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Chair

Mr. Mark Warawa

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● (1105)

[*English*]

The Chair (Mr. Mark Warawa (Langley, CPC)): We have quorum, so we'll call this meeting to order, colleagues.

Toward the end of our last meeting, on Thursday of last week, Ms. Leslie—we regret to hear she is not feeling well and we send her our best wishes—asked a question of the agency. She said, "I was wondering if we could ask the clerk to ask the agency if they're able to answer questions about other jurisdictions". The response was that the agency would answer all questions to the best of their ability and knowledge, but they could not provide expert testimony on issues beyond their mandate and authority. So that deals with that.

We have with us two well-respected lawyers and experts in their field. We thank Mr. Stephen Hazell and Mr. Paul Cassidy for being with us today. We will begin with Mr. Hazell.

You have up to 10 minutes for your testimony.

Mr. Stephen Hazell (As an Individual): Thank you, Mr. Chair.

Good morning, members. My name is Stephen Hazell. By way of introducing myself, I should say that I'm a lawyer in private practice but I wear a number of hats, one of which is that I act as counsel with Ecojustice, a not-for-profit law firm. Today I'm speaking as an individual.

I thought I would provide what I call a number of new directions for the committee to consider as it figures out how it wants to proceed with the seven-year review. I'm of the view that the Canadian Environmental Assessment Act has done a pretty good job over the years, but it has many flaws.

It has become complicated and unwieldy, and it's not addressing Canada's most pressing ecological issues or the needs of governments, proponents, and the public in the environmental assessment process. CEAA is often failing to properly assess projects with critically important environmental effects, such as greenhouse gas emissions from oil sands projects, but it also legally requires assessments of hundreds of small projects—such as scientific permits to study birds—whose well-understood effects either are minimal or can be mitigated.

This committee has a tremendous opportunity to step back and take a look at some other ways of proceeding with environmental assessment and to make the system better, from a number of perspectives.

Copies of my brief have not been distributed because unfortunately I was away on holidays last week and didn't really get down to serious writing until the weekend. The clerk assures me that it will be provided once it's translated.

I firmly believe that any environmental assessment process has a number of key elements, and I won't review those. But it must be legislated, it must engage the public effectively, it must be accountable,and it must avoid duplication of other environmental assessment processes.

I want to focus the bulk of my time on discussing some of these ideas. Probably none of them are my ideas, really. It's just that I'm here compiling and presenting to the committee some different ways in which we could proceed with environmental assessment that I think would improve the process.

They're not necessarily mutually consistent either, so one idea doesn't necessarily mesh well with the others. Partly that's your job, as I see it, to figure out what the best structure should be as we go forward.

There are five basic ideas.

One, shouldn't we focus on sustainability as opposed to assessing environmental effects?

Secondly, shouldn't we try to make sure that we're addressing federal environmental commitments in our federal environmental assessment system process?

Thirdly, there's this thought that maybe if we had permitting for environmental assessments, once completed that would be helpful in terms of their implementation.

For the fourth idea, which was raised a little bit by President Elaine Feldman of CEAA the other day, how about a single agency approach rather than the self-assessment approach by multiple departments and agencies?

Finally, this one is a bit more dramatic, perhaps, but I think it has some appeal. It's the idea of integrating the environmental assessment process with the regulatory approval process for projects, so that it would be one-stop shopping federally for assessments as well as for approvals.

Sustainability assessment asks these questions. Does a project or policy provide net benefits for the community, province, and nation? Does it advance our economy and society towards a sustainable future? It's a much narrower framework, and it differs from environmental assessment under CEAA, which asks, "What are the adverse environmental effects of a project, are they significant, and how can they be mitigated?"

As well, sustainability assessment asks questions about how to improve the positive aspects of a project instead of just focusing always on the negative stuff. Sustainability assessment also looks at fairness issues—intergenerational as well as intra-generational.

Sustainability assessment has been gaining ground in a number of environmental assessment processes around the country. Some federal panel reviews have used the sustainability assessment approach, partly because it deals better with issues such as greenhouse gas emissions, which, frankly, have been very poorly dealt with by most panel reviews recently. There are a few exceptions to that, but given my limited time I won't get into them.

Think about whether we should be assessing the sustainability of projects. And by sustainability, I'm talking about environmental, social, economic sustainability, and not just focusing on adverse environmental effects, as is currently the case. So this is asking the committee to think about that.

Secondly, on achieving federal environmental commitments, the federal government has a number of environmental commitments. Some of them are stated in, say, the federal sustainable development strategy. Some of them are stated pursuant to international agreements that we have, say, the Copenhagen Accord or the biodiversity convention. Shouldn't we be using the environmental assessment process to support the achievement of those existing federal commitments?

We can do that in a number of ways. Australia has done it one way. They identify projects that are of national significance and that may not have a specific federal trigger, so those projects are assessed. There's a determination that it is a project of national significance and they're going to do a federal environmental assessment because it's important for the country to do that.

There's another way of looking at this. In the recent couple of years, we've had a number of terrible disasters, the Fukushima disaster this year, the Deepwater Horizon disaster last year, and to make sure that we don't omit some Canadian disasters, the 1984 Ocean Ranger disaster, which killed close to 100 people. The environmental effects we don't know about; they weren't really measured. Maybe they weren't that great. Nonetheless, it was a terrible disaster. How can we use an assessment process to ensure that Canada doesn't have those types of disasters anymore?

The current legislation doesn't require assessment of worst-case scenarios. It does require assessment of accidents and malfunctions, but generally speaking, there has been a minimal attempt to try to figure out what would be the worst thing that can happen. What would we do about it? What would be the effects if the worst case happened?

One that's been on my mind a lot recently, because I've been involved in some of the panel reviews in northern Alberta, relates to tailings dams for oil sands projects. What if there were a tailings dam failure along the Athabasca River?

If you've ever seen photos of the Suncor tailings dam adjacent to the Athabasca River...it's pretty startling. You have a gigantic tailings reservoir cheek by jowl with the Athabasca River and dozens of metres above the level of the Athabasca River. This is just a pile of dirt, basically.

There are engineered standards. There are the Canadian Standards Association standards that are applicable to these tailings dams; nonetheless, what would a worst-case scenario mean if something were to happen to that dam? Basically, you would probably wipe out most aquatic life in the Athabasca River for many kilometres downstream.

On a different thought, right now when an environmental assessment is done under CEAA, a determination is made as to the significance of the effects and suggested terms and conditions. Those are implemented by the responsible authority, and then there's supposed to be follow-up and monitoring, which, generally speaking, doesn't happen, or happens very infrequently.

One idea is to say okay, the agency is going to actually issue a permit following the completion of the environmental assessment. The permit will say what the terms and conditions related to that approval are, and it will cover off the full gamut of environmental issues dealt with by...whether it's a joint panel review or a comprehensive study. So that's another one.

There are two others, which I'll run through quickly. One is about establishing a single agency rather than the self-assessment approach. Elaine Feldman discussed that one a little the other day. I think this is a good idea. You would enable the agency to focus on bigger projects and perhaps have less focus on smaller projects.

● (1110)

One quick point that didn't come up the other day in the committee was that there are existing regimes federally that allow smaller projects to be assessed. You have the parliamentary commissioner in place now, who wasn't there 20 years ago when CEAA was enacted, and you also have the federal sustainable development strategy and the departmental sustainable development strategies to look after the smaller types of projects.

Finally, this is probably the boldest idea of all. It is the idea of having the agency, probably the Canadian Environmental Assessment Agency, do assessments of big projects like comprehensive study projects and the panel review types of projects, but also having it issue the approvals for those. It would be one-stop shopping.

If you're a proponent, a mining company, say, and you're looking for some federal decisions so you can get on with your project, there would be one agency you could go to and say, “Okay, let's do the environmental assessment”. At the end of that day, that same agency would issue the approvals, whether it's Fisheries Act stuff, CEPA, or species at risk, you name it.

The chairman is telling me I have to wind up, so I will stop there.

The Chair: Thank you, Mr. Hazell. That was very interesting.

Mr. Cassidy, you have 10 minutes.

● (1115)

Mr. Paul Cassidy (As an Individual): All right. I'll do my best.

Thank you very much to the committee for the invitation to appear before you today. I hope my appearance will be of assistance to you in your study of this important piece of legislation.

By way of a brief introduction, I've been a lawyer for 27 years, the first three of those years in the Department of Justice, and the last 24 in private practice devoted exclusively to environmental law. I'm a member of the bar of both Ontario and British Columbia. As a Maritimer by birth and upbringing, I'm very proud to say that I've practised environmental law across this country, including north of 60.

I had my baptism by fire between 1988 and 1994, when my career intersected with Mr. Hyer, I'm delighted to say, when I was heavily engaged in the Ontario class environmental assessment for timber management, which I believe still holds the record for the most number of hearing days of any environmental assessment process in Canada, if not the world. I might also add that I'm also very proud to see my member from Qualicum Beach, Nanaimo, and Port Alberni here today—Mr. Lunney.

A major part of my practice is advising corporate proponents—large and small—on major projects in respect of the intricacies of environmental assessment law in Canada. That's where my abiding interest in this legislation comes from.

I'm most interested in engaging in the questions and answers with you, so my opening remarks will be brief to stay within the 10 minutes. They will relate primarily to improving the efficiency of the EA process. I want to make it very clear, however, that my remarks will be based solely on my personal experience. As such, they represent only my opinions and not necessarily those of my clients, my law firm, or any other individual or company.

I want to come back to focus on that word “efficiency”. Mr. Hazell used some interesting words, many of which I can agree with. In fairness, I think CEAA is quaint, arcane, unwieldy—to use one of his words—and a little out of date. I'm glad that this review is happening, because a lot has happened since it was first enacted. A lot has happened since its predecessor, the EARPGO, was in place, and I think it needs some serious reworking to improve its efficiency.

My remarks on efficiency are not designed to reduce the capability of parliamentarians, the agency, RAs, or anyone to provide for effective environmental assessment in this country, but they are designed to address what I think are some serious inefficiencies that have developed in the CEAA process. There are other ways to conduct environmental assessment in Canada effectively, and they're already being done, in my respectful submission, by some of the provinces.

Some of those efficiency issues relate to topics that I'm sure you're well familiar with and have heard discussed. Mr. Hazell used the word “duplication”. I concur with his views on that. There is hopeless duplication involving the provincial and federal environmental assessment processes, and in many regards, and that could be avoided by adjustments to the federal environmental assessment process.

There can be improvements in another area you're very familiar with, and that is the concept of harmonization between the federal and provincial processes. Better efforts can be made to harmonize the various regimes that exist across Canada in environmental assessment.

That may involve things such as the concept of one project, one assessment. That may involve things such as process substitution, where the minister can decide that the provincial process can substitute for the federal environmental assessment process in particular defined circumstances. That may involve—and Mr. Hazell has touched on some of this—the concept of permitting and marrying the environmental assessment process with the permitting process that occurs. I'll discuss that in a few minutes.

Again, this all goes back to the efficiency concept. I think we can do a lot of work on improving the timeline for these processes. It is unacceptable for an environmental assessment of whatever size of project to take four years, and that's not uncommon in the federal environmental assessment process. I think you can improve the federal timeline requirements.

That was started this summer, in June, with the enactment of the timeline requirements, but it is still very lacking.... For example, it doesn't have any requirements on the time limits for the reviews. It doesn't have any time limits on the decision to be made by the minister, which stands in contrast to British Columbia, where I practise and happen to live. It has very clear timelines for those things to occur.

● (1120)

So it's a good start, but more work needs to be done, I believe, by that process to improve efficiency.

I agree with Mr. Hazell that we can do more to avoid potential multiple processes. Indeed, you even have the scenario now... because somebody amended section 21.1 of CEAA last year to take out a provision that could prevent a comprehensive study process from being completed and then having a review hearing. That section was amended, and now we have that prospect again. You might end up with a comprehensive study process followed by a review process, which I think makes no sense.

So those are the themes I want to touch on today and those are the themes I intend to discuss—along with any questions you might have in that regard.

I would close by saying, and I'm sure the agency is going to be delighted to hear this, that I think there needs to be more improved resources for that agency. Time and time again, whenever I get involved in a federal environmental assessment process, it's like a revolving door with personnel changes and people having to be re-educated. I don't believe there are enough resources dedicated to that.

I like Mr. Hazell's idea about perhaps having this agency beefed up to a circumstance where you have a lot more role for the agency as opposed to these responsible authorities. I mean no disrespect to anybody in the room who is from a responsible authority, but I find that to be actually an out-of-date concept.

In that regard, I'm going to close off with a rather radical suggestion that you might even rethink this whole concept about triggers in CEAA—that is, the law list trigger—as the basis for deciding that a federal environmental assessment should occur. I think that's out of date. I don't see any reason, and I'd be happy to debate it with you, why you wouldn't consider avoiding all of that and instead just set out a prescribed projects regulation. In other words, everything that's on a regulation that you want assessed federally, you list. If it meets that criteria, there's going to be an environmental assessment.

You can have safety valves. You can have the minister, where it's not on that list, nevertheless decide there has to be one. Or, where a proponent may not be on that list—in other words, its project does not meet the criteria for an environmental assessment—you can nevertheless have some valid reasons why a proponent wants to go through one.

Why don't we do that? In other words, we now have this very complicated piece of legislation—i.e., we don't know if it's a project that's reviewable or if it's on the exclusion list or the inclusion list—and we get all bound up in that. I can tell you that when I do a memo as to whether or not the provincial environmental assessment applies in a particular province, that takes up usually a paragraph. But when I turn my mind to whether or not the federal environmental assessment applies, it's like three paragraphs.

I just use that as an order of magnitude. It's a much more complicated piece of legislation, in my respectful submission, than it needs to be in 2011.

CEAA was enacted at a time when there were debates about the jurisdiction of the federal level of government over the environment. I think those have by and large been answered. Anybody who takes issue with the federal jurisdiction of the environment in 2011 is probably going to lose, the way the court rulings have come.

So there's actually, in my view, clear law that the federal government has the ability to have federal environmental assessments. Why don't you just list what it is you want to have an environmental assessment of? If Mr. Hazell wants these big projects listed, fine...if that's up to Parliament to decide, or whoever. But if you don't, we can have that debate and then avoid a lot of back and forth on whether or not a trigger is applied, etc.

Those are my submissions. I hope I have been helpful. They're very general, but I'll be happy to answer questions.

Did I meet the 10 minutes?

The Chair: You actually have a little over a minute left.

Mr. Paul Cassidy: Well, since I've been espousing efficiency, I'll leave it at that.

Voices: Oh, oh!

The Chair: Thank you, Mr. Cassidy.

Thank you to both witnesses. That was a very thought-provoking presentation.

The first round begins with Ms. Rempel, for seven minutes.

Ms. Michelle Rempel (Calgary Centre-North, CPC): To both witnesses, thank you for coming today and for your comprehensive presentations. Your time here is most appreciated. We certainly think this is a very important issue for us to review.

My questions today are for Mr. Cassidy.

In the context of your concept about efficiencies and the impact this could have on end users, perhaps you could briefly tell us how long you've been serving clients in this area with regard to providing assistance in environmental assessments.

Mr. Paul Cassidy: Well, I'll stand to be corrected on when CEAA was enacted, but I believe it was 1993. I've been involved in the development of projects involving federal environmental assessments since the get-go. Indeed, I was involved in the EARPGO process before then, so that dates me to about 20 years.

Ms. Michelle Rempel: Roughly how many clients have you served in that period of time?

● (1125)

Mr. Paul Cassidy: Hundreds.

Ms. Michelle Rempel: What types of projects have your clients been engaged in such that an environmental assessment was required?

Mr. Paul Cassidy: Well, as I indicated, I tend to get involved in the larger projects, but sometimes the proponents can actually be small. You could have a small mining company, for example, that's been trying to develop a project for several years, all the way up to a large mining company that has a smaller project but is nevertheless caught—as Mr. Hazell indicated, sometimes these projects get caught for no apparent reason—under a law list trigger.

The projects are typically resource extraction projects and energy-related projects. These are all aspects of resource extraction, including clean energy.

The concept Mr. Hazell talked about, which is that we should have some recognition in the environmental assessment process of the positive benefits of things like clean energy, for example, I think is a very important statement to make. I don't see that necessarily in CEAA right now.

In fact, one could make an argument...and I think Professor Weaver at the University of Victoria, who is on the Intergovernmental Panel on Climate Change, is strongly of the view that we're going to have to make some pretty dramatic decisions here. Sometimes these clean energy projects have to go through a process that is expedited, to get them through and get them to deal with the important issues Mr. Hazell has raised. By that, I mean clean energy in all forms: run-of-river power, hydroelectric power, and wind farms.

I can suggest names of witnesses who would be delighted to come forward from those various industries to give you an idea of how important that is.

Ms. Michelle Rempel: Thank you.

You spoke of the need for process efficiencies. Perhaps in that context, could you speak to some of the major challenges your clients have faced, including stranded capital, window-to-markets issues, etc.?

Mr. Paul Cassidy: That's a big issue with regard to some resource extraction industries, but for other industries perhaps not as much. Market timing is a key issue.

You always run up against this with regard to investments in those industries. People say they have a window where the market is at this point, and this mine or this project becomes uneconomic if they can't get an EA approved within 18 to 24 months, so if you're telling them it's four years, they say, “Forget it”.

I've actually been involved in those situations a lot. I say to clients that I can't give them a guarantee, that I can't even give them a reasonable likelihood that it's going to be mapped within what I consider to be a reasonable timeframe. Quite frankly, most often the culprit is CEAA. It's not the provincial regimes across the country.

Ms. Michelle Rempel: How often do you find that this is an issue in dealing with your clients?

Mr. Paul Cassidy: Very frequently.

Ms. Michelle Rempel: Most of the time? The majority of the time?

Mr. Paul Cassidy: I would refer to the word “frequently”.

Ms. Michelle Rempel: We're talking about your clients and the challenges they face. In your experience, what are some of the burdensome aspects you might face in your practice with regard to the legislation?

Mr. Paul Cassidy: Well, lawyers always like certainty, because clients like certainty.

Voices: Oh, oh!

Mr. Paul Cassidy: It's a very uncertain process in CEAA. For example, Mr. Hazell referred to this RA concept. I know the major projects management office is doing the best they can on this, but for a long time you'd have RAs fighting over which one was going to take the lead. You'd start to guess. I hate guessing.

Mr. Hazell and I are not paid to guess, are we?

Mr. Stephen Hazell: No.

Mr. Paul Cassidy: No. We're paid to actually give our best opinion.

So you end up, for example, with an RA with a minor role in a project getting involved in debates as to whether they will have a more significant role.

Those are the types of process examples that I pull my hair out trying to deal with, and which are not in existence in other jurisdictions across Canada.

Ms. Michelle Rempel: We've already started to hear some testimony with regard to experience around small projects. You've spoken to this briefly as well today.

In terms of the small projects you've dealt with, do you believe that environmental benefits attained by an assessment outweigh the effort by the project proponent and the government?

Mr. Paul Cassidy: I'm sorry. Can you rephrase the question?

Ms. Michelle Rempel: Sure. In your experience when you've been dealing with assessments pertaining to smaller projects, and with regard to some of the challenges your clients might have faced, which we talked about earlier, is there a sort of cost-benefit point you've experienced when they're entering this process?

Mr. Paul Cassidy: Yes, there is. I think the initial screening process was designed to deal with that back when CEAA was originally developed. Of course, when you have a trigger under the environmental assessment.... For example, if a bridge, a minor stream crossing, necessitates a subsection 35(1) authorization of the Fisheries Act, that's a potential harmful alteration of fish habitat. That triggers CEAA. The federal jurisdiction, of course, goes far beyond the fisheries issues, and the federal Environment Assessment Act says you have to assess it all. You have this minor project for one stream crossing and, the next thing you know, you're into a full-fledged federal environmental assessment.

In circumstances that Mr. Hazell has aptly described, some of those circumstances are very well known and very well mitigated. This is why, for example, we have these operational statements that the Department of Fisheries and Oceans has in place. You follow those. Why do we need to have a separate federal environment assessment in that circumstance? I don't understand it.

● (1130)

Ms. Michelle Rempel: Again, with regard to small projects, to carry on with some of your thoughts here, small projects are caught right now, as I'm sure you're aware, under the “all in unless excluded” approach. You're probably aware that many provinces do utilize a list approach. Perhaps you could speak to some of the benefits of using that approach with regard to small projects.

The Chair: Mr. Cassidy, the time is up. Could you give a very short answer?

Mr. Paul Cassidy: I'll just repeat what I said earlier. I would be in favour of the somewhat radical idea of doing away with this whole law list trigger concept and going to defined, prescribed regulations that have thresholds on size and impact on the environment, but I realize that's probably out there.

The Chair: Thank you.

Next we have Mr. Hyer for seven minutes.

Mr. Bruce Hyer (Thunder Bay—Superior North, NDP): Thank you very much.

Mr. Hazell, I have a quick question on this. I know it likely has a long answer, but I'd like the high points. How should projects be identified? If we're not doing a good job of it now, if we're missing the big ones and doing a lot of small ones, how would we improve on that?

Mr. Stephen Hazell: That is really a central question. My concern with just regulating or establishing a set list of projects, as Mr. Cassidy is suggesting, is that it's problematic because new things come along. If you have a set list, you might not catch some important things. I think there certainly has to be some discretion.

I do share his view that the law list approach has not worked. The problem with the law list approach is that the regulatory statutes, such as the Fisheries Act, are antique, much more antique than the Canadian Environmental Assessment Act, and they don't mesh well with environmental assessments.

The Fisheries Act really is one of the key problems. Ten years ago, there was a major effort in the federal government to try to reform the Fisheries Act, to try to establish a permitting sort of approach as opposed to this crazy authorization approach. I think it was basically the federal-provincial issues that ultimately killed it, and that was too bad.

How do you identify projects? I'm not sure. I think there have to be a number of ways. Mainly you have to work with the project list, but certainly there has to be some ability for the federal government to identify projects that are of national significance, that do relate to the achievement of federal environmental objectives and give some authority to the federal government to launch a panel.

Mr. Bruce Hyer: Let me build on that, Mr. Hazell.

It sounds as though CEAA is very reactive in its present mode. It sits back and waits for triggers and that kind of thing, and it seems to focus on doing that for small projects and avoiding some of the big ones.

You, in your 2010 report, said that the environmental assessment process under CEAA has not been used effectively by the Government of Canada in addressing at least one of its own stated environmental priorities: climate change and greenhouse gas emissions.

Also, this committee, in section 3.6 of the 2003 report, said something similar: "...Canada's national and international environmental legal and policy commitments, objectives and standards" should be "incorporated into the environmental assessment process under CEAA".

So should we somehow build strategic and policy objectives of the government—the stated ones that we supposedly stand for—into CEAA? If we were to do that, how would we do it?

Mr. Stephen Hazell: There are two parts to the question. The first part relates to projects that are of federal interest that are not currently being assessed. Elaine Feldman gave an example last week. She talked about these in situ SAGD oil sands projects and how, if they are not having some effect on fish habitat, there will not be a federal assessment, whereas for oil sands, mines usually do destroy fish habitat, and hence there's a federal trigger. Why is that? In both cases, they're producing huge amounts of greenhouse gas emissions. That was the first point.

With respect to what we call strategic environmental assessment, how do you actually build sustainability into federal decision-making? I should say that there is actually a cabinet directive that applies right now and says that as cabinet memoranda are developed, there's supposed to be an analysis of the environmental effects. That's supposed to happen. It used to be the case that some public information emanated from that. Now it doesn't.

I think there's a case to be made for legislating a strategic environmental assessment process, so that as part of the normal course of events in developing decisions and policies for the federal government, the environmental effects would be considered as a matter of law. I wrote a paper on that 10 or 15 years ago. I prepared a draft bill, actually; it's part of the paper I wrote. I can provide that to this committee if it's of interest.

● (1135)

Mr. Bruce Hyer: Mr. Cassidy, would you like to build on those thoughts?

Mr. Paul Cassidy: Well, for years I've heard the discussion about strategic environmental assessments. The Ontario class environmental assessment was, in many respects, almost a strategic environmental assessment. It dragged on for six years.

I'm very concerned about the use of the environmental assessment process to deal with what are basic public policy issues that I think involve a conversation with Canadians far beyond the individual participants in an EA process.

So I have concerns about that process. I think it can be hijacked, and in addition—

Mr. Bruce Hyer: But how do we deal with cumulative effects, Mr. Cassidy, where—

Mr. Paul Cassidy: Well, cumulative effects are being dealt with.

Mr. Bruce Hyer: —a whole lot of small and large projects contribute to environmental degradation in a huge way, most scientists would agree, and yet we don't deal with them collectively?

Mr. Paul Cassidy: CEAA already deals with cumulative environmental impacts. So I think there is a mechanism for that to be dealt with in the federal process, and it's increasingly being adopted in provincial processes. You have to remember that the environmental assessment process in Canada, the first legislation for which was in Ontario in 1975, has always been proponent-driven, and I'm in favour of keeping it that way. In other words, the proponents....

You used the phrase "reactive". I say it's proponent-driven, so I would prefer that it maintain that focus on proponents coming forward and, then, proper decisions being made. That's the point of the EA process: that you take into account all the appropriate factors that you should take into account. Whatever you want to include—cumulative environmental impacts, climate change, whatever Canadians want—should be in that process, but I come back to the concept of efficiency that is my major concern.

Mr. Bruce Hyer: Those are my questions.

The Chair: Thank you. You ended 15 seconds early.

Our next seven minutes is for Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you very much, Mr. Chair.

Thank you to the witnesses who are here today.

Having practised law for almost 30 years, I was only waiting for somebody to say that when you said you were a lawyer, we wouldn't hold it against you, because—

Voices: Oh, oh!

Mr. Stephen Hazell: They always do, though.

Mr. Stephen Woodworth: Yes, they always do. That's what I got for 30 years.

Thank you very much. You're both well versed in these issues.

I did want to direct some questions to Mr. Hazell, because you said at the outset that you are not here on behalf of any particular group today, but on your own behalf.

Mr. Stephen Hazell: That's correct.

Mr. Stephen Woodworth: But I do understand that you are the managing partner of Ecovision Law. Is that your own law practice?

Mr. Stephen Hazell: That's correct.

Mr. Stephen Woodworth: I also understand that you are a counsel with Ecojustice. Is that correct?

Mr. Stephen Hazell: That's right.

Mr. Stephen Woodworth: And you have in fact appeared in other venues to talk about the environmental assessment at the federal level.

Mr. Stephen Hazell: That's right, over many years.

Mr. Stephen Woodworth: In particular, you were at a conference for the OAIA on October 14, 2010. I guess that's over a year ago already. Do you recall that?

Mr. Stephen Hazell: Yes, I do recall that.

Mr. Stephen Woodworth: You were there and presented a paper entitled "Federal EA: Revisiting First Principles". You remember that?

Mr. Stephen Hazell: Yes.

Mr. Stephen Woodworth: The information I have is that you were there presenting as a counsel for Ecojustice. Do you recall that?

● (1140)

Mr. Stephen Hazell: Yes, I think that's right.

Mr. Stephen Woodworth: So I'm assuming at that point that you would be speaking for Ecojustice.

Mr. Stephen Hazell: That's right.

Mr. Stephen Woodworth: I was very interested in some of the suggestions for reform that you presented to that conference. In particular one of them, I understand, was that there should be a focusing of CEAA on bigger projects with better EAs and that could ease provincial and private sector concerns. Do you recall that general recommendation?

Mr. Stephen Hazell: Yes, that's right.

Mr. Stephen Woodworth: Because this has been touched on by a number of questioners already, I'd like to come to grips with what you mean by "bigger projects" in that recommendation you made as Ecojustice counsel.

Mr. Stephen Hazell: I think a starting point, actually, are the major projects identified by the Major Projects Management Office. If it's big enough to be of interest to MPMO, then there probably should be a serious environmental assessment done, either a comp study or a panel review.

That just gives you a flavour for it. It's not so easy to say what a major project is; it has to be with dynamics or an iterative process, because new things are coming up all the time. Ten years ago, we didn't worry so much about wind farm projects. Now that's one of the biggest issues we have.

Mr. Stephen Woodworth: So that's really the difficulty because, as a legislative committee, we want to give some guidance to the Major Projects Management Office, perhaps, so are we talking in terms of dollar value, in terms of square miles or hectares that are affected by a project? What sorts of parameters are you referring to when you talk about a bigger project?

Mr. Stephen Hazell: Well, there are a couple of ways of coming at it. You've suggested a couple. One, you could go with the dollar value for the project. Or you could go with a test in terms of some environmental indicator. For example, you could say any projects that would result in greenhouse gas emissions greater than x tonnes of CO_2 equivalent.... That might trigger a federal assessment, given that we're trying to reduce our....

You could have some indicator of project size in terms of dollar value, or it could be the size of the footprint, potentially, although I see more problems with that one, or it could be in terms of some environmental indicator.

Mr. Stephen Woodworth: I'd like to just talk about the flip side of this question. I'll reference a presentation that you made earlier this year on April 15, 2011, to the Queen's Institute for Energy and Environmental Policy. Your paper was entitled "Environmental Assessment in the Climate Century". This one has your Ecovision Law logo on it, so I assume you were speaking on behalf of your law firm at that time. Is that right?

Mr. Stephen Hazell: Yes.

Mr. Stephen Woodworth: In particular, you made comment in this paper as to significant shortcomings of the Canadian Environmental Assessment Act. One of the shortcomings was: "Too much sweating of small stuff (legal requirements for small projects)". So the flip side of what we were just talking about is this: how would you define "small projects" that perhaps shouldn't necessarily be caught up in CEAA?

Mr. Stephen Hazell: Well, I think a small project is a project that isn't a major project, so I think they're two sides of the same coin.

Mr. Stephen Woodworth: That's a good lawyer's answer right there.

Voices: Oh, oh!

Mr. Stephen Hazell: Roughly 99% of projects are these small projects. A number of them are triggered through law list provisions. I've mentioned one: if you want to study birds in a migratory bird sanctuary, you need a permit, and to get the permit, you need an environmental assessment.

Well, thousands of these have been issued and, at one point, a colleague at Environment Canada said he had a full person-year devoted to assessing the environmental effects of the scientific permit-issuing process. It seems crazy.

But I think you need to look at the context a little bit. I mean—

Mr. Stephen Woodworth: Excuse me for just a minute. When you say it seems crazy, I take from that you mean that it's probably not necessary. Is that what you mean?

Mr. Stephen Hazell: It's not necessary to have a legally binding process to deal with it. The department should be able, through the departmental sustainable development strategies and other processes, to manage to ensure that when they issue those scientific permits, they're not damaging migratory bird habitat.

● (1145)

The Chair: Thank you, Mr. Woodworth. Your time is up.

Next is Ms. Duncan.

Ms. Kirsty Duncan (Etobicoke North, Lib.): Thank you, Mr. Chair.

Thank you to the witnesses for coming in. We really appreciate your testimony.

Mr. Hazell, I just want to make sure that we're strengthening and improving this. One of my concerns...and there have been criticisms of this, so this is why I'm bringing it forward. From the 2009 and 2010 budget bills, there have been changes to environmental assessment. Is it possible to table with this committee those specific changes, their related statutes and regulations, and whether each weakened or strengthened the assessment process? Is that possible?

Mr. Stephen Hazell: Yes. I think in submissions made by the Sierra Club, certainly, when I was the executive director there a few years ago, we did an analysis of the changes made in the 2009 budget, which basically removed the Navigable Waters Protection Act as a trigger. That had a number of important impacts. For 2010, there were thousands of projects that were no longer assessed by virtue of the changes that were made.

I think what I want to say about it is that I don't necessarily disagree that we need to reduce the number of environmental assessments that are done federally—by some estimates, 5,000 a year—but it's how you go about that, and ensuring that we try to and do catch the big ones, because eliminating the Navigable Waters Protection Act trigger meant, in some cases, that a number of dams and dikes were not assessed that clearly had implications for aquatic ecosystems, and they were not subject to the Fisheries Act trigger.

So yes, we can give you more information about the impacts of those cuts, but—

Ms. Kirsty Duncan: That would be terrific. Could you table them with the committee for 2009 and 2010?

Mr. Stephen Hazell: What I can provide is the analysis that was done by Sierra Club and with Ecojustice for last year's budget.

Ms. Kirsty Duncan: I would appreciate that.

In your opinion, should infrastructure projects be exempt from environmental assessment?

Mr. Stephen Hazell: They should not be exempt from environmental assessment merely because they're infrastructure projects.

What sort of infrastructure project are we talking about? If we're talking about siting a sewage treatment plant on a wetland, that should be assessed because it may have significant environmental effects. Also, just because a project is intended to benefit the environment in some way, that is not a reason for excluding it from assessment either, because it may have a number of significant adverse effects.

However, a lot of the infrastructure projects are small things, such as building a community arena or something like that. Perhaps those should not be subject to assessment.

At the federal level, I think we do need to focus on the big stuff and not sweat the small stuff so much, which unfortunately hasn't been a feature of CEAA so far. Not that there hasn't been a lot of good work done in the screening assessments—there has been, but we've learned some things. A lot of standards have been developed because of the work that has been done, such as, for example, no pipeline crossings over streams.

There's a standard set of rules for companies building pipelines across streams and rivers. Those are followed. We don't need to go into a big song and dance about that, because basically the engineers know what the standards are,and they follow them.

Ms. Kirsty Duncan: Thank you.

In your opinion, should the minister be able to limit any environmental assessment to a portion of the project? I believe this is contrary to the Supreme Court ruling on the Red Chris Mine. Have there been examples where this has occurred?

Mr. Stephen Hazell: Well, there have been a number.... I don't think the Minister of the Environment should have that authority. I think the approach the government should take should be the approach stated by the Supreme Court in Red Chris, which is that the project is the project as stated by the proponent, and neither the responsible authority nor the environment minister should be trying to narrow that down.

There are a lot of examples of so-called project-splitting. Among the most egregious is the case of True North, which is another case that went to the Supreme Court, in which you have an oil sands mine and there's a road and a bridge crossing associated with that.

The Department of Fisheries and Oceans, in its wisdom, decided to scope that tar sands mine project as a bridge and a road. In essence, the tar sands by itself was not subject to the environmental assessment. That was probably the most egregious example that one can think of. I just don't think it's a good idea for the Minister of Environment to have that authority.

● (1150)

Ms. Kirsty Duncan: You've provided one example—and that is egregious—but have there been other examples where this has occurred and are you able to table these with the committee? Because we need to be able to see these.

Mr. Stephen Hazell: Yes. Well, I'm not aware of any list that has been prepared. Most of this stuff is based on personal experience. I don't think any statistical summary has been presented.

Sometimes it's the case that a project will be subject to a comprehensive study because of its size, and the proponent may be able to repackage some of the elements of the project so that it would only be subject to a federal screening. That sort of thing does happen from time to time.

Ms. Kirsty Duncan: Can I ask one more question? I'm out of time with the committee....

I think for both of you, if you could table a list of your top issues that the committee should focus on first during its review of the act, that would be very helpful.

The Chair: Madam Duncan—

Ms. Kirsty Duncan: And I'm done. Thank you.

The Chair: —your time's up.

Mr. Hazell, a very short answer.

Mr. Stephen Hazell: Yes, certainly.

The Chair: That was short. Thank you.

Mr. Paul Cassidy: I'm going to rely on the statements I've made with regard to the issues I saw.... I'll leave it at that.

[*Translation*]

Le président: Ms. St-Denis, you have the floor for five minutes.

[*English*]

Ms. Lise St-Denis (Saint-Maurice—Champlain, NDP): I'll speak in French.

[*Translation*]

My questions are directed to Mr. Cassidy.

Before asking the questions I prepared, I would like to go back to something you mentioned earlier. You talked about harmonizing the process between the federal government and provinces. Unless I am mistaken, the Canadian Environmental Assessment Agency has raised this issue. We were told, I believe, that this problem no longer exists since July 2010, that there is now a coordination and harmonization of the decisions made at the federal and provincial levels. I am not talking about decisions made within the federal government but about harmonization with provinces. A timeframe has been set for determining if the project should be assessed and also for the tabling of the report; I believe those time limits are 90 days and one year respectively.

Could you please elaborate on this? Is what they told us true? This does not completely square with what you said. I am sorry to be asking those questions but I am not a lawyer.

[*English*]

Mr. Paul Cassidy: No, it's quite all right, and I regret that I cannot speak to you in the other official language.

However, I will respond by saying that my boots-on-the-ground experience is that we still have issues with regard to a lack of harmonization of processes in Canada, driven, by and large, by the differences in timelines that the various legislation across the country provides. In some cases, as I indicated earlier, it's the absence of timing or requirements on the federal side.

To answer your question, in brief, my view is that there needs to be a lot more work done on the harmonization. I appreciate that efforts have been made. I'm very aware of the comprehensive agreements that are in place with certain provinces, including British Columbia, but I believe that we still are running into difficulties associated with inconsistent approaches and, indeed, ultimately, the ultimate lack of harmonization: that being inconsistent decision-making, where you have a federal process making one ruling and a provincial process on the very same project making a different ruling. That, to me, is the ultimate failure of harmonization.

● (1155)

[*Translation*]

Ms. Lise St-Denis: Thank you.

In your view, is a more stringent environmental assessment act required in order to tie in the federal government's greenhouse gas reduction targets and the production of fossil fuels in Canada?

[*English*]

Mr. Paul Cassidy: I think there are other ways to deal with the issues of fossil fuels and the issues you raised than the environmental assessment process. I'm not ruling out that the environmental assessment process can be used in that regard, but I think there are ways for those issues to be addressed that are more efficient than the environmental assessment process.

So I would not generally agree with the suggestion that stricter forms of environmental assessment are the best approaches for those issues.

[*Translation*]

Ms. Lise St-Denis: Thank you.

Should we, in Canada, readjust the government's enforcement power and the incident criminal offences?

[*English*]

Mr. Paul Cassidy: That's an interesting question because, as Mr. Hazell referred to, the enforcement of environmental assessments in Canada has had an interesting history, to the extent where, for example, in British Columbia, you get an environmental assessment certificate at the end of the day. That is actually the type of permit that I think Mr. Hazell is referring to. It is an offence to violate an environmental assessment certificate. Indeed, in the Ontario legislation the same has occurred. There was even litigation about that in Ontario, years ago, when an environmental assessment certificate was alleged to be violated.

So there is a history of those types of ultimate processes involving an enforcement. That's not the case in CEAA right now, as you know, but it has an interesting history.

I would only support such an arrangement if there were a full, concurrent approval process where permitting occurs at the same time and you have that one-stop type of shopping that Mr. Hazell referred to.

The Chair: Thank you so much.

The last questioner is Mr. Toet, for five minutes.

Mr. Lawrence Toet (Elmwood—Transcona, CPC): Thank you.

My questions are directed to Mr. Hazell.

They go back to some of the triggering that you spoke about in your introduction and that Mr. Hyer touched on a little bit in his questioning. I first want to refer to a presentation that I believe you made on "Environmental Assessment in the Climate Century" to the Forum of Federations on September 14.

Mr. Stephen Hazell: Right.

Mr. Lawrence Toet: Were you a representative of the Sierra Club of Canada when you gave this presentation?

Mr. Stephen Hazell: Remind me what the date of that was.

Mr. Lawrence Toet: It was September 14, 2009.

Mr. Stephen Hazell: At that time, I was executive director of the Sierra Club. That's correct.

Mr. Lawrence Toet: So it would have been a presentation in that role.

Mr. Stephen Hazell: That's correct.

Mr. Lawrence Toet: Okay. On page 10 of that, you describe the national environmental significance approach that is used in Australia.

Mr. Stephen Hazell: Right.

Mr. Lawrence Toet: My understanding is that this approach is being used in Australian assessments and specifically means that an environmental assessment in Australia is triggered when "...actions [are] likely to have a significant impact on a matter of national environmental significance". Would that be a correct description of that process?

Mr. Stephen Hazell: That's correct, yes.

Mr. Lawrence Toet: Could you elaborate, then, on how this process would work in Australia? You seem to have some good things to say about it. I'd be interested in hearing you elaborate a little further on that.

Mr. Stephen Hazell: My understanding is that, as in Canada, most environmental assessment activity is actually undertaken at the state level—the provincial level in Canada—so the states have the primary authority and the federal Government of Australia does not get involved so much in environmental assessment activity.

But there is this provision in the federal Australian legislation that allows the federal government to undertake an environmental assessment. They can do that when they make a determination that it is a matter of national significance. Some of the areas that are considered to be nationally significant are laid out in that legislation. Climate change wasn't one of them, but there are other matters that were.

My interest in that law is really based on the idea that a national government should have some discretionary authority to assess projects that are in the national interest even though they may not otherwise be captured by some law list trigger.

An example is given of an in situ oil sands project: a huge amount of greenhouse gas emissions. As a country we're committed at the provincial level, the federal level, etc., to reduce our greenhouse gas emissions. Shouldn't the federal government have a seat at the table? Or shouldn't the federal government be able to require an environmental assessment in that situation?

Australia took this approach. It may be of interest in terms of an amendment to CEAA.

● (1200)

Mr. Lawrence Toet: Okay. That leads me into my follow-up question on that. You say it may be of interest to look at in Canada. How can you see that helping in our process in Canada?

I know that the Australian model basically includes world heritage properties, wetlands of international importance, Commonwealth marine areas, nuclear actions, etc. They do have a really formalized process. They're also very formalized as to what would bring this assessment about.

How do you see that working out in Canada, then? You obviously have a liking for the model, to some degree, so how do you see that working within the Canadian structure?

Mr. Stephen Hazell: I would say there could be a provision in CEAA which basically states that where the Minister of the Environment determines that a project is of national significance, he or she may establish a panel review to review that project.

There are some similar sorts of provisions in CEAA right now. They're very complicated and they have not been used that much, but there is the option for individuals to petition the Minister of the Environment to establish a panel review, under several different sections.

This would be clear, and I think it would improve the overall operation of the act and ensure that the federal government is looking out for the environmental effects of projects that are really and truly national in scale.

The Chair: Thank you, Mr. Hazell and Mr. Cassidy.

Mr. Cassidy, you made a long trip to come here.

We thank both of you so much for providing some valuable and important information.

That ends this portion of the committee.

Ms. Rempel.

Ms. Michelle Rempel: I have a point of order, Mr. Chair, with regard to process for tabling documents. I know that my colleague has asked for a couple of documents to be prepared by one of the witnesses. It's my understanding that we typically ask for documents when they're referenced in a presentation or perhaps haven't been provided to the committee.

I'd like some clarification on process for that as well as what's been requested.

The Chair: Are there any other comments on that point of order?

Ms. Duncan.

Ms. Kirsty Duncan: Thank you.

I'm not sure if this committee runs differently, because I've served on other committees where that was quite appropriate to ask. Unless there are rules specific to this committee that I'm missing, that's the process I'm used to.

The Chair: Is there anybody else on the point of order?

Seeing no other hands, I'll say that it was an informal request. Any member of the committee can make an informal request. There's no obligation on the witnesses, the clerk, or anybody in this committee to actually provide those. If the committee wanted to request that officially—a formal request—it would require a motion. At this point, it's informal. The request came from Ms. Duncan and there's no obligation for any action at this point.

We're out of time at this point, so I would entertain a motion to adjourn.

That's moved by Ms. Rempel.

The meeting is adjourned.

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