

LAWSON LUNDELL

BARRISTERS AND SOLICITORS

LEGAL ISSUES
RELATING TO IMPACT
ASSESSMENT
PROCESSES AND
DECISIONS:

THE CANADIAN
EXPERIENCE

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VANCOUVER ▼

CALGARY ▼

YELLOWKNIFE ▼



WESTERN CANADIAN ▼ BUSINESS LAW

LEGAL ISSUES RELATING TO EIA

THE CANADIAN EXPERIENCE

JURISDICTIONAL ISSUES

- ▶ Overlapping – Not exclusive
- ▶ The EARP Experience
- ▶ Federal / Provincial Harmonization

HARMONIZATION IN ACTION

- ▶ The Mackenzie Valley Pipeline EIA
 - National Energy Board
 - CEAA
 - MVIERB
 - MVLWB

ABORIGINAL CONSULTATION

- ▶ *Constitution Act, s. 35*
 - Assess Rights or Claims
 - Consult
 - Accommodate
- ▶ Statutory Requirements
 - CEAA
 - Provincial Environmental Assessment Act
 - Land Claim Agreements (e.g. NLCA)

COMPLIANCE WITH LEGAL REQUIREMENTS

- ▶ Substantive Requirements
- ▶ Process Requirements

SUBSTANTIVE LEGAL REQUIREMENTS

- ▶ EIA “Triggers”
- ▶ Identify:
 - Necessary Approvals, Licenses, Permits, etc.
 - Decision-Makers
 - Statutory Requirements for EIA

STANDARD OF “CORRECTNESS”

- ▶ Decision-makers must correctly interpret legal requirements
- ▶ No judicial “deference” on legal interpretation

PROCESS REQUIREMENTS

- ▶ Notification
- ▶ Timelines
- ▶ Regulatory Responsibility / Delegation
- ▶ Initial Screening, Comprehensive Studies, Panel Review
- ▶ Administrative Law Requirements

MANAGING THE EIA PROCESS

Three Perspectives:

- ▶ Decision-Maker
- ▶ Project Proponent
- ▶ Intervenor

LEARNING FROM EXPERIENCE

- ▶ Failure to Comply with:
 - Substantive Requirements
 - Process Requirements
 - Aboriginal Rights

EXAMPLES OF SUBSTANTIVE NON-COMPLIANCE

- ▶ Oldman River Project:
 - Incorrect interpretation of Federal EARPGO
 - See: [1992] 1 S.C.R. 3
- ▶ McLean Lake Uranium Mining Project:
 - Incorrect Interpretation of “Project” under CEAA
 - See: 2003 49 C.E.L.R. (N.S.) 251

EXAMPLES OF SUBSTANTIVE NON-COMPLIANCE, cont.

▶ Cardinal Coal Project:

- Omission of requirements of *Migratory Birds Convention Act*
- Insufficient compliance with EIA components – “Alternatives”, “Cumulative Effects”, etc.
- See: 1999 30 C.E.L.R. (N.S.) 175

DEFERENCE TO DISCRETION

▶ Sunpine Project:

- Exercise of discretion in “scoping” a project for EIA
- Judicial deference
- See: 248 N.R. 25

DEFERENCE TO SCIENTIFIC EXPERTISE

- ▶ Vancouver Island Peace Society (Re Nuclear Armed Vessels)
- ▶ Judicial deference to scientific and technical expertise
- ▶ Court not an “Academy of Science”
- ▶ See: 1992 3 F.C. 42

PROCESS ISSUES

- ▶ Failure to give notice
- ▶ Failure to consider submissions
- ▶ Cardinal River Coal – Intervenor submission not listed as evidence
- ▶ Failure to provide costs to intervenors
- ▶ Failure to exercise authority to compel evidence
- ▶ Allegation of bias

ABORIGINAL RIGHTS ISSUES

- ▶ Constitutional Rights
- ▶ Fiduciary Duty of Crown
- ▶ Duty to Consult
- ▶ Duty to Seek Accommodation of Rights
- ▶ Requirement to Incorporate Traditional Knowledge into EIA

SUMMARY

EIA Requires:

- ▶ Legal Compliance
- ▶ Scientific and Technical Assessment

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