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Cooperative Environmental Assessments: Their Increasing Role in Oil and Gas Projects

As the subject matter of "environment" is not specifically assigned in the Constitution to only the federal government or the provinces, there has been an increasing trend toward cooperative environmental assessment processes to avoid jurisdictional friction points. This article describes the relevant jurisdictional friction points that have encouraged this trend and describes some issues and considerations that have arisen in relation to recent cooperative environmental assessments carried out for oil and gas projects.

Dans la mesure où la constitution canadienne n'indique pas clairement si l'environnement est une compétence fédérale ou provinciale, les deux paliers de gouvernement ont de plus en plus tendance à mener le processus d'évaluation environnementale en concertation de manière à éviter des frictions. Cet article tente de cerner les diverses sources de friction qui ont favorisé cette tendance à la concertation et fait le point sur les difficultés et les considérations qui ont surgi récemment à la suite d'évaluations environnementales conjointes de projets d'exploration pétrolière et gazière.

*General Counsel, National Energy Board. The views expressed herein are those of the author and not those of the National Energy Board. The author wishes to thank Ms. Susan Gudgeon, paralegal, for her very able and patient assistance throughout the many drafts of this article.
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Introduction

As the case law has noted,¹ the Constitution Act, 1867 does not assign environment as a specific head of power to either the provincial or federal governments, whereas jurisdiction over the various aspects of energy-related projects has been specifically assigned. The federal government has constitutional jurisdiction over the transportation of energy both interprovincially and internationally.² As a result of the Natural Resource Transfer Agreements,³ the provinces have authority over the exploration

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for, development and production of energy within the province. As well the provinces have jurisdiction over the intraprovincial transportation of energy. The federal government has rights over the development and transportation of energy resources in the north and the offshore areas, although in some areas those rights are shared.

An energy project subject to either federal or provincial jurisdiction can have environmental ramifications in areas of both federal and provincial jurisdiction. For example, while the federal government is responsible for the fisheries resource, provincial governments have responsibilities in relation to provincial bodies of water. Impacts on air quality can also affect both federal and provincial areas of jurisdiction. As a result of issues such as these, the question of how to delineate this joint jurisdiction over the environment has been increasingly before the courts in recent years. The constitutional challenge facing the courts was aptly described by La Forest J. in R. v. Hydro-Québec where he said in his judgment for the majority,

[the all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment has inevitably placed upon the courts the burden of progressively defining the extent to which these powers may be used to that end. In performing this task, it is incumbent on the courts to secure the basic balance between the two levels of government envisioned by the Constitution. However, in doing so, they must be mindful that the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated. Given the pervasive and diffuse nature of the environment, this reality poses particular difficulties in this context.

A number of the recent court decisions that have sought to secure this basic balance between the two levels of government are in the area of environmental impact assessment. An environmental impact assessment can trigger several jurisdictional friction points, two of which occur frequently: the scope of the project to be assessed and the environmental effects to be considered. These two matters will be briefly examined next in this article. The recent use in oil and gas project proposals of coopera-

4. For example, accords were entered into between the federal government and the provinces of Newfoundland (Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3) and Nova Scotia (Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c. 28) for management of the offshore energy resources.
6. Ibid. at 267.
7. For a more complete discussion of the four areas of jurisdictional friction that occur when an environmental assessment is undertaken see J. Hanebury, "Environmental Impact Assessment and the Constitution: The Never-Ending Story" (2000) 9 J.E.L.P. 169.
tive environmental assessment processes to avoid jurisdictional issues will be noted and some issues and considerations raised by those cooperative assessment processes will be explored.

I. Jurisdictional Friction Points

1. The Scope of the Project

The first jurisdictional friction point that can arise in an environmental impact assessment is the determination of the scope of the project to be assessed. The scope of the project has been the subject of significant judicial consideration in the past few years. The issue to be decided in every assessment is the ambit of the project subject to the environmental impact assessment. Is it limited to the proposal as described by the proponent, or should it and can it be expanded to include other projects or activities?

Under the Canadian Environmental Assessment Act there has been a series of cases that have considered the question of how broadly a federal entity undertaking an assessment (responsible authority) is able to scope a project to be assessed. These cases have not considered the constitutional basis for scoping but rather the statutory interpretation of the relevant provisions of the CEAA. The ability to scope a project is set out in s. 15:

(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(a) the responsible authority; or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

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8. See B. Hobby et al., Canadian Environmental Assessment Act, An Annotated Guide (Aurora, Ont.: Canada Law Book Inc., 1997) at II-52 where it is suggested that the reasoning in the Oldman River case can be used to support the inclusion of related undertakings in a scoping exercise. [hereinafter CEAA, An Annotated Guide].


10. See Citizens’ Mining Council of Newfoundland and Labrador v. Canada (Minister of the Environment), [1999] F.C.J. No. 273 (F.C.T.D.) [hereinafter Citizens’ Mining]; Manitoba Future Forest Alliance v. Canada (Minister of the Environment), [1999] F.C.J. No. 90 (F.C.T.D.) [hereinafter Manitoba] and Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans), [1999] F.C.J. No. 1515 (F.C.A.) [hereinafter Sunpine]. As well, the time of writing, there are a number of cases on scoping that have yet to be heard or decided John Lavoie v. Canada (Minister of Fisheries and Oceans) [A-611-00]; Inverhuron an District Ratepayers’ Association v. Canada (Minister of the Environment) [A-427-00]; an Hamilton-Wentworth (Regional Municipality of) v. Canada (Minister of the Environment) [T 1400-99].
(2) For the purposes of conducting an environmental assessment in respect of two or more projects,

(a) the responsible authority, or

(b) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority, may determine that the projects are so closely related that they can be considered to form a single project.

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

(a) the responsible authority, or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority, likely to be carried out in relation to that physical work.

While none of the cases to date considering the scope of the project under the CEAA has dealt with the specific constitutional questions raised by expanding the scope of a project, earlier case law under the Environmental Assessment Review Process Guidelines Order has considered the broader constitutional issues. From the case law under the CEAA and the EARPGO the following principles can be distilled.

The Supreme Court of Canada has made it clear under the EARPGO that, where there is the requisite underlying legislative authority, the scope of the project subject to assessment could be broadened to permit an assessment of the environmental effects of related provincially regulated projects. However, with the recent interpretation given to s. 15(3) of the CEAA, the scope of the project appears to have been limited to undertakings directly tied to the proposed physical work, such as its construction and operation, or ancillary or subsidiary undertakings, i.e. the construction of a temporary work camp for the workers constructing the project that is subject to assessment. The breadth of the constitutional authority available in relation to the scope of the project was not considered in light of the specific wording of the statute. Consequently, the constitutional authority to scope a project subject to assessment may be broader than the existing statutory authority under the CEAA. Deter-
mining the scope of the project subject to assessment is one of the jurisdictional friction points that has led to an increasing number of legal challenges and has encouraged the development of cooperative environmental assessment processes.

2. The Effects to be Considered

The second jurisdictional trouble point arises once the scope of the project has been determined. It is a determination of which factors will be assessed. Subsections 16(1) and (2) of the CEAA set out the factors to be considered in an environmental assessment. The assessing body is required to consider the environmental effects of the project including any "cumulative effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out" and their significance. There is no distinction made in the CEAA between environmental effects on areas of provincial jurisdiction and environmental effects on areas of federal jurisdiction. The legislation implies that all effects are to be considered. In light of the case law to date under the EARPGO, such a wide-ranging consideration of environmental effects may raise a constitutional issue.

CEAA s. 16(1)(a) provides that "the environmental effects" are to be considered and there is no restriction against a consideration of effects on provincial areas of jurisdiction. Despite this, both the courts and commentators on the CEAA have suggested that when the trigger is an authorization included in the Law List Regulations the effects to be considered should be limited to those within federal jurisdiction.

However, in the one case to date on point under the CEAA the trigger was an approval under the Navigable Waters Protection Act. This is the same legislation as was considered by La Forest J. in the Supreme Court of Canada decision in Oldman River, when he held that the environmental effects to be considered under the EARPGO were limited to those effects on federal areas of jurisdiction. No case considering the CEAA has addressed the question of whether this limitation on the effects that can

16. Supra note 9, s. 16(1)(a)
17. Ibid., s. 16(1)(b).
18. Supra note 11. For a detailed description see as well the article referenced in supra note 6.
20. Hobby et al., supra note 7 at II-56 where it is stated that "[t]he environmental effects of a project with a 'regulatory' trigger [s. 5(1)(d)] can only be those which may have an impact on the areas of federal responsibility affected."
be considered applies to assessments triggered pursuant to other regulatory approvals.

In light of past case law it is possible that further judicial interpretation may result as parties seek to delineate what effects may be considered by the assessing entity when an assessment under the CEAA is triggered by a different authorization on the Law List Regulations. The uncertainty and the case law related to this jurisdictional friction point is yet another reason for the increasing interest in cooperative environmental assessment processes.

II. The Development of Cooperative Environmental Assessment Processes

As a result, at least in part, of these jurisdictional friction points and the risk of costly legal challenges, there has been an increasing trend toward cooperative environmental assessment processes. Prior to 1989, only five joint panel reviews had been undertaken under the EARPGO. In the period between 1989 and 1990, fourteen further joint panel reviews were either announced or completed. With the promulgation of the CEAA, joint review panels were given a clear statutory basis. Section 40 of the CEAA provides for joint review panels on a case by case basis, while s. 58(1)(c) permits the Minister of the Environment to enter into federal-provincial agreements or arrangements for assessment processes.

Similarly, the legislation implementing the two Atlantic accords allows for cooperative environmental assessment processes. For example, under the Canada-Newfoundland Atlantic Accord Implementation Act, the Canada-Newfoundland Offshore Petroleum Board (CNOPB) is required to avoid duplication of work and activities and to “conclude with appropriate departments and agencies of the Government of Canada and of the Government of the Province memoranda of understanding in relation to environmental regulation” and “such other matters as are appropriate”. Both offshore regions have the ability to coordinate an assessment process and ensure duplication is avoided.

In January 1998 the members of the Canadian Council of Ministers of the Environment (CCME), with the exception of Québec, approved the Canada-Wide Accord on Environmental Harmonization and a number of sub-agreements. On the same date the parties signed a sub-agreement on

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23. S.C. 1987, c. 3. There is a similar section in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, supra note 4. Mirror provincial legislation has also been enacted in both cases.
environmental assessment which aimed to realize "better environmental protection by promoting cooperation, achieving efficiency and great certainty in environmental assessment processes and establishing accountability in environmental assessments involving more than one jurisdiction."\textsuperscript{24}

The sub-agreement applies if there are two or more government bodies required by law to assess the same proposed project. It does not apply where environmental assessment processes are already in place as a result of aboriginal land claims or self-government agreements.\textsuperscript{25} The sub-agreement provides for a common framework under which bilateral agreements can be developed between the federal government and individual provinces and territories. A number of bilateral agreements have been concluded or are in process.\textsuperscript{26}

Experience under these bilateral agreements is greatest in British Columbia where an agreement has been in place since 1997. Nineteen cooperative environmental assessments have been completed in the province and four project reviews were underway in early 2000.\textsuperscript{27} The first project assessment under the Canada-Alberta agreement has been commenced.\textsuperscript{28}

In general terms, the agreements provide for notification and cooperation between federal and provincial departments and agencies undertaking assessments. Each agreement is different, with the result that the provisions of each must be carefully reviewed to understand the strength of the obligations to be met by the participating parties. With the development of both a legislative basis and a policy framework supporting cooperative environmental assessment processes, it is clear that formal interjurisdictional cooperation will play an increasing role in environmental assessments.

\textsuperscript{24} Canadian Council of Ministers of the Environment, "Two-year Review of Canada-Wide Accord on Environmental Harmonization" (Ottawa: CCME, 2000) at 4.
\textsuperscript{25} Ibid. at 5.
\textsuperscript{26} Canada-British Columbia: The Canada-British Columbia Agreement for Environmental Assessment Cooperation has been in place since April of 1997 and the parties have agreed that it meets the requirements of the sub-agreement on environmental assessment. Canada-Alberta: The Canada-Alberta Agreement for Environmental Assessment Cooperation was signed in June 1999. It replaced an agreement concluded in 1993. Canada-Saskatchewan: The Canada-Saskatchewan Agreement on Environmental Assessment Cooperation was signed in November 1999. Canada-Manitoba: The Canada-Manitoba Agreement on Environmental Assessment Cooperation was signed on May 8, 2000. Canada-Ontario: Negotiations are underway between Canada and Ontario and it is hoped that an agreement can be finalized in 2000.
\textsuperscript{27} Supra note 24.
\textsuperscript{28} Ibid. Further information on these agreements can be found on the Canada Environment Assessment Agency website, online: <http://www.ceaa.gc.ca>.
III. **Cooperative Environmental Assessments of Oil and Gas Projects**

Historically there has been ongoing informal cooperation between the federal and provincial departments and agencies involved in the environmental assessment of energy projects. For example, the National Energy Board (NEB) has cooperated with the provinces in a number of informal ways in relation to environmental assessments. Informal processes have included requesting applicants to provide correspondence and minutes of meetings with provincial agencies and departments; requiring applicants to follow up on provincial concerns; ensuring information is made available to the province; requiring the filing of environmental impact assessments considered by the province; suggesting the province meet with the other responsible authorities to discuss joint issues with an assessment; and coordinating processes so that parties can deal with a “single window.”

In addition to these informal cooperative mechanisms, there have been three formal cooperative federal-provincial environmental assessment processes under the CEAA for oil or gas projects. The first was a joint federal-provincial offshore board panel review under the aegis of the CEAA of the Sable Offshore Energy Project/Maritimes and Northeast Pipeline Project (Sable Gas Project). The second project involved the CNOPB and entailed a CNOPB/CEAA/Newfoundland assessment for the Terra Nova Development project (Terra Nova Project). The final project is a new proposal for a pipeline across Georgia Strait (Georgia Strait Project). At the time this article was written the NEB and the British Columbia Environmental Assessment Office had concluded an agreement for the cooperative environmental assessment of the proposal by way of a comprehensive study report. This agreement represented a new step in cooperative environmental assessment processes as the prior processes had been tied to panel reviews. Since that time the project has been referred by the federal Minister of the Environment for a panel review. As British Columbia has no requirement under its legislation to undertake an environmental assessment of the project, it is anticipated the panel review will not be a joint federal-provincial panel review.

Although it remains early days in the development of cooperative environmental assessment processes for oil and gas projects, some observations on these cooperative processes can be made.

IV. **Cooperative Environmental Assessments of Oil and Gas Projects — Issues and Considerations**

As a result of the three cooperative environmental assessment processes developed to date and some of the informal cooperative processes relied upon by the NEB, some practical and legal issues and considerations have
arisen which should be taken into account when considering or trying to develop cooperative environmental assessment processes.

1. **Parties to the Agreement**

One of the first issues that can arise is who should be invited to participate in developing the necessary agreements and terms of reference. Under the *CEAA* it is possible that each federal authority responsible for undertaking an environmental assessment of the project (i.e. a responsible authority) can seek to be involved in the negotiations, even if it has no right to be a signatory to the ultimate agreement. As well, the provincial government or provincial assessment office and the Canadian Environmental Assessment Agency may wish to contribute to the negotiation of the agreement. The relevant offshore board and the NEB will usually see themselves as key players and various federal or provincial departments may take the view that they have a role to play. In the result, the first task is to sort out who should be involved in the initial meetings to discuss the options for a cooperative assessment. This can, understandably, be a delicate process and involve a number of political sensitivities.

In the case of the Terra Nova Project, a proposal to develop the petroleum resources for the Terra Nova oil field on the northeast Grand Banks of Newfoundland, the CNOPB, the federal Ministers of Environment and Natural Resources and the provincial Ministers of Environment and Labour, Mines and Energy and Intergovernmental Affairs signed the Memorandum of Understanding establishing the assessment. In the case of the Sable Gas Project, applications were submitted to three regulatory agencies — the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB), the NEB and the Nova Scotia Energy and Mineral Resource Conservation Board — for projects that involved the construction of offshore and onshore facilities for the drilling, production, transmission and processing of natural gas. Gas and associated natural gas liquids were to be collected from offshore production platforms and brought ashore by means of a submarine pipeline to a gas plant in Nova Scotia. Gas would be processed and then transported via an onshore pipeline to Canadian and American markets. An agreement for a joint public review of the proposal was entered into among the Ministers of Environment for Canada and Nova Scotia, the Ministers of Natural Resources for Canada and Nova Scotia, the Chairman of the NEB and the Acting Chief Executive Officer of the CNSOPB.

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29. The *CEAA* provides that the Minister of the Environment is the federal party responsible for joint environmental assessment processes, however other government departments arguably have input into the scoping decision pursuant to s. 15 of the *CEAA*. 
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As earlier noted, the cooperative assessment initially explored in
relation to the proposal by Georgia Strait Crossing Pipeline Limited
differed from the Terra Nova Project and Sable Gas Project proposals as
it involved a comprehensive study and report rather than a joint panel
review. As well, there were fewer parties negotiating the agreement. The
proposal involved the construction of a gas pipeline from Washington
State across the Strait of Georgia and onto Vancouver Island. The onshore
portion would be approximately 13 kilometres in length and in early 2000
a project description was filed with the NEB to start the assessment
process. In addition to the NEB, the Department of Fisheries and Oceans
(DFO) subsequently identified itself as a possible responsible authority
required to ensure the assessment of the project under the CEAA. The
Canada-British Columbia Subsidiary Agreement for Environmental
Assessment Cooperation required that the NEB and DFO notify the
province of the project. The subsidiary agreement allowed for the
inclusion of the province in the environmental assessment process for the
project whether or not it had a trigger under provincial assessment
legislation. After several months of negotiations, the province entered
into a Memorandum of Understanding with the NEB, the Assessment
Office of the province and DFO to coordinate its participation in the
preparation of the comprehensive study report, if that were the assess-
ment option chosen. As the NEB ultimately referred the proposal to the
Minister of the Environment for referral to a panel review, there was no
need to implement the agreement.

2. Time Required to Develop Cooperative Environmental Assessment
Processes

Practically, the development of cooperative environmental assessment
processes takes both the time and the resources of the government entities
involved. While a relatively simple agreement such as the one entered
into for the Georgia Strait Project may take only a matter of months, more
diverse projects involving a range of government departments and
agencies can take well over a year. Counsel and others involved in the
Terra Nova Project and Sable Gas Project processes have commented on
the lengthy lead time required to both establish the processes to be used
in the cooperative environmental assessment and to formalize them in a
memorandum of understanding.

From the proponent's point of view this can be an important practical
consideration. In a competitive business environment a delay in the
assessment of a proposal can render the proposal moot. A proponent may
prefer the risk of jurisdictional challenge to the loss of opportunity that
can result if an unusually lengthy period is required for project assess-
ment. Therefore it may not immediately see any advantage resulting from attempts to coordinate cooperative environmental assessment processes.

If cooperative environmental assessment processes are increasingly the assessment mechanism used by federal and provincial departments and agencies, these practical considerations should diminish as precedents are established, agreements executed and cooperative environmental assessment processes streamlined. For example, s. 59(i)(v) of the CEAA establishes the power to make regulations to adapt the CEAA assessment process for the offshore boards. However, in the last few years government resources have generally shrunk, not expanded, with the result that the importance of these practical restraints should not be underestimated. They can constitute an impediment to the development of new ways of carrying out assessments or can mean that it takes longer to develop and implement new procedures and precedents.

3. **Melding Different Procedures and Processes**

Melding the various assessment and regulatory processes established by the different levels of government into a cooperative process and ensuring the necessary requirements of natural justice are met can be a challenge. This is particularly true when there is a quasi-judicial regulatory procedure with an environmental component that is also being accommodated within the cooperative process as was the case in the Sable Gas Project proposal. The NEB, as a quasi-judicial tribunal, has always run its hearings on the basis of the presentation of sworn evidence tested by cross-examination followed by final argument. Upon occasion, up to a week of hearing time has been consumed by the presentation and consideration of preliminary motions. Most environmental hearings, on the other hand, proceed on the basis of presentations by the proponent and other interested parties. Evidence is rarely sworn and cross-examination is infrequent. Proceedings often follow a “town hall meeting” format and motions and objections based on legal arguments or principles are rare.

The agreement for the review of the Sable Gas Project proposal provided that the review would meet the requirements of the CEAA, the Nova Scotia Environment Act and the National Energy Board Act. In addition, the review would meet the requirements of the CNSOPB and its appointed Commissioner under the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Nova Scotia Offshore Petroleum Accord Implementation (Nova Scotia) Act.

The hearings were held in four Atlantic communities and went from early April to mid-July 1997. The proceedings resulted in excess of 12,000 pages of hearing transcripts. The procedures adopted for the hearing were those set out in the *National Energy Board Rules of Practice and Procedure, 1995*. While a number of informal community sessions were held, most of the hearing was conducted pursuant to the NEB's usual processes. This introduced a structured approach to an environmental assessment process that had historically been informal. As noted by Dr. Fournier, chair of the Sable Gas Project review panel, "[c]riticisms received during and after the process included the following: daunting, intimidating, complex, legalistic, adversarial, inaccessible and formal." However, in his view, these criticisms were not justified. For example, in relation to the requirement that intervenors who wished to fully participate in the proceedings must register to do so, he commented that "[i]t quickly became clear that this mechanism was the first step toward introducing rigor into a process which had considerable potential to be chaotic. . . . It was the first orderly step in the creation of an information exchange process." He went on to point out that, "given the financial, environmental and social stakes involved and with their attendant emotions, the formality encourages a civility and decorum, which aids the process. In other words it helps to defuse the emotion. . . ." On the subject of cross-examination he noted that it "proved to be probably the single most useful tool to separate anecdote and hearsay from factually verifiable testimony". Whether or not one agrees with his assessment of the process, it is clear it engendered considerable comment.

In the case of the Terra Nova Project proposal, the CNOPB did not require that the public hearings follow a quasi-judicial format, nor did any other party to the Memorandum of Understanding. In the result, while there was the ability to take sworn testimony, the process used followed the more traditional format of presentations by the proponent in each hearing site followed by presentations by interested parties. There were no formal motions made by the parties to the panel and there was no criticism by the participants of the process itself. The proceedings were held in four Newfoundland communities and took seven days. Approximately twenty people made oral submissions and over seventy written submissions were received.

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33. Letter from Dr. Fournier to Ken Vollman, Chair of the NEB (13 January 2000).
34. Ibid.
35. Ibid.
36. Ibid.
37. Comment of Angus Taylor, General Counsel to the CNOPB.
Under the Georgia Strait Project agreement a procedure was established if the assessment was to be undertaken by way of a comprehensive study. The comprehensive study report was to be prepared by the proponent prior to the commencement of the hearing under the NEB Act. As a result, there would be no hearing process in conjunction with the preparation of the report and therefore there was no specific allowance for formal presentations by interested parties. However, the proponent was asked to involve the public in the comprehensive study and the preparation of the report, although the method of involvement was not mandated. It was anticipated that the comprehensive study report would ultimately be filed by the proponent as part of its environmental evidence in support of its application for a certificate under the NEB Act. At that stage intervenors with concerns that had not been addressed could choose to become involved in the NEB hearing process, which would be conducted according to the National Energy Board Rules of Practice and Procedure, 1995.

Arguments can be made in support of both formal and informal processes, and there is likely no clear answer as to which is preferable. There are advantages and drawbacks to both. However, when a quasi-judicial process is melded with a more informal environmental assessment process, the safer course of action is to follow the stricter process to ensure the necessary natural justice requirements are met. To do otherwise would put the process at risk and threaten the validity of any ultimate decision. Furthermore, within that stricter process there is usually still room to accommodate and assist participants who are not lawyers and find the proceedings difficult. It must be recognized, however, that the adoption of a more formal process can cause a level of discomfort in parties to the joint assessment agreement who are more used to an informal model.

4. Legislated Procedural Differences

Even with the adoption of a prescribed process for the conduct of the joint assessment process, in some instances there can be legislated procedural differences in the various statutes underpinning the joint process. To date this issue has not arisen in relation to the joint hearings for the Sable Gas and Terra Nova Projects. An obvious example is the different wording

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38. As noted earlier, on 28 September 2000 the National Energy Board referred the matter to the Minister of the Environment for referral to a panel review.
39. For example, the NEB has established processes where intervenors who merely wished to "have their say" could avoid being served with all of the documentation filed by parties, register at the door when the hearing came to their town, obtain an approximate time for their participation and, with the assistance of board counsel, advise of their concerns. In one case a nervous intervenor waited in the bar until board staff advised that they were "on"!
utilized under ss. 16.1 of the *NEB Act* and 35(4) of the *CEAA* for the test to decide on the confidentiality of evidence. Section 16.1 of the *NEB Act* provides:

In any proceedings under this Act, the Board may take any measures and make any order that it considers necessary to ensure the confidentiality of any information likely to be disclosed in the proceedings if the Board is satisfied that:

(a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person’s competitive position; or

(b) the information is financial, commercial, scientific or technical information that is confidential information supplied to the Board and

(i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and

(ii) the Board considers that the person’s interest in confidentiality outweighs the public interest in disclosure of the proceedings.

Section 35 of the *CEAA* provides in part:

(3) A hearing by a review panel shall be public unless the panel is satisfied after representations made by a witness that specific, direct and substantial harm would be caused to the witness by the disclosure of the evidence, documents or other things that the witness is ordered to give or produce pursuant to subsection (1).

(4) Where a review panel is satisfied that the disclosure of evidence, documents or other things would cause specific, direct and substantial harm to a witness, the evidence, documents or things are privileged and shall not, without the authorization of the witness, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, documents or other things pursuant to this Act.

It remains to be seen if the tests in the two statutes can work together, or if they are different to the extent that material may be held confidential under one while it must be released under the other. Arguably, in the latter case, the test that grants confidentiality would govern, but this has yet to be determined.

This is but one example. There may be other instances where legislated procedural differences contained in enabling legislation or relevant regulations could lead to a joint panel having to rule on complex issues of interpretation, with the resultant risk of a successful legal challenge of the process. It will take some time, and perhaps ultimately some legislative amendments, for these issues to be resolved. While increasingly statutes are permitting or encouraging cooperative assessment pro-
cesses, a detailed review of possible procedural anomalies has not occurred.

5. Mandate of Panel Members

Cooperative environmental assessment panels can be put together in a number of ways. One option is to put the panel together for administrative purposes only. For example, a five-member panel could be made up of two provincial members required to report back on environmental matters to the province, two federal members required to prepare an environmental assessment report under the CEAA, and a member of a regulatory tribunal mandated to make a decision on a number of matters, including environmental concerns, under the tribunal’s enabling legislation. While in theory it would appear that with such a panel some administrative expediencies could occur, the procedural implications are significant. In theory each group with a separate mandate within the panel might be required to rule on a procedural motion. If different rulings resulted, the proceedings could be disrupted, with panel members, for example, effecting exits and entrances as certain evidence is presented. Furthermore, considerable effort would be required to ensure that the rule of natural justice that “he who hears must decide” is observed. The normal collegial atmosphere of the panel would be lost as certain panel members would not be free to discuss the matters before them with other members of the panel. In short, legally and logistically a panel of this sort presents numerous challenges.

Unlike the case with the subsequent Sable Gas Project panel, these problems were avoided with the Terra Nova Project panel, as each panel member had identical joint responsibilities and a single report was prepared which would satisfy the requirements of the Canadian Environmental Assessment Act, the CNOPB and the province of Newfoundland.

The situation was not as straightforward in the Sable Gas Project cooperative assessment. By agreement a joint review panel was struck. It consisted of two full-time NEB members, a third member who sat as a temporary member of the NEB and as a member of the federal-provincial joint panel, one member who sat on the joint review panel and was a Commissioner under the accord legislation, and one member who sat solely on the joint review panel. All five had a shared mandate as members of the cooperative environmental assessment panel. Clause 5.2 of the agreement provided:

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40. See e.g. the Canada-Newfoundland Atlantic Accord Implementation Act, supra note 4, s. 46, which requires an MOU for a cooperative process be pursued to “ensure effective coordination and [to] avoid duplication of work and activities.”
The Panel shall consist of five (5) members for the Review of the Projects:

(a) two (2) members shall be permanent members of the NEB;

(b) one member shall satisfy the eligibility requirements for a temporary member of the NEB and shall be jointly nominated by the Environment Ministers, the CNSOPB and the Chairman of the NEB. A request shall be made to the Minister of Natural Resources to recommend to the Governor in Council the appointment of that proposed member as a temporary member of the NEB. Should that proposed member's appointment as a temporary member of the NEB be confirmed, that member shall be appointed to the Panel by the Environment Ministers;

(c) one member shall be jointly appointed by the Environment Ministers and the CNSOPB. For the Offshore Project only, the member jointly appointed under this paragraph will also be acting as a Commissioner pursuant to the Accord Acts, and

(d) one member shall be jointly appointed by the Environment Ministers.

The agreement provided that the public review would allow for the collection and examination of environmental evidence and the hearing of argument on the environmental effects of the projects for the use and subsequent deliberations and decision making on the applications by regulatory authorities. It also provided a forum for the Commissioner to distribute publicly the development application, and further permitted the collection of information in relation to the development application for use in subsequent deliberations and recommendations to the CNSOPB.

The shared mandate of all of the panel members under the CEAA, and the requirement in the agreement establishing the panel that the National Energy Board Rules of Practice and Procedure, 1995 would govern, meant that procedural rulings could be made by the panel on a joint basis. It became apparent early on in the panel’s mandate that it would be difficult to separate the environmental evidence from the evidence required by the panel members who had other responsibilities. For example, there was considerable overlap and connection between the evidence required for the environmental assessment and that required by the NEB to consider the application to construct and operate the pipeline. As a result, the panel decided that all members would all hear all of the evidence, although this meant that care would need to be taken to ensure that discussions among panel members were appropriate. Although procedurally challenging, the evidence was collected on that basis.

Despite this successful precedent, the preferred structure for a cooperative assessment panel is doubtless one where all panel members have identical mandates. Where mandates under several pieces of legislation
are being carried out, it is preferable that each panel member be appointed under each statute. Where jurisdictional, political, pragmatic or other reasons render this approach impossible, the parties to the agreement, the proponent and the panel members should be aware of the difficult and awkward procedural machinations that may be required to ensure the process is legally viable.

Even when all panel members in a cooperative assessment have identical mandates, issues can arise. For example, it can be unclear what tests they are to apply or what interests, if any, they are to represent. For example, under the NEB Act members of a panel generally consider an application to construct a pipeline in light of the public convenience and necessity. As a national board, the members often look to the Canadian public interest. When panel members also have a mandate under provincial or other legislation, the underlying test may be more local in nature. The legislation governing the CNSOPB and CNOPB, for example, provides that a benefits plan must be approved by the board prior to the approval of a development plan or the authorization of any work or activity. The benefits plan refers to benefits for both Canada and the relevant province, but the emphasis is on the provision of employment and other opportunities to citizens of the respective province.

Furthermore, members appointed as a result of their selection by the federal or provincial governments may think that they are to “represent the interests” of that constituency, with the result that the panel members could have differing views of their mandates. If that were to occur the jurisdictional friction points that were supposedly avoided by the cooperative assessment could move right into the assessment process itself. Where there are different tests, or panel members perceive themselves as representing particular geographic interests, a question could arise as to how the tests or interests can be reconciled. However, these concerns are mere supposition at this stage and have not been demonstrated by experience.

In the case of the Terra Nova Project assessment, all three panel members were long-time Newfoundlanders and their unanimous report made it very clear that the benefits to the province were of significant concern to them. In the Sable Gas Project cooperative assessment, two of the members were with the NEB which is located in Calgary, one was from New Brunswick and two were from Nova Scotia. In the words of the Chair of the panel, Dr. Fournier of Nova Scotia,

41. See ibid., s. 45.
42. This requirement can be waived. See ibid., s. 45(2), (6)(b).
[the appointment of three local members to the five-member panel] gave the affected Provinces a feeling of genuine representation with people who knew and understood local issues and concerns. . . . The two [NEB] regulators were also critical since they represented a great deal of professional experience on issues and practice . . . . In general the mix was very good and the personalities were pleasantly compatible.  

The issue of panel composition was raised before the courts in the case of the Express Pipeline Project joint panel review, the first joint panel review under the CEAA. That panel was a joint federal panel under both the CEAA and the NEB Act. It consisted of four members. Two members were temporary appointments to the NEB and two were permanent appointments. All four members were appointed as members of the joint panel by the Minister of the Environment pursuant to the CEAA. After the issuance of the joint panel report the constitution of the panel was challenged. The applicant alleged that the joint panel was not properly constituted because the panellists under the CEAA were also members of the NEB and therefore there was a reasonable apprehension of bias. This argument was rejected by the court during the oral hearing and then summarily dismissed in the subsequent written reasons when the court stated that the allegation made “nonsense of sections 40, 41 and 43 of the [Canadian Environmental Assessment] Act.” This is the only case that touches on panel composition and the role of the panels in both the Sable Gas and Terra Nova Projects was not tested before the courts.

Lastly, where the cooperative assessment mechanism utilized is a panel review, especially where it incorporates a regulatory process with an environmental component (such as an NEB application), there can be a difficult learning curve for panel members who may be used to different procedures or who may be scientists who are unfamiliar with hearing procedures and natural justice requirements. Their sole goal may be the attainment of scientific truth, by their own independent research if necessary! They may not realize that parties have a right to know the case they have to meet. As a result there is a need for the careful and early training of panel members, which again can take time.

Conclusion

In short, there is a need for careful legal advice when various regulatory and assessment processes are combined to achieve administrative efficiencies and to enhance assessment processes. To date the case law related to cooperative environmental assessment processes has been

43. Supra note 33.
45. Ibid. at 18.
primarily focussed on joint panel reviews. While there has been some litigation targeted at assessment issues contained in joint panel reports, there has been little about issues related to the establishment of panels for joint assessments. In part this could be a result of s. 42 of the CEAA.

Where the Minister establishes a review panel jointly with a jurisdiction referred to in subsection 40(1), the assessment conducted by that panel shall be deemed to satisfy any requirements of this Act and the regulations respecting assessments by a review panel.

One commentator has noted that one apparent purpose of this section is to protect assessments conducted by properly constituted joint panels from successful challenges on minor procedural grounds. Both the Terra Nova and Sable Gas Project cooperative assessments engendered legal challenges, but, as earlier noted, neither related to the composition of the panel or the cooperative assessment process itself.

In the case of the challenge to the Terra Nova Project, two parties sought to remove a limitation in the terms of reference that precluded the panel from examining the questions of energy policy, jurisdiction, and the fiscal and royalty regimes. Their application was dismissed as being, in part, unnecessary and premature. After the conclusion of the Sable Gas Project joint review panel and the issuance of the report, the Industrial Cape Breton Community Alliance Group on the Sable Gas Project launched actions in the Federal Court of Appeal and the Supreme Court of Nova Scotia. It argued that several errors had occurred, including an error of jurisdiction when the panel failed to require a full socio-economic analysis of the effects of the Sable Gas Project on Cape Breton Island. In the course of his reasons, released October 20, 2000, McKay J. found that where the review panel, composed of accepted experts, acts within its jurisdiction the courts will give significant deference to its decision. However a question of law concerning the jurisdiction of the panel will be assessed against the standard of correctness.


47. CEAA, An Annotated Guide, supra note 8 at II-108.


49. A subsequent case, St. John's (City of) v. Canada (Canada-Newfoundland Offshore Petroleum Board) and The Proponents of the Terra Nova Oil and Gas Field Development [1998] N.J. No. 233 (Nfld. S.C.T.D.), sought to have the board enforce a condition of the employment benefits plan and was therefore not tied to the cooperative assessment process. Subsequently moved to the Federal Court Trial Division, Sable, supra note 46. See as we the proceedings in the Nova Scotia courts, Supreme Court of Nova Scotia, Court File No 145185 which is unlikely to proceed.
This is not the first case where the courts have been reluctant to overturn assessments on the basis of errors in the assessment itself and have deferred to the scientific expertise of the assessing body. Therefore, when faced with an unfavourable decision, intervenors may increasingly look to overturn decisions on the basis of procedural errors. As a result, cooperative environmental assessment processes are likely to come under increasing judicial scrutiny in the future.

One case of interest on the issue of cooperative assessment processes is the *Canadian Environmental Law Association v. Canada (Minister of Environment)*. In that case the applicant challenged the validity of a number of intergovernmental environmental agreements including the Canada-Wide Accord on Environmental Harmonization and the sub-agreement on the harmonization of federal and provincial environmental assessment processes. The case was dismissed at the Trial Division level, a decision which was upheld by the Federal Court of Appeal. In the course of giving the unanimous judgment of the Federal Court of Appeal, Linden J. noted “we see no legal difficulties, at this time, in this effort to coordinate and cooperate, which is the main purpose of the accords.” Simply put, the judicial view to date appears to be supportive, even encouraging, of cooperative environmental assessment processes.

In summary, the benefits of “one window” assessment, which include the possible avoidance of jurisdictional concerns, the completeness of environmental impact assessments and the avoidance of interjurisdictional duplication and overlap, are clear. However, it is likely still too early to determine if those benefits can be fully realized in light of some of the impediments to success.

With time, a number of the present problems with cooperative assessment processes may be addressed. The greater use of cooperative environmental assessment processes by federal and provincial departments and agencies can result in the establishment of process “precedents” which will reduce the time and resources required by the parties to initiate the process. If that occurs, the use of cooperative environmental assessment processes will likely increase and the concerns of proponents about the time required to implement new processes may diminish. The need to ensure that new processes do not violate the rules of natural justice or the statutory requirements of the cooperating federal and provincial depart-

51. See *e.g.* supra note 44.
55. *Oldman River, supra* note 1.
ments or agencies will continue, but the effort necessary to accomplish this objective could be minimized. This can occur as a result of the increased experience that will come as a result of the greater use of such mechanisms. As well, some legislative amendments may be required to smooth out any conflicting statutory overlaps. Finally, while such cooperative assessment mechanisms may avoid jurisdictional friction points and therefore reduce the risk of legal challenge of an environmental assessment on the basis of constitutional issues it should not be forgotten that it may increase the number of legal challenges of the cooperative environmental assessment processes utilized. Parties unhappy with a substantive environmental decision and frustrated by the courts’ deference toward such decisions, may increasingly look to procedural issues as a method to overturn the decision. The case law on jurisdictional friction points related to environmental impact assessment may be replaced by case law that examines procedural friction points.