Human Rights and Resource Development Project

Public Access to Information in the Oil and Gas Development Process

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Disclaimer

This paper is for informational purposes only. It reviews an area of the law that is novel and far from settled. The legal arguments and information set forth in this paper should not be relied upon as legal advice. In all cases a lawyer should be consulted to determine the best course of action for your particular case.

Foreword

This paper examines access to environmental and related information in the oil and gas development process in Canada and Alberta. Specifically, it looks at how someone would get information about their environment at various stages of the oil and gas process. Whether there is a right to environmental information, and how one would go about obtaining this information, are important issues for many people. Access to environmental information, for example, would be advantageous to:

- learn the effects of a new upstream water treatment plant on water quality;
- see how a proposed sour gas well near your corner of the city could affect the health of your children;
- find out how you can get the information you need to decide whether you should sign a lease agreement with an oil drilling company;
- discover how a former industrial site, where your community is, was cleaned up so you know whether or not it would be safe to eat vegetables grown in a home garden;
- learn what the effects of an oil well will be on your family's farmland; and,
- learn what the cumulative effects of an oil spill near your family's vacation home will be on the water in which your children like to play.

This paper is the sixth publication to come from this project, the purpose of which is to explore the relationship between two important areas of law: human rights, as they are protected by law in Alberta, and the legal regime pursuant to which natural resources, such as oil and gas, are developed in the province.

The two non-profit organizations which have undertaken this Project — the Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law — are dedicated to legal research, publication and education. Thus, we do not take positions regarding the factual controversies which lie behind some of the conflicts over resource development in Alberta. Nevertheless, our work on the Project proceeds from the assumption that those controversies are serious enough that it is crucial for the relevant law on these matters to be as clearly articulated and as widely understood as possible.

This paper was informed by many sources. These include the previous publications from the Project, as well as presentations made at several legal education workshops by the core working group on this Project, namely, Janet Keeping, Linda McKay-Panos, Monique Passelac-Ross and Nickie Vlavianos. In addition, the insights and comments from other speakers and from the participants at these events were invaluable to the Project, and to this paper. Finally, summer law students Rachel Hird and Michael Lipton

provided very helpful assistance in checking legislation and suggesting edits. We thank them all for their participation.

Much of the material in this paper is based on a thesis prepared in the Master's Programme for the Faculty of Law, University of Calgary in 2000, under the supervision of Professor A. Lucas and Monique Passelac-Ross (*The Public's Right to Effective Access in the Environmental Assessment Process*). Linda is grateful for their assistance.

Lastly, we want to express thanks to our own organizations for supporting our desire to undertake the Human Rights and Resource Development Project and to the Alberta Law Foundation for providing the funds to make it all possible.

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Table of Contents

Chapter 1: Introduction

This paper sets out to discuss Canadians' right to access to environmental information under Canadian federal and Alberta provincial legislation. The paper examines access to information during the oil and gas development process. We also note some areas in the access to environmental information process that may need improvement.

Chapter Two of the paper discusses the nature of Canadian's right of access to information. We examine whether there is a right of access to information, the nature of that right, the purpose of the right, and the effectiveness of the legislation or other means intended to recognize and fulfill the obligations imposed by the right. Chapter Two also briefly discusses why the right to access to information is essential. Access to information is important in the recognition of our rights as citizens in a democracy, the need for accountability of governments, corporations and others involved in administrative processes, and the need for significant public input into government decision-making. Accountability in all types of decision-making, including environmental decisions, has become important to many Canadians, and public consultation and public participation are being used more frequently and written into legislation as a result.[1] Because of ministerial discretion and other factors, there are some difficulties with the assertion that in a parliamentary democracy government accountability is guaranteed by access to information. On the other hand, information is a valuable commodity that a well-informed public can use as a means of power and influence.[2]

Chapter Three provides a summary of the existing opportunities for obtaining access to information in the oil and gas process, with emphasis on access to information during the environmental assessment process.

Chapter Four provides a summary of the key points of the paper.

The Appendix contains a glossary and an overview of the steps involved in obtaining access to provincial government information; in particular, environmental information. It also contains a summary of the federal environmental assessment process and access to environmental information under that process.

Access to information is very important to public participation in decision-making. This is statement is also applicable to environmental decision-making.[3] Schrecker describes access to information as "the most elemental aspect of access to the decision-

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[1] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (hereinafter *CEAA*).

[2] I. Galnoor, ed., *Government Secrecy in Democracies* (New York: Harper & Row, 1977) at 80.

[3] *Saskatchewan Action Foundation for the Environment v. Saskatchewan (Minister of the Environment and Public Safety)*, [1979] 2 W.W.R. 97 (Sask. C.A.).

making process."[4] Practically speaking, meaningful participation is not possible without access to information.[5] Access to information is but one element of effective public participation. Other elements include procedural fairness, the opportunity to make presentations, and the need for reasons.

Because of Canada's unique history containing both the influence of parliamentary sovereignty from Britain and popular sovereignty from the United States, there has been a tension between secrecy and openness in government. Further, there was no common law right of access to information in Canada. However, the advent of the *Canadian Charter of Rights and Freedoms*[6] in 1982 has had an influence on shifting the balance towards openness. Nevertheless, there remain many examples of legislation and practice which evidence a reluctance to recognize an unfettered public right of access to information.

Neither the right of access to information nor the right to a healthy environment is set out in the *Charter*. It may be argued that at minimum Canadians need the procedural right of access to information to exercise their right to freedom of expression or their right to vote, which are expressed in the *Charter*. Further, *Charter* section 7, which provides for the recognition of the right to life, liberty and security of the person, can be argued to provide for a procedural right of access to information in order to enjoy meaningful opportunities to participate in environmental decision-making. While the right of access to information in the context of the *Charter* applies only to government-held information, in order to protect the public's life, liberty and security of the person, arguably the government has some obligation to promote access to information held by the private sector.

There is a clear statutory basis for a right of access to information in the environmental assessment (EA) process during some activities. However, it is less clear how individuals can obtain access to environmental information during other stages of the oil and gas process. A few provinces, but not Alberta, have gone so far as to pass environmental bills of rights to guarantee a right of access to environmental information. Some proponents of the bills of rights hope that they will confer more than just a right to participate or some requirement of due process or natural justice before environmentally

[4]T.F. Schrecker, *Political Economy of Environmental Hazards* (Ottawa: Law Reform Commission of Canada, 1984) at 17.

[5]*Ibid.* See also: R. Parenteau, *Public Participation in Environmental Decision Making* (Ottawa: Minister of Supply and Services, 1988) at 7 *et seq.*; T. McKim, *Sustainable Participation: Law and Policy* (LL.M. Thesis, University of Calgary, 1993) [unpublished].

[6]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter *Charter of Rights* or *Charter*).

harmful decisions are made. They desire substantive rights which would provide that participants can actually impact the EA decision-making process.[7]

As with all rights, the right of access to information must be balanced against other rights, such as the right to privacy and other private rights. Because the rights of access to information, privacy rights and environmental rights are not directly expressed in the Canadian constitution, Canadian courts, tribunals and policy makers do not have much guidance when attempting to reconcile these sometimes competing rights.

A right of access to information is an important factor in ensuring environmental protection. The possession of comprehensive information is one critical component of effective participation in environmental decision-making. For example, access to information in the pre-decision phase of a project can be a preventative measure rather than a punitive one. This means that environmental degradation may be prevented by a regime that focuses on participation rather than on merely punishing the polluters after permanent damage has been done. In 1981, M. Rankin maintained that effective access to information with regard to the environment was urgently needed.[8] Indeed, Rankin asserted that "the quality of public participation will vary in direct proportion to the degree of information available."[9]

As noted by the Friends of the Earth, there are several practical advantages of wider public access to environmental data: These include:[10]

1. additional resources become available for identifying where and how to protect the environment;

2. wider usage of data leads to higher data quality;

3. the common usage of data reduces the effort expended by all parties;

4. there is more commercial interest in public data resource; and

5. there is a realistic identification of which data is important without distortion due to ability to pay constraints.

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[7]J. Swaigen & R.E. Woods, "A Substantive Right to Environmental Quality" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1991) 195 at 200.

[8]M. Rankin, "Information and the Environment: The Struggle for Access" in J. Swaigen, ed., *ibid.* at 286.

[9]*Ibid.*

[10]Andrew Lees & Rob Atkinson, *Data for Environmental Monitoring* (London, UK: Friends of the Earth, 1996), online: <http://www.foe.co.uk>.

Recent legislative developments in several Canadian jurisdictions have led to increased opportunities for public participation in EA and in other related processes. However, increased opportunities are not sufficient. Effective participation must be preceded by and accompanied with possession of adequate information about the proposed activity and its effects.

If comprehensive information is not available, any rights or opportunities to participate in decision-making become pointless.[11] This has been recognized for a number of years. For example, in 1987, the Stakeholder Group on Environmental Reporting recommended the development of a comprehensive environmental reporting system to provide available, accessible and credible data on the environment and resources.[12] It also recommended that all environmental quality information and natural resource information be made accessible to any person who needs it.[13] The Group stated that this type of information can be made properly accessible if requesters are instructed on how to access the information and if they are helped to interpret the information that is obtained.[14]

Thus, the lack of effective public information programmes by proponents creates public suspicion and a general misunderstanding of projects.[15]

The international community has recognized the need for effective access to information in environmental matters. For example, the Organization for Economic Cooperation and Development (OECD), of which Canada is a member state, has developed principles that stress the provision of information concerning projects and new activities which may give rise to a significant risk of pollution, public participation in hearings, and public access to administrative and judicial procedures, among others.[16] Further, in 1987, the World Commission on Environment and Development ("the

[11]A.R. Lucas, "Fundamental Prerequisites for Citizen Participation" in B. Sadler, ed., *Involvement and Environment*, Proceedings of the Canadian Conference on Public Participation (Edmonton: Environmental Council of Alberta, 1977) 43 at 51.

[12]Environment Canada, *The Stakeholder Group on Environmental Reporting, A Study of Environmental Reporting in Canada* (Ottawa: Supply and Services, 1987) at 8.

[13]*Ibid.* at 13.

[14]*Ibid.* at 13-14.

[15]F. Hurtubise & R. Connelly, *Public Participation in the Canadian Environmental Assessment and Review Process* (1979) at 22.

[16]OECD Council Recommendations C(74) 224; C(76) 55; C(77) 28; *OECD and the Environment* (Paris, 1986).

Bruntland Commission") emphasized the importance of public participation to sustainable development:[17]

> [T]he pursuit of sustainable development requires [among other things] a political system that secures effective citizen participation in decision-making.

Numerous references to gathering and disseminating information can be found in the global policy action plan — Agenda 21 — formulated at the 1992 United Nations Conference on Environment and Development,[18] Rio De Janeiro.[19] English lawyer Gisele Bakkenist emphasizes that the need for environmental information arises at all levels, from senior decision-makers to grass roots organizations and individuals.[20] There have been developments in the European sector regarding access to environmental information as well.[21]

Perhaps most pertinent, in 2001, the *Convention On Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* came into effect in the Council of Europe.[22] Article 1 sets out the objective of the Convention, requiring signatory states to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. It also refers to the goal of protecting the right of every person of present and future generations to live in an environment adequate to health and well-being. While this Convention does not apply directly in Canada, it indicates the importance of access to environmental information in the international community.

Thus, there is global support for the notion that access to environmental information is necessary. However, some corporations allege that they have been harmed by disclosure.[23] Others are concerned about the cost of access to information (to the government or to the individual), the possibly deleterious uses to which the information

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[17]World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 65.

[18]*United Nations Environment Programme (1992) Agenda 21*.

[19]Gisele Bakkenist, *Environmental Information* (London, UK: Cameron May, 1994).

[20]*Ibid.* at 9.

[21]See, for example, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, U.N.T.S. vol. 2161, p. 447 (30 October 2001).

[22]U.N.T.S. vol. 2161, p. 447 (30 October 2001) ("The Aahrus Convention"). See also: United Nations Environment Programme *The Dublin Declaration on Access to Environmental Information* (2000).

[23]See, for example: W.L. Casey, J.E. Marthinsen & L.S. Moss, *Entrepreneurship, Productivity and the Freedom of Information Act* (Toronto: Lexington Books, 1983).

may be put, the cessation of voluntary disclosure if the information may become public, and the invasion of privacy, among other issues.[24]

The report concludes that while the registry system is a strength in the access to information process, there are three fundamental weaknesses with legislation and processes under the legislation — the complexity of the process, the overabundance of ministerial discretion and the breadth and number of exemptions from disclosure provided for under the various EA and access to information laws.

On a positive note, the legislation is moving in the right direction — towards recognition of the need for public participation — there just needs to be improved effectiveness in the application of the legislation and procedures.

[24]See: G. Winter, "Freedom of Environmental Information" in O. Lomas, ed., *Frontiers of Environmental Law* (London, UK: Chancery Law Publishing Ltd., 1991) 102 at 106-8.

Chapter 2: Why Access to Environmental Information is Important

2.1 Canadian Law and Policy and Access to Information

2.1.1 Right of Access to Information in Canada — Common Law, Constitution and Legislation

Why is access to government information important in Canada and Alberta? There are several reasons, three of which will be discussed. First, as citizens we have a right of access to government information. Second, the general accountability of the government is enhanced when citizens have access to many types of government-held information. Further, the opportunity to ensure accountability of governments, corporations and others in administrative processes is extended when citizens have access to information about relevant issues. Third, having a critical position in the flow of information to and from the government can prompt an individual or group to become highly influential in government policy-making. This influence can be used to positively change government, and perhaps corporate, policies and practices.

2.1.2 General Evolution of the Right

In order to develop the assertion that Canadians have a right of access to information, it is necessary to provide a brief overview of some of the political conditions that influenced the evolution of access to information legislation in Canada.[25] Canada has a unique history that has affected our perceptions of the relationship between the government and the people. Canada has at least two influences in this area — Britain and the United States.

The British tradition that we inherited — parliamentary sovereignty — supports the view that the Prime Minister and Cabinet are sovereign. This tradition also holds each minister responsible for the actions of her or his department. Respect for parliamentary sovereignty does not particularly support a right of access to information. For example, when access to information legislation was first contemplated in Canada, it was argued

[25]For an overview of the development of access to information legislation in Canada, see for example, D.C. Rowat, ed., *The Making of the Federal Access Act: A Case Study of Policy-Making in Canada* (Ottawa; Carleton University, 1985); Canada. Information Commissioner of Canada, *The Access to Information Act: 10 Years On* (Ottawa: Minister of Public Works and Government Services, 1994); D. Schneiderman, "The Access to Information Act: A Practical Review" (1987) 7 Advocate's Quarterly 474; H. McNairn & C. Woodbury, *Government Information: Access and Privacy*, looseleaf (Toronto: DeBoo, 1989).

that broad access to information would dilute the absolute responsibility of ministers for their departments and thereby make ministers less accountable to the public.[26]

The British tradition also emphasized government secrecy. Canada embraced this concept, passing such legislation as the *Official Secrets Act*, which was intended to control access to and the disclosure of sensitive government information. This Act was applied liberally to prevent access to information which should have been public.[27]

Much of Canada's legal tradition originates in Britain. Thus, it is not surprising that before access to information legislation was passed, Canadians did not have a common law right of access to government information.[28] Documents in the hands of the executive branch of the government were not accessible as of right. The only proper way to obtain a document was to ask a member of the Legislative Assembly to question another member in the Assembly.[29]

On the other hand, the United States had a different philosophical outlook about the role of government and first passed access to information legislation in 1966. One strong political philosophy in the United States may be traced to Locke, Blackstone and Dicey, who espoused the principles of popular sovereignty or popular democracy.[30] This idea invests the people with the sovereign power which they in turn delegate to the government. It is evident from the opening paragraphs of the United States Declaration of Independence (1776) that the signers believed that government derived its powers from the consent of the governed.[31]

Both the British and the American attitudes towards sovereignty had an impact on Canadian politics. As stated by the Information Commissioner of Canada in 1994:[32]

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[26]Canada. Information Commissioner, *ibid.* at 4.

[27]*Ibid.* at 4.

[28]*Canadian Newspapers Company Limited v. Manitoba*, [1986] 2 W.W.R. 673 (Man. C.A.), leave to appeal to S.C.C. refused 44 Man. R. (2d) 80n.

[29]*Ibid.* at 689-90 (C.A.).

[30]See, for example, J.C. Smith & D. Weisstub, *The Western Idea of Law* (Toronto: Butterworths, 1983) at 446-510.

[31]The second paragraph reads (in part): "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed …"

[32]*Supra* note 25 at 3 (Information Commissioner). See also: P. Gibson, in Rowat, *supra* note 25 at 13-23.

> Canada's case is informed by a particular set of circumstances: no radical revolutionary break from the mother country and the pull of dual attractions, aristocratic, hierarchical roots and American liberal and egalitarian ideals.

That there was controversy surrounding the passing of federal access to information legislation is evidenced by the fact that it took 17 years from the time it was first introduced in Parliament (1965) for legislation to become law.[33] Further, the Alberta government did not pass access to information legislation until 1994 (in force in 1995).[34]

Canada's attachment to the British tradition impacts Canadians' relationship with our government. Unlike the American system, whose principles emphasize distrust of the state, egalitarianism, and populism, Canada's organizing principles reflect a need for a strong state, and the respect of and deference for authority.[35] This has resulted in deference to elites in Canada and therefore greater control by those who manage our institutions.[36] Historically, compared to Americans, Canadians complain less about those in authority, are less aggressive in demanding their rights and are more desiring of a strong paternalistic government.[37] Thus, the government has had a greater role in Canadian society and the economy.[38] Generally, Canadian society is more elitist and more respectful of status and authority than American society.[39]

What does this mean for access to information? First, deference to authority could explain why Canadian and provincial access to information legislation provide the heads of government departments with a great deal of discretion to determine whether government information is subject to an exemption and whether it should be released. Second, it could explain why so much information remains secret. For example, Cabinet deliberations and advice to Ministers are generally exempted from release in Canada. Third, deference to authority could also explain the relatively minor role that public participation (which includes access to information) is given in environmental assessment procedures. If we believe that those in authority (whether by election or appointment) are the most qualified to make decisions, we will minimize the direct decision-making power given to the general public. Finally, deference to authority could explain the relatively minor role that the public has when Canadian politicians are making policy decisions.

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[33]Rowat, ed., *ibid.* at 7.

[34]This legislation is discussed in detail in Chapter 3.

[35]S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (Canada: C.D. Howe Institute, 1989) at 2.

[36]*Ibid.* at 15.

[37]*Ibid.* at 44.

[38]*Ibid.* at 49.

[39]*Ibid.* at 153.

However, there are some who believe that, like other industrialized democracies, Canada is experiencing a shift in values leading to less deference towards authority.[40] These authors point to a general decline in confidence in government institutions (parliaments and bureaucracies) and a demand for meaningful participation, especially among those aged 15 to 34.[41] At the same time, while the potential for citizen participation in political life has risen, the traditional methods of participating are not being used.[42] For example, there has been a rise in protests.[43] This could mean that Canadians will demand more meaningful opportunities for participation.

At the same time, recent developments in Canada have tended to shift the balance towards openness in government. The entrenchment of fundamental rights and liberties in the *Charter of Rights and Freedoms*[44] in 1982 had an impact on government and the courts. An all-party committee reviewing Canadian access to information laws in 1986 stated that the access to information laws were instruments with which to strengthen Canadian democracy, as these laws could be used in defence of individual rights. Further, the committee stated that the *Charter* and the access legislation represent significant limits on bureaucracy and have provided a firm anchor to individual rights.[45]

As with many rights, the right of access to information is not absolute. It competes with and must therefore be balanced against other rights. These include the right of individuals to privacy and the rights of persons who supply information to government on the understanding that it will remain confidential. These competing interests create difficulties which are addressed in Chapter Three.

2.1.3 Charter and Access to Information

Neither the right of access to government information nor the right to a healthy environment is set out in the *Charter*. However, the *Charter* may provide Canadians with an implied right of access to government information. It may be argued that Canadians require the procedural right of access to information in order to exercise their right of freedom of expression under *Charter* subsection 2(b) or their right to vote under *Charter*

[40]N. Nevitte, The Decline of Deference: Canadian value change in cross-national perspective (Peterborough: Broadview Press, 1996).

[41]*Ibid.* at 54-59.

[42]*Ibid.* at 70.

[43]*Ibid.* at 104-106.

[44]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter *Charter*).

[45]Canada. Department of Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Supply and Services, 1986).

section 3. They may also require a right of access to information when the government is making regulatory decisions which threaten their *Charter* section 7 right to life, liberty and security of the person.[46] Finally, it may be argued that in order to receive equality before the law or equal benefit of the law under *Charter* subsection 15(1), Canadians may require adequate access to information. Each of these *Charter* sections deals with some aspect of public participation in government activities.

Freedom of expression is a critical aspect of public participation in political decision-making. As stated by the Supreme Court of Canada[47] and paraphrased by Cleaver *et al.*:[48]

> [T]he values and principles that underlie [Charter subsection 2(b)'s] freedom [of expression] are that seeking and attaining the truth is an inherently good activity; [that] participation in social and political decision-making is to be fostered and encouraged …

This view was reinforced by Justice La Forest in *Ross v. New Brunswick School District No. 15*,[49] when he explained the values underlying *Charter* subsection 2(b):

> In my reasons in RJR-MacDonald, supra, I stated that the 'core' values of freedom of expression include 'the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process' (p. 280).

Even as far back as 1938, the Supreme Court of Canada recognized the importance of freedom of expression and public access to information (in this case, through the press), when Justice Cannon stated:[50]

> Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government … Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the state within the limits set by the criminal code and the common law.

Further, the *Charter* section 3 right to vote is most effectively exercised by an educated population. As stated by Malcolmson and Meyers, the primary purpose of the

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[46]Martha Jackman, "Rights and Participation" (1990-91) 4 C.J.E.L.P. 23.

[47]*Irwin Toy Limited v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

[48]B. Cleaver *et al.*, *Handbook Exploring the Legal Context for Information Policy in Canad*a (London, ON: Faxon Canada, 1992). See also: *R. v. Zundel* (1992), 16 C.R. (4th) 1 (S.C.C.), where the Supreme Court held that the purpose of the guarantee in *Charter* s. 2(b) was to permit free expression to promote truth, political or social participation, and self-fulfillment.

[49][1996] 1 S.C.R. 825 at 876-877. Although La Forest J. was dissenting in RJR-MacDonald, he wrote the unanimous judgment of the Court in Ross, so these remarks are authoritative.

[50]*Reference re Alberta Legislation*, [1938] S.C.R. 100.

modern Parliament is to make the Cabinet accountable to the public for its actions.[51] Parliament, then, plays a vital role in keeping the government sensitive to voters' concerns. Voters must therefore be informed about the key issues in order to have effective input both during and between elections. One method of becoming educated about issues is to have sufficient access to pertinent government-held information.

Access to information is also a key aspect of the *Charter* section 7 right to life, liberty and security of the person.[52] Even before this right was entrenched in *Charter* section 7, the Courts repeatedly recognized the importance of public access to government-held information in order to ensure the proper operation of the principles of natural justice and the duty of fairness.[53] Once the *Charter* applied in Canada, the Supreme Court of Canada interpreted the meaning of "fundamental justice" (in the requirement that the right to life, liberty and security of the person not be denied except in accordance with the principles of fundamental justice) as being even broader than the common law requirement of natural justice.[54] The principles of fundamental justice are to be found in the basic tenets of our legal system, and involve the fair balancing of societal interests with the interests of the person claiming that his or her right to life, liberty and security of the person is being abridged.[55] There are circumstances where people may argue that if they are not granted appropriate access to information, they are being deprived of their *Charter* section 7 right in a fashion that is not in accordance with the principles of fundamental justice.

Focusing on environmental decision-making, Martha Jackman states that access to information has a basis in constitutional law. She states that *Charter* section 7 interests are at issue whenever Parliament and its delegates adopt and implement regulatory measures which affect the environment. Thus, regulatory decisions which threaten *Charter* section 7 interests "cannot be constitutionally valid unless the person or groups

[51]Patrick Malcolmson & Richard Myers, *The Canadian Regime* (Peterborough: Broadview Press, 1996) at 129.

[52]Section 7 reads: "Life, Liberty and Security of Person — Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[53]*Scott et al. v. Rent Review Commission* (1977), 23 N.S.R. (2d) 504 (C.A.); *Abel v. Advisory Review Board* (1980), 31 O.R. (2d) 520 (C.A.); *Cadieux v. Director of Mountain Institution et al.* (1984), 9 Admin. L.R. 50 (F.C.T.D.); *Magnasonic Canada Ltd. v. Anti-Dumping Tribunal*, [1972] F.C. 1239 (C.A.); *Sarco Canada Ltd. v. Anti-Dumping Tribunal*, [1979] 1 F.C. 247 (C.A.); *Canadian Broadcasting League v. Canadian Radio-Television and Telecommunications Commission* (1979), 29 N.R. 383 (Fed. C.A.); *Canadian Radio-Television Commission v. London Cable T.V. Ltd.*, [1976] 2 F.C. 621 (C.A.).

[54]*Reference re Section 94(2) of the Motor Vehicle Act* (1985), 48 C.R. (3d) 289 (S.C.C.).

[55]*Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 (S.C.C.).

affected have had a meaningful opportunity to participate in the decision-making process."[56]

Thus, a strong argument can be made that a procedural right of access to information is necessary in order for Canadians to be protected by or to exercise their rights under the *Charter*.

It should be pointed out that the *Charter* applies to an individual's relationship with the government and is not directly applicable to relationships between private parties.[57] It therefore may be more difficult to argue that the *Charter* supports the right of access to information held by the private sector. However, although the *Charter* only applies to limit government action, the government may certainly promote the rights and freedoms contained within the *Charter*, especially to protect minorities and some of our vulnerable citizens.[58] Thus, the government may promote access to information held by the private sector in order to benefit the public.

2.1.4 Access to Information Legislation

While there traditionally was no common law right of access to information, there are several legislative provisions the existence of which directly or indirectly supports the assertion that Canadians currently have this right. First, the courts and various administrative tribunals have interpreted legislation so that procedures thereunder provide a statutory basis for access to information. Second, access to information legislation in the federal and provincial jurisdictions provides for a right of access to information. Finally, legislation dealing with the environment also contains access to information provisions, thus underlining the significance of this right.

In *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)*,[59] the Saskatchewan Court of Appeal (per Sherstobitoff J.A., writing for the majority) used a purposive approach to the interpretation of the Saskatchewan *Environmental Assessment Act*[60] to find a statutory basis for granting the public access to the information at issue. The Court determined that the Act's purpose of engaging the public in environmental protection necessitated that the public be empowered with a right of access to information which forms part of an

[56]Jackman, *supra* note 46.

[57]*R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

[58]See, for example: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 779; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1051-2.

[59][1992] 2 W.W.R. 97 (Sask. C.A.).

[60]S.S. 1979-80, c. E-10.1.

environmental assessment.[61] The Court emphasized that there must be meaningful public input into the environmental assessment process so that decisions made are more publicly accessible. Sherstobitoff J.A. (for the majority) stated that "informed public participation is possible only if all participants are given full access to all available information except that specifically exempted by statutory authority."[62]

Every jurisdiction in Canada has passed access to information legislation.[63] These laws clearly provide a statutory right of access to information. For example, the federal *Access to Information Act*[64] states in section 2 that:

> 2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Some argue that since these rights are merely provided in legislation, they could be easily taken away (*e.g.*, by withdrawing or amending the legislation). Thus, the argument continues, they are not entrenched. While it probably would not be politically expedient, Parliament or the legislatures could indeed withdraw access to information legislation. However, the fact that a right is not entrenched does not mean that the right does not exist.

2.1.5 Environmental Bills of Rights

Although issues regarding access to environmental information are discussed in detail later, there are some special legislative enactments in Canada which provide for access to

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[61] *Supra* note 59 at 120.

[62] At 111 (W.W.R.).

[63] These are, in chronological order: *Freedom of Information and Protection of Privacy Act*, S.N.S. 1990, c. 11 [originally passed in 1977]; *Right to Information Act*, S.N.B. 1978, c. R-10.3; *The Freedom of Information Act*, S.N. 1990, c. F-25 [originally passed in 1981]; *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, S.Q. 1982, c. 30; *Access to Information Act*, R.S.C. 1985, c. A-1; *The Freedom of Information Act*, C.C.S.M. 1985, c. F-175; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M-36; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01; *Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1; *Access to Information Act*, R.S.Y. 1986, c. 1; *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61; *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5; *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20; *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 2002, c. F-15.01.

[64] R.S.C. 1985, c. A-1.

environmental information. The following discussion focuses on environmental bills of rights.

In response to public demands for increased participation in environmental decision-making, some Canadian jurisdictions have passed or considered passing environmental bills of rights. Because of concerns about lack of accountability in environmental decision-making, many environmental advocates have called for the entrenchment of an Environmental Bill of Rights within the Canadian Constitution[65] (by amending the *Charter).*[66] Although this has not yet occurred, several provinces and territories have passed or introduced environmental bills of rights which include provisions dealing with access to information and other participation rights.[67] Proponents of this type of legislation assert that the entrenchment of environmental rights underlines their importance and overcomes obstacles such as constraints on opportunities to participate in judicial and administrative decisions.[68]

The type of participation envisioned by champions of environmental bills of rights includes substantive as well as procedural rights. The inclusion of substantive rights means that participants would have an actual impact on environmental decisions.[69]

Those who assert for a right to environmental quality hope that it will confer more than a right to participate or some requirement of due process or natural justice before environmentally harmful decisions are taken. They want a right which will dictate a decision in favour of environmental protection in difficult cases. They hope this right will be equivalent to a civil liberty, on the one hand, constraining government actions harmful to the environment, and, on the other, equivalent to a property right, restraining the use of private property in ways that are incompatible with sound ecological management.

The Ontario Environmental Bill of Rights (EBR) does not entrench inalienable rights to protect the environment. Muldoon and Lindgren define the EBR as:[70]

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[65]*Canada Act 1982* (U.K.), 1982, c. 11.

[66]See, for example: D. Gibson, "Constitutional Entrenchment of Environmental Rights" in N. Duple, ed., *Le droit à la qualité de l'environnement* (Montreal: Quebec Amerique, 1988) 275; and D. MacDonald, *The Politics of Pollution* (Toronto: McClelland & Stewart, 1991).

[67]See: *Environment Act* (Yukon), S.Y. 1991, c. 5; *Environmental Bill of Rights* (Ontario), S.O. 1993, c. 28; *Environment Quality Act*, R.S.Q. 1977, c. Q-2, s. 19.1; *Environmental Quality Act*, R.S.Q. 1977, c. Q-2, which provides in s. 4 that every person has a right to a healthy environment, *Environmental Rights Act*, R.S.N.W.T. 1988, c. 83.

[68]J. Benidickson, *Environmental Law*, 2d (Concord: Irwin Law, 2002) at 46. See also: K. Douglas, *An Environmental Bill of Rights for Canada* (Ottawa: Library of Parliament, 1991).

[69]J. Swaigen & R.E. Woods, "A Substantive Right to Environmental Quality" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1991) 195 at 200.

> a law that confers certain environmental rights on the people of Ontario and establishes certain governmental obligations.

The EBR includes several provisions that may assist the public in achieving access to information and in participating in environmental decision-making. These include:

- the right to get notice of, and to comment upon, proposed policies and legislation which may affect the environment;
- the creation of an environmental registry; and
- the appointment of an Environmental Commissioner for Ontario, who is an officer of the Legislative Assembly.

The EBR promotes government accountability by requiring 14 Ontario ministries to develop and implement "statements of environmental values" that explain how the ministries will implement the purposes of the EBR. These statements, along with other significant environmental information, are available to the public and are held in the environmental registry.

The EBR relies heavily but not exclusively upon political accountability to ensure that good environmental decisions are made. This means that the public and the Environmental Commissioner are relied upon to review and report on the government's and other's compliance with the EBR. As a final resort, people may apply to the courts to enforce their environmental rights as necessary.[71] The EBR thus strives to ensure public participation in environmental decision-making while avoiding the expense of formal court action.[72]

Other provinces have also introduced or tried to introduce environmental bills of rights. For example, in 1998, the opposition party in Alberta introduced an *Environmental Bill of Rights*.[73] In part of the preamble, the proposed legislation stated:

> Whereas, while the government of Alberta has the primary responsibility for protecting the environment, the people shall have the ability to participate in the protection of the environment in an effective, timely, open and fair manner.

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[70]P. Muldoon, Richard Lindgren & Pollution Probe, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery Pub. Ltd., 1995) at 3.

[71]*Ibid.* at 39-40.

[72]*Ibid.* at 40.

[73]Bill 218, 1998. This Bill was defeated. Alberta's first Environmental Bill of Rights was introduced in 1979 (Bill 222, 1st Sess., 19th Leg. Alta.).

Two purposes of the proposed Act were to ensure government accountability in environmental decision-making and to facilitate the participation of the people of Alberta in the decisions of the Government affecting the environment.[74] The Minister of the Environment would have been required to provide the public with notice of and the opportunity to comment upon proposed Acts, regulations, code of practice or policy which could have a significant impact on the environment.[75] Although it was not explicitly set out in the proposed Act, proper public participation in the manner envisioned under the Act would have required effective access to information.

2.1.6 Public Rights to Information vs. Privacy Rights and Other Limits

The desirable limits on the general right of access to information must be considered. Most people recognize that in any democracy there are competing rights which must be weighed and reconciled. There are legitimate reasons for limiting access to government information. However, it is very difficult for legislators to determine the appropriate limits, and those who interpret and apply the legislation seem to struggle with balancing the various competing rights and interests.

Under the current access to information regimes, there are a number of circumstances where access to information is not available. Some of these are set out in exemptions or exceptions. Other barriers to access are not based on rights but are based on cost and interpretation factors, among others. Some of the exemptions in access to information legislation seek to address the following competing rights or concerns:

- respecting the confidentiality of other governments;
- maintaining relationships with other governments;
- respecting personal privacy;
- protecting trade secrets or confidential commercial information provided by third parties;
- protecting confidential commercial government information;
- protecting government security or defence;
- protecting law enforcement; or

[74]Section 2.

[75]Section 4.

- protecting cabinet secrecy.

It should be noted that often various government departments or agencies are permitted by the legislation to share information amongst themselves; they simply cannot release the information to the public. Also, some access to information legislation contains a public interest override, which permits the government to override exemptions or exceptions, such as personal privacy, and then release information if disclosure is in the public interest.

The above list contains some exemptions that are arguably easier to support than others. Many people likely support the notion that personal information should not be disclosed, unless there is a very good reason. On the other hand, some of the other categories of exempt information appear to be more self-serving on the part of the legislators, and less based on legitimate rights concerns.

Often this conflict between rights is characterized as one of "public rights" versus "private rights". Because the rights of access to information, privacy rights, property rights, and environmental rights are not entrenched in the Canadian constitution, Canadian courts, tribunals and policy makers do not have much guidance when attempting to reconcile these sometimes competing rights. One method of reconciliation is to provide increased effective public participation in decision-making so that all interests may be appropriately considered.

2.1.7 Accountability

Closely related to the concept that citizens have the right of access to information is the argument that access to this information will ensure government and perhaps private sector accountability.[76] Citizens must have the right of access to government information to ensure that their elected representatives and the civil service are fulfilling their obligations. A liberal democracy such as Canada's depends on effective access to information because of the importance of accountability in our system.

Malcolmson and Myers assert that equality and liberty are the fundamental principles of Canada's democratic regime.[77] At its fullest expression, political equality means that *all* citizens are given the right to exercise political power.[78] Various regimes throughout

[76]See, for example, A. Roberts, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws* (Kingston: Queen's University, School of Policy Studies, 1998) at 1-2. However, see *Canada Packers Inc. v. Canada*, [1988] 1 F.C. 483 (T.D.), dismissed (1988), 53 D.L.R. (4th) 671 (Fed. C.A.) where the Trial Division held that the purpose of the federal access to information legislation was not specifically to ensure accountability, but to provide access to information.

[77]*Supra* note 51 at 21.

[78]*Ibid.* at 22.

the world have applied the principle of equality in differing ways. Where all citizens are equally and directly involved in political decision-making, the regime is called a direct, or radical, democracy.[79] Most modern democracies are not purely radical. However, there are differing degrees of direct democracy among them. Canada's system has been referred to as "responsible government", whereby the executive branch of the government is accountable for its actions to a democratically elected legislative body.[80]

Since Canada opted for a parliamentary democracy, which means that our equal citizens delegate responsibility for public matters to a small group of elected representatives,[81]these representatives are accountable to the people through elections.[82] Over time, Canadians have continued to support the virtues of "representative government", but insist that the government must be accountable to the electorate in a meaningful way.[83] Thus, in Canada, to uphold our value of equality as a fundamental principle of democracy, people who are elected or appointed to political office must be accountable to the people for their actions and decisions.[84] Put another way, the regime must meet with the approval of its citizens.[85]

Malcolmson and Myers assert that because of government's growing complexity, the traditional structures of communication and control are inadequate in a modern parliamentary democracy. Other methods of ensuring accountability, often borrowed from direct democracies, are being introduced in Canada. These include holding referenda and passing legislation that permits constituents to recall their elected representatives from office. Public consultation and public participation are being used more in the preparation of public policy. Improved access to government information reinforces the existing structures of communication and control and fosters more direct public participation in the policy making process.[86]

Most Canadians likely agree that politicians and the bureaucracy need to be accountable to their constituents. However, as noted by Patrick Gibson in 1985, there is widespread doubt about the efficacy of the House of Commons or other traditional mechanisms of accountability: elections and a free press.[87] Even some Members of

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[79]*Ibid.*

[80]*Ibid.* at 59.

[81]*Ibid.*

[82]*Ibid.* at 23.

[83]*Ibid.* at 171, note 1.

[84]*Ibid.* at 24.

[85]John Locke in Malcolmson & Myers, *ibid.* at 37.

[86]*Ibid.* at 15.

[87]Gibson in Rowat, *supra* note 25 at 14.

Parliament acknowledge that Canadians have become cynical about government and that the Canadian governments must address the electorate's demands for greater transparency, more accountability and improved performance. One way of moving towards these goals is to provide more access to information and more public participation.[88] Thus, as Webb states, "[t]he further one strays from the direct democracy model, the more one needs to incorporate every possible form of public participation to compensate for the inadequacies of indirect, representative democracy."[89]

Accountability is a very important component of Canada's liberal democracy. Cabinet is accountable to the House of Commons. Elected representatives in the House of Commons are in turn accountable to the electorate. Additionally, civil servants are accountable to the Ministers appointed to oversee their departments.[90] Again, those Ministers are accountable to the House of Commons for the conduct of the civil servants working in their Departments.[91] This admittedly imperfect system of public accountability will only be more efficient with increased and effective access to government information.

Thus, access to information plays a critical role in ensuring government accountability. Whether the existing Canadian system for access to information is effective in improving government decision-making is debatable, especially in light of recent trends to restructure government departments and to off-load their functions onto the private sector, where they are arguably not subject to access to information legislation or public scrutiny.[92]

Not only must our politicians have access to information, but information must be available to the public in an accessible form. However, one significant aspect of a parliamentary democracy — ministerial discretion — can create difficulties for effective public access to information. In Canada, this tradition creates traditional trust of and deference to the government (which may be eroding). The government therefore has the control and the discretion over information. As noted by Rothman, as long the government "is in a position to shape the implications of data for policy, it will continue to exercise control over information."[93] Rothman also asserts that even access to

[88]Bob Speller, MP, "Enhancing Public Perception of Parliament and the Legislative Process" (1994) Canadian Parliamentary Review 15 at 16.

[89]K. Webb, "Taking Matters Into Their Own Hands" (1991) 36 McGill L.J. 770 at 778.

[90]However, as, Mark Dickerson & Tom Flanagan, in *An Introduction to Government and Politics*, 5th ed. (Toronto: ITP Nelson, 1998) at 410-12, point out, many observers fear that too much power is vested in the civil service and that it is not as subordinate as it should be to cabinet and Parliament.

[91]Rowat, *supra* note 25 at 124.

[92]Roberts, *supra* note 76 at 19.

[93]R. Rothman, "The Symbolic Uses of Public Information" in I. Galnoor, ed., *Government Secrecy in Democracies* (New York: Harper & Row, 1977) 62 at 67.

information provisions will not be effective in addressing these aspects of parliamentary democracies (control and discretion) because "[i]n order for the public to perceive governmental decisions as legitimate, government has to convince the people that the particular decision is the only one possible under the circumstances."[94] This is not necessarily because of some evil intention to deceive, but because the rhetoric of democracy requires government officials to justify their decisions. Therefore, "[d]emocratic government is supposed to serve and be responsible to its citizens, yet it retains discretionary power as to whom it serves and to what extent."[95] Thus, the reality is that democracy creates the opposing practices of preserving the government's discretion to conceal information with the people's right to have it. Unfortunately, under the current system, the government, especially the executive, has the advantage vis-à-vis access to information.[96]

One difficulty with the reverence towards government discretion is that discretion is exercised unevenly. Thus, as is discussed immediately below, recognized groups are in a position to have unfair access to government decision and policy-makers. As discussed by Galnoor:[97]

> [t]he very basis of justifying some measure of administrative discretion has been eroded when preliminary consultations are carried out within inner circles that include selected outsiders. Government cannot claim executive privilege for information that it is willing to disclose to co-opted or self-appointed guardians of particular interests.

There are, therefore, some difficulties with the assertion that in a parliamentary democracy, government accountability is guaranteed by access to information. However, because of government discretion and control, information has become a valuable commodity that a well-informed public can use as a means of power and influence.[98]

2.1.8 Access to Information and Policy Formation

The third rationale for increased access to information is its beneficial impact on policy-making in Canada. This rationale shifts from an analysis of the *right* of access to information to the practical use of information by the public in exchange for access to decision-makers and policy-makers. In *Group Politics and Public Policy*,[99] Paul Pross

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[94]*Ibid.* at 67.

[95]*Ibid.* at 68.

[96]I. Galnoor, "What Do We Know About Government Secrecy?" in I. Galnoor, ed., *Government Secrecy in Democracies* (New York: Harper & Row, 1977) 275 at 312.

[97]I. Galnoor, "The Information Marketplace" in Galnoor, ed., *ibid.*, 77 at 80.

[98]I. Galnoor, "What Do We Know About Government Secrecy?" in Galnoor, ed., *ibid.*, 275 at 293.

[99]A. Paul Pross, *Group Politics and Public Policy*, 2d (Toronto: Oxford University Press, 1992).

looks at government policy-making. Pross believes that Canada has experienced a diffusion of power through the entire government system due to the rampant expansion of government. Because of this factor, the government has delegated much responsibility to the administrative branch. The government is very hierarchical and bureaucratic, so each undertaking is divided into comprehensive and manageable units of work.[100] Within each major policy field there are sub-fields. For example, under agriculture, there are dairy farming, grain, egg and poultry sub-fields. Each sub-field has its own group of specialists who deliver programs and contribute to policy development. So, according to Pross, "the detailed work of administering policy is carried out by subordinate semi-autonomous or independent government agencies, each of which has close ties to groups representing the interests"[101] of a particular area. Because the state is the most prominent in the policy-making relationship, groups wanting to influence public policy have had to adapt themselves to its policy-making procedures.

Possession of technical or other valuable information is assigned a crucial role in Pross's model. Pross states that groups wanting to be influential in the policy community must share at least some of the attributes of bureaucracy. To be the most influential, a group must have a strategic place in the information flow, among other characteristics. Having a strategic position is not enough, however. The power of a particular group may allow it to have a say in policy development, but the impact of that contribution will depend on how well the group understands and exploits its strategic position. Expert knowledge of the policy field is very valuable, particularly if the group holds a monopoly or near monopoly on vital information. This type of information can be exchanged for access to decision-makers and for a continuing place in the information flow. If a group has access to key decision-makers, this shows that the policy community has acknowledged its power and considers that the group possesses vital information and the ability to persuade others to support or to abandon a cause.[102]

Pross's emphasis on information and its flow in the policy-making process suggests that access to information can be very important to effective public participation in the policy-making process. If individuals and groups wish to have a definite long-term impact on the policy-making process, they need to have access to that process.[103] This may be achieved if the group possesses key information and expertise.

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[100] *Ibid.* at 116-18.

[101] *Ibid.* at 118.

[102] *Ibid.* at 143.

[103] Thomas Rochon and Daniel Mazmanian assert that gaining access to the policy process is the most effective way for organizations to have an impact on policy incomes. See "Social Movements and Policy Process" (1993) 528 Annals of the American Academy of Political and Social Science 72.

2.2. Perspectives on Importance of Access to Environmental Information

2.2.1 Significance of Access to Environmental Information

The public is becoming increasingly concerned about the costs of environmental degradation and demands a more thorough accounting by both government and the private sector regarding decisions and actions in the environmental area.[104] Many legislative reforms emphasize increased accountability. For example, environmental assessment (EA) legislation and environmental bills of rights create more opportunities for public input into decision-making.[105]

Public participation in the entire oil and gas process is important because it enhances the quality of decisions made by opening the process to different perspectives and issues that may not have otherwise come to the attention of the decision-makers.[106] Further, public participation in EA and other environmental decision-making processes can result in improved access to information and fewer court cases.[107] However, in order to enhance decision-making, participation needs to be effective.

What is required in order for participation to be "effective"? R. Cotton and D. P. Emond argue that an adequate EA process should have decision-makers who are representative of the community at large and who are independent from government and interest groups.[108] Second, the process should include broad, effective, and timely public participation.[109] Finally, it should ensure accountability in the procedures followed and the substantive decisions reached.[110] Further, as noted by Schrecker, the "procedures for environmental impact assessment should facilitate and maximize public participation."[111]

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[104]Canadian Council of Ministers of the Environment, *1991 Environmental Scan: National and International Issues* (Winnipeg: CCME, 1991) at 7.

[105]*Ibid.*

[106]R. Cotton & D. Emond, "Environmental Impact Assessment" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1991) 245 at 265; See also: Canada. Federal Environmental Assessment Review Office, *Public Review: Neither Judicial, Nor Political, But an Essential Form for the Future of the Environment: A Report Concerning the Reform of Public Hearing Procedures for Environmental Assessment Reviews* (Ottawa: Supply and Services, 1988) at 12.

[107]W. Tilleman, "Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community" (1995) 33 Colum. J. Transnat'l L. 337 at 343. See also: A. Ureta, "Prevention Rather than Cure: The EC Directive and its Impact in Spain and the U.K." (1992) Environmental Liability 61 at 62.

[108]*Supra* note 106 at 259-60.

[109]*Ibid.* at 265.

[110]*Ibid.* at 275.

[111]T. Schrecker, "The Canadian Environmental Assessment Act: Tremulous Step Forward, or Retreat into Smoke and Mirrors?" (1991) 5 C.E.L.R. (N.S.) 192 at 204. See also: M. Reed, *Citizen Participation*

As these criteria imply, effective participation requires that access to information procedures are built into EA.

Finkle and Lucas summarize the elements required for procedural fairness in EA. First, participants must have access to the data, interpretation and comment about the EA and an open public opportunity for comment and questions.[112] Second, decision-makers should lack bias or pre-decision.[113] Third, procedures must be sufficiently broad and flexible to ensure that participants have the opportunity to have their concerns heard.[114] Fourth, unspoken policy assumptions must be explicitly stated.[115] Fifth, participants should be able to address issues of procedural fairness early in the process.[116] Sixth, participants should have resources sufficient to fully and effectively participate.[117] Seventh, time limits on participant presentation are necessary, but should not be inflexibly enforced. Finally, decisions should be made in writing.[118] Public access to information is a critical component of many of these elements.

While many of these elements may have been informally provided in environmental processes, relying on informally obtained information can result in unfair access to some significant potential participants and no access to others.

Over the last two decades, legislation has evolved somewhat towards ensuring effective public participation and access to information.[119] However, there is room for improvement. What amounts to "effective citizen participation" and "effective access to information" may vary according to whether one looks at the perspectives of the public, the government or industry.

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and Public Hearings: Evaluating Northern Experiences, Cornett Occasional Papers No. 4 (Victoria: University of Victoria, 1984).

[112]P. Finkle & A. Lucas, "Introduction" in E. Case *et al.*, eds, *Fairness in Environmental and Social Impact Assessments: Proceedings of a Seminar* (Calgary: Canadian Institute of Resources Law, 1983) at x.

[113]*Ibid.* at xi.

[114]*Ibid.* at xi.

[115]*Ibid.* at xi.

[116]*Ibid.* at xii.

[117]*Ibid.* at xii.

[118]*Ibid.* at xii.

[119]In addition to access to information and environmental assessment legislation, there are other opportunities for access to information and public participation under various federal and provincial legislation. For example, the *Ontario Environmental Bill of Rights*, S.O. 1993, c. 28 provides for participatory rights. Other legislation which seeks to regulate environmental contaminants, such as the federal *Canadian Environmental Protection Act*, S.C. 1999, c. 33, provides for an accessible public registry and other opportunities for participation in decision-making.

2.2.2 Public Perspective

Public participation is dependent upon effective access to information. Whatever the method of participation available to the public, access to information is always required to enable effective participation. Ideally, the public needs to have a direct role in final political or administrative decisions. In order to be meaningful, public participation in decision-making must not merely be limited to an opportunity to state one's position without any real sharing of the decision-making power.[120] Arnstein provided the classic "ladder of participation" that set out a hierarchy of citizen participation. This ladder starts from citizen manipulation, to consultation, to partnership, to delegated power, and finally to citizen control.[121] Conacher notes that, for the most part, Canadian political procedures have evolved only to the public consultation level.[122] Even with these less than ideal levels of public participation, access to information remains critical.

When the public role in decision-making is limited to the less than ideal consultative practice, there are a number of factors which must be present in order to ensure effective citizen participation. McKim asserts that "sustainable participation" in environmental decision-making is created by implementing the following principles: the decision-making process must be active, open-ended and holistic, and inclusive, and must provide both procedural and substantive fairness.[123] Of particular interest are the principles of inclusiveness and fairness. Those who have previously been excluded or silenced must be brought into the decision-making process.[124] Further, procedural fairness requires that, at minimum, the individual affected by an agency's activities be allowed an opportunity to respond or participate in the administrative process before a proposed activity is launched.[125] Finally, the equitable distribution of political resources will help to ensure substantive fairness in the decision-making process.[126]

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[120]McKim, *supra* note 29 at 21.

[121]S. Arnstein, "A Ladder of Citizen Participation" (July 1969) American Institute of Planning Journal 216-224. See also: R. Lang & A. Armour, *Environmental Planning Resourcebook* (Montreal: Lands Directorate, Environment Canada, 1980) at 302-308, where the authors evaluate various types of public participation.

[122]D. Conacher, "Power to the People: Initiative, Referendum, Recall and the Possibility of Popular Sovereignty in Canada" (1994) 49(2) U.T. Fac. L. Rev. 174 at 182.

[123]*Supra* note 29 at 22-25.

[124]*Ibid.* at 26. See also: C. Pateman, *Participation and Democratic Theory* (London: Cambridge University Press, 1970), J.J. Rousseau, *The Social Contract* (London: Oxford University Press, 1947) translated by G. Hopkins; J.S. Mill, Representative Government (London: J.M. Dent & Sons, 1910).

[125]McKim, *supra* note 29 at 27.

[126]*Ibid.* at 27-28. See also: S. Penney, "Assessing CEAA: Environmental Assessment Theory and the Canadian Environmental Assessment Act" (1994) 4(3) J.E.L.P. 243 at 255-256.

When analyzing participation in environmental decision-making, the most important resources for ensuring fairness in the process include access to decision-makers, access to funding, and access to information.[127] Because Canada is a representative democracy, with delegated decision-making, access to decision-makers is important. As noted previously in this chapter, *some* members of the policy community have direct access to decision-makers. However, to be effective, *all* participants must have direct access to decision-makers.[128] In addition to access to the decision-makers, fairness requires adequate access to funding[129] and effective access to information.

Thus, from the point of view of the public, meaningful participation, which includes effective access to information, is integral to an effective environmental decision-making process.

2.2.3 Government Perspective

From the perspective of the government, the key elements of "effective" citizen participation may include some of those discussed above under "public perspective". For example, enhanced public participation presents more alternatives to government decision-makers and provides greater opportunities to reconcile public concerns with government policy.[130] Thus, the Alberta government stated that participation of stakeholders and the general public in energy and environmental concerns has enhanced the quality of land and resources management.[131] Governments may also benefit from access to information because it increases accountability to the public, it improves the understanding of issues among all of the parties, it improves the public's understanding of the problems involved in a project and the resulting enhanced public participation may lead to a ministerial decision that avoids costly public hearings.[132] In particular, some argue that the EA process addresses the public's concerns about accountability by providing public scrutiny of government activities.[133]

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[127] *Supra* note 29 at 27, note 100.

[128] Tilleman, *supra* note 107 at 345. Another aspect of access to decision-makers is proper notice of opportunities to participate. Interested groups and individuals must be aware that they can participate.

[129] A detailed discussion of the rationale underlying adequate funding is beyond the scope of this paper.

[130] *Supra* note 107 at 346.

[131] Alberta. Resource Development, "Environmental Regulation of Natural Gas Development in Alberta" (1998), online: <http://www.energy.gov.ab.ca>.

[132] *Supra* note 107 at 333-34.

[133] R. Wallace, *Public Input To Government Decision Making*, Occasional Paper No. 13 (Ottawa: Federal Environmental Assessment Review Office, 1985 at 63; P. Wolf, *The Human Side of Environmental Impact Assessment*, Occasional Paper No. 7 (Ottawa: Federal Environmental Assessment Review Office, 1981) at 23-24.

However, the government may also have unique considerations regarding effective public participation and access to information. Under the current political climate, the government would probably stress that above all, public participation in proceedings must be *seen* to be cost-effective, efficient, fair, and beneficial, yet must also protect government confidentiality and preserve the exercise of ministerial discretion.

The government may be regarded or may regard itself as the entity that must balance all of the competing interests in public decision-making. However, the government may be more partial to or may be thought to be more partial to some of the interests. For example, the government often sees itself as the advocate of economic development. Reed (and others) notes that as a result of prolonged contact with various industries via the regulatory process, government authorities tend to embrace the biases and values of the industries that they are regulating.[134] On the other hand, government may be accused by industry as too sympathetic to public demands. Thus, the government may perceive itself as having the role of ensuring that oil and gas projects proceed, but at the same time, of encouraging the public to believe that it has received adequate information and has had adequate input into the decisions.[135]

In not allowing for meaningful citizen participation (including access to information), government has been accused of tokenism. That is, environmental decisions have already been made behind the scenes before the public has actually had any input.[136] Since Canada is a representative democracy, ongoing direct participation is not really embedded in our government decision-making practices. Thus, there are no prerequisites for public decision-making power. Public participation, whether by hearings, consultations or workshops, may therefore be used by government as a means of social control. That is, governments may construct public participation in a way that satisfies the public's desire to have input, yet provides no significant impact. Thus, whether or not they have had effective access to information in the process, participants may feel vindicated because they have been "heard" at a public hearing, but they actually may have no real impact on the final decision.[137] At hearings, the public may communicate *to* panel members, but not really dialogue *with* them. During a public consultation process, the public may have more opportunities for dialogue and debate, but the contents of the final report and the action taken after the report is given are not under public control. Further, the government often limits consultations and workshop participation to invited stakeholders rather than to the general public. The government maintains ultimate

[134]M. Reed, *Citizen Participation and Public Hearings: Evaluating Northern Experiences*, Cornett Occasional Papers No. 4 (Victoria: University of Victoria, 1984).

[135]E. Cotterill, *Environmental Assessment: What is it? Where is it Going?*, Occasional Paper No. 4 (Ottawa: Federal Environmental Assessment Review Office, 1981) at 8-9.

[136]R. Lang & A. Armour, *The Assessment and Review of Social Impacts* (Hull: FEARO, 1981) at 73.

[137]R. Parenteau, *Public Participation in Environmental Decision-Making* (Ottawa: Federal Environmental Assessment Review Office, 1988) at 5. See also: Tilleman, *supra* note 107 at 346.

control, which, from its point of view, may be desirable for "effective" citizen participation.[138]

Governments are also accountable to the public for the cost of various activities. Thus, public participation and access to information from the government's perspective must be cost effective. Public consultation takes time and costs money. For example, government involvement costs taxpayers money to prepare an EA statement or to hire someone to do so. Informing the public and providing opportunities to be heard also costs money. For large projects, the costs of public participation can be high, especially if there are diverse or cumulative effects involved in the project.[139] However, Tilleman points out that the decision *not* to initially consult, especially in large projects, can result in very expensive changes to the completed project or can result in unnecessary opposition to it.[140] This can affect both government and industry.

Government participants in environmental decision-making may also endeavor to preserve ministerial discretion. The government might be very uncomfortable with a decision-making process that is ultimately under the control of citizens. It is difficult, although not impossible, to establish direct citizen participation and decision-making in a parliamentary democracy.[141] This would mean that ministers would have to cede some of their discretionary power to citizens. It is probably more expedient to allow the public to erroneously believe that it has true control over a decision than to actually allow this to be the case. However, from the public perspective, effective access to information means that the results of exercising a right of access are effective. No amount of access to information is effective if the public has no significant input into the decisions that are made.

Finally, governments are concerned about protecting their confidentiality. There is a legacy of official secrecy in Canadian government. A number of the exemptions from disclosure in Canada's *Access to Information Act* (*AIA*)[142] reflect this legacy. For example, all cabinet, cabinet committee and Privy Council documents are exempt from disclosure unless they are over twenty years old, the decision relating to the documents has been made public, or four years have passed since the decision was made.[143] From the point of view of the public, by limiting access to information, the government undermines the effectiveness of public participation. From the point of view of the

[138]Canada. Environment Canada, *A Report on the Green Plan Consultations* (Ottawa: Supply and Services, 1990) at 130.

[139]Tilleman, *supra* note 107 at 348.

[140]*Ibid.*

[141]Conacher, *supra* note 122 at 176.

[142]*Access to Information Act*, R.S.C. 1985, c. A-1.

[143]Subsection 69(3).

government, these exemptions from disclosure are necessary as they guarantee full honesty in advice given to the government, and they also protect government officials from undue scrutiny in their decision-making.

Thus, although the government may have a "public interest" in public participation and access to information, because of its interests in exercising control and discretion, it may view "effective" citizen participation in a more circumscribed light.

2.2.4 Industry Perspective

Industry wanting to pursue various projects may have differing priorities or concerns regarding public participation and access to information. The environmental planner working for industry has a number of concerns regarding environmental information. He or she must decide the amount and type of information to be collected regarding the proposed project. Second, he or she must decide when the information should be collected and how it should be inputted into the planning stages of the project. Third, he or she must decide who should have access to the information and under what conditions. Finally, he or she must determine how the information will be stored and monitored, and how the process of data collection will be paid for.[144] Thus, industry's priorities regarding access to information may or may not coincide with the public's.

Some industries have determined that public participation in many stages of the oil and gas process is beneficial. For example, Suncor Inc. claims to involve the public from the initial project concept stage, through issue scoping and identification, to EA, mitigation and monitoring.[145] The potential benefits include avoiding opposition, reducing the likelihood of the need to retrofit the project, improving project planning, uncovering previously unknown information which results in cost savings for proponents, and providing information that can be used for future projects.[146]

Other industries have concerns about the effects of increased public participation and access to information. These include concerns about loss of control, competition, efficiency, liability, and public relations.

As noted earlier in this chapter, public participation has increased as one method of addressing some of the deficiencies of Canada's representative democracy. Through public participation in environmental decision-making, the public can exercise a little

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[144]N. Nevitte, *The Decline of Deference: Canadian value change in cross-national perspective* (Peterborough: Broadview Press, 1996) at 238.

[145]Suncor Inc., *Environmental Report* (1996).

[146]R. Gibson & B. Savan, *Environmental Assessment in Ontario* (Toronto: Canadian Environmental Law Research Foundation, 1986) at 416.

control over the non-government sector, which consists of some stakeholders that have a very significant influence in our country. The fear is that if the companies lose control over the process, outsiders will promote unrealistic solutions to problems that are not well understood, or may propose solutions that reflect their own political agenda rather than the economic interests of the company.[147] However, one response to the fear of losing control — not communicating with the public — can actually result in only a few very vocal voices being heard, and communication with affected parties ceases to be effective.[148] Further, the fear of losing control can be ameliorated by negotiating mutually agreeable boundaries with participants. For example, the number and scope of issues to be decided can be agreed upon in advance.[149] Also, staff can be trained about the proliferation of interests which motivate the different stakeholders and which propel their various strategies, and thus can respond accordingly.[150]

The most common concern voiced by industry is that access to information can have a detrimental effect on industry's competitive edge. The fear is that heightened emphasis on public participation in the environmental regulatory field cannot help but require more comprehensive access to information by the public. The very nature of effective EA requires disclosure and information gathering. Because industry is government's main environmental regulatory target, the amount and type of information required from it is such that providing access to this information can lend an unfair advantage to competitors, who can also obtain the information. This is especially of concern because the person applying for access to information does not have to provide reasons for wanting the information.[151] The process of providing effective information and public participation takes time and money.[152] Industry may fear that what they have taken time and money to produce may become available free to competitors or others.[153] This can also effect industry's competitive edge, and might discourage the development of new safe environmental technology.[154]

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[147]B.J. Hance *et al.*, *Industry Risk Communication Manual: Improving Dialogue with Communities* (Boca Raton, FL: Lewis Publishers, 1990).

[148]J. Mulligan *et al.*, *Principles of Communicating Risks* (Calgary: The Macleod Institute for Environmental Analysis, 1998) at 45.

[149]*Ibid.* at 47.

[150]T. Friend, "Learning to Speak on Sound Bites" (1996) Outside at 47-53 and 132-133.

[151]S.B. Linden, Q.C., "The Impact of Freedom of Information Legislation on 'Trade Secrets' in Law and Practice" in R.T. Hughes, Q.C., ed., *Trade Secrets* (Toronto: Law Society of Upper Canada, 1990) 269.

[152]*Supra* note 148 at 45.

[153]L. Barrera-Hernández, "The Legal Framework of Information Management" (1997) 7 J.E.L.P. 175 at 202.

[154]*Ibid.* at 205.

However, there are several provisions in access to information legislation that serve to protect industry from this exposure. For example, there are mandatory exemptions for trade secrets and confidential information. Also, third parties who have supplied information must often be notified and can object to the release of the information. Indeed, some information held by the government is not subject to access to information requests at all. At the same time, there are instances where industry's concerns about exposure may have to be overridden because of public safety or public health issues.

Industry may also be concerned about undertaking projects in an efficient way that is timely and cost-effective. Protracted public hearings and complex EA reports, which must take into account public concerns, can strain company resources. Often experts must be hired by proponents to deal with biophysical and socio-economic impacts. These experts can cost a great deal of money.[155] Lengthy court battles can be extremely costly. The current cost-cutting climate does not encourage industry to spend more time and resources on creating effective information sharing and public participation in decision-making. As stated by Mulligan, "[u]nless interactive exchange of information, shared decision-making and stakeholder partnerships are perceived to be an integral part of doing business, risk communication will be neglected."[156]

Industry may also be uncomfortable with public participation because it fears that communicating information about environmental risks may create conflict and controversy, which could in turn result in increased exposure to legal liability. Some risk managers fear that an organization will invite regulatory penalties or litigation if it publicly discloses environmental inadequacies of a proposed project. These concerns may be addressed in the mediation and negotiation stages where there are opportunities for dialogue and participatory decision-making.[157] Also, while routine and timely data dissemination may increase the risk of exposure to legal liability, sustained public opposition to an industry because of the lack of communication may potentially cause more damage than that which may be incurred from a lawsuit.[158]

Industry will therefore generally assess the efficacy of public participation in terms of a cost-benefit analysis. If the public participation regime, which includes access to information, is seen to create long term benefits for companies, they will be more inclined to facilitate those elements required for effective public participation.

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[155]Tilleman, *supra* note 107 at 348, footnote 34, where he notes that in Alberta NRCB Decision Report #9103, the applicant paid over one million dollars for experts and their reports in preparation for an EA hearing.

[156]*Supra* note 148 at 44.

[157]*Supra* note 148 at 45.

[158]*Ibid.* at 48.

2.3 Conclusion

It is clear that there may be some overlap and some conflict among the public's, the government's and industry's definition of "effective access to information" in the oil and gas process. However, this report focuses on the perspective of the citizen. Therefore, based on the literature surveyed above, the key elements of effective participation oil and gas process, as related to effective access to information, include: adequate notice of opportunities for public participation and information available; meaningful and fair opportunities to participate in the form of adequate information disclosure at every stage of the process; adequate funding for participation; adequate support to interpret information provided; timely receipt of necessary information; and sufficient access to the courts where necessary to uphold these elements. Effective access to information is a necessary support for these elements. For example, Reed asserts that for decision-making proceedings to be fair, all participants should have access to all relevant information and government expertise well in advance of the proceedings.[159] Thus, effective access to information is critical to effective public participation.

Donald Smiley asserts that increased access to information will result in clear and well understood relations within the government so that specific government actors can be held responsible for particular categories of actions.[160] Second, he asserts that with increased access to information, elected and appointed government officials could carry on their activities within the context of continuous, informed and vigorous debates about actual or proposed government policies.[161] However, he also notes that access to information legislation may not go far enough to ensure accountability because the very decisions that should ideally be subject to vigorous public debate — such as policy matters discussed within cabinet — are carried on with a high degree of secrecy.[162]

Thus, although access to factual information may be sufficient for the public to hold the government accountable for its administration of programs and policies, it does not necessarily provide enough information to scrutinize effectively the public policy-making process.[163] The public needs access to proposals, competing options and the reasoning

[159]Reed, *supra* note 134.

[160]D. Smiley, "Freedom of Information: Rationales and Proposals for Reform" in J. McCamus, *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981) 1 at 3.

[161]*Ibid.* at 3. It is not clear whether the goal of increased accountability has been reached in the years since access to information legislation has been in force.

[162]*Ibid.* at 14.

[163]H. Mitchell, *Access to Information and Policy Making: A Comparative Study* (Toronto: Commission on Freedom of Information and Individual Privacy, 1978) at 215.

behind policies to assist in making policy makers accountable to both the public and the legislature.[164]

The material in the next chapter sets out a brief overview of Alberta's oil and gas approval process, directly followed by a general analysis of the access to information opportunities during the process.

[164]*Ibid.*

Chapter 3: The Oil and Gas Process and Access to Information

This chapter provides basic information about what occurs in the various stages of the oil and gas process, discusses the opportunities for public access to environmental information during these stages and mentions some concerns about these opportunities.

3.1 Modes of Access to Environmental Information

Information relevant to participants in the oil and gas process may be available from private (non-government) or public (government) sources. The method used to try to obtain private or public information may be formal or informal. Some private information is indirectly accessible through a request to the government. For example, if a private company is required under legislation to submit information to a regulating body, this information may be subject to a formal access to information request. However, the same information may be exempt from disclosure. Further, the information actually available from the private source may be far more extensive than that submitted to the government. It may be extensive, but not readily available. Once information is under the control of the private sector, it is not subject to a regulated access to information process. Of great concern to some access to information advocates is the current government practice of contracting out information services to the private sector, thus creating an additional barrier to public access to information.[165]

Thus, in order for the public to obtain the required information, it may be necessary to look to more than one source and to use more than one method of obtaining it.

3.1.1 Informal Sources of Information

Informal or indirect sources of information pertinent to the environment include individuals, corporations, interest groups, libraries, databases, the Internet and government agencies. Many access to information consultants recommend that the initial approach to the government for information subject to legislation should be informal in order to save time and money.

Knowledge that there is pertinent information available informally varies widely. As with most forms of access to information, one needs notice that the information is available and details about from whom to request it. If one does not possess these two pieces of data, it is very difficult to obtain effective access to information.

[165] A. Roberts, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws* (Kingston: Queen's University, School of Policy Studies, 1998) at 24-28, online: <https://www.cna-acj.ca/client/cna/cna.nsf/object/LimitedAccess/$file/limitedaccess.pdf>.

In order to find out informally whether information exists and where to obtain it, citizens need to know about helpful sources, such as the Environmental Law Centre (Alberta), or registries such as the *Canadian Environmental Assessment Registry*.[166] Further, some proponents may have voluntary policies in place regarding public notification.[167] It is not terribly unusual for companies to approach interest groups publicly or in confidence for input before initiating projects.[168] Informal methods of obtaining notice about information are often thought to be superior to available legislated means because many people think that if one develops a friendly relationship with a corporation, one will be able to share information and thereby have a greater impact upon the corporation's environmental decision-making process.

There are, however, some potentially significant drawbacks to an informal notification approach. First, while groups may obtain much information about the proposed project through informal contact, there is the potential that the information could be presented in the most favourable light and could therefore be somewhat suspect. Second, some people may be in a better position than others to receive notice that information is available. Thus, there is a danger that the proponent will receive incomplete or inaccurate input from the few who are aware of the information. Third, there are no controls on thoroughness or timeliness of notice. Further, it is not clear how one would challenge incomplete notice or non-compliance with a voluntary notification policy.

Another potential benefit of the informal information gathering process is that the type of information available (*e.g.*, public and private) is more extensive, assuming that the requester successfully gains access to it. If a relationship of trust develops between the requester and the corporation, it may be possible to obtain information that would otherwise be confidential or exempt under formal access to information legislation. This could occur even in the situation where the information is requested from the government. Nevertheless, the same concerns exist for disclosure that were listed above — quality, completeness and timeliness of disclosure, as well as the inability to appeal defective disclosure.

A third benefit to obtaining information informally is that there are no procedural hoops; hence obtaining access to information can be quite expeditious. However, the length of time it takes to get the information is unregulated and completely out of the

[166]This is a master list of all the EAs carried out under the *CEAA* that have been registered by responsible authorities, and provides contacts for further information on EAs. It is an electronic database managed by the Canadian Environmental Assessment Agency.

[167]J. Mulligan *et al., Principles of Communicating Risks* (Calgary: The Macleod Institute for Environmental Analysis, 1998) at 34.

[168]See for example, the informal process described in P.S. Elder, "Biological Diversity and Alberta Law" (1996) 24(2) Alta. L. Rev. 293 at 327.

control of the requester. A related difficulty occurs if one has waited a significant amount of time for information. Once it is received, one has to examine the information to see if it meets his or her requirements. If not, one has to start from the beginning to make a formal request, thus incurring potentially significant time delays. The delay could have a very real impact on participation in the process.

The cost of informal access to information is uncertain and unregulated. The information supplier could charge either nothing or exorbitant fees.

There is always the possibility, which is not limited to informal access to information requests, that the received information is not accurate. There is no formal recourse if this occurs, nor if the information request is refused, nor if the received information is incomplete. It may be possible to appeal to a higher authority, such as a manager or department Minister, but there is no guarantee that he or she will entertain an appeal, let alone order disclosure or more complete disclosure.

Despite the potential drawbacks, there may be some circumstances where an informal access to information request would be the most expedient, efficient method of obtaining environmental information that could be helpful in the oil and gas process.

3.1.2 Formal Processes for Obtaining Access to Environmental Information

3.1.2.1 Canadian Access to Information Act

The federal *Access to Information Act* (*AIA*)[169] provides Canadians and landed immigrants the right to view or obtain copies of federal government-held information, subject to some exceptions. The *AIA* has been used on numerous occasions to obtain information on environmental concerns. For example, Ken Rubin, a public interest researcher, has made thousands of requests for information, many of them on environmental issues. After a request for information about the extent of the Canadian asbestos lobby to the United States, Rubin found that government emissaries were lobbying to change EPA standards during Canada's acid rain deliberations. Rubin also uncovered the minutes of a meeting of the Atomic Energy Control Board revealing that officials had serious concerns for the safety of nuclear installations.[170]

While the *AIA* applies generally to federal government-held environmental information, information related specifically to environmental assessment is also subject

[169]R.S.C. 1985, c. A-1. A companion piece of legislation, the *Privacy Act*, R.S.C. 1985, c. P-21, came into force on the same day.

[170]Canada. Information Commissioner of Canada, *The Access to Information Act: 10 Years On* (Ottawa: Minister of Public Works and Government Services, 1994) at 18.

to a process under the *Canadian Environmental Assessment Act* (*CEAA*).[171] In fact, while the Canadian Environmental Assessment Agency is specifically listed in Schedule I of the *AIA* as a government institution subject to an access to information request,[172] *CEAA* subsection 35(4) is specifically listed in *AIA* Schedule II, directing that this information not be disclosed under the *AIA*.[173] Nevertheless, there may be some significant applicable information held by the government that is not necessarily held under the *CEAA* process.

The public becomes aware that the federal government may have some relevant environmental information through a number of sources. However, as with all information subject to the *AIA*, it is up to the citizen to ascertain the location and nature of the information available.

One indirect way that access to environmental information may be barred is the practical reality that there is a decentralized system for access.[174] This means that requests for information must be made to the appropriate institution. The system for ascertaining the correct name of the institution is quite complex as there are hundreds of departments and ministries. Although incorrectly directed requests must be transferred to the correct institution under the *AIA*, it is possible that the transferring institution may miss a possible source of information. Consequently, requesters might be better served if there were a central location for making access requests.

There are several direct and indirect ways that information can become unavailable to a requester. In some cases, the way that the requester formulates his or her access to information request may result in the denial of access to information. In other cases, practices of the government may result in inaccessibility.

The requester must be careful not to word the request too broadly or too narrowly so as not to receive the desired information. This is difficult when the applicant may not know of the existence of specific records, but is looking for a specific type of information. If the requester does not word the request properly, he or she may unwittingly not obtain the desired information.

Under the *AIA*, the government is not obligated to create a record even if that information is within the institution's capacity.[175] Further, the government is not obligated to extract a statistic, draw conclusions, or make comparisons from data that it

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[171]S.C. 1992, c. 37.

[172]*AIA*, s. 3.

[173]*AIA*, s. 24.

[174]H. McNairn & C. Woodbury, *Government Information: Access and Privacy*, looseleaf (Toronto: DeBoo, 1989) at 2-13.

[175]*Ibid.* at 2-20.

possesses. The requested record must already exist.[176] Also, when the government responds to a request for information, it can reply in a way that neither confirms nor denies the existence of a record.[177] Consequently, it is quite conceivable that a requester could miss available data simply through unfortunate wording of the request.

Another possibility is that the request is too broad and results in an unwieldy, potentially expensive number of documents. Also, the issue of whether the record is under the "control" of the government department can be a barrier to access.[178]

Rubin claims that one way that people are being denied access is through overuse of claims that the material is subject to an exemption.[179] He cites the example of the Privy Council denying a request for exact per diem rates and retainers of part-time appointees to Crown corporations, boards and commissions on the ground that the information was exempt because it would reveal personal salary information.[180]

The *AIA* has a mandatory[181] exemption for third party information. The legislation requires that third parties be given notice of an intention to disclose information which might affect them. A third party is a person who is not directly involved in the request for information. "Third party" is defined in the AIA as "any person, group of persons or organization other than the person that made the request or a government institution." Unnecessary third party notification of a potential exemption might delay access.

Another difficulty is the very broad language that is used in some of the exemptions. For example, subparagraphs 21(1)(a) and (b) provide discretionary exemptions for advice or recommendations developed in the last 20 years by or for a government institution or for an account of consultations or deliberations involving officers or government employees, a Minister or his staff. While exceptions are made for the reasons of a decision that is made in the exercise of a discretionary power that affects the rights of a person or for consultant's reports prepared by non-government persons, these exemptions are quite broad. "Advice" is not defined in the Act and it is possible to construe many different types of information as advice.

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[176]*Ibid.* at 2-14.

[177]*AIA*, s. 10(1)(b).

[178]This issue is discussed below under Alberta's *FOIPA*.

[179]K. Rubin, *Using Canadian Freedom of Information Legislation: A Public Interest Researcher's Experience* (Ottawa: 1990).

[180]*Ibid.*

[181]The government institution must not disclose this information.

The *AIA*'s public interest override applies to the release of third party information.[182] The public interest in disclosure must clearly outweigh any financial loss or gain, prejudice or interference with contractual negotiations of a third party. There is no other public interest override in the *AIA*.

In September, 1999, the Friends of the Earth made an *AIA* request for information on the amount of sulphur contained in gasoline from various refineries and contained in reports that refiners must submit to Environment Canada. Several refiners challenged the release of the information under the third party exemptions under the *AIA*.[183]

There is yet another barrier to effective access to environmental information. Rubin notes that professionals in departments may be reticent to release information, particularly about health and safety issues.[184] Rubin discusses the reasons put forward for their reluctance to release this kind of information. First, he notes that department officials think that the information is incomplete or that the papers must be presented first amongst their colleagues. Second, he has found that they do not want to alarm the public. Third, he has found that they will state that the data was obtained from the private sector. Fourth, they will tell him that factual data includes sensitive recommendations. Finally, Rubin has found that the department will give the reason that the data may eventually be published.[185] This type of reluctance can make access more difficult.

The amount of time it takes to fulfill an access to information request is of concern. While the *AIA* provides that a request must be responded to within 30 days, extensions are available. For example, if the request must be transferred to another department or if a third party needs to be notified, an extension will be required.

In 2003-2004, over 50 percent of the requests under the federal act took longer than the minimum 30 days.[186] Some departments are worse than others when it comes to delays. For example, as noted by Paul Wells, 85.6% of information requests to Revenue Canada are not answered within the time required by law.[187] Rubin stresses that the departments know that they will only be mildly admonished for delays.[188]

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[182]Subsection 20(6).

[183]Friends of the Earth, "Federal Court Application T-1302-98" *News Release* (16 September 1999).

[184]*Supra* note 179.

[185]*Ibid.*

[186]Canada. Public Works and Government Services, *Access to Information Annual Report 2003-2004*, online: <http://www.pwgsc.gc.ca/atip/text/annualreport0304-e.html#231>.

[187]"Delay a big part of what happens on Hill these days" *National Post* (29 April 1999).

[188]*Supra* note 179.

The *AIA* requires a modest $5.00 application fee,[189] but reproduction fees are charged. Fees are charged both for copies and for the time spent compiling the information (if over 5 hours is spent). It is not unusual for a request to be in the thousands of dollars. For example, Southam News has dropped inquiries after being asked for fees as high as $10,000.[190]

An applicant can also apply for a discretionary waiver of fees. However, Rubin has experienced at best a write-off of the first $25.00.[191] For example, when Rubin was involved in applications regarding conditions in meat packing plants, the Department of Agriculture told him that he would have to pay $80,000 — including computer time at $16.50 per minute. He refused and, after negotiation, obtained some of what he sought for free.[192]

Under the *AIA* legislation, the requester can complain about a refusal of access, time delays, costs and other matters to the Information Commissioner. Although the Information Commissioner has broad powers of investigation, he or she can only make recommendations to heads of government departments. These recommendations are not binding.[193]

Any person who has been refused access and who has received an answer to his complaint from the Information Commissioner, may apply to the Federal Court for a review of the matter within 45 days after the time results of an investigation by the IC are reported to the complainant. Third parties involved in the disclosure of a record can also apply for review by the Federal Court.[194]

A further appeal lies to the Federal Court of Appeal.[195] These proceedings take time, however, which can effectively bar access to needed environmental information.

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[189]In *Rubin v. Canada (Minister of Employment and Immigration)* (4 October 1985) T-194-85, (Fed. T.D.), the court held that applications not accompanied with the requisite $5.00 fee are not applications the refusal of which can be adjudicated by the court.

[190]R. Bott, "State Secrets" *Saturday Night* (October 1987) 51 at 56.

[191]*Supra* note 179.

[192]*Ibid.*

[193]*AIA*, s. 37.

[194]Section 41.

[195]See: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27.

3.1.2.2 Alberta's Freedom of Information and Protection of Privacy Act

Alberta's *Freedom of Information and Protection of Privacy Act* (*FOIPA*),[196] provides for access to records held by government bodies, including local government bodies, health care bodies, and educational bodies. The *FOIPA* sets out the scope of information available for access, the process for obtaining access to information and the records which are not available because they are subject to exceptions.

In Alberta, access to information requests must be made in writing and must be accompanied by the required fee.[197] There are some exceptions made (*e.g.*, for disabled persons). Access to information is available to any applicant and the *FOIPA* permits access to information by an agent.[198] The government does not inquire into the reasons behind the access request.

The process for obtaining information, including environmental information, is set out under the *FOIPA*. First, the requester must determine which public body should receive the access to information request. The request is made to the freedom of information and privacy coordinator for the public body.[199] There is a form to be filled out and a fee to be paid. The public body then deals with the access to information request by granting access, by transferring the request to another public body, or by refusing access to some or all of the information based on one or more discretionary or mandatory exceptions.[200] A dissatisfied requester may appeal to the Information and Privacy Commissioner ("the Commissioner") for a review of the decision.[201] The Commissioner can appoint a mediator to investigate or settle the complaint.[202] If the matter is not settled, the Commissioner may conduct an inquiry, after which the public body may be ordered to grant access or the decision of the public body may be upheld.[203] The Commissioner's order is final, although applicants have the right to judicial review by the courts if they believe that the appeal process was not conducted in a legally fair manner.[204]

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[196]R.S.A. 2000, c. F-25 (hereinafter *FOIPA*).

[197]*FOIPA*, ss. 6 and 7.

[198]*FOIPA*, s. 84.

[199]*FOIPA*, s. 87; A.R. 200/95, s. 2(1).

[200]*FOIPA*, ss. 16 to 29.

[201]*FOIPA*, s. 65.

[202]*FOIPA*, s. 68.

[203]*FOIPA*, s. 69.

[204]*FOIPA*, ss. 73 and 74.

There are some provisions in Alberta that are intended to assist one in obtaining access to information. First, the public body has a duty to assist applicants in making their requests more particular or more effective.[205] Second, for a $50.00 fee, one can make a continuing access request for up to two years.[206] This could be very helpful in the environmental law area where data and other updates about a particular project or situation could arrive after one makes the initial access to information request.

Many of the concerns with the Alberta *FOIPA* are similar or identical to those expressed under the *AIA* and will not be repeated in this section.

As with other methods of access to environmental information, the citizen must know about the existence of the information before he or she can obtain it. In Alberta, a Directory is published to assist requesters in knowing about the types of information that is available and from which government department. The Alberta Directory is available on-line or in most public libraries. However, it does not contain detailed information about specific projects — just general categories of information.

The necessity for a directory points to a difficulty with access to information legislation. There is a decentralized system for access; there is no central system for obtaining government information. This means that request for information must be made to the appropriate institution. The system for ascertaining the correct institution is quite complex and involves paging through directories, which list hundreds of departments and ministries and their services. Although incorrectly directed requests must be transferred to the correct institution under the legislation,[207] it is possible that the transferring institution might miss a possible source of information. Requesters might be better served if there was a central location for making access requests.

The legislation requires that third parties be given notice of an intention to disclose information which might affect them. A third party is a person who is not directly involved in the request for information.[208]

In addition, policy guides published by the government assist the requester in specific access requests.[209] The Information Commissioner publishes annual reports which provide statistics and other relevant information.

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[205]Section 10.

[206]Section 9.

[207]*FOIPA*, s. 15.

[208]*FOIPA*, ss. 30 and 31.

[209]Alberta Labour. Information Management and Privacy Branch, *Freedom of Information and Protection of Privacy: Policies and Practices* (Alberta: 1998).

The definition of "record" under *FOIPA* is quite broad.[210] The *FOIPA* applies to information created before the Act was in force.[211] Additionally, the *FOIPA* lists records that are not covered by the Act.[212] Alberta's list of records not covered by the Act is quite long and includes court documents, personal notes of judicial or quasi-judicial persons, records in the custody of or created by on officer of the Legislature, records of the Ethics Commissioner, examination questions, teaching materials, certain archival records, prosecution records, registry information, records of the Speaker of the Legislative Assembly or a member of the Legislative Assembly, Executive Council documents, certain treasury branch records, and credit union records.[213] This list of exceptions is longer than in most other Canadian jurisdictions.

In addition to the direct exclusion of records from the application of the *FOIPA*, there is a paramountcy provision in section 5. This section provides that wherever there is an inconsistency with another enactment, the *FOIPA* prevails unless there is an express provision to the contrary in the other Act or in the FOIP regulation.[214] That information can be excluded under the paramountcy section is a concern as requesters can become confused about the proper process to follow and may not be able to access the information at all. At the least, requesters will be delayed in obtaining the desired information while waiting for the public body's negative response to their request.

A list of government departments and agencies from which access may be obtained is located in the regulations.[215] The records available for access must be in the custody or control of the public body.[216] The issue of "control" is significant as it can result in a barrier to access. Neither the *AIA* nor the *FOIPA* states that the information in the hands of the government actually belongs to the people. In fact, most people assume that the information belongs to the government. This assumption can lead to the conclusion that the government has the right to shield information from being released.[217]

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[210]*FOIPA*, s. 1(1)(q) "record"; s. 88.

[211]*FOIPA*, s. 96.

[212]*FOIPA*, s. 4. See *Re Alberta (Environmental Protection)* (22 July 1997) Order No. 97-008 (Alta. I.P.C.), where the Commissioner held that the Department of Environmental Protection properly applied the *FOIPA* to exclude a report made by the Ombudsman which was an investigation of the approval of a timber company's application for Phase I of a mainline road.

[213]*FOIPA*, s. 4(1).

[214]A.R. 200/95.

[215]A.R. 200/95, Schedule I.

[216]*FOIPA*, s. 4.

[217]Darrell Evans, "Freedom of Information" (Speech, Calgary, Alberta, 20 April 1993). See generally, Alberta Civil Liberties Research Centre, *Access to Information Legislation in Western Canada*, 1993.

The interpretation of "control" is becoming more important since government is farming out much of its data managing requirements to private industry. The Alberta Commissioner determined that records in the private sector are outside of the *FOIPA*'s jurisdiction.[218] As noted by Alisdair Roberts in a study done for the Canadian Newspapers Association, transferring functions out of government can create barriers to access to information. Delegation of service delivery and regulatory functions to industry-owned organizations threatens access to information as delegates and contractors are usually exempt from freedom of information laws.[219]

As noted, the *FOIPA* contains numerous exemptions from disclosure.[220] Some of the exemptions are mandatory some are discretionary. There are some theorists who argue that the presence of exemptions in access to information legislation reflects the attitude that the Legislature is sovereign and therefore its information should remain secret.[221]

There are problems with the application and interpretation of the exemptions. First, there are simply too many exemptions. Because of the numerous exemptions, the legislation appears to emphasize secrecy rather than freedom of information. These numerous exemptions contain carved out exceptions which make the *FOIPA* very difficult to interpret and apply and could discourage access to information requests. Further, the exemptions are very broadly worded in some cases and leave much room for interpretation in a manner that prevents access to information.

In one case,[222] the applicant was successful in its request for access to information from the Alberta Environmental Centre. The applicant requested access to a report prepared for a third party by the Centre and an independent consulting company. The third party objected to the disclosure of the report. The Centre said that the report was produced under a contract with the third party, which contained a confidentiality clause. The Centre argued that if it could not guarantee its clients' confidentiality, it would be unable to attract clients or clients might be discouraged from contracting with the Centre

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[218]*Re Alberta (Municipal Affairs)* (25 June 1997) Order No. 97-006 (Alta. I.P.C.).

[219]A. Roberts, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws* (Kingston: Queen's University: School of Policy Studies, 1998) at 24-28. See also: C. Bruce, "Rethinking the Delivery of Government Services" in C. Bruce, R. Kneebone & K. McKenzie, eds., *A Government Reinvented* (Toronto: Oxford University Press, 1997) at 421-460; C. Bruce & D. Woytowich, "Delegated Administrative Organizations: Alberta's 'Third Option'" in R. Ford & D. Zussman, eds., *Alternative Service Delivery: Transcending Boundaries* (Toronto: IPAC/KPMG, 1997) at 208-222.

[220]*FOIPA*, ss. 16 to 29.

[221]O. Lomas, ed., *Frontiers of Environmental Law* (London, UK: Chancery Law Publishing Ltd., 1991) at 102-114.

[222]*Re Alberta (Environmental Protection)* (5 December 1996) Order No. 96-016 (Alta. I.P.C.). See also: D. Tingley, "Access to Environmental Information — That Cattle Report" (1997) 12(2) Environmental Law Centre News Brief 1.

for research projects. This would harm the economic interest of the Centre under *FOIPA* subsection 24(1)(c). In holding that the Centre had not correctly withheld the report, the Commissioner said that the *FOIPA* requires that the harm must result from the disclosure of the specific information being sought, and not from the disclosure of material produced under contract in general. In this case, there was nothing in the report itself which would harm the economic interest of the Centre.

In another case,[223] the Commissioner dealt with a request to Alberta Environmental Protection for documents relating to an amendment of a specific waste control regulation made under the *EPEA*. The public body withheld some relevant information on the basis that the information fell under one of three exemptions to disclosure under the *FOIPA*: solicitor-client privilege (subsection 26(1)(1)); information relating to the provision of legal services (subsection 26(1)(b)); and information which would reveal the contents of draft regulations (subsection 23(1)(e)). The Commissioner determined that the public body was entitled to refuse disclosure of the severed materials. Because the exemptions were discretionary, the Commissioner examined whether the information should be disclosed even though it did not have to be disclosed. The Commissioner noted that the public body must consider the objects and purposes of the *FOIPA* when exercising its choice to refuse information disclosure. In this case, the Commissioner was not satisfied that the public body did so, and returned the decision to the public body for reconsideration under subsection 68(2)(b).

In a third case,[224] the applicants sought information about leaks from underground storage tanks at three service stations. The public body released some of the records but refused to release others on the grounds, among others, that subsection 26 (privilege) applied. The two third parties who owned the service stations argued that the information that had been provided to the public body was privileged because of upcoming litigation and that the privilege had not been waived. The Commissioner ordered that some of the information provided to the public body was not to be disclosed because of section 26.[225]

In a fourth case,[226] the Commissioner upheld the public body's decision to disclose 90 pages of a possible 312 pages (thereby withholding 222 pages) dealing with the

[223]*Re Alberta (Environmental Protection)* (7 January 1997) Order No. 96-017 (Alta. I.P.C.).

[224]*Re Alberta (Environmental Protection)* (28 October 1997) Order No. 97-009 (Alta. I.P.C.). See also, D. Stanford & C. Arthur, "Speak No Evil: Freedom of Information in Environmental Litigation" (1998) 6 Digest of Environmental Law and Environmental Assessment 101.

[225]See also: *Re Alberta (Environmental Protection)* (25 February 1999) Order No. 98-017 (Alta. I.P.C.), where s. 26(1)(a) applied to prevent the disclosure by Alberta Environmental Protection of a Contamination Assessment Report.

[226]*Re Alberta (Environmental Protection)* (28 January 1999) Order No. 99-001 (Alta. I.P.C.). But see *Re Alberta (Environmental Protection)* (12 May 1997) Order No. 97-007 (Alta. I.P.C.), where the Commissioner held that s. 23 did not apply to prevent the release of documents related to a gas plant because they contained facts, not advice.

Kananaskis Country recreational development policy. The public body relied upon *FOIPA* subsections 23(1)(a), (b), and (g) and found that it could exercise its discretion to withhold policy information containing advice, consultations, or pending budgetary information.

In a fifth case,[227] the Commissioner held that the release of 148 names of persons who received licences to hunt grizzly bears in Alberta in 1998 would not be an unreasonable invasion of third parties' personal privacy under *FOIPA* section 16.

In a sixth case,[228] the Commissioner granted Epcor Generation Inc.'s application to eliminate a sentence before providing access to a letter it had written to the Department of Community Development relating to the future development of the Rossdale Power Plant site. The Commissioner agreed that the information was commercial information under *FOIPA* subsection 15(1)(a), communicated to the government on the basis that it was confidential under subsection 15(1)(b), the release of which would reasonably be expected to significantly harm the third party's competitive position under subsection 15(1)(c).

The third party exemptions are most likely to affect an information request in the environmental area. The Alberta legislation has a discretionary[229] exemption for third party information. Third party information includes trade secrets; financial, commercial, scientific or technical information; information the disclosure of which could reasonably be expected to result in material financial loss or which could reasonably be expected to prejudice the competitive position of a third party; and information the disclosure of which could reasonably be expected to interfere with contractual or other negations of a third party. In 2004-2005 in Alberta, there were 1,770 requests for general information (and 1,406 personal information requests). On 1,027 occasions information was excepted from disclosure because it was third party personal information; on 43 occasions it was excepted from disclosure because it was third party business or tax information.[230]

The third party exemption is very broad and has been widely litigated in the federal jurisdiction.[231] The majority of access to information decisions out of the federal jurisdiction deal with the interpretation of the third party exemption. This is starting to be the case in Alberta also. For example, in one case,[232] the Commissioner held that Alberta

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[227]*Re Alberta (Environmental Protection)* (28 October 1997) Order No. 97-009 (Alta. I.P.C.).

[228]*Re Alberta (Community Development)* (22 August 2001) Order No. 2001-021 (Alta. I.P.C.).

[229]The head of the public body has the discretion as to whether to disclose this information.

[230]Alberta. Government Services, *Freedom of Information and Protection of Privacy Annual Report 2004-2005* at 4-11.

[231]See Alberta Civil Liberties Research Centre, *supra* note 217 at 41-50.

[232]*Re Alberta (Alberta Environment)* (5 November 2004) Order No. F2004-013 (Alta. I.P.C.)

Environment was correct in disclosing records pertaining to soil conditions at the site of a former service station, and that the public body did not have sufficient evidence to conclude that significant harm could reasonably be expected to result to the third party (current owner of the property) from the release of the information.

The *FOIPA* provides an over-reaching override for the release of information about a risk of significant harm to the environment or to the health or safety of the public or other public interest information.[233] This provision is attractive but is seldom used by the government unless there is an application by a member of the general public that information be released for public health and safety reasons. In one case,[234] the Rocky Mountain Ecosystem Coalition applied to have the Minister of Environmental Protection officially release a report on the impact of the petroleum industry on cattle production under *FOIPA* section 31.[235] The Information and Privacy Commissioner held a special review and decided that he could properly review the use of section 31 by heads of public bodies. The Commissioner noted that he would only exercise his supervisory powers in clear and compelling circumstances and would then review the manner in which the heads performed their duty to decide what is in the public interest.

The amount of time it takes to fulfill an access to information request is of concern. While the *FOIPA* provides that a request must be responded to within 30 days, extensions are available. For example, if the request must be transferred to another department or if a third party needs to be notified, an extension will be required.

In 2004-2005, 18 percent of the requests under the *FOIPA* took longer than 30 days and nearly one third of these took over 60 days.[236]

Further, if the matter needs to be appealed, by the time one obtains access, it may be too late.

The cost of access to information can be a barrier to obtaining the information. In Alberta, the government charges an initial $25.00 fee which is non-refundable and which covers the first 150 pages of information. Thus, a person who receives one page pays the same as a person who receives 150 pages. If the request nets over 150 pages, the regulations stipulate the amounts that must be paid.

An applicant can also apply for a discretionary waiver of fees (by the public body or by the Commissioner). In one case, the applicant was refused a fee waiver by the public

[233]*FOIPA*, s. 32.

[234]*Re Alberta (Environmental Protection)* (6 January 1999) Order No. 98-018 (Alta. I.P.C.).

[235]The report had been leaked to some people, but had not been officially released by the government. See: D. Thomas, "Oil Industry No Threat to Cattle, Report Finds" *Edmonton Journal* (20 June 1996).

[236]Government Services, *supra* note 230 at 11.

body under subsection 87(4)(b) (now s. 93(4)(b)) [this permits the head of the public body or the Commissioner to waive the fee if it is in the public interest] and the Commissioner was asked to review this decision. In ordering that the applicant's fees be waived,[237] the Commissioner re-iterated a non-exhaustive list of criteria relevant to the issue of public interest under this subsection, as well as two principles to consider in applying the criteria:[238]

1. The Act was intended to foster open and transparent government, subject to the limits contained in the Act, and

2. The Act contains the principle that the user should pay.

The 13 criteria are:

1. Is the applicant motivated by commercial or other private interests?

2. Will members of the public, other than the applicant, benefit from disclosure? (This does not create a numbers game, however.)

3. Will the records contribute to the public understanding of an issue (that is, will they contribute to open and transparent government)?

4. Will disclosure add to public research on the operation of Government?

5. Has access been given to similar records at no cost?

6. Have there been persistent efforts by the applicant or others to obtain the records?

7. Would the records contribute to debate on or resolution of events of public interest?

8. Would the records be useful in clarifying public understanding of issues where Government has itself established that public understanding?

9. Do the records relate to a conflict between the applicant and the Government?

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[237] *Re Alberta (Environmental Protection)* (6 October 1999) Order No. 99-015 (Alta. I.P.C.). See also *Re Alberta (Environmental Protection)* (26 August 1999) Order No. 99-024 (Alta. I.P.C.), where the Commissioner waived the applicant's fees of $477.50 on an application for access to all records related to the impact of the reconstruction of Highway 752 on fisheries habitat, because of the public interest in the protection of the environment.

[238] *Ibid.* at ss. 51 and 52.

10. Should the public body have anticipated the need of the public to have the record?

11. How responsive has the public body been to the applicant's request? For example, were some records made available at no cost or did the public body help the applicant find other less expensive sources of information or did the public body help the applicant narrow the request so as to reduce costs?

12. Would the waiver of the fee shift an unreasonable burden of the cost from the applicant to the public body, such that there would be a significant interference with the operations of the public body, including other programs of the public body?

13. What is the probability that the applicant will disseminate the contents of the records?

In this case, the applicant was an "environmental watchdog" that requested access to Sunpine Forest Product's Annual Operating Plans. The Commissioner noted that the applicant served a public education function, that people relied on the applicant to review the information, that the applicant shared the information with others, that the applicant did follow-up, that the applicant met with forestry officials bi-monthly and that the applicant used the Operating Plans to keep informed of the issues. The Commissioner also found it significant that the applicant was not motivated by commercial or private interests, and that the records did not related to a conflict between the applicant and the Government.[239]

In another case involving a request for a fee waiver,[240] the Commissioner held that the applicant did not fulfill its burden of proving that a fee waiver should be granted. The Commissioner also held that the public body exercised its discretion properly when it refused the waiver request.

The federal and provincial legislation provide for two very different appeal systems. Unlike under the federal system, in Alberta, the Information Commissioner can *order* disclosure. A complaint must be made to the Information Commissioner within 60 days of receiving a response from the public body.[241] If one wishes to appeal the decision or action of the Information Commissioner, the recourse is to the Court of Queen's Bench for judicial review of the decision. In some circumstances, the Minister can appoint a

[239]*Ibid.* at ss. 77 and 82.

[240]*Re Alberta (Dept. of Environmental Protection)* (8 January 1997) Order No. 99-012 (Alta. I.P.C.). See also: *Re Alberta (Agriculture, Food and Rural Development)* (4 November 1999) Order No. 99-016 (Alta. I.P.C.), where a fee waiver was denied.

[241]*FOIPA*, s. 66.

Court of Queen's Bench Justice to act as an adjudicator to hear a complaint about the Information Commissioner's action or decision.[242]

In over half of the Canadian jurisdictions, the Information Commissioner has adjudicatory powers. Many critics think that this system is preferable as it saves the parties time and money because they do not have to resort to the courts to resolve an access dispute.

If the Information Commissioner makes binding decisions about access to information, he or she must appear to be impartial. The best situation occurs where the Information Commissioner is selected by an all-party legislative committee and is an officer responsible to the Legislature rather than to a Minister.[243] Thus, any appearance of bias is reduced.

3.1.3 Civil Litigation

Another formal method of obtaining information is through the civil litigation process. If one initiates a civil lawsuit, one can take advantage of the discovery procedures outlined in the Alberta Rules of Court (or in the Federal Court Rules) which provide for discovery of documents in the possession of the parties to the lawsuit and even documents held by third parties. However, in order to pursue a civil lawsuit successfully, the plaintiff must have a cause of action and standing to bring a lawsuit.[244] These requirements can pose real barriers in many environmentally-related situations.[245]

Should initiating a lawsuit prove plausible, after the pleadings are filed, the lawsuit usually proceeds to the discovery stage. During this stage, all relevant documents in the possession or control of the parties must be listed in an affidavit of documents.[246] The types and categories of documents available for discovery are broadly defined in the Alberta Rules of Court.[247] If the parties are not satisfied with the list provided in the

[242]*FOIPA*, ss. 75 to 81.

[243]This is the case in Alberta. See *FOIPA*, s. 45.

[244]For an example of a recent lawsuit in an environmental assessment context, see *Sierra Club of Canada v. Canada (Minister of Finance)* (31 May 1999) T-85-97 (Fed. T.D.), where the applicants applied for judicial review to set aside the federal government's authorization of financing in the sale of Candu reactors to the People's Republic of China without an environmental assessment.

[245]Even under the *Canadian Environmental Protection Act*, *infra*, where provision is made for pursuing a civil suit, there are many limitations. For example, the remedy only applies to breaches of the *CEPA*. Second, the plaintiff must show that she has suffered or is about to suffer personal loss. Causation is often a problem.

[246]Rules of Court, R. 188.

[247]R. 186.

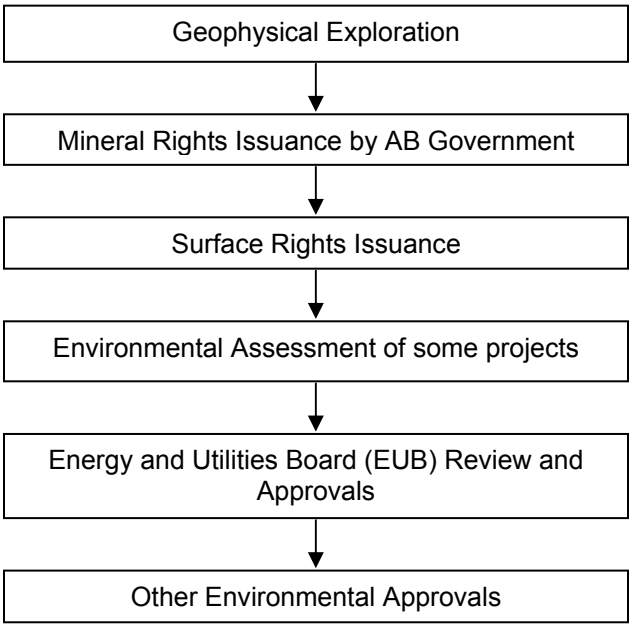
affidavit of documents, they can apply to the court who can order a further and better affidavit of documents.[248] Further, even documents held by third parties can be ordered by the court to be discovered.[249] Finally, access to information and privacy legislation does not apply to prevent access to information during discoveries.[250]

The cost of a lawsuit can be very high and it can take several years to finally conclude the matter. At the end of the day, if the party loses, he or she could be liable for extensive costs and fees. In most cases, pursuing a lawsuit in order to obtain information is probably not feasible.

In general access to information regimes, the government needs to incorporate some of the discovery procedures in order to better assist the public. In other words, providing a list of all documents pertaining to a request and listing whether or not they are subject to an exemption could be very useful. Then, the requester could choose which documents he or she would like to see and could pursue obtaining those required documents for which an exemption is claimed.

3.2 Access to Information at Various Stages of the Oil and Gas Process

Diagram of the Oil and Gas Process in Alberta



[248]R. 196.

[249]R. 209.

[250]See for example, Alberta's *FOIPA*, s. 3.

3.2.1 Exploration and Rights Issuance

The Province disposes of its oil and gas interests pursuant to the *Mines and Minerals Act*, R.S.A. 2000, c. M-17 (the "Act") and associated regulations, which establish a tenure system for oil and gas rights to be leased and administered in the province.[251] Companies are granted the right to explore for and develop the resources in exchange for royalties, bonus bid payments and rents payable to the Province.

Exploration is performed by private industry. The law generally does not require any public notification of exploration, nor any access to industry-held information about exploration. A member of the public seeking to obtain such information would be required to approach the oil and gas company directly to negotiate obtaining such information. However, as noted in Chapter Two, companies desire a competitive edge and are usually very guarded about sharing exploration information with the public.

Alberta's oil and gas rights are issued in the form of licences or leases through a competitive sealed bid public auction system. Companies or individuals wishing to acquire rights to produce oil and gas request Alberta Energy to make a public offering of these rights. The highest bidder is awarded the rights to drill for and recover oil and gas. Public offerings are held every two weeks. Notices of the parcels to be offered are published on Alberta Energy's website, and in paper copy, about eight weeks prior to the sale.

This offers some limited opportunities to obtain information about the rights issuance process. Notices of the parcels to be offered are published on Alberta Energy's website and in paper copy about eight weeks prior to the sale. The public does have access to the website, but, as noted by Nickie Vlavianos, there are questions about the efficacy of the notices for a non-industry audience, as they are "highly technical and not user-friendly."[252]

Further, once a member of the public accesses the website, the rights have been chosen for sale. The public has no right to participate in the decision to offer the rights for sale or into what conditions should be attached to the sale. In addition, there is no direct notice to potentially affected surface landowners when the subsurface rights are posted or sold. "Public" includes both landowners who may be directly affected by the subsequent oil and gas activity and members of the public at large who may be interested in the

[251]Some of the following material, which describes the rights issuance stage, is reproduced from Nickie Vlavianos, *The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis*, Human Rights Paper #5 (Calgary: Canadian institute of Resources Law, 2006) 29-30.

[252]Vlavianos, *ibid.* at 30.

cumulative and long-term impacts of oil and gas activity on Alberta's lands, water, wildlife, air quality and wilderness values.[253]

It may be possible to argue under administrative law or the *Charter* that the principles of fundamental justice are violated because of the lack of public notice and consultation in the process.[254] Public access to information at this stage of the process, coupled with effective consultation, would, of course, be desirable.

3.2.2 Environmental Assessment Process

3.2.2.1 Alberta's Environmental Assessment Process

After the rights issuance stage, in some circumstances, but *not* in the case of oil and gas drilling in Alberta,[255] projects require an environmental assessment (EA) under the Alberta *Environmental Protection and Enhancement Act* (*EPEA*),[256] which is discussed in detail below. In addition, some projects may require an EA under federal legislation (discussed in the Appendix). Environmental protection by the Alberta government is dealt with through three mechanisms: policy initiatives, provincial legislation, and the EUB approval process.[257] Each of these mechanisms has the potential for providing the public with opportunities for access to information and will be analyzed for those purposes below.

3.2.2.2 Description of the Process

The *EPEA* sets out the environmental impact assessment (EIA) process for Alberta. The stated purpose of the *EPEA* includes promoting and protecting the wise use of the environment, recognizing sustainable development, and preventing or mitigating environmental impacts.[258] The purpose of the EIA process under the *EPEA* is to support the goals of environmental protection and sustainability, to integrate environmental protection and economic decisions early in the planning process, to predict the

[253]*Ibid.* at 31.

[254]*Ibid.* at 32 to 43.

[255]Environmental assessment of these projects are dealt with under the *Energy Resources Conservation Act*, as discussed below.

[256]R.S.A. 2000, c. C-12.

[257]Alberta. Resource Development, *Environmental Regulation of Natural Gas Development in Alberta* (1996).This document states that the key legislation is the *Environmental Protection and Enhancement Act*, the *Public Lands Act*, R.S.A. 2000, c. P-40, the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 and the *Pipeline Act*, R.S.A. 2000, c. P-15.

[258]*EPEA*, s. 2.

environmental, social, economic and cultural consequences of proposed activities along with assessing mitigation plans, and to provide for public, proponent and government involvement in the review process.[259]

The EIA process is significant in Alberta because it is a condition precedent to the Alberta Energy and Utilities Board (EUB) or the Natural Resources Conservation Board (NRCB) approving any "proposed activity" as defined in subsection 39(e) of the *EPEA*. Energy projects and certain reviewable non-energy projects are therefore subject to EIAs under the *EPEA*. *EPEA* section 53 makes it clear that the EIA process must precede any consideration of a project or proposed activity by the EUB or the NRCB.

There are four stages for EIAs under the *EPEA*:

1. Initial Review

The initial review stage is triggered when a proponent, government department, local authority or other entity informs Alberta Environment that there is a new project. Projects that may warrant further consideration are referred to the Director of Environmental Assessment. EIAs apply to activities in the nature of "construction, operation, or reclamation" if scheduled under the *EPEA* or designated by regulation. The *Environmental Assessment (Mandatory and Exempted Activities) Regulation*[260] sets out those activities for which an EIA is required (mandatory) and those activities for which no EIA is required (exempted). The Director of Environmental Assessment decides whether or not an EIA is required for other activities. Alberta Environment's Director may require EIAs if specific criteria set out in the *EPEA* are met.[261] These include the location, size and nature of the project. Further, the Minister of the Environment can intervene and direct a proponent to prepare an EIA, even if the activity has been exempted by regulation.[262]

If further assessment is not necessary, the proponent then applies for any necessary approvals for the proposed activities. Directors considering applications for approvals under the *EPEA* must consider any applicable decisions of the NRCB or the EUB.[263]

If the Director decides that further assessment is needed,[264] the proponent must then provide public notice of the decision.[265] The notice must be published in at least one

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[259]EPEA, s. 40. See also: Alberta Environment, *A Guide to the Proposed Alberta Environmental Protection and Enhancement Legislation* (Edmonton: 1990) at 8-9, 17.

[260]Alta. Reg. 111/93.

[261]*EPEA*, ss. 43 and 44.

[262]*EPEA*, s. 47.

[263]*EPEA*, s. 67(2).

[264]*EPEA*, s. 44(1)(b)(i).

issue of a newspaper (approved by the Director), and it must include the location and brief details about the proposed activity, it must indicate that a person who is directly affected can submit a written statement of concern, and the date by which that statement of concern must be submitted, and it must set out the locations where information about the proposed activity may be obtained or inspected.[266] Any person directly affected by a proposed activity may submit a written statement of concern within 30 days of this notice.

2. Screening Report

At stage two, a screening report is prepared, based on the information obtained through the screening process, and the Director of Environmental Assessment decides if an EIA is required.[267] The report must include (among other items) the proposed activity's location, purpose and potential impact on the environment.[268] The report must be made available to the public.[269] If an EIA is not required, the proponent can then apply for an approval.[270] If an EIA is required, the proponent will then be directed to prepare one. The Minister of the Environment can also require that an EIA report be prepared for a proposed activity.[271]

If there is an application for an approval, the public must be notified.[272]

3. EIA Report

At stage three, an EIA report is prepared. To help determine the report's contents, the proponent prepares proposed terms of reference[273] which are viewed by the Director and which are made available for public review and comment.[274] After a reasonable time has passed for the public to review the terms of reference, the Director issues final terms of reference, which the proponent must use in preparing the EIA report. These are made available to the public.[275]

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[265]*EPEA*, s. 44(5).

[266]Alta. Reg. 112/93, s. 3.

[267]*EPEA*, s. 45(1)(a).

[268]Alta. Reg. 112/93, s. 4.

[269]*EPEA*, s. 45(2).

[270]*EPEA*, ss. 66 and 68.

[271]*EPEA*, s. 47.

[272]*EPEA*, s. 72(1).

[273]*EPEA*, s. 48(1).

[274]*EPEA*, s. 48(2).

[275]*EPEA*, s. 48(3); Alta. Reg. 112/93, s. 2(1)(l).

The *EPEA* sets out a list of information to be included in an EIA report. These include a description of the potential positive and negative environmental impacts of the proposed project, as well as its plans to mitigate any potential adverse impacts and to respond to potential emergencies.[276]

Once the report is complete, it is submitted to the Director for review. The Environmental Appeal Board has held that subsection 47(h) [now 49(h)] of the *EPEA* must be included in an EIA. As a result, any EIA which fails to consider alternatives is "*per se* deficient" regardless of the type of approval contemplated.[277]

4. Director Review of EIA

Finally, at stage four, the Director reviews the EIA report and may request additional information. The proponent can be required to publish the report. The public must be provided with notice that the EIA report or a summary of it is available.[278] The completed EIA report is then made available for any public hearings held as part of reviews by the EUB or the NRCB. If no such review is taking place, the report is submitted to the Minister of the Environment. Although the *EPEA* provides for public submissions and notification of activities, only activities within the purview of the NRCB or the EUB are intended to undergo public hearings.[279] However, the Minister can refer an activity to the Lieutenant Governor in Council, who can make an order that the activity is a reviewable project within the meaning of the *Natural Resources Conservation Board Act*.[280] This means that the project could be subject to the hearing process under the Act.

Once again, the proponents can apply for approvals at stage four. When the Director decides to issue an approval, persons who submitted a statement of concern and others whom the Director considers appropriate are given notice of the approval decision.[281]

The *EPEA* also provides for inter-jurisdictional agreements regarding EIAs. This means that the federal and Alberta governments can enter into a joint hearing on a project.[282]

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[276]*Alberta Environment Guidelines for Environmental Assessment*, online: <http://www3.gov.ab.ca/env/protenf/publications/ProjectScreeningGuidelines-Final.pdf>.

[277]*Kozdrowski v. Alberta (Department of Environmental Protection)* (12 June 1997) Order No. 96-059 (Alta. E.A.B.), s. 139.

[278]Alta. Reg. 112/93, s. 8.

[279]P.S. Elder, "Biological Diversity and Alberta Law" (1996) 24(2) Alta. L. Rev. 293 at 326.

[280]*EPEA*, s. 54.

[281]*EPEA*, s. 74.

[282]*EPEA*, s. 57; *CEAA*, s. 54.

Under the *EPEA*, the Director must maintain a registry of information provided to or created by the Director as part of the EA process.[283] The registry contains screening and EIA reports.

The *EPEA* provides for the independent review by the Environmental Appeal Board (EAB) of decisions, such as approvals and environmental protection orders, made under the Act.[284] The EAB is an independent administrative tribunal that hears appeals of decisions made under the *EPEA*. Members are appointed by Cabinet.[285] It provides opportunities for those who are "directly affected" by a decision to appeal that decision to the EAB.[286] The EAB has all the powers of a Commissioner under the Public Inquiries Act.[287] Generally, the EAB makes recommendations to the Minister of the Environment and the Minister then makes the final decision.[288] However, on matters relating to requests for confidentiality or administrative penalties, the EAB makes the final decision.[289]

If an applicant, approval holder or other person believes that he or she has grounds for an appeal, then he or she must file a notice of objection within the time periods set out in the *EPEA*. Generally the time period for filing a notice of objection is 30 days.[290] The EAB can dismiss a notice of objection if it considers the notice to be frivolous or vexatious,[291] or if the person appealing a decision fails to comply with a requirement to submit additional information requested by the EAB.[292] The EAB must dismiss an appeal if the person has already participated in or had the opportunity to participate in public hearings or a review on the matter held under the NRCB or under the EUB and all of the

[283]*EPEA*, s. 56; Alta. Reg. 114/93.

[284]*EPEA*, Part 4.

[285]Alberta. Environmental Appeals Board, online: <http://www.eab.gov.ab.ca/>.

[286]*EPEA*, s. 91. "Directly affected" means that the person must demonstrate a personal interest that is directly impacted by the approval granted. See, for example: *CUPE Local 30 v. Alberta (Public Health Advisory and Appeal Board)* (1996), 34 Admin. L.R. (2d) 172 (Alta. C.A.); *Friends of the Athabasca Environmental Association v. Alberta (Public Heath Advisory and Appeal Board)* (1996), 34 Admin. L.R. (2d) 167 (Alta. C.A.).

[287]*EPEA*, s. 95(1).

[288]*EPEA*, ss. 99(1) and 100.

[289]*EPEA*, ss. 91(1)(n) and (o), and 98 (1) and (3).

[290]*EPEA*, s. 91(4).

[291]*EPEA*, s. 95(5)(a)(i).

[292]*EPEA*, s. 95(5).

matters included in the notice of objection were considered during the hearing or review.[293] This dismissal can occur at any stage of the proceedings.[294]

The EAB does not have any direct authority to review an EIA. Rather, if an EIA is submitted as part of an application for an approval and the director relies exclusively information in the EIA to allow the approval, and that approval is appealed to the EAB, the EAB may allow criticisms of those data in considering the prudence of the Director in issuing an approval.[295] Further, in a case involving a landfill, the EAB recommended that the Minister order the Director to require that an EIA be performed with attention made to cumulative impacts, when this had not been previously done.[296]

The *EPEA* provides for parties to an appeal to the EAB to apply for an award of costs.[297]

In sum, the opportunities for public involvement in the EA process under Alberta's *EPEA* arise when public notice is given that a proposed project is being screened and an EIA is required; when public input is sought regarding the terms of reference of an EIA report and when the public is able to access EA information through the registry. Further, while directly affected members of the public may have input during approval appeal hearings at the EAB, they do not have direct input into EIA process decisions. The opportunity for formal hearings arises under the EUB and NRCB approval processes.[298]

3.2.2.3 Concerns about the Alberta Environmental Assessment Process

The government of Alberta claims to have placed a very high value upon public consultation over the last 20 years in the environmental regulation field.[299] The *EPEA* is one of a number of pieces of Alberta legislation, regulations and guidelines that have

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[293]*EPEA*, s. 95(5)(b).

[294]*Chem-Security (Alberta) Ltd. v. Alberta (Environmental Appeal Board)* (1997), 56 Alta. L.R. (3d) 153 (Alta. C.A.).

[295]*Supra* note 277, s. 120.

[296]*Mizera v. Alberta (Department of Environmental Protection)* (13 July 1999) Order Nos. 98-231 to 98-233-R (Alta. E.A.B.).

[297]*EPEA*, ss. 96 and 105(d); Alta. Reg. 114/93, s. 20.

[298]Some of the access to information aspects of the EUB process are discussed below.

[299]As stated by Alberta Resource Development in *Environmental Regulation of Natural Gas Development in Alberta* (1996): "Alberta's 20 years of experience with this collaborative multi-stakeholder process has resulted in early identification and resolution of land-use conflicts, in-depth public consultation, and incorporation of environmental values within the decision making process."

some impact on environmental performance. Thus, it is difficult to generalize about the strengths and weaknesses of the process. Nevertheless, there are some general qualities of the process which affect the efficacy of public participation and access to information.

First, a positive aspect of Alberta's EA process under the *EPEA* is the ability for members of the public to have input into the setting of terms of reference for EIAs. This ensures that potentially a broad range of factors may be considered. However, as with the *CEAA*, the public does not have input at the initial review stage, and therefore has no say regarding whether an EIA is required before an approval is granted.

Second, there are concerns about the types of activities that are excluded from EIAs under the *EPEA*. Of particular importance in Alberta, the *Environmental Assessment (Mandatory and Exempted Activities) Regulation* releases the "drilling, construction, operation or reclamation of an oil or gas well" from the process of EA under the *EPEA*.[300] The environmental impacts of these activities are governed by other legislation, such as the approval process under the *Energy Resources Conservation Act* (*ERCA*), the *Oil and Gas Conservation Act*, and the *Pipeline Act*.[301] However, since the approvals process is incremental, the cumulative effects of numerous wellsites are not properly addressed in Alberta.[302] Thus, a significant activity is excluded from effective EA in Alberta.

A significant drawback in the provincial *EPEA* is the amount of governmental discretion permitted. In 1990, the Environmental Legislation Review Panel was struck to hold public meetings throughout Alberta in order to obtain the public's views on the then proposed *EPEA*. The report issued by the Review Panel indicated that the most frequent criticism of the intended legislation was that there was too much discretionary power vested in the Minister, the Lieutenant Governor in Council (Cabinet) and the Department of the Environment's officials.[303] Members of the public were concerned that the "government simply wants the flexibility to appear stringent while remaining lax."[304] The *EPEA* continues to vest a great deal of discretion in these entities. Although there is provision for input by the public, in many cases the government makes the final determinations about EIA and related procedures.[305] Thus, although the public was very

[300]Schedule 2(e), Exempted Activities.

[301]*Supra* note 257.

[302]J. Roger Creasey, *Cumulative Effects and the Wellsite Approval Process* (M.Sc. Thesis, University of Calgary, 1998) [unpublished].

[303]Alberta. *Report of the Environmental Legislation Review Panel* (Edmonton: 1991), Brian Evans, Chair, at 26.

[304]*Ibid.*

[305]John Pratt, "Voisey's Bay Development Spawns Court Challenge" (July 1998) Eco Bulletin 1 (Canadian Bar Association, National Environmental Law Section) at 2 emphasizes that government ministers must exercise discretionary power with care and in the best interests of society. The majority of

vocal about the need for meaningful public involvement in the EA process, it is not always clear how the public's participation has impacted upon ultimate decision-making.[306] Indeed, most of the decisions of the EAB are in the form of "recommendations" to the Minister, who may or may not follow these recommendations.

A related shortcoming is the requirement that only those who are "directly affected" may have complete access to the appeals (or hearings) process. This means that they have certain procedural opportunities that others do not. For example, those who are "directly affected" under the *ERCA* hearing process have the right to receive notice of an application, to learn all of the facts, to present evidence, to cross-examine the evidence of the applicant and to make presentations by way of argument.[307] Further, under the *ERCA*, only those who are directly affected may have access to intervenor funding. If a person does not meet the criteria of "directly affected", his or her information may not reach decision-makers and he or she may not have access to information about the project in order to comment thereon. Thus, comprehensive information about a particular activity may not be made available to decision-makers or to the public.

A final general concern about Alberta's *EPEA* is the lack of formal public hearings until the appeal stage. While hearings are provided for under the EUB and NRCB approval processes, if the project is not subject to these approvals, public hearings do not occur until (and *if*) the matter reaches the EAB. Again, while the public may become aware of a project, without public hearings, there are limited opportunities to question the proponents and to draw out information about their projects.

3.2.2.4 The Alberta Environmental Protection and Enhancement Act and Access to Information

The purpose section of the *EPEA* emphasizes the need for public participation in the making of environmental decisions.[308] Various sections in the *EPEA* provide for increased access to information, participation in the EIA and approval process and, when directly affected, for the public's right to appeal certain decisions.

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the Supreme Court of Canada, in *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.), held that while discretionary decisions will be given considerable respect by the courts, the discretion must be exercised within the boundaries imposed in the statute, the principles of the rules of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Canadian Charter of Rights and Freedo*ms.

[306] *Supra* note 303 at 9-11.

[307] *ERCA*, s. 26(2).

[308] Section 2.

The main access to information or disclosure provisions may be found in sections 35 and 56. Alberta Regulations 112/93 and 273/2004 contain access to information and public notice provisions.

The *EPEA* section 2 and the EAB decisions stress the importance of communication in order to ensure that all citizens have a shared role in the protection, enhancement and wise use of the environment and that they can provide advice on decisions affecting the environment. Notice must be effective and all parties must communicate if the goals of the *EPEA* are to be carried out.[309] On the other hand, in *Bildson v. Acting Director of North Eastern Slopes Region Alberta Environmental Protection*,[310] the EAB held that because Bildson had already received notice of, participated in or had the opportunity to participate in an EUB review of a coal mine project, he was therefore unable to appeal the Alberta Environmental Protection's approval. Of note is the fact that there was no oral public participation in the EUB review. Thus, the emphasis on open communication may be circumscribed in some cases.

One of the biggest criticisms of any access to information regime is that the public does not really know what types of data are available and how to go about obtaining this data. Most of the notice provisions and procedures regarding environmental information in the *EPEA* are found in regulations. Many individuals do not know how to access regulations. This can bar access to information.

On the other hand, the Alberta government has published a public guide to the *EPEA*.[311] This explains in general terms how the *EPEA* works and how the public might participate in various aspects of environmental screening and assessment. The website also list the types of information to which the public might obtain access. These are listed in very general terms. Members of the public would have to perform some research to know what specific data that they require.

There are some provisions in the *EPEA* and Regulations which could assist the public in learning about the types of information available. First, notices of EAs of proposed non-mandatory activities, the proposed terms of reference for EIAs,[312] and notice of the final EIA report[313] must be published in a newspaper.[314] There are no time limits on these

[309]See: *Parry v. Alberta (Dept. of Environmental Protection)* (18 January 1999) Order Nos. 98-246 and 98-248-D (E.A.B.), s. 18-19, where the EAB noted that the citizen has a responsibility to protect the environment and therefore must provide the Director with sufficient identifying information about an item of concern. The public must explain and support its concerns, to the extent possible and reasonable.

[310](1996), 34 Admin. L.R. (2d) 167 (Alta. C.A.).

[311]Alberta Environment, online: <http://www3.gov.ab.ca/env/protenf/epea/eiaproce.html>.

[312]*EPEA*, s. 48.

[313]*EPEA*, s. 52.

[314]A.R. 112/93.

notices, except that public notice must be made within 10 days of the publication and submission of a final EIA report.[315] In *Nurani* v. *Alberta (Environmental Appeal Board),*[316] the Environmental Appeal Board was found to have the jurisdiction to re-consider its own decision on the basis of lack of notice of the hearing to the intervenors.

One has to question whether these notice provisions are sufficient for interested persons to participate productively in the assessment process. Any delay in publication might jeopardize the public's ability to understand a technical EIA document or to respond effectively to it.[317]

The *EPEA* requires the government to maintain a public registry of documents and information received from proponents.[318] This registry must contain the name of the proponent, a brief description of the proposed activity, the location, notices of the proposed activity, disclosure documents, the director's decision regarding the need for an environmental impact assessment report,[319] statements of concern, screening reports, proposed terms of reference, public comments on proposed terms of reference, location of the EIA report and any summaries of it, and any letter of referral to the ERCB[320] or the NRCB.[321] If the public is aware of the registry and obtains the information with expedience, it could prove invaluable, with the caveat that the Act limits the information disclosure provisions to information provided by proponents since the Act came in force.[322] However, public registries are not without their problems.

One positive feature of the *EPEA* is that information is available to the "public". This term is not defined in the Act, nor in the *Interpretation Act*.[323] Consequently, it could be given a very broad interpretation.

Another positive aspect of the *EPEA* is that it allows access to information that is generated by non-governmental agencies and individuals.

In addition to the information available in the public registry, there is other EA information available for public access. This is listed in section 35 and includes

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[315]A.R. 112/93, s. 8.

[316](1997), 210 A.R. 281 (Alta. Q.B.).

[317]D.P. Emond, *Environmental Assessment Law* (Toronto: Emond-Montgomery Limited, 1978) at 89.

[318]*EPEA*, s. 56.

[319]These include: the name of the proponent, the type of proposed activity, the activity's location and a statement of the Director's decision. See A.R. 112/93, s. 2.

[320]Energy Resources Conservation Board (currently called the EUB).

[321]Natural Resources Conservation Board.

[322]Subsection 35(2).

[323]R.S.A. 2000, c. I-8.

information about a proposed activity, an approval or various application, environmental and emission monitoring data, reports provided under approval conditions, any reports or studies that are provided to the Department and are required by the regulations to be disclosed to the public under section 35, statements of concern, notices of appeal, government approvals, government certificates, government monitoring data, government reclamation certificates and any other information that the Minister considers should be public information. Significantly, the Minister has discretion as to the manner and form that disclosure will take when these other types of information are released under subsection 35(3).[324] This has the potential to cause some difficulties for requesters. For example, the Minister could insist that no copies of documents be taken or that only certain documents may be copied or viewed. Since the decision to release such information is in the Minister's discretion, there is limited recourse to a person who is refused access to this type of information or who is provided access in a form that is unacceptable.

There are also limitations to the type of information available on the registry. For example, if an "activity" is not listed in the schedule as one possibly requiring an EIA, the government may not have this information on its registry. Further, the government has control of the data that is placed on the registry. The public must rely on the accuracy and timeliness of the government in placing this data thereon.

The legislation should provide for audits or some type of controls on the registry.

One positive aspect of disclosure under the *EPEA* is that the environmental impact assessment information available for disclosure (if not subject to an exemption) may include a description of the potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal, and spatial considerations.[325] Thus, the public may be able to obtain some background data to assist in knowing more about the EIA decision.

Another positive aspect of the disclosure provisions is that the public may be able to obtain reports and studies held by the government, which could include reports about the environmental impact of government policies and programs. The access to these reports accords with the *EPEA*, which states that one purpose of the *EPEA* is to recognize the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions.[326] However, it is not clear from the *EPEA* how this information could be used to support public input into the assessment of the environmental impact of policies and programs. The EA process under *EPEA* Part 2 does not clearly provide for EA of policies and programs — only of "proposed activities".

[324]A.R. 273/2004, s. 35(3).

[325]Subsection 35(1)(a)(i); s. 49(d).

[326]Subsection 2(d).

Although the public may be able to obtain some information, the *EPEA* contains significant exemption provisions. If non-governmental information provided under the *EPEA* is related to a trade secret and the person submitting the information makes a written request to the Director that it be kept confidential, the Director must honour that request if he or she considers it to be well-founded.[327] Further, while the confidentiality request is being considered, the Director cannot release the information to the public without a court order or with the consent of the person who submitted it.[328] Thus, a person desiring to delay (temporarily or permanently) another person's access to EA information could merely request that it be kept confidential.

"Trade secret" is not defined in the *EPEA*. Further, there is no procedure in the *EPEA* for review of actions taken by the Director with regard to access to information requests. The allowing of this exemption from the application of *FOIPA* seems also to protect information from disclosure even if it is in the public interest to disclose it. By comparison, the *FOIPA* permits disclosure in the public interest even if there is a mandatory exception for a trade secret.

If the matter reaches the EAB, the Rules of Practice permit the EAB panel chair to issue protective orders that he or she determines are necessary to prevent undue disclosure of classified, confidential or proprietary information. If the chair determines that this information should be made available to another party, the chair can direct the party to prepare an unclassified summary or extract of the original.[329] Thus, at every stage of the *EPEA* procedure, it seems that confidentiality is well protected.

Further, in light of the fact that there is no procedure in the *EPEA* for review of actions taken by the Director with regard to access to information requests, the lack of specific time limitations is a fundamental flaw.

The Director has the discretion to refuse copies if the information is already provided to a group that the person is affiliated with.[330] There are no further details provided in the legislation about considerations that should be made by the Director with regard to this provision. It was probably drafted to respond to the concern about numerous frivolous or vexatious requests for information. However, it may be construed as looking behind the access to information request to the motives of the person who is requesting the information. This type of provision can be used to deny access to information and should be avoided.

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[327]Subsection 35(5).

[328]Subsection 35(7).

[329]Alberta. Environmental Appeals Board, *Rules of Practice* (2004) Rule 26.

[330]A.R. 273/2004.

From the point of view of a person requesting access to information, the appeal provisions are arguably the weakest part of the *EPEA*. Presumably, since the *EPEA* does not generally provide an internal review mechanism for decisions of the Director to refuse access to information, the information requester would have to rely on the appeal mechanisms provided in the *FOIPA*.

Under the *EPEA*, one situation permits review of an information decision. If a Director refuses a request that information be kept confidential, the person requesting confidentiality can appeal this decision to the EAB.[331] This provision suggests that the drafters of the *EPEA* were more concerned with protecting confidentiality than they were with public access to environmental information.

Nevertheless, if a person becomes involved in an EAB hearing, he or she will be granted disclosure of documents for the purposes of the hearing.[332] Because the EAB has noted that promoting public participation in environmental decision making is an important policy underlying the *EPEA*, it has held that disclosure of relevant materials (that are not privileged) is an obligation that falls on all parties.[333] It may, therefore, be possible to obtain information if involved in the EAB process. The interest of the person in the EAB process, however, must be legitimate. The EAB can dismiss a Notice of Objection if it determines that it is frivolous and without merit.[334]

3.3 Alberta Environment and Utilities Board and Access to Information

As mentioned, the Energy and Utilities Board (the "EUB") is often the final arbiter of whether or not an oil and gas project will proceed.

The *Energy Resources Conservation Act* (*ERCA*)[335] deals with access to environmental information. This legislation and the *Natural Resources Conservation Board Act*[336] are very important to environmental assessment in Alberta. When these

[331]*EPEA*, s. 91(1)(o).

[332]A.R. 273/2004.

[333]*Ash v. Alberta (Dept. of Environmental Protection)* (27 January 1998) Order No. 97-032 (E.A.B.), s. 20. In this case, the hearing was postponed because the appellant was not provided with the necessary information.

[334]*EPEA*, s. 95(5).

[335]R.S.A. 2000, c. E-10. The Energy Resources Conservation Board and the Public Utilities Board were merged to become to the Alberta Energy Utilities Board. However constituent boards continue to have different practices and administration.

[336]R.S.A. 2000, c. N-3.

Acts apply to a project, EA becomes a multi-stage process, and procedures such as access to information and public participation are subject to these Acts. For example, the *ERCA* provides opportunities for public access and input into some of the Alberta Energy Utilities Board's decisions. The *ERCA* states that one of its purposes is to provide for the recording of, and timely and useful dissemination of, information regarding the energy resources of Alberta.[337]

The *ERCA* contains provisions that deal with EA. This is critical because as noted Alberta's *EPEA* specifically excludes a number of activities from its formal EA process. Some of these activities, such as oil well and natural gas well drilling, are quite widespread in Alberta. Other legislation, such as the *ERCA*, is used to deal with EA of these activities. Section 3 of the *ERCA* states that the Alberta Energy Utilities Board (EUB), in determining whether a proposed project is in the public interest, will consider the environmental, social and economic effects of the proposed development.[338]

While the EUB has the jurisdiction to look at effects of a proposed development, there are a number of concerns about the efficacy of the *ERCA*'s process for EA in Alberta. For example, there are a number of operational and administrative barriers to the examination of natural gas wellsite cumulative effects using the process under the *ERCA*, partly because the EUB does not have control over all of the relevant activities and partly because the wellsite approval process is incremental.[339]

Under administrative law, reasonable notice is required as a principle of procedural fairness. The *ERCA* gives the board the discretion to notify the public of applications for licences that fall under the EUB's jurisdiction through notices, whether or not there is going to be a hearing.[340] Concerned individuals then have the opportunity to obtain copies of applications and other information from the applicant. Although the EUB has much valuable information, the material is not easily accessible from an index. Unless the requester is aware of a particular project or hearing, it is difficult to access the data available. The EUB publishes a bulletin and guidelines regarding specific applications, information letters and interim directives. The latter two have a technical focus and are directed at industry.

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[337]*ERCA*, s. 2(f).

[338]See, for example, Coalition of Citizens Impacted by the *Caroline Shell Plant v. Alberta (Energy and Utilities Board)*, [1996] 9 W.W.R. 637 (Alta. C.A.), where the majority of the Court of Appeal declined to interfere with the EUB's decision under *ERCA*, s. 2.1 to limit the scope of a public hearing so that local ranchers could not call evidence about the effects of increased sulphur dioxide emissions on cattle.

[339]Creasey, *supra* note 302 at 87-100.

[340]*EUB Rules of Practice*, A.R. 101/2001, s. 21.

In *Nurani* v. *Alberta (Environmental Appeal Board),*[341] the Alberta Court of Queen's Bench held that the Alberta Environmental Appeal Board (EAB) could conduct a hearing to re-consider an earlier decision because the interveners claimed that although they had an interest in the proceedings, they had received inadequate notice of them.

During administrative proceedings before the EUB, participants or potential participants may need to become familiar with the type and amount of information that is available for disclosure. For example, all submitted applications for licences that fall under the EUB's jurisdiction and supporting documents are available from the EUB on microfiche. Information on microfiche includes notices of hearings, applications, intervener submissions and decisions. EAs and terms of reference are also available. The information available at the EUB is catalogued by hearing. If a hearing is ordered, interveners are provided with access to information and other procedural protections.[342] The Board can order production of documents. Further, anyone willing to pay the fee can be provided with data about a hearing that has taken place.

If a matter before the EUB (or other administrative tribunal) proceeds to a public hearing, there are statutory and common law disclosure requirements. Whether a person receives information depends upon whether or not he or she is a participant in the public hearing. The EUB has the obligation to convene a public hearing "if it appears to the Board that its decision on an application may directly or adversely affect the rights of a person."[343] To be an active participant, or to have "standing" in an administrative hearing before the EUB, one must be "directly affected" by the matter.[344] The meaning of "directly affected" has been the subject of several legal decisions, particularly in the context of whether a tribunal will grant standing to a person. *In CUPE Local 30 v. Alberta (Public Health Advisory and Appeal Board*)[345] and *Friends of the Athabasca Environmental Association v. Alberta (Public Heath Advisory and Appeal Board),*[346] the Alberta Court of Appeal found that the phrase "directly affected" restricts procedural rights to persons having a personal rather than a community interest in the matter. Potential interveners must therefore show that there is no other reasonable and effective manner in which the question might be brought forward.

Each party interested in the outcome of a matter before an administrative tribunal is entitled to a full and fair hearing.[347] A full and fair hearing requires that the party being

[341](1997), 210 A.R. 281 (Q.B.).

[342]*ERCA*, s. 26.

[343]*ERCA*, s. 26(2).

[344]*ERCA*, s. 40.

[345](1996), 34 Admin. L.R. (2d) 172 (Alta. C.A.).

[346]*Supra* note 286.

[347]*CUPE Local 301 v. Montreal (City)*, [1997] S.C.J. No. 39.

heard knows the matters which the decision-maker intends to take into account and the evidence which the decision-maker has received which counters his or her position. The traditional rule is that a party is entitled to disclosure of all material the decision-maker will use in making the decision, but not necessarily disclosure of everything which could possibly touch upon the matter.[348]

The timing of the disclosure of information in administrative hearings is critical. To be most effective, participants must have the information in sufficient time to prepare for the hearing. Although the practice of the EUB is to provide fairly comprehensive information, there is little general legislative guidance on the timing for the release of information to the public.

Because participation in administrative hearings can be quite extensive, participants may require financial support in order to obtain needed information and/or expertise to interpret the information, or to otherwise participate in the hearing.

Vilante and Bogart assert that because in administrative proceedings, members of the public challenge the proposal of a government or private agency having substantial human and financial resources to present its case, the playing field must be leveled so that individuals and members of public interest groups can effectively participate. Financial assistance to the parties or interveners, provided by the government, the tribunal or the proponent, is, in their view, critical for redressing the imbalance.[349]

Funding is available from the EUB for some interveners for hearings under the *ERCA*.[350] To receive funding, the person must have an interest in or be in actual occupation of or entitled to occupy land that is or may be directly and adversely affected by the Board's decision.[351] Another situation where funding is available is when parties decide to appeal a decision to the EAB. The *EPEA* provides that people may appeal to the EAB by filing a notice of objection if they are an approval holder or if they are "directly affected" by the Director's decision.[352] Under both the *ERCA* and the *EPEA*, the funding is received in the form of an award of costs, which may be awarded in advance of the hearing, but the amount of which is in the discretion of the Board.[353] Thus, a participant

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[348]*Re Ciba Geigy Canada Ltd. v. Patented Medicine Prices Review Board* (1994), 26 Admin. L.R. (2d) 253 (Fed. T.D.), aff'd (7 June 1994) Doc. A-209-94 (Fed. C.A.).

[349]M. Valiante & W.A. Bogart, "Helping 'Concerned Volunteers Working out of their Kitchens': Funding Citizen Participation in Administrative Decision Making" (1993) 31 Osgoode Hall L.J. 687 at 692.

[350]*ERCA*, s. 28.

[351]*ERCA*, s. 28(1).

[352]*EPEA*, s. 91.

[353]*ERCA*, ss. 28(2) and (6); *EPEA*, s. 96.

runs the real risk that he or she will have to pay his or her own costs of preparing for and of appearing at a hearing.

The *EPEA* and the EAB Regulation provide that costs may be awarded to parties on an interim or final basis. To be awarded, costs must be directly and primarily related to the matters contained in the notice of objection and the preparation and presentation of the party's submission.[354] A request for costs in an appeal before the EAB could involve costs for experts to advise on technical matters, values and procedural matters. Unlike the situation in awarding costs in civil litigation, it is not necessarily the case that the "winner" is awarded costs in a quasi-judicial administrative hearing.[355] In fact, more than one party may be awarded costs, or no parties may be awarded costs. Indeed, the EAB has the jurisdiction to award costs against any party. However, if the appellant has a specific, legitimate concern, the EAB will not be inclined to award costs to thwart them, even if they are unsuccessful.[356] In assessing costs, the EAB will look at whether the party presented valuable evidence and contributory arguments. Further, the evidence must substantially contribute to the hearing, it must directly relate to the matters contained in the notice of appeal and it must make a significant and noteworthy contribution to the goals of the *EPEA*.[357] Finally, the appellant will be successful in a claim for costs if he or she raises significant issues in the public interest that no one else raises and that are tied to the goals promoted in section 2 of the *EPEA*.[358] However, as noted, the appellant runs the real risk that he or she will have to bear his or her own costs of participation. Often, participation in a hearing is the best way to obtain EA information.

There are no specific provisions for internal review of a refusal to disclose information under the *ERCA*. Section 43 provides that a person who is affected by an order or direction made by the Board may apply to the Board for a hearing within 30 days after the date on which the order or direction was made. There appear to be no reported decisions where section 43 was used to appeal decisions of Board employees to deny access to information. Further, there is no indication that the *ERCA* may be used to challenge internal decisions by Board employees.

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[354]*EPEA*, s. 96; A.R. 114/93, ss. 18-20.

[355]R. Macaulay, Q.C., *Practice and Procedure Before Administrative Tribunals* (Scarborough: Carswell, 1988) at 8-1.

[356]*Kostuch v. Alberta (Department of Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (Alta. E.A.B.), aff'd (on other grounds) (1996), 35 Admin. L.R. (2d) 160 (Alta. Q.B.).

[357]*Supra* note 277, ss. 25 and 26.

[358]*Ibid.*, s. 34.

Judicial review of a decision to refuse to disclose information under the *ERCA* will be difficult because there is a privative clause in the legislation.[359] This limits the type of appeal that can be made. An appeal to the Alberta Court of Appeal on a question of law is permitted.[360] However, it is unlikely that a refusal to disclose information would be reversed by the Court of Appeal as the court would be quite reluctant to interfere with the EUB's exercise of discretion unless it is clearly unreasonable.[361]

3.4 Conclusion

There are several issues that pertain to most legislative methods of obtaining access to environmental information. First, the public must be able to ascertain what type of information is available for access. The legislation is by no means consistent in its efforts to fulfill this requirement. Yet, this simple factor is key for effective public access to information and participation. Second, there needs to be improvement in the ways that the public is made aware of and is able to obtain available information. The government needs to make some efforts to assist the public in this regard. Notice requirements need to be specific, including the manner of notification and the time involved. Public education may be required to increase awareness of the oil and gas process and access to information procedures. Further, the public needs to have specific statutory recourse if it is denied access to environmental information.

Third, most legislation dealing with access to environmental information over-emphasizes balancing the public's right to know with the private sector's concerns about confidentiality. In some cases, it seems that the economic interests of the private sector outweigh the public interest in protecting the environment. On the other hand, a responsible government will desire to encourage full disclosure by industry. Most access to information legislation tends to depend too heavily on creating an adversarial process in dealing with the public interest — private rights tension rather than in encouraging all parties to work together. This is a difficult situation to resolve.

In some cases, the public should obtain information much earlier in the oil and gas process so that it could participate more effectively. Ideally, proponents would contact individuals and groups for input during the initial planning stages rather than after a plan has been made. Thus, concerns such as the cumulative impacts of a proposed project could better be addressed.

In light of the limitations of the above-noted legislative and other methods of obtaining access to environmental information, one has to wonder whether the public can

[359] *ERCA*, s. 25.

[360] *ERCA*, s. 4.

[361] *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.).

make any meaningful contribution to environmental decision-making. However, the inclusion of public participation provisions in the newer legislation indicates that efforts are slowly being made to improve the situation.

Chapter 4 draws some conclusions about the effectiveness of access to information during the oil and gas process in Alberta.

Chapter 4: Summary

4.1 Introduction

This paper examined whether there is a right of access to information, the nature of that right, the purpose of the right, and the effectiveness of the legislation or other means intended to recognize and fulfill the obligations required by the right. Next, using specific criteria, it examined the effectiveness of the Canadian and Alberta legislation and procedures dealing with access to environmental information.

4.2 Effectiveness of Canadian and Alberta Legislation

The purposes of EA procedures are to consider the environmental effects of projects, to reduce their impact upon the environment (including cumulative impacts) and to encourage public participation.[362] Access to information is an integral part of public participation. In the oil and gas process, the public needs to have access to comprehensive information in order to make informed judgments about and to participate in decisions about activities that will affect the environment.

It is clear that there may be some differences of opinion among the public, the government and industry as to what "effective" access to information in the oil and gas process entails. Based on the citizen's perspective, the literature suggests that the key elements of effective access to environmental information include: adequate notice of opportunities for participation and of the information available; meaningful and fair opportunities to participate in the form of adequate information disclosure at every stage of the oil and gas process; adequate funding for participation; timely receipt of the information and sufficient access to the courts where necessary to uphold these elements. Further "effective access to information" includes both the method and result of exercising the right of access to information.

Generally, the evolution of EA legislation and procedures is towards effective access to environmental information in the oil and gas process. However, there is room for improvement. Further, there are different strengths and weaknesses in various legislative regimes. Nevertheless, some generalizations can be made.

One overarching problem with procedures for access to information in the oil and gas process is their overwhelming complexity. There are several steps and stages involved in determining the role of the public in the process and the procedures which support that role. First, there is the difficulty of determining whether the proposal is subject to an EA

[362]R. Northey & W. Tilleman, "Environmental Assessment" in E.L. Hughes, A.R. Lucas & W. Tilleman, eds., *Environmental Law and Policy*, 2d (Toronto: Emond Montgomery, 1998) at 190.

process at all. In several cases, the information needed to make this determination is available only in policy guidelines or regulations, which are not particularly accessible by the public. Likewise, in determining whether a particular body is subject to an access to information request, one must do a considerable amount of research and possess a considerable amount of comfort with legislation, schedules to that legislation and regulations — this is assuming that the citizen is aware of where the information might be located. Second, there is the difficulty of determining the type of EA to which a project is subject. This, in turn determines the nature and amount of public access to information. Further, the process varies from jurisdiction to jurisdiction. Third, there is the difficulty of determining which legislation applies to a particular activity. There are a number of pieces of legislation in Alberta, for example, that deal with various aspects of EA. Fourth, there is the question of how one participates in the process and where one obtains the information. Then, there is the difficulty in interpreting the documents prepared by proponents or responsible authorities and the cost involved in securing expert advice to interpret the information. Finally, the public needs to understand the appeal process and when one is able to go to court to challenge a decision. In many cases, the public needs to be "directly affected" to participate in the process at any significant level. Clearly, for the public to have effective access to information, there needs to be intensive public education about this complicated process.

The second overarching problem with access to information in the oil and gas process is the role of Ministerial or governmental discretion. The respect for and availability of the exercise of ministerial discretion many stages of the process significantly erodes or overrides the efficacy of public participation. The following examples are troublesome areas where too much ministerial or governmental discretion may be present:

- when determining under the *ERCA* whether a decision on an application may directly or adversely affect the rights of a person;
- when determining whether parties will be awarded costs and how much;
- when making the final decisions regarding projects (*e.g.*, whether they should proceed or whether further review is needed);
- when determining whether a review panel is needed, when selecting decision-makers for a review panel and when setting the terms of reference for the decision made by the review panel;
- when deciding whether participants are entitled to funding and how much;
- when determining under the *AIA* and the *FOIPA* whether fees can be waived;
- by not vesting the federal Information Commissioner with anything more than powers of recommendation;

- when determining the manner and form that disclosure will take place under the *EPEA*;
- when determining whether a refusal to disclose information under the *EPEA* was reasonable;
- when determining whether information can be confidential under the *EPEA*;
- when determining whether an EA is required under the *EPEA* for a project;
- by not vesting the EAB with final decision-making authority with regard to EAs and approvals;
- by limiting public involvement in EAB hearings to those who are "directly affected"; and
- when determining whether information should be released in the public interest under the *FOIPA.*

Thus, although the public has the right to effective access to information in the oil and gas process, the existence of discretion may serve to dilute or eradicate the efficacy of the public's impact upon ultimate decision-making. Perhaps the amount and scope of discretion should be circumscribed.

A third overarching problem is the number of exemptions from disclosure of information. Indeed, most, if not all, of the exemptions from disclosure in access to information legislation focus on human economic or privacy concerns. Many argue that economic concerns outweigh basic human rights in some of the mandatory exemptions (*e.g.*, trade secrets or confidential information). More recently, environmental protection and assessment legislation mentions the importance of sustainable development and ecosystems. These laws, however, deal with access to information largely in the context of human participation in decision-making, and do not directly discuss the benefits of access to information to the environment. Further, although there are public interest override clauses in some access to information legislation, these usually require the government department to weigh the potential economic loss or harm to third party suppliers of the information or others against the public interest in disclosure. Finally, although information about significant effects on the environment must be disclosed, the emphasis in the public interest override clauses is upon public health and safety. From a utilitarian perspective, it would appear that the focus of many aspects of access to information legislation is upon economic values rather than general public or environmental goods.

Thus, until access to information legislation or disclosure provisions contained in environmental protection legislation focus on ecological principles, they could perpetuate environmental problems rather contribute to solving them.

4.3 Conclusion

There are some real and potential strengths for effective access to information in the oil and gas process. First, there is an improvement in the recognition of the desirability of public participation in the EA process in legislation. Second, some proponents have developed an informal consultation process which seems to be netting some very positive results in terms of access to environmental information. Third, the existence of the public registries of environmental information is a positive development. While registries may be flawed, they can be built upon and audited to ensure that the information available is going to support effective access to information in the process.

In sum, as noted by Robinson in 1982:[363]

> When a broad range of interests is well represented and ample opportunity is provided to influence government decision-making, the results can be very good. On some occasions, under pressure to move fast and make use of a strong mandate on a given issue, officials are unable to engage in a broad consultative process. Speed and efficiency are the watchwords. I have nothing against speed in the decision-making process but if it is achieved at the expense of giving insufficient weight to other legitimate values, and perhaps, ignoring, for example, long-term environmental damage, then such decision-making is not really efficient.

[363]R. Robinson, *Environmental Impact Assessment: Government Decision-Making in Public*, Occasional Paper No. 10 (Ottawa: FEARO, 1982) at 10-11.

Appendix

- Glossary of Terms
- Table of Abbreviations
- Selected List of Federal and Provincial Statutes
- List of Websites for Information
- Steps Involved in Obtaining Alberta Government Information
- The Federal Environmental Assessment Process and Access to Environmental Information

Glossary of Terms

Canada-Alberta Agreement for Environmental Assessment Cooperation — Agreement made in 1999 that was renewed in 2005 that outlines how the two jurisdictions will cooperate on projects that require environmental assessment both provincially and federally.

Environmental assessment — A process intended to determine the effects of a project on the environment before the process is carried out by identifying these effects, identifying ways to mitigate these effects and whether there will be significant damage nonetheless.

Environmental impact assessment — The process of determining the effects of a project on the environment and which aspects of a project should be addressed in the environmental impact assessment.

Environmental impact statement — The final report issued that details all the aspects of a project and its impact on the environment.

Informal information sources — Ways to obtain environmental information without filing an access to information request such as simply asking the company undertaking a project.

Private information sources — Environmental information held by non-governmental bodies such as private environmental agencies or private companies.

Third party information — Information that is held privately but used by the government to inform an environmental decision that, because it is held privately, may not be released in an access to information request.

Alberta Provincial Terms/Statutes

Alberta Directory — A directory that lists the types of information available from different governmental bodies but not detailed information about specific projects.

Alberta Energy and Utilities Board — Responsible for regulating and adjudicating energy and utilities matters within Alberta; it is an independent, quasi-judicial agency of the Government of Alberta primarily responsible for oil and gas wells and provincial pipelines/facilities.

Freedom of Information and Protection of Privacy Act — Legislation that provides individuals with a right to request access to information in the custody/control of public bodies.

Information Commissioner — An individual independent of the government who is responsible for reviewing the access to information decisions made by public bodies.

Environmental Appeal Board — Serves as a final quasi-judicial board for the public and for industry to appeal environmental board decisions.

Environmental Protection and Enhancement Act — Alberta's provincial legislation that regulates the air, land and water which consolidated numerous previous acts regarding the environment.

Natural Resources Board Conservation Act — Legislation that provides for there to be an impartial review process for projects/activities that could affect Alberta's natural resources.

Canadian Federal Terms/Statutes

Access to Information Act — Legislation that aims to provide individuals with a means to obtain government held information.

Canadian Charter of Rights and Freedoms — Part of the Canadian Constitution that outlines certain rights and freedoms that apply to relationships between individuals and the Federal Government.

Canadian Environmental Assessment Act — The federal legislation that details which projects need to undergo environmental assessment, the depth of the assessment that is required and the environmental assessment process.

Canadian Environmental Assessment Agency — The federal body that is set up to provide Canadians with environmental assessments.

Canadian Environmental Assessment Registry — Contains information about projects currently undergoing environmental assessment across Canada and lists environmental assessments that are currently available for public comment.

Canada Gazette — The federal government's official newspaper where you can get information on new acts and regulations and also includes private sector notices that are required by statute to be published.

Environmental Assessment and Review Process Guidelines Order — Formalized environmental assessment procedures adopted by the Federal government.

Environment Canada — The federal government's environment department responsible for weather, wildlife/species protection, water quality, climate control and air quality among other items.

National Energy Board — This board works within a mandate set by Parliament but is an independent federal agency that regulates several parts of Canada's energy industry including interprovincial and international pipelines.

Table of Abbreviations

AIA	*Access to Information Act*
CEAA	*Canadian Environmental Assessment Act*
Charter	*Canadian Charter of Rights and Freed*oms
EA	environmental assessment
EAB	Environmental Appeal Board
EARP	Environmental Assessment and Review Process Guidelines Order
EIA	environmental impact assessment
EIS	environmental impact statement
EPEA	*Environmental Protection and Enhancement Act*
ERCA	*Energy Resources Conservation Act*
ERCB	Energy Resources Conservation Board
EUB	Alberta Energy and Utilities Board
FOIPA	*Freedom of Information and Protection of Privacy Act*
NEB	National Energy Board
NRCB	National Resources Conservation Board
OECD	Organization for Economic Cooperation and Development

Selected List of Federal and Provincial Statutes

Federal Statutes

Access to Information Act, R.S.C. 1985, c. A-1

Canada-Alberta Agreement on Environmental Assessment Cooperation (2005)

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Canadian Environmental Protection Act, S.C. 1999, c. 33

Privacy Act, R.S.C. 1985, c. P-21

Provincial Statutes

*Energy Resources Conservation Ac*t, R.S.A. 2000, c. E-10

Environmental Assessment Regulation, 112/1993

Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

List of Websites for Information

Websites for Federal Information

Access to Information Glossary:
http://www.tbs-sct.gc.ca/gos-sog/atip-aiprp/glossary_e.asp

Access to Information and Privacy Homepage:
http://www.tbs-sct.gc.ca/gos-sog/atip-aiprp/index_e.asp

Access to Information and Privacy Information from Justice Canada:
http://canada.justice.gc.ca/en/ps/atip/

Access to Information Requests:
http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_121/CHAP2_4-2_e.asp#gen

Access to Information Request Form:
http://www.tbs-sct.gc.ca/tbsf-fsct/350-57_e.asp

Canadian Environmental Assessment Agency:
http://www.ceaa-acee.gc.ca/index_e.htm

Canadian Environmental Assessment Agency and Public Participation:
http://www.ceaa-acee.gc.ca/011/index_e.htm

Description of the Access to Information Act:
http://www.ec.gc.ca/EnviroRegs/Eng/SearchDetail.cfm?intAct=1044

Environment Canada's Green Lane:
http://www.ec.gc.ca/envhome.html

Environment Canada: Prairies and Northern Region:
http://www.pnr-rpn.ec.gc.ca/index.en.html

Federal Environmental Acts & Regulations:
http://www.ec.gc.ca/EnviroRegs/ENG/Default.cfm

Federal Environmental Assessment:
http://www.ec.gc.ca/ea-ee/home/home_e.asp

Federal Government Institutions and Access to Information and Privacy Coordinators:
http://www.tbs-sct.gc.ca/gos-sog/atip-aiprp/apps/coords/index_e.asp

General Environmental Assessment:
http://www.ec.gc.ca/EnviroRegs/Eng/SearchDetail.cfm?intAct=1000

National Energy Board:
http://www.neb.gc.ca/index_e.htm

Websites for Provincial (Alberta) Information

Alberta Energy and Utilities Board:
http://www.eub.gov.ab.ca/bbs/default.htm

Alberta Environment:
http://www3.gov.ab.ca/env/

Alberta Environmental Assessment Overview:
http://www3.gov.ab.ca/env/protenf/assessment/

Alberta Environmental Assessment Process:
http://www3.gov.ab.ca/env/protenf/assessment/pub/EAProcessGuide.pdf

Alberta Register of Environmental Assessment Information Summary:
http://www3.gov.ab.ca/env/protenf/assessment/summary.html

Alberta Freedom of Information and Protection of Privacy Act:
http://foip.gov.ab.ca/legislation/index.cfm

Canada-Alberta Agreement for Environmental Assessment Cooperation:
http://www3.gov.ab.ca/env/protenf/ccme/

Environmental Protection and Enhancement Act:
http://www3.gov.ab.ca/env/protenf/approvals/factsheets/enhanact.html

Freedom of Information and Protection of Privacy Act:
http://www.oipc.ab.ca/foip/

Freedom of Information and Protection of Privacy Act Request Process:
http://www.oipc.ab.ca/foip/system.cfm

Government of Alberta Directory of Public Bodies:
http://foip.gov.ab.ca/pbdirectory/index.cfm

How do I make a Freedom of Information and Protection of Policy request?:
http://foip.gov.ab.ca/faq/foip_request.cfm

Office of the Information and Privacy Commissioner:
http://www.oipc.ab.ca/home/

Request to Access to Information Form:
http://www.oipc.ab.ca/ims/client/upload/Request_to_Access_Information.pdf

The Right to Information and the Right to Privacy Brochure:
http://foip.gov.ab.ca/resources/publications/InfoBrochure.cfm

Steps Involved in Obtaining Alberta Government Information

Step One: Determine which public body should receive the access to information request.

- If desired, obtain a copy of the *Alberta Directory* from a public library or on-line
- If possible, ascertain which data bank(s), register(s), file(s), or database(s) would likely contain the required information.
- Determine the name, address and phone number of the Freedom of Information and Privacy Coordinator (FOIP Coordinator) for that particular public body.

Step Two: Call the FOIP Coordinator to see if you can get the information without filing a formal information request.

This could save you the $25.00 application fee and copying charges

Step Three: To proceed with a formal request, fill out the appropriate form and send in the application fee.

- Fill out a *Request for Access to Information* Form, indicating specifically the records that are requested. Ask for the opportunity to clarify the request, if necessary. Ask to be informed about additional fees before the request is filled.
- Alternatively, write a letter to the appropriate FOIP Coordinator stating your specific request. Include your name, address and telephone number. State whether you prefer to receive copies of the document or examine them.
- Alternatively, if you are visually impaired or have a limited ability to read or write in English, you may make an oral request to the FOIP Coordinator.
- Consider whether to make a continuing request (for up to two years at a cost of $50.00).
- Enclose the $25.00 application fee. If necessary, make a request for a fee waiver — first to the public body, and then to the Information and Privacy Commissioner.

Step Four: Wait for a Response from the Public Body.

- Possible responses by the head of the public body include:

- a reply within 30 days granting access to the information or setting out the estimated costs of proceeding with the request;

- a transfer of the request to another public body, which must reply within 45 days from the date the first public body received the request;

- notification that an extension of the 30 day time limit is required; or

- a refusal of access to some or all of the record based on one or more discretionary or mandatory exceptions (*e.g.*, it is personal information, third party information, etc.).

- The requester then may review the response to determine whether a complaint to the Information and Privacy Commissioner is necessary.

Step Five: If access is denied, or if there are other difficulties, request a review by the Information and Privacy Commissioner.

- You have 60 calendar days after you receive the decision from the public body to appeal to the Commissioner, who is an independent officer of the Legislative Assembly.

- The Commissioner can receive and investigate complaints about any decision, act, or failure to act of the head of the public body that relates to the request (for example, a decision not to release a record or part of it). A complaint may also be that a public body has improperly collected or used personal information.

- Complete and send to the Commissioner a "*Request for Review"* form. Alternatively, write a letter to the Commissioner in which you outline your request for a review. Include your name, address, telephone number, reason for requesting a review and the public body to which your request was originally made. Enclose a copy of your original request, if available.

Step Six: The Information and Privacy Commissioner may appoint a mediator to investigate and settle the complaint.

- The mediator may be someone from inside the Commissioner's office. That person will try to facilitate a settlement. In many cases, a settlement is reached.

Step Seven: If the matter is not settled, the Information and Privacy Commissioner may conduct an inquiry.

- The review must be conducted within a 90 day time frame and all orders issued by the Commissioner are legally binding.

- The Commissioner's order may require a head of a public body to grant access, confirm the original decision made by the head of the public body, or enforce other provisions of the Act. A copy of the order may be filed with the Court of Queen's Bench.

Step Eight: The Commissioner's order is final.

Applicants have the right to judicial review by the courts if they believe that the appeal process was not conducted in a legally fair manner.

The Federal Environmental Assessment Process and Access to Environmental Information

Material about the federal environmental assessment process is contained in the Appendix, because in many cases, the provincial and federal government have agreed that where an assessment is required under both provincial legislation and federal legislation, to avoid duplication, a single cooperative assessment may be performed.[364]

The *Canadian Environmental Assessment Act* (*CEAA*),[365] together with a number of regulations,[366] comprises the current federal EA process. The Canadian Environmental Assessment Agency (the "Canadian Agency") oversees the implementation of the *CEAA*. The Canadian Agency is independent of the department of Environment Canada, but under the direct supervision of the Minister of the Environment (the "Minister"). The Canadian Agency has no decision-making powers regarding projects, but provides advice to proponents and governments regarding EAs.

The *CEAA* applies to situations where the federal government has jurisdiction. It applies to any public or private sector project "that involves federal proponency, federal funding, federal realty or designated federal approval."[367] There are projects exempted from EA procedures. These include projects carried out in response to emergencies, projects receiving federal funding in advance of the specific details on the project and those listed in the Exclusion List Regulations.[368] Under the *CEAA*, the federal agency responsible for a particular activity (the "responsible authority") is the agency that performs an EA.[369] The responsible authority can assign or delegate this task to the proponent.[370]

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[364]See: *Canada-Alberta Agreement on Environmental Assessment Cooperation* (2005), online: <http://www.ceaa.gc.ca>.

[365]*Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

[366]*Inclusion List Regulations*, SOR/94-637; *Law List Regulations*, SOR/94-636; *Exclusion List Regulations*, SOR/94-639; *Comprehensive Study List Regulations*, SOR/94-638; *Federal Authorities Regulations*, SOR/96-280; *Projects Outside Canada Environmental Assessment Regulations*, SOR/96-491; *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-981; *Canada Port Authority Environmental Assessment Regulations*, SOR/99-318.

[367]R. Northey & W. Tilleman, "Environmental Assessment" in E.L. Hughes, A.R. Lucas & W. Tilleman, eds., *Environmental Law and Policy*, 2d (Toronto: Emond Montgomery, 1998) at 199. See *CEAA*, s. 5(1). The *Law List Regulations* designate federal permits, approvals, and licences under various regulatory statutes.

[368]*CEAA*, s. 7.

[369]*CEAA*, ss. 2 and 37(1).

[370]*CEAA*, s. 17.

There are four different types of EAs provided for under the *CEAA*. First, the *CEAA* provides for a full EA under section 14 for those projects involving a federal authority, a federal trigger, and knowledge of essential project details. Second, regulations made under subsection 59(i) provide for varying any aspect of the EA process in certain circumstances. This is referred to as a "varied environmental assessment." Third, there are some types of projects that provide for the assessment of their environmental effects rather than a full EA.[371] Finally, there are projects subject to a special panel review because they may have significant transboundary effects.[372]

The focus of all federal EAs is upon the environmental significance of potential environmental effects, including cumulative effects and some socioeconomic effects.[373] If a project is subject to a full EA, the *CEAA* provides a two-stage process for assessing its environmental effects.[374] First, there are self-directed assessments. Second, there may be public review where self-directed assessments result in outstanding issues. Public review applies to only about one percent of projects and can involve mediation, public hearings before independent experts, or a combination of these.[375]

Self-directed assessment may be done in one of two ways — through informal screening or through a comprehensive study. The self-directed screening (informal screening) applies in about 95 percent of the projects.[376] A self-directed assessment may involve a comprehensive study in about five percent of the projects.[377] Once a self-directed assessment (whether a screening or a comprehensive study) is complete, an assessment report is prepared and a course of action is followed on the project.[378]

The *CEAA* does not specify a precise process for performing EAs. The Canadian Agency has set out a five step process:[379]

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[371]See *CEAA*, ss. 40, 43, 54, 59(j), (k) and (l).

[372]See *CEAA*, ss. 46, 47 and 48.

[373]*Supra* note 367 at 199.

[374]*CEAA*, s. 2(1) defines "project" as a proposed physical work and any related construction, operation, modification, decommissioning, abandonment or undertaking. It also includes physical activities not relating to a physical work if they are prescribed in the *Inclusion List Regulations*.

[375]*Supra* note 367 at 199.

[376]*Ibid.*

[377]*Ibid.* Projects subject to a comprehensive study are designated in the *Comprehensive Study List Regulations*.

[378]*Supra* note 367 at 214.

[379]G. Hegmann *et al.*, *Cumulative Effects Assessment Practitioners Guide* (Hull: Canadian Environmental Assessment Agency, 1999) at 9-50. See also: Canadian Environmental Assessment Agency, online: <http://www.ceaa.gc.ca>.

1. scoping;
2. describing or assessing environmental effects;
3. mitigating environmental effects;
4. evaluating or determining the significance of adverse environmental effects; and
5. follow-up.

Depending upon the practice of the responsible authority, the public may or may not have any input into these five steps. While the actual assessment may be complex and the technical aspects are beyond the scope of this paper, there are some basic tasks that are recommended under each step. The extent of the analysis will depend upon the nature of the proposed project.

Scoping involves identifying and perhaps limiting the number of issues to be examined in an EA. When scoping, EA practitioners identify regional issues of concern, select appropriate valued ecosystem components (VECs), identify spatial and temporal boundaries for the assessment, identify other actions that may affect the same VECs, identify potential impacts due to actions, and identify possible effects.[380]

The responsible authority has the power to determine the scope of a project.[381] The *CEAA*, subsection 16(3), sets out the various aspects of the project that must be considered in an EA of that project. In *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)*,[382] the court held that a temporary road and airstrip located precisely at the same locations as a road and airstrip that the proponent proposed to build later for a mine and mill all formed part of a greater project and should be part of the same assessment by a provincial-federal review panel. The Federal Court of Appeal has indicated that the exercise of scoping a project under *CEAA* section 15 will not be interfered with lightly.[383]

The responsible authority has the discretion to decide which other projects or activities to include and which to exclude for the purposes of a cumulative environmental effects assessment under subsection 16(1). However, in conducting a cumulative

[380] *Ibid.* at 9.

[381] *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)*, [1992] S.C.R. 3.

[382] (1997), 152 D.L.R. (4th) 50 (Nfld. C.A.).

[383] *Alberta Wilderness Association v. Express Pipelines Ltd.* (1996), 137 D.L.R. (4th) 177 (Fed. C.A.) leave to appeal sought by Rocky Mountain Ecosystem Coalition S.C.C. No. 25618 dismissed as abandoned 20 March 1997.

assessment, both the project as scoped and sources outside of the scope are to be considered.[384]

When analyzing effects, EA practitioners complete the collection of regional baseline data, assess effects of the proposed action on the selected VECs and assess the effects of all selected actions on the selected VECs.[385] There are a number of scientific assessment tools available for this stage of the process.[386]

Next, measures that will mitigate the effects are recommended.[387] Then, practitioners evaluate the significance of residual effects (those effects that are left after mitigation has been completed) and compare the results against thresholds or land use objectives and trends.[388] Finally, practitioners recommend regional monitoring and effect management follow-up methods.[389]

EA procedures are to be undertaken as early as practicable in the planning stages of a project.[390] Further, no work can be started on a project until the EA process is complete.[391] This prevents irrevocable action being taken on a project before an EA is completed.

1.1 Specific Stages of the Federal Environmental Assessment Process

Descriptions of each of the formal stages of the EA process under the *CEAA* are set out below.

1.1.1 Informal Screening

Unless a proposed project is subject to the Inclusion List, responsible authorities decide whether or not the screening process applies to a project.

If a responsible authority decides to perform a screening, *CEAA* subsection 16(1) sets out the factors that must be considered in the preparation of an informal screening report. These include the:

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[384] *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans), supra* note 381.

[385] *Supra* note 379 at 9.

[386] *Ibid.* at 28 *et seq.*

[387] *Ibid.* at 9.

[388] *Ibid.*

[389] *Ibid.*

[390] *CEAA*, s. 11(1).

[391] *CEAA*, s. 11(2).

- environmental effects of a project, including the cumulative effects likely to result from the combination of the project and other past or future projects or activities;
- significance of those effects;
- comments from the public (if any);
- mitigation measures to address significant adverse environmental effects; and
- other relevant matters that the federal authority considers appropriate, including the need for the project and alternatives to the project.[392]

CEAA subsection 18(3) provides the responsible authority with the discretion to decide if there will be an opportunity for public consultation in the screening before a final decision is made about the project. Even in the case of screenings for complex or controversial projects, there is no statutory requirement for public consultation.[393]

Screenings can vary in time, length and depth of analysis. Some screenings will only require a brief review and a one or two page report; others may need more extensive review. The responsible authority must prepare or ensure the preparation of a summary report.

Once a screening is complete, the responsible authority must take one of three actions. First, it can decide to proceed with a project whose adverse environmental effects are not likely to be significant, assuming the implementation of relevant mitigation procedures. Second, if significant and unjustified adverse environmental effects are likely despite mitigation, the responsible authority must not proceed with the project. Finally, if there is uncertainty, or if public concern warrants, the responsible authority must refer the project to the Minister of the Environment (the "Minister") for further review (consideration by a review panel or mediation, or both).[394] The decision of the responsible authority is to be based on the significance, if any, of the adverse environmental effects of the project, on mitigation measures and on public concerns. "Public concern" is not defined in the *CEAA*.

In some cases, the Canadian Agency can declare that one screening report will be applicable to other similar projects. This is called a class screening.[395]

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[392]See: *Sharp v. Canada (Canadian Transportation Agency)* (1999), 31 C.E.L.R. (N.S.) 1 (Fed. C.A.), application for leave to appeal to S.C.C. dismissed 16 December 1999 (File 27474), where the court determined that the Agency had adequately considered these factors.

[393]*Ibid.*

[394]*CEAA*, s. 20(1).

[395]*CEAA*, s. 19.

1.1.2 Comprehensive Study

A comprehensive study must be done on those projects listed in the regulation.[396] A comprehensive study must address the factors set out in subsection 16(1), and must address these additional matters set out in *CEAA* subsection 16(2):

- the purpose of the project;
- alternative means of carrying out the project and the environmental effects of those alternatives;
- the follow-up program; and
- the impact of the project on the capacity of renewable resources to meet present and future needs.

Before making any decision on the project, the responsible authority submits the comprehensive study report to the Canadian Agency for review.[397] The Canadian Agency publishes a notice that the report is available for public review and comment. In the comprehensive study process, opportunities for public comment must be made available and the results provided to the Minister of the Environment when the report is presented.[398]

The Canadian Agency publishes guidelines that set out its responsibilities regarding public notification about the EA.[399] Once the Canadian Agency receives the EA, it must facilitate public access to the report, publish a notice setting out the date, the place at which copies of the report may be obtained, the deadline and address for filing comments on the conclusions and recommendations of the report.[400] Although the responsible authority pays for public notification, the Canadian Agency and responsible authority together develop a notification plan. In formulating this plan, they take into account the location and circumstances of the public likely to have an interest in the EA. Notice format, language requirements, and public access places differ from project to project.[401] Standard methods of notification include public notices in newspapers, news releases, mailings and public service announcements about where the report may be viewed. The Agency has not adopted strict deadlines for the provision of public comments on the

[396] SOR/94-638.

[397] The Canadian Agency has published guidelines for preparation of a comprehensive study. See: Canadian Environmental Assessment Agency, online: <http://www.ceaa.gc.ca/012/012/2-3_e.htm>.

[398] *CEAA*, s. 22.

[399] *Supra* note 397.

[400] *Ibid.*

[401] *Ibid.*

report. In most cases, the review and comment period is 30 to 45 days long.[402] The public is invited to provide written comments. The Agency provides a copy of the public comments to the responsible authority and includes the comments in the public registry. Agency staff analyze the public comments received and attempt to help resolve any disagreements that might otherwise require the project to be referred to mediation or a panel review. The Agency then makes recommendations to the Minister.[403]

Once a comprehensive study is complete, the Minister then makes one of three decisions. First, if the study concludes that significant environmental effects are likely or uncertain, or if public concern warrants, the Minister must direct further EA (consideration by a review panel or mediation, or both).[404] Second, the Minister can refer a project back to the responsible authority to proceed, where the project's adverse environmental effects are not likely to be significant, assuming the implementation of relevant mitigation procedures. Finally, if significant and unjustified adverse environmental effects that cannot be justified in the circumstances will result, the Minister will refer the project back to the responsible authority, which cannot proceed with the project.[405]

There are some cases where a comprehensive study is required by regulation. In these cases, and in all other cases where a comprehensive study is performed, the responsible authority has some discretion regarding the extent and nature of public participation in the process. However, once the public has participated in the EA process, the Minister of the Environment must take the public input into account when determining the next step in the process.[406] The public must have the opportunity to review and comment upon the comprehensive study reports before any decisions are made on the project.[407]

1.1.3 Review Panel and Mediation

In some cases, an independent EA is conducted by a mediator or by a review panel. Each of these additional phases of federal EA provides for a report to the responsible authority and to the Minister, who must ensure that it is available to the public.[408] Any recommendations made in the report are advisory — the government makes the final decision on whether the project should proceed.

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[402] *Ibid.*

[403] *Ibid.*

[404] *CEAA*, s. 20(1).

[405] *CEAA*, s. 23.

[406] *CEAA*, s. 16(1)(c).

[407] *CEAA*, s. 23.

[408] *CEAA*, s. 36.

A project will be referred to a mediator or review panel when it is uncertain whether the project is likely to cause significant adverse environmental effects; the project is likely to cause significant adverse environmental effects and it is uncertain whether these effects are justified in the circumstances; or public concern warrants it. A project can be referred for an independent review at any time during a screening or comprehensive study.

Mediation and review panels can be used for part or all of the EA. A review panel is used where mediation is not appropriate (*e.g.*, there are too many interested parties) or has been unsuccessful. The review panel must obtain the necessary information and make it available to the public, hold public hearings, prepare a report and submit the report to the Minister and to the responsible authority.[409]

Only the Minister of the Environment determines that there should be a review panel. The Minister consults with the responsible authority and then appoints a chair and panel members, as well as establishes the terms of reference of the review. The public does not have any enforceable say in these matters. The public is invited to informal scoping meetings where the panel may hear the public's views about the issues to be addressed in an environmental impact statement (EIS). The public also may comment upon the proposed guidelines for the EIS. Once the panel receives the EIS, the public must be given at least 60 days to comment on the adequacy of the EIS as a response to the guidelines which were provided. Next, the panel will hold public hearings with a minimum 21 day notice. At the hearings, the panel receives views and opinions on the merits of the proposal. The panel provides public notice of the time and place for the hearings and members of the public register if they wish to make a presentation. Procedures are mailed to participants. After the hearings are complete, the panel prepares a report that contains its conclusions and recommendations.[410] The Minister then releases the report to the public.[411] The government publicly responds to the panel's recommendations.

Participants do not have to prepare written briefs but may do so. The panel chair determines whether there is a question period after each speaker and there are usually time limits set for participation. Evidence is not given under oath and participants are not cross-examined. This means that public participants are not considered to be official parties and cannot therefore cross-examine other participants.

Funding may be provided to help members of the public to prepare for and participate in background scoping meetings, to review the proponent's EIS, and to prepare for and

[409] *CEAA*, s. 34.

[410] *CEAA*, s. 34.

[411] *CEAA*, s. 36.

participate in the mediation or the panel hearings.[412] Potential participants apply for funding from the Canadian Agency. The Canadian Agency states that:

> Only parties who can demonstrate that they meet at least one of the following criteria will be eligible:
>
> - have a direct, local interest in the project, such as living or owning property in the project area;
> - have community knowledge or Aboriginal traditional knowledge relevant to the environmental assessment; or
> - plan to provide expert information relevant to the anticipated environmental effects of the project.[413]

An independent funding administration committee reviews funding applications and makes recommendations to the president of the Agency who reviews and approves the recommendations.[414]

The review panel's report must include the review panel's rationale, conclusions and recommendations on the EA of the project, mitigation and follow-up programs.[415] The Federal Court has indicated that it will not question the panel's appreciation of the adequacy of the evidence before it.[416] The report must also include a summary of public comments.[417]

Once a responsible authority receives the mediator's or review panel's report, he or she must take the report into account before making a decision about the project.[418]

1.1.4 Appeals

Judicial review is available in the Federal Court of Canada of decisions made by decision-makers under the *CEAA*.[419] Thus, if a litigant wanted to challenge a decision made without benefit of an EA, he or she could apply to the Federal Court to quash that

[412]Subsection 58(1.1).

[413]Canadian Environmentall Assessment Agency, *Guide to the Participant Funding Program*, online: <http://www.ceaa.gc.ca/012/013/1-3_e.htm>.

[414]*Ibid.*

[415]*CEAA*, s. 34(c(i).ii).

[416]Alberta Wilderness Association, *supra* note 383 at 181.

[417]*CEAA*, s. 34(c)(ii).

[418]*CEAA*, s. 37.

[419]*Federal Court Act*, R.S.C. 1985, c. F-7, s. 18.1.

decision. Subsection 18.1 of the *Federal Court Act* permits anyone "directly affected" by a decision (or lack of a decision) to bring an application for judicial review. Generally, standing will be granted to a public interest group where a serious issue is raised, the applicant shows a genuine interest as a citizen and there is no other reasonable and effective manner to bring the issue before court.[420]

A judicial review application reviews whether the decision-maker correctly interpreted the law and whether the decision was made on the basis of facts and reasons relevant to the purpose for which the decision was authorized. If these elements are present, the court will not reverse a decision merely because it does not agree with it.[421]

1.2 Federal Environmental Assessment Process and Access to Information

1.2.1 General Concerns

The *CEAA* states that one of its purposes is to "ensure that there be an opportunity for public participation in the environmental assessment process."[422] The Canadian Agency has stated that public participation in proposals leads to consideration of those effects which cannot always be identified or measured by scientific or technological means. Further, public participation is "an important element for promoting public trust in the environmental assessment process."[423] However, despite the emphasis on public participation, there are strengths and weaknesses in the EA process and the access to information procedures set out under the *CEAA*.

Nikiforuk sets out a number of criticisms of the current EA process. He asserts that EA has "become a cynical, irrational and highly discretionary federal policy in Canada."[424] He describes the current EA practice as "a bureaucratic exercise that is neither cost-effective nor conservation-minded."[425] Nikiforuk's criticisms include:

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[420] *Friends of the Island Inc. v. Canada (Minister of Public Works) (No. 1)* (1993), 102 D.L.R. (4th) 696 (F.C.T.D.) at 734-6, varied 131 D.L.R. (4th) 285 (Fed. C.A.), leave to appeal to S.C.C. refused 138 D.L.R. (4th) vii. See also: *Sunshine Village Corporation v. Banff National Park (Superintendent)*, [1995] 1 F.C. 420 (T.D.), aff'd 20 C.E.L.R. (N.S.) 171 (Fed. C.A.), leave to appeal to S.C.C. refused 20 February 1997.

[421] Beverly Hobby *et al.*, *Canadian Environmental Assessment Act: An Annotated Guide*, looseleaf (Aurora: Canada Law Book, 1997) at IV-3.

[422] *CEAA*, s. 4(d).

[423] *Supra* note 413.

[424] A. Nikiforuk, *"The Nasty Game": The Failure of Environmental Assessment in Canada* (Toronto: Walter & Duncan Gordon Foundation, 1997) at i.

[425] *Ibid.*

- the legislation and EA process are too complicated;[426]
- there is no independent authority to conduct assessments;[427]
- there are few standards and little consistency among government departments in performing EAs;[428]
- there are no penalties for those who perform inadequate EAs or fail to perform them at all;[429]
- there is a lack of follow-up on the value or quality of past EAs;[430]
- EAs are too "jargon-laden, wordy and obtuse";[431] and
- recent attempts at harmonization between the provincial and federal governments have resulted in the federal government's contracting out of constitutional responsibilities.[432]

"Effective access to information" implies that both the method and result of exercising the right of access to information must be appropriate. Many of Nikiforuk's criticisms are applicable to one or both aspects of effective access to information in the EA process. First, a complex legislative regime does not encourage public participation as the public will not be able to easily ascertain its role in the process. Thus, the complexity of the process is a potential bar to effective access to information. For example, in the *CEAA*, the inclusion and exclusion lists are confusing and are contained in regulations. Many members of the general public do not possess regulations and do not know how to obtain or read them, would therefore be unable to effectively access this basic information about projects covered or not covered by the legislation. Further, terms significant to the public's understanding of the process, such as "cumulative effects" are not defined in the legislation. This is exacerbated by the complexity of EA statements. How can the public effectively participate if it does not understand the process nor the content of significant components of the process? How will members of the public ascertain which information is significant and/or required?

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[426] *Ibid.*

[427] *Ibid.*

[428] *Ibid.*

[429] *Ibid.*

[430] *Ibid.* at ii.

[431] *Ibid.*

[432] *Ibid.*

Second, the lack of independence in conducting assessments and making decisions about projects can taint the public participation process. For example, ministerial discretion permits any public recommendations to be overruled by cabinet; panel decisions are not binding. People may not be encouraged to exercise any right of access to information if they know that their subsequent recommendations can be overruled. Further, because of self-assessment, the "law allows the self-interest of government bureaucracies to constantly supersede the public interest."[433] If the proponent dictates the terms of reference for self-assessments, how will the public obtain significant information about how self-assessments were performed, what factors were considered and what factors were not? Third, the lack of standards and consistency in applying EAs could make it very difficult for even an educated public participant to determine the likely impacts of a project, or whether the proper indicators have been examined.

There are other general concerns with public participation in the EA process. First, even if the government sets out to improve public participation, the "public" represents several, sometimes competing, interests. These include "local residents, Aboriginal persons and communities, local and regional government officials, community organizations, such as homeowner groups, senior citizens organizations, service clubs and conservation groups, professional and business associations, small business owners, educational institutions, public interest groups and the media."[434] It is difficult to balance these competing interests and to ensure all groups have equal access to information in the decision-making process. For example, not every member of the public has the scientific expertise or funding to engage the support of experts who can interpret materials provided by proponents. Participant funding is not available for all types of procedures under the *CEAA.*

Another overarching weakness with the *CEAA*'s EA process is that it does not apply to federal government policies and programs — only to projects. The public is thereby excluded under the *CEAA* from participating in discussions about the environmental impacts of federal policies and programs.[435] Further, since the *CEAA* does not mandate EAs for policies and programs, access to information is ad hoc and subject to the discretion of the proponents or to information obtained in other ways. Although the

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[433]*Ibid.* at 10. Many of the concerns noted by Nikiforuk are also found also in R. Gibson, "The New Canadian Environmental Assessment Act: Possible Responses to Its Main Deficiencies" (1992) 2 J.E.L.P. 223.

[434]Canadian Environmental Assessment Agency, *A Citizen's Guide to the Environmental Assessment Process* (Ottawa: Supply and Services Canada, 1994) at 12.

[435]See: Canada. *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (Chapter 8: Greening Government Operations: Measuring Progress) (Ottawa: Public Works and Government Services, 1999) at 9-8 *et seq.*, where the Commissioner discusses the value of strategic environmental assessment, which includes public involvement in decisions about programs and policies.

CEAA does not mandate public participation in government policies and programs, public consultation is now a standard practice in the formation of policies, programs and statutory instruments.[436] Even if the public is invited to participate in these discussions, it does not have any binding authority under the *CEAA* regarding policies and programs. Further, providing opportunities for consultation does not necessarily guarantee that it will be effective.[437] Tingley sets out three main concerns regarding public consultation in the environmental law reform process. These could impact access to information in the EA process. First, she notes that a common flaw of public consultation is a failure to establish clear and open objectives for the exercise so that participants know at the outset how the recommendations will be used by decision-makers. Second, there is a potential that some participants use the consultation process as an opportunity to lobby decision-makers. Tingley notes that while this behaviour has been criticized by environmentalists, they stand a better chance of success in formal consultations processes than they did previously. Finally, the potential conflict of roles of participants can create confusion during decision-making. For example, participants may be experts in their own right and at the same time may represent and speak for a recognized constituency. Tingley also notes that although she believes that public consultation is a valuable exercise, unless "participants feel that they have been listened to in a fair and open way, public consultation will be short-lived."[438]

A strength of the *CEAA* is the creation of the public registry. A responsible authority must establish a public registry for every project that is subject to an EA.[439] The registry must be set up at the beginning of the EA and maintained until the follow-up program for the project is finished.[440] The public registry must contain:[441]

- all reports related to the EA;
- all public comments filed on the EA;
- any records prepared by the responsible authority for the purpose of designing and implementing follow-up programs for the project;
- any records produced as the result of the implementation of a follow-up program; and

[436]D. Tingley, *Public Consultation and Environmental Law Reform: Learning As We Go* (Edmonton: Environmental Law Centre, 1995) at 1.

[437]*Ibid.* at 74-7.

[438]*Ibid.* at 78.

[439]*CEAA*, s. 55.

[440]*CEAA*, s. 55.1(1).

[441]*CEAA*, s. 55.1(2).

- any documents requiring mitigation measures to be implemented.

CEAA subsection 55.5 places some limitations on this provision as the public registry will contain only documents that have been publicly available or would have been made public in any event; records in the possession of the responsible authority or Canadian agency that would have been disclosed under the federal *Access to Information Act* if a request for disclosure had been made; or information, other than third party information, that the responsible authority or the Minister believes should be disclosed in the interest of effective public participation in the EA process.

Although there are some limitations on comprehensiveness of information available on the registry, members of the public can at least gain access to information that could help them to participate more fully in the EA process.

1.2.2 Specific Concerns

There are some provisions in the *CEAA* that provide some general notification about EA information. Under the *CEAA*, the public must be given "reasonable notice" of draft guidelines, codes of practice, agreements and arrangements.[442] "Reasonable notice" is not defined under the *CEAA*. The government must also provide public notice of the receipt of a comprehensive study report, a mediation report, a review panel report, a follow-up program, or mitigation measures. Certain members of the public must be notified about review hearings. Further, the public can consult the registry to see if an EA is underway for a particular project. If so, the public can contact the responsible authority to determine the nature of public participation in the assessment. Finally, the Canadian Environmental Assessment Agency provides on-line guidance about the EA process and notes opportunities for citizen involvement.[443]

In addition to the general provisions, there are some specific provisions under various EA stages provided in the *CEAA* which affect whether the public has sufficient notification about information available. The first stage of the EA process is screening. The *CEAA* does not contain sufficient opportunities for effective access to information during screening, the most frequently used EA process. Under the *CEAA*, the responsible authority determines whether a screening is necessary. There are no legislated opportunities for public input into whether a screening is necessary. In addition, the public does not have input into setting the terms of reference for a screening assessment. These are set out in the legislation (section 16). Thus, the *CEAA* basically does not provide for the public to have input into identifying issues that should be examined

[442] *CEAA*, s. 58(3).

[443] Canadian Environmental Assessment Agency, online: <http://www.ceaa.gc.ca/011/index_e.htm>.

during a screening.[444] The issues that are examined will affect the type of information required by the public.

Further, the level and type of public involvement in the screening is at the discretion of the responsible authority.[445] Even in the case of complex or controversial projects, there is no statutory requirement for public consultation. Thus, the public can be shut out completely or the responsible authority can circumscribe the type of public participation that is permitted. Thus, while the public may have some access to information, the effectiveness in the result of exercising this right may be significantly diluted if the public has no direct say in the process. In sum, unless a proponent adopts a prehearing consultation program that notifies and consults with affected persons, there is a real danger that the EA will be performed without adequate public input or that the EA will be inadequate because it is too narrow, it is based on incorrect assumptions or faulty data.[446]

If participation is authorized at the screening stage, responsible authorities must provide the public with notice of and an opportunity to examine and comment on the screening report.[447] The usual method of providing this notification is through publication in the *Canada Gazette* or on-line on the Canadian Environmental Assessment Registry website.

Before any proposed screening report is designated as a class screening by the Minister of the Environment, the public must be notified and given an opportunity to comment on the report.[448] The Canadian Agency must take the public comments into account when making a decision whether or not to designate a project as subject to a class screening.

While there are more extensive opportunities for access to information at the mediation and review stages, as noted previously, the vast majority of assessments never reach these stages. Mediation sessions are not usually open to the general public, but individuals having a direct interest in or who are directly affected by a proposed project

[444]W.A. Ross & P.S. Elder, "Defining the Scope of Environmental Assessment Reviews" (Paper, Canadian Institute of Resources Law Conference, 1993) [unpublished].

[445]*CEAA*, s. 18(3).

[446]D. Paul Emond, "Environmental Planning and Environmental Assessment: Proactive Administration by Administrative Tribunal" in R. Cote *et al.*, eds., *Law and the Environment: Problems of Risk and Uncertainty* (Montreal: Canadian Institute for the Administration of Justice, 1993) 123 at 149.

[447]*CEAA*, s. 18(3).

[448]*CEAA*, s. 19(2).

are encouraged to participate.[449] Presumably those who do participate in mediation would enjoy some level of access to needed information.[450]

The information available for disclosure under the *CEAA* is limited to EA information. Thus, an EA must first be contemplated by the legislation before any documents are submitted and therefore potentially accessible. EAs must be performed in situations outlined in the statute. There are also certain activities which are either made subject to or exempted from the EA process. These are contained in inclusion and exclusion lists that are published in the regulations. Many individuals do not know how to access regulations. This can bar access to information.

The *CEAA* does not provide for general access to other environmental data. Under the *CEAA*, information must be accessed through the registry. The Canadian Agency must maintain a public registry of all records produced, collected or submitted for every project where an EA is conducted. The registry contains the *Canadian Environmental Assessment Registry*, a list of all available documents, and the documents themselves. The types of documents available from the registry include assessment reports, public comments on assessments, follow-up program documents, terms of reference for a mediation or review panel, and mitigation documents.[451] The registry is accessible electronically. The *CEAA* does not provide for access to background information, data and policy decisions underlying the assessment decisions.

One comparatively positive aspect of the *CEAA* is that the process of providing information is proactive — information is made available to the public before a formal request for access to information is made. This is unlike the *Access to Information Act*, which is reactive in that public access is triggered by a request for information.[452]

The registry must be operated in a manner that ensures convenient public access to the information.[453] However, the concerns of timeliness of the placement of information and its completeness and accuracy exist for this registry like any other.

There is a limit on the contents of the public registry.[454] The information placed on the registry must fall within one of three categories. First, it must have otherwise been

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[449]*Supra* note 433 at 22; *CEAA*, s. 29(2).

[450]R. Northey, *The 1995 Annotated Canada Environmental Assessment Act and EARP Guidelines Order* (Scarborough: Carswell, 1994) at 609.

[451]Section 55.

[452]B.J. Hobby *et al.*, *Canadian Environmental Assessment Act: An Annotated Guide*, looseleaf (Aurora: Canada Law Book, 1997) at II-22.

[453]Section 55.

[454]The Canadian Agency states that the Public Registry contains the Federal Environmental Assessment Index (a master list of all federal EAs carried out under the *CEAA*), departmental document

made available to the public. Second, the responsible authority must believe that the information would be disclosed under the federal *Access to Information Act*. Third, the Minister or responsible authority must believe on reasonable grounds that the disclosure of the information would be in the public interest because it is necessary for effective public participation in the assessment process.[455]

Additionally, under section 6, any documents that contain Cabinet confidences will not be filed in the public registry. This provision also prevents the disclosure of Cabinet confidences to a review panel even if the panel required the production of documents containing those confidences.[456] Thus, some important environmental information may not be available under the *CEAA*.

Because the *Access to Information Act* sets the parameters for the types of information that may be disclosed, third party information may be exempted from being placed on the registry. Subsection 55.5(2) of the *CEAA* provides that sections 27, 28 and 44 of the *Access to Information Act* apply. This means that third parties must be notified that their information will be placed on the registry. If the third party does not agree with the government's decision to disclose the information, it can appeal to the court for judicial review of this decision. Third party information is defined in the same fashion as under the *Access to Information Act*.[457]

Finally, in the case of a joint federal and Alberta review, the *Canada-Alberta Agreement for Environmental Assessment Cooperation* provides that both jurisdictions will maintain public registries on the project and that the public, proponent and the other government will be provided access to the registries, in accordance with the requirements of their respective legislation. The parties to the agreement also state that they will explore ways of providing the public with more convenient access to information about cooperative environmental assessments, including linking their respective websites.[458] Because each jurisdiction has different access to information provisions under the EA legislation, the public must access both registries to insure the receipt of available pertinent information.

There are general difficulties with effective access to information in the various stages of the EA process. First, there is no requirement that reasons be provided for screening decisions. Second, timely access to information and the amount of information

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listings (all available documents relating to each EA) and documents (see "What is the Public Registry System?", online: <http://www.ceaa.gc.ca>).

[455]Subsection 55.5(1)(b)(ii).

[456]*Supra* note 452 at II-35.

[457]Subsection 55.5(2).

[458]Article 8.0, Public Registry.

available varies between reviews. Parenteau, in analyzing the original screening process under the former Environmental Assessment and Review Process Guidelines Order, expressed concern that participants were not given any power to ensure that their views were really taken into account by the decision-maker.[459] This concern is also applicable under the *CEAA*, as public participants do not currently have the legislated opportunity to provide input into the scope of screenings.[460] In turn, the scope of the screenings will determine the range of information available through the registry.

There are similar concerns with the comprehensive study stage of the process. As with other aspects of the *CEAA* decision-making processes, discretion can be exercised in a way that prevents effective access to information. Several steps of the public participation portion of the comprehensive study involve the exercise of discretion. The method of public notification, the amount of time the public has to reply, whether further study is necessary, and what to recommend to the Minister about the project are all subject to the discretion of the Canadian Agency or the responsible authority. The public has no final say in these matters.

Even though the Minister must take public input into account, the public does not have any direct control over the Minister's decision. Thus, although the public has greater opportunities to participate in a comprehensive study, key aspects of effective public participation are missing in the process.

Clearly, the EA review panel stage under the *CEAA* affords the greatest potential for effective access to information. The terms of reference for the panel are likely to require the preparation of additional information on a project. Once the responsible authority or proponent has presented such information, the review panel must ensure that all information required for an EA is made available to the public.[461] Further, once the review is complete, and the report is submitted to the Minister, the public has a right to review the report.[462]

However, even at the review panel stage there is room for improvement. In most instances, the public does not have a role in the selection of decision-makers or in setting the terms of reference of the decision. The Minister utilizes his or her discretion to do so. Indeed, Nikiforuk states that under the EARP Guidelines, when Ottawa did not like panel recommendations, the federal government simply set up alternative panels that "quickly

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[459]R. Parenteau, *Public Participation in Environmental Decision-Making* (Ottawa: Federal Environmental Assessment Review Office, 1988) at 23-4.

[460]*CEAA*, ss. 15 and 16.

[461]*Supra* note 450 at 609.

[462]*CEAA*, s. 36.

rubber-stamped" federally funded projects.[463] Again, any existing right of access to information is severely circumscribed by these tactics.

The *CEAA* is really lacking when it comes to time limits for providing information. It does not specify when the information must appear on the registry.

Further, notification of other types of documents must merely be provided within a "reasonable time". This is problematical.

The Act is silent about the cost of obtaining documents, but the policy is to charge a fee for copies of documents.[464] As with access to information legislation, it is preferable if the Act specifies a maximum fee that may be charged for document retrieval.

If a matter proceeds to a review panel, the public can obtain copies of the assessment as well as copies of written briefs. Participant funding is available, if the party is directly affected by the decision.[465] Intervenor funding is not provided under the *CEAA* for screenings nor for analysis of comprehensive studies.

Although the cost of participating in a review hearing is potentially covered by participant funding, cost can be a barrier to effective access to information. If participants do not have the resources to participate, they may not have the adequate opportunity to be heard. For example, if participants do not have adequate background information about the cumulative impacts of the project, anything they have to say may not be applicable or may not be taken seriously. Clearly, "those who lack the resources to collect, analyze and present information and argument are at a serious disadvantage [in the EA process]."[466]

Because of the technical nature of environmental issues, members of the public need the assistance of expert witnesses and counsel in order to be able to participate effectively. As noted, the quality of an EA is enhanced if cumulative effects are considered. However, the consideration of cumulative effects requires enhancement of the type and quantity of information required. It is not clear that the regime under the *CEAA* ensures that there is effective access to information about cumulative effects. Further, many hearings are lengthy and involve a variety of issues that cannot be known before the hearing begins. Nevertheless, applicants must develop their funding proposals before they know all of the issues and with only a rough estimate of the time involved.[467] Thus, a public environmental consultation is arguably less effective than a formal quasi-

[463] *Supra* note 424 at 7.

[464] *Supra* note 450 at 32.

[465] Subsection 58(1.1).

[466] *Supra* note 446 at 145.

[467] *Ibid.* at 146.

judicial environmental hearing, where procedural and substantive safeguards are in place, such as the ability to cross-examine witnesses.[468]

No internal mechanism exists for reviewing decisions with regard to access to information. Thus, the Act is silent about approaching the Minister, for example, to review a refusal to disclose information or to examine a delay. The requester is left with the remedy of applying to Court for judicial review of an administrative decision. This is time-consuming and expensive. By the time that the information is obtained (on a successful review), it could be totally useless to the requester. The third party opposing disclosure is recognized at judicial review hearings and his or her right to appeal for judicial review of disclosure decisions is affirmed under the *CEAA*.[469]

A responsible authority can request the Minister to refer a project to a mediator or a review panel if public concerns warrant.[470] However, it is unlikely that the refusal to disclose information would be referred for review by the person who is refusing to disclose it.

One legal decision illustrates the successful use of the appeal process to secure access to EA information. In *Saskatchewan Foundation for the Environment ("SAFE") Inc. v. Saskatchewan Minister of the Environment and Public Safety*,[471] the Saskatchewan Court of Appeal determined that SAFE had the right of access to documents relating to four major projects in Saskatchewan. One argument made by SAFE was that the EA legislation in Saskatchewan contemplated that SAFE was entitled to documents related to the EA process under the Act.

The government made several arguments, including that SAFE had no right to the documents except as was provided in section 11 of the Act. This section provided that once the Minister had completed a review of an EA statement, the review and the statement were to be made public. However, some of the reviews were not complete. Further, the government argued that SAFE had no standing to make the application as the act did not create private rights. Finally, the government asserted that the remedy that SAFE applied for was not available, that the matter was moot and the application was untimely.

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[468]M. Jeffery, "Appropriateness of Judicial and Non-Judicial Determination of Environmental Issues" (1988) Environmental and Planning Law 265 at 271.

[469]The *CEAA* provides that the federal *Access to Information Act*, s. 44 applies to third party information. This section permits applications for review.

[470]Section 25.

[471][1992] 2 W.W.R. 97 (Sask. C.A.). However, it took over two years for the matter to be resolved at the Court of Appeal stage.

The government's arguments were not successful. In ordering disclosure of the documents, Sherstobitoff and Cameron JJA. (Wakeling, J.A., dissenting) held that public debate and consultation are integral parts of the EA process. Such informed public participation is only available if the participants are given full access to all available information.

This decision seems to provide some direction as to the completeness of information that should be made available to the public under the EA process.

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*Add Shipping and Handling

Within Canada: first book $5.00; each additional book $2.00
Outside Canada: first book $10.00; each additional book $4.00

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