decision making;
- decreases accountability for decisions made;
- facilitates challenge to illegal or invalid decisions before they are implemented;
- illuminates goals and objectives, which is necessary for working through value and normative conflicts;
- furnishes venues for clarifying different understandings of a resource problem or situation, which is key to resolving cognitive conflicts;
- helps avoid costly and time-consuming litigations; and
- reduces the level of controversies associated with a problem or issue.

It is obvious, even from the foregoing brief summary, that public participation in EA can provide diverse and important benefits for planning and decision making. However, whether such benefits are realized in any particular case depends to a large extent on the legislation and policy applicable in the case. Therefore, it is important to have a basic understanding of Canadian EA legislation (Table 4.1) pertaining to public participation. The ensuing section provides an overview, focusing on the core provisions of current EA public participation regimes, namely provisions dealing with adequate notice, access to information, participatory assistance, public comment, and public hearings. The discussion centres on federal legislation (the CEA), but it includes references to various provincial and territorial processes.

Key Public Participation Provisions in Canadian Environmental Assessment

Adequate Notice

Once a development proposal is submitted to government authorities and the EA process is triggered, adequate notice is fundamental to fair and meaningful public participation. Notice should be provided in such a way that it comes to the attention of interested persons well before decisions are made. Notice normally involves some form of advertisement through local/printed media, in some cases broadcast media. It provides the public with notification of the proposal and informs them where they can get further information and to whom they can submit their comments.

All Canadian jurisdictions have notice provisions in their EA statutes, regulations, or supporting policies. However, there is little consistency in how notice is provided for important milestones in the EA process, such as the filing of the proposal and the completion of the environmental impact assessment (EIA) (see chapter 7 for a summary of other key steps in the EA process).

Under the CEA, notice is mandatory for all types of assessment, screenings, comprehensive studies, mediations, and hearings. Notice of an assessment must be presented on the Canadian Environmental Assessment Agency (CEAA) Agency website within 14 days of the start of the assessment. The CEAA Agency is responsible for
## Table 4.1 A list of primary Canadian EA legislation, plus government websites providing access to the legislation

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Primary Legislation and Internet Web Address (accessed March 2009)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland</td>
<td>Environmental Protection Act, N.S.N. 2002, c.6-142. <a href="http://www.gov.nl.ca/legislation/laws/topics/c/e-6-142/index.html">http://www.gov.nl.ca/legislation/laws/topics/c/e-6-142/index.html</a></td>
</tr>
</tbody>
</table>
ensuring proper notice is provided (CEAA, section 53.1). In Alberta, the proponent is required to publish notice of an application in at least one paper with daily or weekly circulation in the locality of the proposed undertaking, and to announce that people who are directly affected can submit their concerns (Alberta Environmental Act, 2004). The provincial EA director can waive this requirement when the activity proposed is considered routine, when notice has already been given, or when there is an emergency. The notice provisions in Ontario's EA Act are strong; they include, for example, requirements on the content of the notice and the provision for notice to be given in the first stage of the process, that is, during development of the terms of reference for the project (Environmental Assessment Act, R.S.O. 1990, c. E-18, section 6). Given the lack of a consistent approach to requirements for notice, participants and proponents must give careful consideration to the formal notice requirements in each jurisdiction.

Access to Information

Ready access to information provided by proponents and to any comments offered by participants and regulators is essential to meaningful participation. There must be opportunities for the timely exchange of information among all parties. A registry or repository system is the basic means of public access to information used in most Canadian jurisdictions. Such registries are usually held in libraries and other public buildings to facilitate orderly access to the information available. Most jurisdictions provide Internet access (or partial access) to their public registries (Table 4.2).

Provisions for access to information in the CEAA are generally quite strong. Specifically, sections 55–55.6 of the Act set out in detail what documents must be made available and establish the Canadian Environmental Assessment Registry and CEAA Agency website. At a starting point, any document that would be available through access to information legislation has to be made available proactively. Furthermore, all relevant information must be made available in a manner that ensures convenient public access. Provincially, there are diverse approaches to access to information. The Alberta legislation (section 56) has a general requirement for a documents registry, but provides little guidance on what needs to be included or how it is to be made accessible (see also the Manitoba Act, section 17). Generally, provinces either leave these issues to regulation (through specific 'volumes' promulgated under the authority of legislation) or have broad statutory provisions respecting access to information.

Participant Assistance

Numerous authors have established the importance of participant (or intervenor) funding (e.g., Gibson 1993; Wood 2003), and this view has long been echoed by Canadian environmental non-governmental organizations (ENGOs). For instance, the Canadian Environmental Network (1988) argued that 'effective participation by the public requires funding. The disproportion of resources between pro-
### Table 4.2 Public registry websites for those jurisdictions providing full or partial Internet access

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Internet Web Address (accessed March 2009)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td><a href="http://environment.alberta.ca/1283.html">http://environment.alberta.ca/1283.html</a></td>
</tr>
<tr>
<td>British Columbia</td>
<td><a href="http://al100.gov.bc.ca/appdata/epic/html/display/epic_home.html">http://al100.gov.bc.ca/appdata/epic/html/display/epic_home.html</a></td>
</tr>
<tr>
<td>Canada</td>
<td><a href="http://www.acer-ceac.gc.ca/050/index_e.cfm">http://www.acer-ceac.gc.ca/050/index_e.cfm</a></td>
</tr>
<tr>
<td>Manitoba</td>
<td><a href="http://www.gov.mb.ca/corporativo/index-regions/index.html">http://www.gov.mb.ca/corporativo/index-regions/index.html</a></td>
</tr>
<tr>
<td>New Brunswick</td>
<td><a href="http://www.gnb.ca/comm-voluntary/index_e.asp">http://www.gnb.ca/comm-voluntary/index_e.asp</a></td>
</tr>
<tr>
<td>Newfoundland</td>
<td><a href="http://www.cw.gov.nl.ca/cw/En/cwFA%202003/pages/index_e.asp">http://www.cw.gov.nl.ca/cw/En/cwFA%202003/pages/index_e.asp</a></td>
</tr>
<tr>
<td>and Labrador</td>
<td></td>
</tr>
<tr>
<td>NorthWest Territories</td>
<td><a href="http://www.nwmeibut.ca/register/index.php">http://www.nwmeibut.ca/register/index.php</a></td>
</tr>
<tr>
<td>Ontario</td>
<td><a href="http://www.ebr.gov.on.ca/ERS-WEB-External/">http://www.ebr.gov.on.ca/ERS-WEB-External/</a></td>
</tr>
<tr>
<td>Québec</td>
<td><a href="http://www.bupe.gouv.qc.ca/decisions/mandats/">http://www.bupe.gouv.qc.ca/decisions/mandats/</a></td>
</tr>
<tr>
<td>Yukon</td>
<td><a href="http://www.yeab.ca/assessments/public_registry.html">http://www.yeab.ca/assessments/public_registry.html</a></td>
</tr>
</tbody>
</table>

...powers and the public necessitates the establishment of an independent funding body to provide adequate amounts of funding to allow full and meaningful participation, at all steps, to committed members of the public. Participation assistance, when it is provided, is usually reserved for large scale, EIA. In such cases, funding can create a more substantive dialogue by allowing participants to gather independent technical expertise related to specific issues in the assessment (see, for example, Lyon and Mathurin 1991; ETSN 2000; Harvey et al., 2007). Public participants can use financial resources to prepare and participate in scoping meetings, review draft assessment guidelines, review the proponent's data, and prepare and participate in public hearings. New Canadian EIA processes provide mechanisms for participants assistance. At one time, the province of Ontario was a leader in this field and enacted a participant assistance statute (the Intervenor Funding Project Act). However, the legislation had a time limit and lapsed in 1996. In practice, only the governments of Canada and Manitoba provide assistance at present. Under the CEAA, assistance is available for both public hearings (discussed further below) and comprehensive studies. See the CEAA Agency website (http://www.
$159,000 for the Consumers’ Association of Canada/Manitoba Society of Seniors
$160,000 for Pimikamak Cree Nation
$145,000 for the Reserve Earth’s Ecosystems/Resource Conservation Manitoba
$115,000 for the Canadian Nature Federation
$80,000 for the Manitoba Metis Federation
$60,000 for Opaskawayak Cree Nation
$60,000 for the Community Association of South Indian Lake
$30,450 for Mawisowin Cree Nation
$20,450 for Puckettanton Fisherman’s Association
$20,000 for Tatapine #18
$5,488 for York Factory First Nation

Public Comment

Meaningful participation processes include reasonable opportunities for the public to comment on the project proposal, respond to the government’s position on the proposal, and react to inputs from other participants. Most often, proponents provide opportunities for public comment during open houses at which the proponents typically supply information on their proposals and invite input. Government regulators normally allow for public comment on its documents by inviting people to provide written comments. These and other opportunities for public comment typically occur irrespective of whether there is a public hearing (see below) for the proposal under consideration.

Provisions in the CEAA for public comment on screenings are weak, generally speaking. The decision on whether (and if so how) to permit comment is at the discretion of the responsible authority (RA), which may be the proponent, the regulator, or both (for a discussion of responsible authorities, see chapter 14). For comprehensive studies (defined in chapter 14), public comment is mandatory but only regarding project scope and on the final comprehensive study report—not on the ongoing assessment or development of the report. It is important to note that
only a handful of assessments out of thousands conducted under the CEA. have gone through a panel review, and less than 50 have undergone a comprehensive study. For more than 59 per cent of the assessments, therefore, the CEA includes no requirement for public comment.

Some provinces, such as Ontario (e.g., sections 6(36), 6.4, and 7.2 of the Act), Newfoundland (e.g., sections 3(2), 6(1), and 7(3) of the Environmental Assessment Regulations, 2003, O.C. 2003-220), and Manitoba (e.g., sections 7(2) and 10(4) of the Act), make generic provision for public comment without providing details on the timing or quality of the opportunities. Consequently, although notice must be given, there is no assurance of the types of opportunities that will be available for members of the public to act on the notice. Most provinces have little in the way of specific requirements for when and how public comments are to be sought and considered, outside the public hearing process.

Public Hearings

To support decision making and add transparency to the EA process, environment ministers in all Canadian jurisdictions have the authority to call public hearings. Public hearings are sometimes equated with impartial decision making because hearing panels typically operate at arm’s length from governments and proponents. However, in no Canadian jurisdictions do hearing panels have ultimate decision-making authority. The role of panels is restricted largely to providing advice to government decision makers. In spite of this, interest groups and other members of the public often favour hearings for their procedural certainty and transparency. In addition, public participants who take part formally in a hearing (often referred to as intervenors) receive access to key documents of all other parties to the hearing. They also receive, in a timely fashion, the formal written reasons for the ultimate decision in the case. With all that said, it is noteworthy that, contrary to popular opinion, very few assessments go to public hearings—less than 2 per cent of all EAs nationally. Further, Harrell (1999) noted that “there is much skepticism about CEA public review panels such as the St. John diamond mine [in the Northwest Territories] review among others.” In the overall context, therefore, panel reviews are probably less important than is suggested by the media attention they typically attract.

The CEA also include provisions for the conduct of public hearings. Section 34 requires review panels to make information available and hold hearings in a manner that offers the public an opportunity to participate. Under section 55(1), hearings are generally open to the public, although the Act does provide for exceptions. Otherwise, the CEA leaves the conduct of public hearings to the panel.

Among the provinces, the Ontario (Part III), Quebec (Division II.1), and Newfoundland and Labrador (sections 62-66) also provide considerable detail regarding public hearings. In other jurisdictions, hearing protocols are adopted from general public inquiry legislation (e.g., Saskatchewan—section 14), established in detail in regulations (e.g., Nova Scotia Environmental Assessment Board Regulations, O.L.C. 95-221, N.S. Reg. 27/85) or developed by hearing panels or govern-
ment to officials (e.g., the Manitoba Clean Environment Commission’s hearing guidelines, http://www.cecmmanitoba.ca/index.cfm?PageID=54 [accessed March 2009]). It should also be noted that other provincial decision-making processes, which often occur before, or concurrently with, a project’s can include hearings as well. Energy utility regulators, such as the Alberta Utilities Commission and the Manitoba Public Utilities Board, are good examples of this.

The CEAA and several provincial acts also provide for various forms of alternative dispute resolution, such as mediation and arbitration. The CEAA permits the use of mediation as a partial or complete alternative to a panel review. Nova Scotia also provides under section 4 of its Act for the use of alternative dispute resolution in place of, or in addition to, decision making. In both jurisdictions, however, uncertainty over the proper application of the legislation, especially with respect to the identification of interested parties and what happens when the alternative dispute resolution fails, has discouraged the use of these mechanisms. In the case of the federal act, these provisions have not been used since since the Act came into force. Ontario (section 8), Manitoba (section 3), and other provinces also have general references to mediation in their legislation.

Enduring Concerns Regarding Public Participation in Environmental Assessment

Despite the potential benefits of public participation in EA and the diversity of legislative approaches to implementation, meaningful participation has proven elusive (Blaug 1993; Meredith 1997; Fruytet al. 1997; Pettis 1996; Diduck and Sinclair 2002; Sinclair and Fitzpatrick 2003). Long-standing concerns range from substantive matters, such as lack of shared decision making, to procedural issues, such as inadequate notice (Sinclair and Doole 2003).

Lack of Shared Decision Making

For citizen activist and some ENGOs, lack of public participation in decision making is a serious shortcoming of Canadian EA processes. A helpful box for understanding the problem is Arneson’s (1989) classic ladder of citizen participation (also see Dorey et al. 1994; Connor 2001). Arneson identified eight levels of public participation and associated degrees of power sharing. The bottom rungs of the ladder, manipulation and therapy (characterized as non-participation), describe participation that amounts to no more than a public relations exercise designed to gain support for a predetermined decision. The middle rungs (forms of tokenism) include informing, which involves flows of information from managers to citizens, but does not include dialogue; consultation, in which citizens are given a voice but are not necessarily heard and placation, in which managers seek citizen advice but retain decision-making authority. The top rungs describe situations where forms of citizen power occur, such as partnerships (where trade-offs are negotiated), delegated power, and citizen control, the last of which involves the highest degree of ‘decision-making close’ (Arneson 1989, 217). Activists and ENGOs are often highly
critical of processes that only consist of lower levels of involvement, and argue that public participation should entail redistribution of power over decision making. In other words, for them, public participation should involve shared decision making.

A related concern is a lack of clarity over the purposes of any given public participation exercise. As suggested above, the purposes of participation can range from relatively modest goals, such as information sharing, to more ambitious objectives, such as partnerships and power sharing. If purposes are unclear, members of the public could easily expect to participate in decision making when the very purpose of the process in which they are involved is considerably less ambitious. In the end, lack of clarity and concurrent unfulfilled expectations frequently leave participants critical and dissatisfied with their participation experiences (Shepard and Bowler 1995; Hazell 1999; Peters 1999; Stewart and Sinclair 2003). This occurred in the Halifax Harbour clean-up, where key choices concerning siting and technology were made in a less than transparent way, leaving participants with little role in the decision making (Doolittle and Sinclair 2006). Lack of clarity can sometimes be traded to mollify public participation jargon. Diverse terms are used, often interchangeably, to describe both the ends (i.e., the goals) and the means (i.e., the strategies and specific techniques) of participation programs. Such terms include involvement, consultation, engagement, information sharing, education, communication, and collaboration. Given this problem, regardless of the terms used, EA practitioners need to be clear about whether the purpose of participation is information exchange, shared decision making, or some other goal.

**Lack of Participation at Normative and Strategic Levels of Planning**

Another concern for activists, NGOs, and academics is lack of public participation at early stages of project planning (Diduck and Sinclair 2002; Diduck and Mitchell 2003). Participation can occur at the normative level of planning (in which decisions are made about what should be done), the strategic level (in which decisions are made to determine what can be done), or the operational level (in which decisions are made to determine what will be done) (Smith 1982). The earlier that participation occurs in the EA process, the more influence the public is likely to have on important issues such as project need, purposes, and alternatives. A good early example of normative involvement is the Mackayne Valley Pipeline Inquiry of the 1970s; it was groundbreaking in the extent to which it engaged potentially affected communities early in the planning process (Bettger 1977). At that stage showed, through early participation, basic choices can be considered (including whether the project should proceed at all) before political momentum builds for a project and substantial amounts of time and money are invested.

In Canada, participation is not required legally until well into the planning process and sometimes not at the operational stages of planning. Participation at earlier junctures is left to the discretion of the proponents, and early involvement is sporadic at best. This has proven to be a barrier to widespread participation,
as explained by the Maple Leaf hog-processing plant in Manitoba (in which the proposal was ultimately licensed to slaughter up to 50,000 hogs per week under a single daily shift scenario). In that case, many members of the public as well as FNQ officials wanted to discuss large normative questions (e.g., Should we have an industrial hog processing plant in our community?) rather than detailed operational issues (e.g., How should the former be for the anaerobic lagoon in the waste treatment facility?) (Dickie and Sinclair 2002). For these people, the fact that they could not discuss the normative questions was an indication that the ultimate decision in the case was a foregone conclusion and that there was therefore little point to participating actively in the EIS.

The recent Red Chris case—MiningWatch Canada v. Minister of Fisheries and Oceans et al. (F.C.—T-954-00); (F.C.A.: A-478-07, A-479-07)—underscored the importance of decisions made by the court about how to engage the public in early scoping decisions. In this case the proponents needed approval from Fisheries and Oceans and Natural Resources Canada for a proposed copper and gold mining operation in British Columbia. Since the project processing more than 1,000 tonnes of ore per day was on the federal comprehensive study list, the project was destined for this type of assessment until the B.C. court re-edited and changed it from being a comprehensive study to a screening. Section 21 of the CEA indicates that

> [When a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of environmental assessment, the actions proposed to be considered in an assessment, the proposed scope of those actions and the ability of the comprehensive study to address issues relating to the project.]

In contrast to a screening, comprehensive studies require that the public be consulted on the scope of the project, have the opportunity to comment on the comprehensive study report, and be given access to a stringing program to help facilitate their participation. MiningWatch argued that the public had not been sufficiently engaged in the process that led to the decision to narrow the scope of the project, and had been excluded from the actual screening assessments undertaken. Justice Lee-Marmara agreed. This decision was considered a major victory as it upheld a law passed by Parliament which required a greater role for public consultation in environmental assessment (MiningWatch 2008). The Crown appealed the Federal Court’s decision, and on 13 June 2008 the Federal Court of Appeal ruled in favour of the Crown, citing the Crown’s discretion regarding decisions related to whether an assessment is to be a comprehensive study or a screening. In early 2009, the Supreme Court of Canada agreed to hear MiningWatch’s appeal of the Federal Court of Appeal’s decision.

In other cases, facilitating public participation early in the planning process has been a challenge, and asking normative questions before specific projects and sites have been identified has created a barrier to broad participation. When the Regional Municipality of Ottawa-Carleton started planning a waste management system, it organized public workshops to help design the project. Despite adequate pro-
mation and apparent widespread public interest, only a handful of people partici-
pated. However since the municipality identified the preferred components of the
system (e.g., a landfill and specific potential sites), the rooms that had been booked
for public meetings were not big enough to hold the participants who wanted to
hear what was planned and have their voices heard. A number of these participants
even indicated that there should have been opportunities for them to be involved
earlier in the process. Hermitage is an important lesson for public participation prac-
titioners—reasonable provisions must be made to allow those who join the process
to be brought up to speed and have their concerns heard.

To complicate matters further, even if early participation is permitted, restrict-
tive policies and practices can sometimes undermine the very purposes of such
involvement. For example, restrictions that limit the number and type of alterna-
tives that can be considered for any given project (an important strategic phase
of project planning) underscore the important benefit of participation, namely, bringing
diverse and innovative ideas. Further, such restrictions confound the ability of
participants to influence the selection of alternatives. Some of these elements can
be seen in the Chestot coal mine EA from Alberta (which involved a proposed
open-pit mine less than 2 km from Jasper National Park, a UNESCO World Heri-
tage Site). In that case, there was limited public participation in the consideration
of alternatives for the project, as well as a general lack of attention to important
reasonable alternatives. Members of the public and ENGOs argued that the under-
ground mining alternative, as opposed to open-pit mining, had not been consid-
ered fully by the proponents and regulators. They challenged the validity of the
assumptions on this and other grounds in court and won, with the judge requiring
the proponents and regulator to do the assessment again but this time with all rea-
sonable alternatives included (see Alberta Wilderness Association v. Cardinal River
Coal Ltd. [1999] 3 F.C. 425). (Recent decisions of the Federal Court of Canada can
be found on the Internet at http://decisions.lex.gc.ca/EN/index.html [accessed
March 2009].) In most EAs involving projects of large magnitude, important is-
ssues to consider are the range of alternatives considered by proponents to meet
the need or problem being addressed by a project and the public’s participation in
the choice of an alternative.

The questions surrounding why innovative and strategic planning sometimes
engenders and sometimes inhibits broad public participation—and why there are
so often difficulties associated with implementing early participation—are chal-
enging and require additional research. Further, to some degree, these questions
are related to ongoing policy initiatives that seek to involve the public in wide-area
planning, which is typically broader in scope, and more overtly value laden
than most EAs. Two examples of such initiatives are discussed later in the chapter,
in the section on future directions.

Information and Communication Deficiencies

Yet another worrying concern pertaining to public participation in EAs is infor-
mation and communication deficiencies, including inadequate notice, inexcessi-
bility of project documents, and lack of dialogical or interactive participation opportunities.

With respect to notice, as discussed earlier, there’s little consistency in legal provisions in Canadian EI processes. For instance, some processes, such as case screenings, have traditionally had discretionary notice provisions. With respect to screenings, which are about 19 percent of all federal assessments, this has meant that assessment is often concluded before the public is given an opportunity to review and comment on the information available. In the case of Bounty Bay Seawoods, which dealt with the development of a major aquaculture project in St. Ann’s Harbours, Nova Scotia, the Sierra Club of Canada challenged the approvals that were granted by the federal Department of Fisheries and Oceans (Sierra Club of Canada v. Canada [Attorney General] [2005], Federal Court of Canada, Trial Division, T-765-02). The Sierra Club argued that its right to participate fully in the EIA (a screening done under the CEA) was denied because access to key EI documents was overly restrictive. The environmental impact statement, for example, was available only for viewing but not for copying the project’s proprietary environmental information, according to the prosecution); and it was only available publically from five locations all of which were in or near Baddeck, Nova Scotia (May 2003). In addition, the final screening report was not placed in the public domain until four days before the project approval was granted. In the end, the court quashed the approval permit and ordered a new IA to be done.

Inadequate notice has also been a legal issue at the provincial level, in Gaddy Lake Guardians Association v. Florence-North Access Road Inc. (1998), 126 Man. R. (2d) 71 (Man. C.A.), for example, the court considered whether the provincial IA office was required to publish project notices in newspapers with circulation outside the directly affected local area. While the applicants, who argued for wider public notice, last the case and the judge agreed with a narrow definition of public, the case brought into focus the issue of notice provincially and its since precipitated a policy change on the part of the provincial government (Sinclair 2002).

Despite recent improvements in public registry systems and the growing influence of access to information legislation, problems still exist with the inaccessibility (both physical and cognitive) of project documents. With respect to physical inaccessibility, some public registries in Canada prevent ongoing problems, including limited hours of operation, lack of harmonization among registry locations, poor condition of documents, incomplete indices, and expensive copying charges (Quarrieby 1999; Kida 1998; Sinclair and Bristow 2001). The Tyonek IA, which involved a logging road and two bridges designed to provide access to forest on the eastern slope of the Rocky Mountains in Alberta, shows the controversy that can arise because of physical inaccessibility (also see the Bounty Bay Seawoods case discussed earlier). In this case, the public registry was in Smoly, Ontario, while the affected publics were over 2000 km away in southwestern Alberta. This was challenged in court, and the judge ruled that the registry must be made more accessible (Friends of the Wild Country Association v. Ministry of Fisheries and Oceans et al. [1999], Federal Court of Canada, Trial Division, T-189-96).
With respect to cognitive inaccessibility, the overly technical language and general lack of readability of the EA documents are concerns for public participation practitioners because these problems tend to impede broad and active participation (Gogolak and Jacobson 1991; Sullivan et al. 1996; Petts 2003; Diduck and Sinclair 2002). Related to the cognitive inaccessibility of EA documents is the complexity and difficulty of the EA itself. In most Canadian jurisdictions, EA legislation is highly technical and jargon filled, which has led to the creation of guidance (or public information) documents. Both the public and proponents rely on guidance material to aid in their understanding of the EA process and ensure their effective participation. However, guidance material is often lacking, as is education about the EA process, including case-specific training opportunities (Sinclair and Diduck 1995; Creal and Grady 1996; Clark 1999 Petts 2003). Recognizing the need for improved guidance, the CEA Agency released new guidance, including the publications ‘Public Participation Guide’ and ‘How to Determine If the Act Applies’ All of the agency’s guidance material is available at http://www.acr-ces.gc.ca/po1/newguidance_e.htm (accessed March 2009)

Although proponents frequently use open houses and similar consultation methods and government officials occasionally convene hearings, dialogic participation techniques are rarely used in Canadian EA. These types of methods (e.g., advisory committees, task forces, community boards, mediation, and non-adversarial negotiation) emphasize ongoing dialogue and communication among project proponents, EA officials, and civic organizations, and are important mutual learning, relationship building, and conflict resolution functions. Table 4.3 summarizes the full range of public participation techniques available for use in EA, including various dialogic practices. Canadian EA has tended to rely on the public information and public input methods, while making little use of the more dialogic (i.e., group problem solving) techniques.

Insufficient Resources for Participants

As noted earlier, participant forcing mechanisms in Canadian EA legislation are varied in their clarity and design, and sporadic in their application. Consequently, ENGOs and other civic organizations frequently lack sufficient resources to make effective interventions. Important voices and issues, reflecting critical yet vital points of view, are therefore often silenced in formal EA processes. This is an enduring concern for EA practitioners and policy makers. The problem is compounded when proponents have a high degree of control over public participation programs, which has been the case in many Canadian jurisdictions (outside of hearing situations) (Sinclair and Diduck 2003). That is, in many EA processes, the proponent has often had considerable control over how the public is consulted and how the information obtained is assessed and utilized. Those promoting the project are thus left to collect, implement, and report to EA decision makers the issues and concerns raised by the public. This can result in an unbalanced representation of the results of the public consultations (in favour of the proposed project) and contributes to negative perceptions of public participation processes.
### Table 4.7 Public participation techniques available for use in EA

<table>
<thead>
<tr>
<th>Passive public information techniques</th>
<th>Feature stories</th>
<th>Information repositories</th>
</tr>
</thead>
<tbody>
<tr>
<td>News conferences</td>
<td>Newspaper articles</td>
<td>Press releases</td>
</tr>
<tr>
<td>Briefings</td>
<td>Technical reports</td>
<td>Coordination</td>
</tr>
<tr>
<td>Websites</td>
<td></td>
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</tbody>
</table>

**Active public information techniques**

<table>
<thead>
<tr>
<th>Briefings</th>
<th>Central contact persons</th>
<th>Community fairs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expert panels</td>
<td>Field offices</td>
<td>Field trips</td>
</tr>
<tr>
<td>Information hotline</td>
<td>Open houses</td>
<td>Technical assistance</td>
</tr>
<tr>
<td>Simulation games</td>
<td></td>
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</tr>
</tbody>
</table>

**Small-group public input techniques**

<table>
<thead>
<tr>
<th>Informal meetings</th>
<th>In-person surveys</th>
<th>Interviews</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small-format meetings</td>
<td></td>
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</table>

**Large-group public input techniques**

<table>
<thead>
<tr>
<th>Public hearings</th>
<th>focus groups</th>
<th>mail, telephone, and internet surveys</th>
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</thead>
</table>

**Small-group problem-solving techniques**

<table>
<thead>
<tr>
<th>Advisory committees</th>
<th>Citizen juries</th>
<th>Community facilitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continuous feedback</td>
<td>Radiation and mitigation</td>
<td>Panels</td>
</tr>
<tr>
<td>Role playing</td>
<td>Task forces</td>
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</table>

**Large-group problem-solving techniques**

<table>
<thead>
<tr>
<th>Workshops</th>
<th>Interactive selling</th>
<th>Sharing circles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Websites and chat rooms</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Future-search conference</td>
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</table>

*Source: International Association for Impact Assessment (2011); EIA, 2006; Rose and Jurewicz 2003.*

Calls for enhanced resources must, however, be weighed against the sentiments of some project proponents that public participation is too expensive (Dutta 1999). Governments have been hesitant to take on more costs—e.g., to pass costs on to proponents—that would add to the overall expense of project planning and development.
Accelerated Decision Processes

All EA laws in Canada restrict the amount of time given to the public to review and respond to EA documentation, typically 30 days and they also restrict the time that regulators have to make a decision. While these timelines are meant as a minimum standard, they tend to be interpreted strictly by regulators regardless of the complexity of the EA at hand. This has occurred because a key issue of concern in project preparation is the amount of time it takes for a decision to be rendered. Proponents often contend that public review periods unnecessarily extend the time it takes to make decisions, thereby creating project inefficiencies and economic uncertainties. As a result, decision-makers have established timelines in an attempt to balance the needs of proponents and those of the public. The result, however, is accelerated decision processes that often do not allow adequate time for the public and some would argue the regulators, to properly review and respond to the EA information provided and for a two-way dialogue, aimed at issue resolution, to occur (Pett, 2003, Browart and Diduck, 2003).

Weak Public Participation in Follow-up

As discussed in chapter 1, follow-up is a critical component of EA because it gauges the way a project actually affects the environment. It provides the basis for designing further mitigation efforts if they are necessary, assessing the accuracy of the predictions made in the original EAs documents, and learning from EA experiences. The CEAA provides for consideration of follow-up for all types of federal assessment, but the implementation of follow-up programs is required only for comprehensive studies and project reviews. If follow-up measures are required, there is an obligation to advise the public of the results of the measures (section 38.2(2)(a) and (b)). Most provinces do not make any reference to follow-up, and none provide for public participation in the follow-up process itself. There is also no provision in any Canadian legislation, including the CEAA, requiring notice of and public comments on the results of monitoring or follow-up measures. The fact that the follow-up processes do not require public participation has likely meant that valuable information gathered during follow-up has not been readily available to the public and that valuable data knowledge has been excluded from the assessments. Despite the general lack of follow-up activities in Canada, there are notable exceptions, such as the low-level flying EA for Labrador and the Spadina mine in the Northwest Territories, both of which are discussed in more detail below.

Promising Future Directions

The foregoing concerns suggest that EA practitioners and policymakers face formidable challenges in creating more meaningful roles for the public in EA planning and decision making. However, consideration of these concerns helps them identify important future directions. These are discussed below, united by the proposition that public participation in EA needs to be reconceptualized in more
collaborative, community-based terms. This would involve fresh views of both the ways people are involved and the very purposes of their participation.

Early and Ongoing Participation

An important future direction for public participation in EAs lies in resolving the tension surrounding normative and strategic planning issues. As noted earlier, some cases suggest that lack of opportunities for early involvement can be a barrier to broader participation, and other cases provide powerful examples of normative involvement. Still others suggest that opportunities for participation can occur too early in the planning process, namely when they arise prior to the development of a concrete proposal to which members of the public can react. In such cases, the very existence of the opportunity presents a barrier to broad, active, and meaningful participation.

The importance of finding ways to encourage early participation was reiterated in a survey of Canadian EA practitioners and LEG officials (Stouffs and Dohle 2003). In that study, the respondents expressed clearly that the way public participation is envisioned by most EA statutes in Canada limits early involvement and fragments later participation opportunities. They pointed out that opportunities for participation in EAs have tended to occur at discrete points in the process, such as during scoping, preparation of the EA, and public hearings. Further, the respondents promoted moving to a more holistic process—that is, to one that encourages meaningful early and ongoing participation. In their view, the process should enable participation from the outset of the project or program planning development phase, when decisions are being made about the objectives and goals regarding what ought or ought not to be done. Later provisions should then ensure opportunities for participation through the operational stages of project development, implementation, follow-up, and eventual decommissioning. Such changes would not only address criticisms concerning the timeliness of involvement, they would create opportunities for ongoing exchange among stakeholders and could have positive implications for power imbalances. They would also be in line with policies in British Columbia, Ontario, and Manitoba that encourage proponents to consult with the public long before the formal EA process is initiated.

In recent years, regional (or wide-area) planning has been an important testing ground for new ideas on the subject of early and ongoing involvement. In British Columbia, the Commission on Resources and Environment and the Land and Resource Management Plan of the 1990s established broad-based round tables that brought local people together in an attempt to resolve regional land-use planning issues. Such tables offered innovative experiments in multi-stakeholder planning consensus-building, and shared decision making (Owen 1998; Perrone et al. 1998; Williams et al. 1998; Jackson 2001). The Government of Manitoba recently started a broad-area planning initiative for the west side of Lake Winnipeg, a large geographic area bounded by Lake Winnipeg on the west, the Ontario-Manitoba border to the east, Sagkeeng First Nation to the south, and Oxford House to the north. The objective was to bring together local communities, First Nations, in-
dustry and environmental organizations to develop a vision for land and resource use in the area that respects both the boreal forest and the needs of local communities (Manitoba Conference 2003). A round table and advisory committee were established to meet with local communities and organizations in the development of a vision and plan for the region that would precede any project EAs for activities such as forestry operations, parks development, and road construction.

As part of this ongoing planning effort, the government has supported traditional area land-use planning activities with thirteen affected First Nations. Coordinators have been hired to assist with these efforts, and the East Side Policy Coordination Committee will ensure that broad-area planning is maintained as these local plans are developed.

Given these experiences and similar policy initiatives in Canada, it is our view that EAs policies and practitioners should continue to seek ways to integrate regional planning with its increasingly concomitant easy and ongoing public participation and formal EA processes. If wide-area planning precedes assessment, EA legislation should then require that the plan be considered during the assessment (though the EA itself was done in a sufficiently open and participatory way). In cases where broader plans do not exist, normative issues would continue to be raised by members of the public during the EA of individual projects. To facilitate the development of broader regional plans, government departments involved in EA processes should be required to alert decision makers when an undertaking is proposed in a region where no land-use plans or policy exists. It would then be up to the decision makers to decide whether EA consultation activities should include broader issues than those raised in the context of the narrow scope of a proposed undertaking or whether a broad planning exercise needs to be carried out before any decision is rendered on the individual undertaking.

**Mutual Learning**

Building on the idea of ongoing participation, another key future direction for public involvement in EAs relates to taking greater advantage of the learning opportunities resulting from participation. As noted earlier, participation in EAs creates important opportunities for learning related to sustainability at various organizational levels. First, it affords opportunities for individual practitioners and decision makers to identify social values and learn from local or traditional knowledge. Second, it provides opportunities for members of the public to acquire scientific and technical knowledge, learn about their community and the interests of fellow citizens, and engage in collective political action. In addition, participation in post-Impacts and cumulative effects assessments opens opportunities for new, communities, and other forms of social organization to learn from past development decisions.

Promising forums for mutual learning are created by mechanisms designed to provide ongoing participation, such as community advisory committees and management boards. Organizations of this type are being used increasingly in EAs, including in research and monitoring functions. Two prominent examples can be
found in the low-level flying EA from Labrador and the BHP Ekati diamond mine EA from the Northwest Territories.

The first example involved a federal assessment of an agreement between Canada (the Department of National Defence and six of its NATO allies (the United Kingdom, Germany, and the Netherlands) to permit low-level military training flights over the Quebec-Labrador peninsula. A key outcome of this controversial EA was the creation of the Labrador Institute for Environmental Monitoring and Research, a co-managing organizations involving local and Aboriginal partners. Since so little was actually known about the impacts of low-level flying on people and the environment, the Institute was established to conduct comprehensive, interdisciplinary scientific research on the flying program. For more information on the Institute and its current activities visit http://www.lear.org/ (accessed March 2009).

In the second example, a federal review panel approved the BHP Ekati diamond mine but with 29 conditions, several dealing with environmental monitoring and mitigation. In 1996, when the federal government conditionally approved the project, it required an agreement to be drawn up among Canada, the Northwest Territories, and the project proponent (BHP Diamonds Inc.) to ensure that the conditions of the review panel were met. The agreement called for the establishment of the Independent Environmental Monitoring Agency, which included representation from local and Aboriginal communities. The tasks of the agency included reviewing monitoring and management plans and results, encouraging the use of traditional knowledge, bringing together concerns of Aboriginal peoples and the general public to the proponent and government, and keeping Aboriginal peoples and the public informed about agency activities and findings. The agency’s most recent annual report can be viewed at http://www.independentagency.net/ (accessed March 2009).

Although the reviews are mixed regarding the efficacy and results of the organizations described above (Maclean Institute 2000; Rank 2004), these are the types of institutional arrangements for ongoing public participation we highly conducive to mutual learning. They not only create opportunities for communication and deliberation, but also provide forums for trust building, risk taking, problem solving, and conflict resolution. All of these are key dynamics for integrating knowledge, power, and modifying basic attitudes, values, and behaviour (Sudhek et al. 2005). Our position, therefore, is that proponents, EA practitioners, and decision makers should continue to expand the use of mechanisms for ongoing participation. Doing so will help maximize the learning benefits that can be derived from participation in EA.

Alternative Dispute Resolution

The use of mediation and other forms of alternative dispute resolution (ADR) has been almost non-existent in Canadian EAs. There is increasing recognition, however, that various tool boxes could be applied usefully at most points of the process when there is conflict among the parties. Such adjustments in process would signal
the need for approval agencies and proponents to give serious consideration to more collaborative techniques of participation. In the regard, the default forms of participation, such as open houses and town hall meetings, would be viewed as a mere prelude to more participatory involvement techniques.

Indications that such a change in thinking is happening can be found on a few fronts. For years at the federal level, the CEAA included the provision that if a mediation attempt failed, the EA would move directly to a panel review. Many viewed this as a deterrence to the use of mediation and the main reason why no mediations were attempted in the first five years of the CEAA’s existence. When the Act was amended in 2003, this requirement was dropped in an attempt to encourage the use of mediation.

At the provincial level, Quebec is by far the most active in using mediation. Under certain circumstances, the Bureau des audiences publiques sur l’environnement (BAPE), an independent body responsible for environmental assessment hearings in the province, can engage in environmental mediation. Unlike the EA process in Quebec, any individual may request that a public hearing be carried out by the BAPE. In reviewing the input received, the BAPE can request that the minister of environment allow a to proceed by way of mediation rather than public hearing.

Since 1995, there have been 39 projects that proceeded in this fashion, and there are now formal rules for this mediation process.

Mahtiska’s Environment Act includes provisions for mediation, as noted earlier. These have been used very rarely, but through a combination of political will and administrative support, some mediations have occurred in recent years. One of these, the Rothsay Rendering EA, was quite successful in that the community and company were able to agree on steps the company needed to take to reduce odours and the company was able to secure funding to install the technology required. The consultation is taking a cautious approach to using mediation and is trying to find ways to level the playing field for all participants at the mediation table. It has had at least one case where the public participants requested mediation rather than a hearing.

In our view, these activities in Quebec and Manitoba and the legislative change at the federal level are positive reforms that should guide change in other jurisdictions.

Community-Based Assessment

New approach in working with residents of small communities to assess the impact of local projects are being tested in various parts of the developing world. What has become termed community-based environmental assessment (CBEA) has merged aspects of conventional EA with aspects of participatory local appraisal (CLAs) to form an innovative way to assess smaller, community-based projects that utilize natural resources for basic livelihood needs (Spring 2003; CLAs 2005; Neefery 2000; Fulber 1996). Typical projects include boreholes, gravity water systems, small reservoirs, agro-forestry, fish ponds, construction of services, schools, and small bridges. Since these projects interact directly with the
physical systems, many already under stress, there is potential for resource degradation through over-extraction, land clearing, soil erosion, contamination, and other forms of exploitation. Application of EA to these processes is emerging as a way to facilitate management of local resources and ensure sustained project benefits (Spalding 2009).

CEEA is a highly participatory approach in which local communities are directly involved in conducting EA. As a result, local residents do much of the assessment themselves with the help of facilitation and environmental practitioners. Recent studies in Kenya and Costa Rica show the benefits of CEEA from the community's perspective, including individual and social learning outcomes, greater social cohesion, and better decision-making (Montes 2008: Sinclair et al. 2009). While the context for CEEA has generally been the developing world, many of the reasons for using this approach are applicable to small projects in Canada—reasons such as the desire to ensure that project processes are assessed and addressed cost effectively and efficiently and to build local capacity for participation in EA. Furthermore, in the right Canadian setting—one involving a localized project with broad support in a small community (perhaps in a First Nation)—it is reasonable to expect to see some of the same types of benefits witnessed in other parts of the world.

Legal Requirements

The benefits of having a legislated and mandatory basis for EA are well-established in the Canadian literature (Jeffery 1991; Gibson 1993; Natzel 1999). Such a foundation reduces administrative discretion, enhances procedural certainty, clarifies authority, creates rights and responsibilities, and protects opportunities for judicial remedies. In spite of this, as noted throughout this chapter, high levels of discretion and critical legislative gaps characterize public participation regimes in Canada. Government EA officials have argued that discretion is necessary to allow for flexibility in tailoring public participation to the multitude of situations created by different EA cases. The opposite view is that with too many discretionary provisions, the law provides little way of direction for achieving meaningful public participation. Sinclair and Deblee (2003) attribute many of the weaknesses found in EA public participation activities to missing discretionality or ineffectual legal provisions. In essence, too much discretion was given to regulators in deciding whether or not there should be public participation in any given case, when it should occur, and what it would entail, and this has led to weak and ineffectual participatory events.

Given this, we advocate a rethinking of the legal underpinnings of public participation in Canadian EA legislation and suggest that changes are necessary to create a clear and mandatory foundation for public participation. Legislative reforms are necessary to address the concerns and enable the future directions outlined above. As argued elsewhere (Sinclair and Deblee 2003; Deblee and Sinclair 2006), many of the changes needed are relatively modest and are consistent with the views of diverse EA reformers both within and outside of government. They also pertain to familiar aspects of EA public participation that have been debated.
since the inception of legislated EA. At the same time, a coherent package of reforms aimed at resolving the concerns and enabling future directions could make a significant contribution to reconceptualizing participation in EA. A series of proactive-driven opportunities for input in a discrete phase in a problem-solving process would enable meaningful public-driven participation occurring throughout the project/policy cycle from development to decommissioning.

Conclusion

Public participation is essential to effective and fair environmental assessment in Canada and elsewhere in the world. Meaningful participation provides diverse social, political, and environmental benefits. It actualizes democratic principles, enables individual and community empowerment, facilitates individual and collective learning, informs planning and decision making, and attains numerous other practical benefits. However, whether such advantages are realized in practice depends on various factors, including pertinent legislative and policy frameworks. Key aspects of EA public participation regimes in Canada include adequate notice, access to information, participatory assistance, public comment, and public hearings.

Owing to Canada’s relatively long EA history and the resulting knowledge gained by its practitioners, this country is often looked at as a leader in public participation. However, this does not mean that public participation practice in Canada is flawless. There are long-standing concerns about weaknesses in the way important aspects of participation are implemented, including lack of shared decision making, lack of early (i.e., formative and strategic) involvement, information and communications deficiencies (e.g., inadequate notice and inaccessible information), and insufficient intervenor funding.

These concerns highlight the challenges facing practitioners, policy makers, and others who care to strengthen the role of public participation in EA. They also illuminate promising future directions, such as the promotion of early and ongoing involvement, the enhancement of opportunities for mutual learning, the increased use of alternative dispute resolution, and the creation of a clear, mandatory legislative base for public participation. With respect to this last point, only relatively modest legislative reforms would be necessary to achieve these goals. At the same time, a coherent, focused package of reforms would help reorient current public participation in EA in a community-based rather than a managerial (or top-down) paradigm. This would facilitate the formation of partnerships among industry, government, and civil organizations, thereby promoting economic development that is community-oriented, equitable, and sustainable (both environmentally and socially) over the long term.

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References


