Bora Laskin Faculty of Law
Professor Jason MacLean
955 Oliver Road
Thunder Bay, ON P7B 5E1

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Review of Environmental Assessment Processes
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, ON K1A 0H3

To Whom It May Concern:

RE: Comments and Suggestions Regarding EA Review Terms of Reference

This letter sets out my comments and suggestions regarding the draft Terms of Reference for the Environmental Assessment Expert Panel review. For convenience, I have organized my comments and suggestions under each of the five questions establishing the scope of the Expert Panel's review.

1. **How to restore robust oversight through environmental assessments of areas under federal jurisdiction, while working with the provinces and territories to avoid duplication?**

This question appears to tacitly accept that there are both political and legal (constitutional) limitations to the federal government's role in the environmental assessment (EA) process. While of course there are, the consensus academic position is that these limitations have been overstated, and that the federal government has ample (if not plenary) political and constitutional jurisdiction to assume a leadership role in the EA process.

The phrase "robust oversight" is key. It not only empowers the federal government to ensure that all other levels of government are complying with appropriate standards (it allows the federal government, in other words, to set a baseline standard and step in to fill gaps where necessary), but it also invites the related question about what "robust" means in an EA process.

It is worth recalling that even before the 2012 amendments Canada's environmental record was questionable. According to the Canadian Environmental Assessment Agency, approximately 25,000 natural resources projects were assessed between 1995 and 2000. An astonishing 99.9 percent were approved.

No wonder a leading scholar of Canadian environmental assessments, Bob Gibson of the University of Waterloo, recently characterized the 40-year legacy of environmental assessment in Canada as "making bad projects a little less bad." The present expert review is an opportunity to change course.

Fundamentally, EA must move beyond being merely an informational tool and become a tool for determining, not *how* proposed projects will inevitably proceed, but *whether* they proceed at all. The way to answer that question is not by mitigating adverse biophysical impacts, but by assessing whether a project will make a net contribution to sustainable development and decarbonization, thereby helping us meet our Paris climate change commitments. EA, in other

words, must become a tool used for facilitating and accelerating the transition to sustainability. EA must become sustainability assessment (or SA).[1]

2. **How to ensure decisions are based on science, facts and evidence and serve the public's interest?**

This an excellent question, but one that is much easier to ask than it is politically palatable to answer. Take the case of oil pipelines. While the federal government's interim regulations are a notable improvement on the National Energy Board's steadfast refusal to consider either the upstream or downstream emissions of oil pipelines, the problem remains that most of the GHG emissions arising from a pipeline are downstream emissions, which the interim regulations' EA process will continue to ignore. An environmental assessment that arbitrarily excludes downstream emissions effectively exports, not only Alberta's bitumen crude oil, but also its ultimate emissions.

That is both bad science and bad foreign policy.

In terms of science, peer-reviewed analyses demonstrate that in order to have a better-than-even chance of keeping global warming to 2 degrees Celsius above the pre-industrial average, at least 85% of Alberta's remaining ultimately recoverable bitumen must remain in the ground. In one model, the percentage rises to 99%.[2]

No oil pipeline that will expand the extraction of Alberta's unconventional oil sands can pass a scientifically valid climate test because *any* increase in unconventional oil production is incommensurate with efforts to limit average global warming to 2 degrees Celsius. This is the scientific standard that must be applied to the Energy East project (and any other) proposal if the government's assessment is to be trusted by Canadians.

Arbitrarily excluding an oil pipeline's downstream emissions is likewise bad foreign policy. Canada was an outspoken member of the "ambition coalition" at the recent Paris climate change negotiations. Thanks in no small part to Canada's leadership, article 2(1)(a) of the final agreement encourages parties to "pursue efforts to limit temperature increase to 1.5 degrees Celsius above pre-industrial levels."

Article 4.4 of the Paris climate change agreement further stipulates that developed countries like Canada should "continue taking the lead by undertaking economy-wide absolute emission reduction targets." Approving a pipeline because the bulk of its emissions will arise downstream, beyond Canada's borders, would violate both the letter and the spirit of this historic agreement.

The answer to the second question of the draft Terms of Reference, then, is to listen to peer-reviewed scientific results and educate Canadians about those results, and chart a course accordingly.[3]

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[1] Jason MacLean, "How to restore trust in Canada's environmental regulations", *Toronto Star* (23 June 2016), online: <https://www.thestar.com/opinion/commentary/2016/06/23/how-to-restore-trust-in-canadas-environmental-regulations.html>.

[2] Jason MacLean, "How to evaluate Energy East? Try evidence", *Toronto Star,* (February 7, 2016), online: <http://www.thestar.com/opinion/commentary/2016/02/07/how-to-evaluate-energy-east-try-evidence.html>.

[3] See Jason MacLean, "The misleading promise of 'balance' in Canada's climate change policy," *Policy Options,* (March 29, 2016), online: <http://policyoptions.irpp.org/magazines/march-2016/the-misleading-promise-of-balance-in-canadas-climate-change-policy/>.

3. How to provide ways for Canadians to express their views and opportunities for experts to meaningfully participate?

This may be the most important question of all from the perspective of democratic accountability. The federal government says that public consultation will be the core of its review of EA. It has promises a coordinated, open, and transparent process based on scientific evidence, working in partnership with Indigenous Peoples, provinces and territories and input from the public, industry and environmental groups. That is the right approach, but the government must not stop there. Instead, it must translate consultation into a new regime that mirrors all of those commitments while encouraging and enabling more Canadians to become meaningfully involved in environmental decision-making. Only then will Canadians trust the government as an environmental steward.

How to do this? EA must move beyond the notice-and-comment model. It is well established, for example, that enhanced opportunities for public participation have improved the quality of environmental decision-making.[4] Structures for public participation were originally significant features of EA.[5] These structures have typically included public notices and invitations to comment on proposed projects, opportunities to make depositions and, in some cases, more formal presentations of evidence before EA panels and hearings.[6] Significant as these opportunities have proven in some instances, "*their ability to alter the trajectory of economic activities in the direction of sustainability has never been fully realized*."[7]

The unrealized potential of public participation in EA can be traced to the predominantly "bipartite bargaining" nature of environmental decision-making in Canada, whereby decisions are influenced primarily by the relevant government agencies and the private-sector actors involved (or, in some cases, between the different levels of government involved).[8] Bipartite bargaining has increasingly been perceived by the public – not unjustly – as deficient due to its tendency to exclude local knowledge and the interests of affected communities.[9]

Hence the need for polyjural and polycentric SA. Public participation in sustainability-based decision-making has the potential to facilitate the meaningful inclusion of diverse perspectives, which are in turn capable – arguably *most* capable – of thoroughly and reliably reviewing project proposals.[10] According to a recent analysis of eight case studies of EAs involving Indigenous groups, for instance, greater Indigenous participation resulted in improved project design, the

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[4] See e.g. Mark Winfield, "A New Era of Environmental Governance in Canada: Better Decisions Regarding Infrastructure and Resource Development Projects" (May 2016), Metcalf Foundation Green Prosperity Papers, online: <http://www.metcalf.com>.

[5] A. John Sinclair & Alan P. Diduck, "Public participation in Canadian environmental assessment: enduring challenges and future directions" in K.S. Hanna, ed, *Environmental Impact Assessment Process and Practices in Canada*, 3rd ed. (Toronto, Oxford University Press, 2015).

[6] *Ibid* at 11. In the U.S. context, "legitimating public participation, and demanding openness in planning and decision-making, has been indispensable to a permanent and powerful increase in environmental protection": Joseph Sax, "Introduction," (1986) 19 *Michigan Journal of Law Reform* 797.

[7] *Ibid* at 7 [emphasis added].

[8] *Ibid* at 9; see also George Hoberg, "Environmental Policy: Alternative Styles" in M. Atkinson, ed, *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Javanovich, 1993).

[9] *Ibid* at 10; see also Mark Winfield, *Blue-Green Province: The Environment and the Political Economy of Ontario* (Vancouver: UBC Press, 2012); R. O'Connor, *The First Green Wave: Pollution Probe and the Origins of Environmental Activism in Ontario* (Vancouver: UBC Press, 2015).

[10] Gibson, Doelle & Sinclair, "Next Generation Environmental Assessment for Canada", *supra*.

integration of new knowledge about potential impacts, discovery of new ways to mitigate environmental damage and community impacts, and the opportunity for greater collaboration.[11] Greater collaboration, however, will only be achieved by encouraging and enabling the equal and ongoing participation of a plurality of voices. While the traditional "notice and comment" approach is capable of furnishing decision-makers with more information, a better understanding of the competing interests at stake, and the likely consequences of different courses of action, this approach neither accounts for nor alters the inequality of resources, power, and influence among different social and political groups. Indeed, reliance on notice-and-comment-style public participation may actually further entrench this inequality. Decision-makers are rarely if ever legally obligated to respond to issues raised in public comments, and in practice, the most influential comments tend to be those that provide decision-makers with the kinds of data and sophisticated analyses that may be used to justify decisions.[12] Representative government "has given way to a world in which the prime minister's courtiers talk to a handful of senior Cabinet ministers, a few carefully selected deputy ministers, lobbyists, former public servants turned consultants, heads of friendly associations, and some CEOs of larger private firms. *This permeates all aspects of government – even regulation*."[13]

A polyjural and polycentric approach to SA calls for more balanced inclusion, involvement, and influence of affected interests and stakeholders.[14] SA decision-making must move beyond the passive interest group pluralism of the notice-and-comment model by institutionalizing the ongoing involvement of underrepresented interests throughout the SA process. This inclusion and the resulting balance of competing interests will allow SA decision-makers to open up the SA process to multiple forms of data and to experiment with a variety of potential solutions. While this proposal may appear to run counter to prevailing norms of centralized coordination, administrative efficiency, and market certainty, increased interaction and experimentation among multiple actors at multiple levels of social organization has the potential of facilitating the emergence of common standards and practices over time.[15] This, of course, is not an entirely new idea. The federal government, for instance, once relied on a multi-stakeholder regulatory advisory committee – the National Roundtable on the Environment and Economy – that was

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[11] Bram Noble, "Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment" (2016), A Macdonald-Laurier Institute Publication, online: <http://www.**macdonaldlaurier**.ca/files/pdf/**Noble**_StewardshipCaseStudies_F_web.pdf>.

[12] See generally Mariano-Florentino Cuellar, "Rethinking Regulatory Democracy" (2005) 57 *Administrative Law Review* 411. In the context of U.S. banking reform, one commentator observed that in responding to public comments, financial "regulators crave data that can be used to justify decisions" while "historically, industry groups have dominated these information wars, plying regulators with exhaustive studies and detailed analyses of the options at hand. Trade groups have more money and more people, and they often produce and control the relevant information about business and customers." See Binyamin Appelbaum. "On Finance Bill, Lobbying Shifts to Regulations" *The New York Times,* (27 June 2010), online: <http://www.nytimes.com/2010/06/27/business/27regulate.html?_r=0>.

[13] Donald J. Savoie, *What is Government Good At? A Canadian Answer* (Montreal: McGill-Queen's University Press, 2015) at 266 [emphasis added].

[14] This involvement ought to be enshrined in legislation and upheld by robust judicial review. As Olszynski argues, "the polycentric nature of the exercise [of EA] underscores the important role of both the Act [*CEAA, 2012*] and the courts in ensuring that environmental concerns are not ignored or marginalized in the face of traditionally predominant considerations (*e.g.* economic ones)." Martin Olszynski, "Northern Gateway: Federal Court of Appeal Applies Wrong CEAA Provisions and Unwittingly Affirms Regressiveness of 2012 Budget Bills", *Ablawg.ca,* (5 July 2016), online: <http://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions/>.

[15] This, generally, is the argument of "democratic experimentalism." See e.g. Michael C. Dorf & Charles F. Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 *Columbia Law Review* 267.

often able to achieve a remarkable level of consensus on complex issues.[16] In fact, the advice received and the credibility gained by the involvement of independent voices have stood up well over time.[17]

4. **How to require project advocates to choose the best technologies available to reduce environmental impacts?**

This too is an excellent question, but following the argument set out above in respect of the third question, it cannot remain a stand-alone question. To illustrate, what is meant by "best"? Best at what? Best as determined by whom? If EA becomes SA, then it follows that (1) "best" cannot be measured as best at mitigating adverse biophysical impacts. It must be defined as best in terms of facilitating and accelerating the transition to a sustainable economy. And (2) if that determination does not involve the meaningful input of a broad array of interested and affected stakeholders, the decision-making process will run the risk of regulatory capture by industry interests (or, at the very least, and just as problematic, the process will be *perceived* to be captured and therefore democratically unaccountable).

5. **How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects.**

Here the answer tracks the response provided in response to question 3 above. According to a recent analysis of eight case studies of EAs involving Indigenous groups, for instance, greater Indigenous participation resulted in improved project design, the integration of new knowledge about potential impacts, discovery of new ways to mitigate environmental damage and community impacts, and the opportunity for greater collaboration.[18] Greater collaboration, however, will only be achieved by encouraging and enabling the equal and *ongoing* (as opposed to one-off) participation of a plurality of voices.

Moreover, as the Federal Court of Appeal recently noted in its decision in the Northern gateway case: "*It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples*," the majority added.[19]

However, contrast this check-the-box reasoning – which curiously conjoins "meaningful dialogue" and "little time and little organizational effort" – with Gitga'at First Nation elder Art Sterritt's response to the Court's judgment. According to Mr. Sterritt, additional consultation will not pave the way to his nation's acceptance of the project. "The Gitga'at people are absolutely against this project. There is really no good that can come of the Northern Gateway project….

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[16] National Roundtable on the Environment and Economy, "National Roundtable on the Environment and Economy", (22 March 2013), online: <http://collectionscanada.gc.ca/webarchives2/20130322140948/http:/nrtee-trnee.ca/>, discussed in Gibson, Doelle & Sinclair, "Next Generation Environment Assessment for Canada", *supra.*

[17] Jeffrey Simpson, "Ottawa kills the emissions messenger", *The Globe and Mail,* (20 June 2012), online: <http://www.theglobeandmail.com/globe-debate/ottawa-kills-the-emissions-messenger/article4350552/>, discussed in Gibson, Doelle & Sinclair, "Next Generation Environment Assessment for Canada", *supra*.

[18] Bram Noble, "Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment" (2016), A Macdonald-Laurier Institute Publication, online: <http://www.**macdonaldlaurier**.ca/files/pdf/**Noble**_StewardshipCaseStudies_F_web.pdf>.

[19] *Gitxaala Nation v. Canada,* 2016 FCA 187 (CanLII) at para. 325 [emphasis added].

Just one spill from this project basically wipes out our access to our food, wipes out our economy, wipes out our culture."[20]

In a properly polycentric model of sustainability-based decision-making, "no" must be on the table as a legitimate outcome from the very outset of any assessment and/or consultation process. Again, no amount of consultation, public participation, or "best practices" can substitute for a lack of underlying substantive sustainability as determined through a genuinely plural and structurally balanced learning and decision-making process.

This is true, moreover, not only as a practical matter of facilitating and accelerating sustainability, but also as a matter of recently-settled Aboriginal law. In *Tsilhqot'in Nation v. British Columbia,* the Supreme Court of Canada held that "incursions on Aboriginal title [and arguably other Aboriginal rights] cannot be justified if they would substantially deprive future generations of the benefit of the land."[21]

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I respectfully hope that these comments and suggestions prove useful to the Expert Panel's review. Please do not hesitate to contact me should you desire further information or references in respect to any of the foregoing comments and suggestions.

Yours truly,

Professor Jason MacLean

[20] Quoted in Shawn McCarthy & & Jeff Lewis, "Court overturns Ottawa's approval of Northern Gateway pipeline", *The Globe and Mail,* (1 July 2016), online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/federal-court-overturns-ottawas-approval-of-northern-gateway-pipeline/article30703563/>.

[21] [2014] 2 S.C.R. 257 at para. 86.