



The Impact of Canadian Environmental Regulatory and Approval Regimes on Business Competitiveness

The global economic environment remains challenging, as Canadian firms and industries address the need to be competitive and maintain jobs and investment in the country. For Canada, one positive trend is the rise of Asia in the global economy. Today, Asia as a whole accounts for more than 35% of global output, and the figure is expected to approach one-half by 2025. Some analysts believe that sustained growth in China and other emerging economies in Asia (and elsewhere) will fuel a prolonged “up-cycle” for many internationally traded commodities, as rapidly expanding middle class populations in these nations enjoy steadily rising incomes and businesses and governments there invest to build infrastructure, factories, and other fixed assets. On the whole, this should present significant opportunities for resource-abundant jurisdictions such as British Columbia (and all of Western Canada). However, the competition for resource-related investment and business activity will be strong, as other resource-rich jurisdictions seek to accelerate development to satisfy growing world demand for energy, metals, other industrial raw materials, and foodstuffs.

With this backdrop, it is worth noting that in BC today there is over \$100 billion in actual or proposed “major project investment” on the books, much of it involving energy, mining and related infrastructure projects. These projects are critical to the province’s economic growth.

British Columbia depends on resource-based industries to supply three-quarters of its international merchandise exports, so the province’s ability to increase investment and jobs requires a focus on adding-value, managing costs, increasing productivity, innovating, and responding strategically to emerging market demand.



Within the realm of managing costs, the province needs a predictable and competitive regulatory regime around project development. Wise regulators will temper their desire to layer rules upon rules in a disjointed fashion to deal with a myriad of specific issues.¹ Without discipline on the part of public agencies and regulatory officials, business interests will hedge their investment decisions or go elsewhere, at the cost of jobs, economic activity and tax revenues here in BC. For investors, certainty equates to reliability, predictability and the fair application of rules, as well as cooperation between all levels of government and non-governmental interests.

¹ *Regulatory Co-opetition: Transcending the Regulatory Competition Debate*, Damien Geradin and Joseph A. McCahery, 2005, p. 13.

The Global Competitiveness Index
2011–2012 rankings and
2010–2011 comparisons

Country/Economy	GCI 2011–2012		GCI 2011–2012 rank among 2010 countries	GCI 2010–2011 rank
	Rank/142	Score		
Switzerland	1	5.74	1	1
Singapore	2	5.63	2	3
Sweden	3	5.61	3	2
Finland	4	5.47	4	7
United States	5	5.43	5	4
Germany	6	5.41	6	5
Netherlands	7	5.41	7	8
Denmark	8	5.40	8	9
Japan	9	5.40	9	6
United Kingdom	10	5.39	10	12
Hong Kong SAR	11	5.36	11	11
Canada	12	5.33	12	10
Taiwan, China	13	5.26	13	13

Source: World Economic Forum, 2012.

The World Economic Forum emphasizes that “the best possible environment for the exchange of goods requires a minimum of impediments to business activity through government intervention,” and it further notes that “the relationship between competitiveness and sustainability is crucial.”² At present, Canada is ranked 12th in overall global competitiveness. While there is no comparable measure for British Columbia, the province is known for being a fairly complex and challenging jurisdiction in which to do business, particularly for companies engaged in resource extraction and processing, infrastructure development and heavy manufacturing. In part, this reflects the interplay of separate provincial and federal review and approval processes for most significant projects. Unresolved First Nations land claims are also an important factor shaping the business environment for resource and infrastructure development in BC.

² 2012 Global Competitiveness Report, World Economic Forum, pp. 22, 67.

Does regulatory inefficiency really matter? According to the OECD, regulatory divergence explains a significant part of the inter-country variation in innovation and productivity – which are key drivers of long-term competitiveness³ – and can cost as much as 10% of national GDP.⁴ In the Canadian context, the existence of multiple governments – federal, provincial, local and First Nations, each with some form of extant or yet-to-be-determined regulatory responsibility – increases the likelihood of duplication and inefficiency. “Dividing power among local, [provincial] and federal ... [agencies] generates competing policy perspectives. If decision processes at one level of government are suboptimal or distorted by bureaucratic sloth, special interest lobbying, corruption, elite domination, self-serving politicians, or simply inadequate information and analytic limitations,”⁵ lengthy and administratively burdensome processes and higher costs are created for business. Furthermore, using regulatory processes designed to evaluate discrete projects as a back-door means to debate fundamental policy issues and societal choices (e.g., whether to develop Alberta’s oil sands or to build the infrastructure required to connect local goods to global markets) serves to compound uncertainty, magnify delays, and layer on yet more costs.

³ “Productivity and Convergence in a Panel of OECD Industries: Do Regulations and Institutions Matter,” *OECD Economics Department Working Paper*, 2002, Stefano Scarpetta and Thierry Tresselt.

⁴ *International Competitiveness and Regulatory Framework: A Canadian Perspective*, 2006, Someshwar Rao and Prakash Sharma.

⁵ Supra, footnote #1

Elements of a Competitive and Comprehensive Regulatory System

So what are the elements of a competitive and comprehensive environmental regulatory system, one that is tailored to fit the circumstances of a wealthy jurisdiction that wants to develop its economy and resource industries but is also committed to high environmental standards? The OECD points to the following attributes of good regulation:

1. it serves clearly identified policy goals, and is effective in achieving those goals;
2. it has a sound legal basis;
3. it produces benefits that justify the costs, considering the distribution of effects across society;
4. it minimizes costs and market distortions;
5. it promotes innovation through market incentives and goal-based approaches;
6. it is clear, simple, and practical for users;
7. it is broadly consistent with other regulations and policies; and,
8. it is compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.⁶



Other desired attributes include a skilled and competent workforce within the public service, regulatory bodies that are properly structured and funded, and a willingness to cooperate among different levels of government and stakeholders.

Canada and British Columbia can put tick marks beside some of these desired attributes of competitive regulation, but we come up short in some areas. In relation to the OECD's itemization noted above, our record can be characterized as: unnecessary duplication and overlap; policy as an output rather than input to the regulatory process; lack of specified timelines and clear guidance on the scope of project documentation; muddled rather than deliberate decision-making where trade-offs use science-based information and evidence; and, a lack of user-friendly points of entry and clear expectations. In addition, our ageing and (and shrinking) public sector workforce increases demands on those officials left behind, and who may not have the required skills or resources to do the job adequately. "Regulators need assistance and encouragement to carry out their regulatory tasks effectively....[and] the main tools for this are guidance and training,"⁷ as well as adequate resourcing, including the use of alternative delivery models where appropriate.

⁶ OECD, 2005, *Guiding Principles for Regulatory Quality and Performance*, adopted by the OECD Council of Ministers, confirming the earlier 1997 OECD Recommendations (OECD,

Report of 1997 on Regulatory Reform), adding new supporting perspectives.

⁷ OECD, *Regulatory Policy and the Road to Sustainable Growth*, October 2010, p. 53.

To some extent these issues are partially addressed by the recent federal government announcements surrounding Responsible Resource Development, the introduction of Bill C38, and the associated revisions to the *Canadian Environmental Assessment Act* (CEAA) contained within it. British Columbia has also been adapting its natural resource development policies and related permitting processes to better align with the needs of business. While many seem to feel that this streamlining of process undermines the ability of governments to deliver necessary environmental protection, we respectfully disagree. Canadians are sensitive to environmental values and will insist on a responsible approach to resource management and environmental protection. Moreover, business leaders recognize the importance of strong environmental standards and are not disconnected from the concerns of citizens at large. Business lives here too, and has the same quality of life aspirations.

Let's look at some of the sources and implications of problem areas linked to environmental regulation as applied to natural resource and infrastructure development.

Duplication and Overlap

“The exercise of regulatory authority by multiple levels of government should, in principle, operate in concert to achieve ...economic and social policy goals.”⁸ The

⁸ OECD, *Recommendations of the Council on Regulatory Policy and Governance*, March 2012, p. 32.



OECD Council on Regulatory Reform points to the need to use tools and mechanisms that ensure more coherent delivery of regulatory obligations.

A notable feature of Canada's regulatory system is overlapping rules and jurisdiction stemming from the country's federal form of government. Although the federal and provincial/territorial governments have constitutionally assigned spheres of legislative jurisdiction, the “environment” is not assigned exclusively to any level of government. Both levels of government can and do regulate environmental matters to the extent those matters fall within the legislative jurisdiction otherwise assigned to them. Over time this overlap has fostered an increased regulatory burden, often without any appreciable environmental benefit – the common result is simply to add costs and delays for those trying to undertake a project or proceed with an investment.

A 2000 study commissioned by the Canadian Environmental Assessment Agency looked at comparative impacts on competitiveness of EA processes in

different countries. The study pointed to a number of unique aspects of Canada's federal EA process, among them the application of EAs to small projects as opposed to only medium to large-sized ones, and the need for proponents to obtain individual federal and provincial permits in addition to going through the EA process, as opposed to adopting a more integrated approach.⁹

In fiscal 2010-2011, over 3,000 screening level assessments were initiated under the federal CEAA regime, compared to 24 comprehensive studies. There is little evidence that the financial and human resources devoted to such a large number of screening level assessments made any difference to the quality of environmental protection. For sizable natural resource-related projects, which clearly merit more detailed environmental reviews, the more significant concern is that they generally have been subject to both federal and provincial processes, and in some cases to additional EA reviews required by other entities, such as port authorities.

Bill C38, recently introduced in Parliament by the Conservative government, goes some way to address these problems. For one thing, it limits the requirement for an assessment to "designated projects" rather than using the current "federal trigger" approach regardless of project size. The existing approach has been a significant concern for business, given the difficulty of determining if and when the federal

process would actually be triggered. Under the proposed legislation, "designated projects" are described as physical activities that are carried out in Canada or on federal lands, that are linked to a federal authority and that are defined in regulation. In addition, revisions to the Act limit the federal agencies and departments that have a hand in the assessment process by reducing the number of "responsible authorities" from 40 to 3.¹⁰ Importantly, the new Act enables substitution of a provincial process for the federal process, although a federal decision is still required unless Cabinet exempts a project subject to a substituted process from federal assessment.

British Columbia's environmental assessment legislation is already equivalent to federal legislation in scope, content and rigor. Furthermore, the *BC Environmental Assessment Act* has provisions for assessing cumulative effects, and it allows for appropriate mitigation of impacts through both project certificate conditions and various ancillary permitting processes. British Columbia, in our view, can and should lead the review of resource and other significant development projects occurring within the province.

That said, another example of regulatory overlap that is of concern from a competitiveness perspective relates to air emissions. BC has regulatory mechanisms for controlling air emissions, and air quality across most regions of the province has improved in recent decades. The federal government has for some time been

⁹ *Comparative Analysis of Impacts on Competitiveness of Environmental Assessment Requirements*, RIAS Inc. and Gartner Lee Limited, September 2000.

¹⁰ Additional authorities may be designated by regulation.

working to finalize and implement a new air quality management system that will include redefined ambient standards for pollutants and lead to the promulgation of new industrial emissions standards. In Metro Vancouver, the regional government also plays a role in regulating air emissions and air quality. The interplay between the proposed new federal standards, existing provincial standards and permits, and local government policy and program delivery in Metro Vancouver is not clear. It is essential that the federal, provincial and local governments avoid subjecting businesses to multiple sets of potentially inconsistent standards and permits in this area.

Timelines

The length of time required to complete regulatory processes can have a significant impact on competitiveness. Over the past decade the *average* large project approval timeline at the federal government level has been in the order of 4 years, with the biggest projects often taking much longer. The federal review process is excessively long, and this can become an issue for investors looking at investment opportunities in various jurisdictions.

The BC environmental assessment regime, unlike the federal one, has the benefit of including defined timelines. With Bill C38, the federal EA process will now incorporate statutory timelines for project reviews – a positive step. Bill C38 contains specific time constraints at various points in the review process: screening level assessment, 45 days; 365 days for an ordinary designated project; and a maximum of 24 months for a panel-reviewed designated project. This

represents a much improved model that should drive greater discipline and focus in the federal EA review process.

Policy Inputs

With timelines specified in legislation and a clearer delineation of the factors to be considered in arriving at decisions on specific projects, the reformed federal EA process may also be able to better manage an emerging issue that some commentators describe as “scope creep.”¹¹ This refers to the fact that many regulatory approval processes are asked to confront and pronounce on issues of broader societal concern, rather than simply focusing on matters pertinent to the impacts of the project under review. For example, in recent pipeline approval processes some interveners have raised issues such as Canadian energy security and the merits of exporting unrefined energy products relative to refining in Canada. Global climate change is another subject that invariably features in the reviews of virtually all energy projects, as well as many non-energy projects that require significant energy inputs as a factor of production. While these kinds of broad policy and societal issues are important, the proper place for discussing and reaching decisions on complex matters such as climate policy and overall energy policy is outside of a regulatory process that is designed to evaluate individual projects. Project reviews should be concerned not with higher-level questions of government industrial, environmental or economic policy, but

¹¹ “Unclogging the Pipes: Pipeline Reviews and Energy Policy,” C.D. Howe Institute Commentary No. 342, Joseph Doucet, February 2012.

rather with the details around a particular project, assuming of course that the project is judged to meet Canada's and/or BC's broader policy – a matter that would and should have been discussed and decided upon in a different forum, namely the legislature and Cabinet. As one author has observed, the regulatory approval process for an individual project is not the appropriate forum to “attempt to solve broad, far-reaching societal challenges.”¹²

User friendly points of entry and clear expectations

Another area in which the efficiency of the Canadian regulatory system could be improved is in the number of points of contact required between industry and regulators. Again, this was referenced in the above-noted Canadian Environmental Assessment Agency study, in which participants observed that an unusual aspect of the Canadian regime was the requirement to obtain various permits and approvals apart from, and subsequent to, the EA process itself.

In the Canadian context, regulatory complexity is often compounded at the permitting stage. A major resource project will usually require multiple permits and approvals at the federal, provincial and sometimes local level. One recent study found that, depending on the nature of the

project being considered, as many as 17 federal departments could have an interest in reviewing aspects of the project; and this figure doesn't encompass the provincial-local aspects of project reviews.¹³ Until recently, the proponent has been required to determine which permits are required and to deal with each Ministry, agency and department separately, normally with little coordination between the various government agencies. Current revisions to CEAA do not address this issue, and British Columbia still has challenges in this regard as well.

Both the federal and provincial governments have taken steps to tackle this problem. The federal Major Projects Management Office was created in 2008 to provide a single point of entry into the federal EA and regulatory approval processes for resource projects, in an attempt to provide better coordination and consistency among agencies, and to reduce timelines associated with the approval process. How this office transforms itself under a revised

CEAA regime remains to be seen. In BC, Major Projects BC is a single web-enabled portal that is a first step in coordinating reviews and permitting for most natural resource development projects, large and small. Its success to date has been mixed, and currently an Integrated Initiative Office is looking at improvements to the variety of



¹² Ibid, p. 15.

¹³ *Making Canada More Competitive, Improving Major Project Regulation in Canada*, 2008, Conference Board of Canada.

permitting responsibilities within the provincial government. None of these steps by themselves is completely satisfactory but some progress is being made.

Conclusion

Governments' efforts to tackle regulatory redundancy, reduce points of contact between business and regulators in project approval processes, and establish legislative timelines in the new CEAA are all positive moves that should make Canada's regulatory regimes for project development more efficient and, ultimately, more comprehensive and competitive. However, more can and should be done.

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