ONTARIO ASSOCIATION FOR IMPACT ASSESSMENT
2013 ANNUAL CONFERENCE, 23-24 OCTOBER
SESSION 9
MARK WINFIELD, YORK UNIVERSITY: COMPLETE SPEAKING NOTES

The Political Economy of Scientific Evidence in Decision-Making

Introduction

Good afternoon and thank you for the opportunity to address your conference.

I was asked to look at the question of the role of scientific evidence in decision-making from the perspective of an academic observer and participant in these processes and, reflecting my former roles with the Pembina Institute and Canadian Institute for Environmental Law and Policy, from the perspective of civil society actors and citizens.

My initial reaction was to reframe the issue, as I don't see this as a question of whether we want the best available scientific evidence to inform our decision-making processes. I don't think that there is any real debate there.

Rather, we have to recognize that scientific "truths" can be contested, and even be the products of social constructions, depending on the perspective and values of their authors. Therefore for evidence to be useful it has to be subject to challenge. The assumptions, methods, quality of evidence have to be able to be questioned. More broadly, many of the key questions that arise in environmental assessment and similar processes are about value choices which cannot be answered by science. This is particularly the case where issues arise around the need and rationale for projects, the availability of alternatives to projects, and their potential wider contributions to sustainability.

In the context of environmental assessment and other evidence-based decision-making processes, this requires a number things need to be in place to ensure effective consideration of evidence.

First, third parties, particularly members of the public, need to have **access** to the decision-making process. Until recently we had tended to think that these barriers had largely been overcome through the *Canadian Environmental Assessment* Act (CEAA) federally, and the *Environmental Bill of Rights* (EBR) and *Environmental Assessment Act* (EAA) in Ontario. However new barriers have been introduced via the C-38 amendments to CEAA and the *National Energy Board Act*. There have also been subtle but very important erosions of rights of access to decision-making in Ontario as well, particularly through the Ministry of the Environment's "approvals modernization"

initiative, and changes in the practice of environmental assessments. The issues of 'standing' for public interest, community and citizen stakeholder groups are back on the table.

Second, the **scope** of the range of decisions on the table needs to be appropriate to the nature and scale of the undertaking, particularly issues of whether the focus is to be on mitigation or wider considerations of need, alternatives to, or contributions to sustainability of a project or undertaking. Wider assessments, which used to be the norm in Ontario, involve obvious value choices. However, limiting scope of assessments to mitigation only, where need and alternatives to are excluded from consideration, as has now become common practice, carries with it major substantive and procedural value choices as well.

Third, civil society, community and citizen participants in the decision-making process have to have the **capacity** to access the necessary expertise to present their own evidence and challenge proponents' evidence. This is a major issue of fairness and legitimacy for decision-making processes. The presentation and examination of evidence requires time, resources and expertise, which typically proponents have or can afford to buy, but that public participants cannot. The question of capacity has become particularly acute as government scientists have become less willing to provide evidence and if they do so they are often highly constrained in terms of what they can say or speak to.

Finally there has to be a **willingness** on the part of the decision-maker to consider the evidence base presented. This issue has become a central question at the federal level over the past few years, particularly through the Bill C-38 amendments to CEAA, and the government's behaviour and statements regarding the Northern Gateway and other pipeline projects.

Academics as Experts

In practice it is very rare for full-time academics to intervene in decision-making processes on their own behalf (with the exception of retired colleagues). Rather they tend to be drawn in as experts on behalf of other parties. The major constraints in terms of what role they can play are less about money than time, except where what is required is original empirical research as opposed to the review of documents prepared by the proponent and government agencies.

In my own experience it is extremely difficult to commit to formal hearing or assessment process with firm deadlines during the academic term. As a full-time professor there are time demands inherent in one's job that can't be solved by money. Only very occasionally will the stars align and provide one with the necessary talented graduate students to do the spade work when it is needed.

In the past it was common for government agencies to present their own evidence, and for their own experts to testify. Sometimes agencies would contradict the evidence from proponents and their allied agencies, revealing important expert disagreements about the knowledge base for decision-making and the potential consequences of different options. Unfortunately, this has become this has become more and more rare. Governments now have a desire to present 'unified' government positions on projects that can hide important disagreements about the evidence and its implications. At the federal level expert officials from agencies like Environment Canada, Fisheries and Oceans and Health are subject to extensive fiscal and political constraints on what they can say and where they can say it.

Civil society/public/community perspective

From the perspective of civil society and public participants in decision-making processes the resource and capacity issue is central. Very few public interest intervenors in decision-making processes have the necessary in-house expertise to present evidence on their own behalf or cross examine proponents' evidence. Only a few very large national or regional organizations (e.g. Pembina, WWF-Canada, EcoJustice) have that capacity and even there it is limited and specific to particular issues.

In most cases they have to get experts to either provide reviews of proponents' evidence or lead their own evidence. Volunteers for such roles are extremely rare. They are usually academics, but for the reasons outlined above they can usually only contribute under very specific circumstances. Even then there may be costs, particularly if any sort of field research needs to be undertaken or even for basic travel and accommodation of experts if they are to actually testify before a panel or decision-making body.

Otherwise community or civil society participants will have to hire experts. That path can be extremely expensive, and cannot be covered through the proceeds of bake sales and fundraisers. Where participant funding has existed (e.g. CEAA panels and occasionally CNSC or NEB joint panels) it has been very modest relative to the resources available to proponents (typically $10,000s for participants vs. proponents who may have millions at their disposal). This issue has been particularly evident in the recent CNSC hearings on Ontario Power Generation's (OPG) proposed Deep Geological Repository for low- and intermediate-level radioactive waste, where the proponent's resources seem, for all intents and purposes, unlimited. Cost awards are possible for participants in some processes, like Ontario Energy Board (OEB) hearings. However, awards are made at the end of the process, and require an established and sustained presence in OEB hearings to have any chance of receiving an award.

These types of barriers to effective participation were part of the reason for the adoption of the Ontario *Intervenor Funding Project Act* in 1989. The legislation, in my view, produced better decisions, but also complicated and slowed the decision-making process by allowing public interest intervenors to lead better evidence and cross-examinations of proponents. The result made the entire process vulnerable to recommendations for 'reform.'

Current situation

Within the context of the Ontario EA process, the demand for expert evidence has been constrained by the consideration that there has not been an environmental assessment hearing in the province for nearly fifteen years. Input may be needed for the paper aspects of the EA process, but there are usually no resources available for such work on the part of civil society actors, many of whom increasingly question the utility of these 'paper' exercises.

The need for expert evidence does continue to arise with respect to the Ontario Municipal Board, Niagara Escarpment Commission, OEB, ERT and other tribunals. Economic as well as biophysical evidence plays a central role in many of the forums.

At the federal level there has been a more explicit and decisive move away from evidence based decision-making (See my Sustainable Energy Initiative working paper on this question at: http://sei.info.yorku.ca/files/2012/12/TheEnvironment.pdf). The federal government's approach has placed less and less weight on the recognition of complexity and the importance of expert input and opinion. This is especially evident in the bill C-38 changes to CEAA and NEB Act, introducing time limits for decision-making processes, limitations on public access to decision-making processes and radically narrowing the scope of the assessment of major projects. At the same time, there has been a shift in the location of decision-making authority from expert agencies to the cabinet or to agencies with no previous expertise in the subject matter at hand.

Consequences

In my view, the result of circumstances and the recent 'reforms' to decision-making processes is that we are not getting good decisions or decisions that are as good as they could be, given that processes end up being dominated by the proponents' evidence.

In the longer term such situations will undermine legitimacy of the processes themselves and therefore public acceptance of their outcomes. If public participants in decision-making processes perceive them as unfair, they will regard the outcomes as illegitimate. Such results leads to additional political conflict, which can lead to further delays, from the perspective of proponents. One has only to witness the saga of the

Northern Gateway pipeline project to see such dynamics in action, to say nothing of recent events regarding the Line 9 pipeline proposal in Ontario, shale gas development in New Brunswick, and the ‘Idle No More’ movement.

If evidence is to contribute effectively to decision-making processes, some form of meaningful and substantive participant/intervenor funding process needs to be in place for major projects if the process is to be perceived as fair and the outcomes accepted as legitimate. At the same time, decision-making processes need to respect complexity, and be prepared to take the time necessary to consider evidence properly on large and complex undertakings with major implications for sustainability. There have been long-standing tensions in EA processes between a proponent’s desire for ‘quick’ outcomes versus the amounts of time and resources need to ensure the presentation and appropriate consideration of evidence and to ensure that the process is, and is perceived to be, fair. In my view the pendulum in Canada has swung far too far in the direction of expediency and away from the quality and fairness of decision-making.