



Straight Talk

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Straight Talk: Bram Noble

In the latest installment of its *Straight Talk* series of Q and As, MLI spoke with Bram Noble, a professor of environmental assessment at the University of Saskatchewan and author of a new MLI paper, about how the EA process often fails Aboriginal communities and companies, and what to do about it.



Bram Noble is a professor of environmental assessment at the University of Saskatchewan. He has published numerous articles on environmental assessment, including one of Canada's leading environmental

assessment books, *Environmental Assessment – A Guide to Principles and Practice*, and has delivered several national and international invited lectures on best practices in environmental assessment. His work in the environmental assessment field is well known; he has been an expert witness for several environmental assessment hearing processes, and is actively engaged in environmental assessment practice. He co-authored the Canadian Council of Ministers of the Environment guidance on regional strategic environmental assessment, developed Ministerial guidance for environmental assessment decision making under the Nunavut Land Claims Agreement, and was a consultant on the development of federal guidance for cumulative effects under the Canadian Environmental Assessment Act 2012. He also served as expert adviser to the Commissioner of Environment and Sustainable Development, to the Auditor General of British Columbia, and to numerous First Nations and provincial governments. He holds a PhD in geography from Memorial University.

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MLI: Let's begin with some basic questions such as what is environmental assessment? Who makes a decision on a project? And who can intervene in the process?

Noble: Environmental assessment is a public process and a publicly accessible process, at least in principle. It's something that's legislated federally, provincially, and across the North. Under all those systems, even though the goals and objectives and processes vary, really it's about identifying the potential environmental and socio-economic impacts of proposed projects – usually resource developments – identifying the public concerns associated with the project, finding ways to mitigate adverse impacts or enhance positive ones, and identify needs for monitoring. Ultimately, EAs provide information to decision-makers so they can make an informed decision about whether a proposed project should be approved, and if so, what conditions should be attached to that approval.

MLI: So what do you think are some of the biggest misconceptions about the EA process?

Noble: Maybe the biggest misconception about EA is that it's about preventing development, or that EA has failed when a project goes ahead and that project has adverse impacts. The reality is that all developments, whether it's Oil Sands and pipelines, or wind farms and solar farms, they all have adverse impacts. And so environmental assessment is not about blocking projects, it's about ensuring that we have the information that we need to make an informed decision about whether the impacts are acceptable, and what conditions or management measures are needed to make a project acceptable.

Probably the second biggest misconception about EA is that it's a process where we can tackle sector-wide or larger policy issues, or that it's an opportunity to lobby against a resource sector such as the Oil Sands, as opposed to really focusing on a particular project. I think we see this most often when we deal with some of the more controversial high-profile projects such as Northern Gateway, Energy East or Keystone. With these big assessments we see a lot of unrealistic expectations, I think not really aligning with what an EA process is really intended to do.

MLI: To what extent do you think the public commentary or even some of the testimony at environmental reviews of projects related to the Oil Sands are dominated by issues that aren't really relevant to the particular project?

Noble: As a public process, environmental assessment in principle should provide the opportunities for people to voice their concerns about a project. But in my experience of being involved in some of these hearing processes as a participant and as an observer, is that often a lot of the information that comes forward is not about the project. It's about the industry. So some of the debates we see around some of our major pipeline project proposals and EA processes, they're not about the pipeline. They're about the Oil Sands; energy policy; environmental policy; international trade. They're all worthwhile issues and they're all issues that need to be addressed, but sometimes they take away from the issues that the EA process is supposed to address and may at some time distract from the role of the impact assessment.

MLI: Perhaps we can back up a bit and just ask some basic questions. What are the types of bodies that conduct the EA reviews and who can appear before them, and what kind of decisions can they make?

Noble: Federally, environmental assessments are conducted by one of three bodies, primarily the Canadian Environmental Assessment Agency. But also, what we've seen recently in terms of major pipeline projects, is that many of those EAs are led by the National Energy Board. The third body is the Canadian Nuclear Safety Commission. So those are the federal authorities responsible for impact assessments and it's the respective ministers that are the ultimate decision-makers.

Now, for some of the larger projects, if we look at the Northern Gateway project or the Lower Churchill hydro project as examples, for those types of projects we typically see independent review panels. Those are commissioned by the responsible authority and they often operate in partnership with other authorities, but their objective is to lead the assessment and provide recommendations to the minister. These panels are comprised of independent experts from various sectors of society or from industry; it could be a land owner. Academics are often on these panels as well.

MLI: And who can appear before them?

Noble: Any member of the public can comment on environmental assessments or attend the hearing processes and information sessions. But in terms of those who can appear before the panels and intervene and receive funding to do that, those are people who meet certain criteria defined as a directly affected interest. So they can be individuals. If you're an individual land owner let's say, and you have a pipeline crossing your land, you may be eligible. Not-for-profit organizations such as environmental organizations can appear, and so can Aboriginal groups. The key criteria is that you have a direct local interest in the project, so you might own property in the area as an example, or have community or traditional knowledge, or you may have expert knowledge that will be useful for the hearing panel. You have to meet one or more of those criteria which are really pretty broad, and it really opens up the door to a wide range of participants.

MLI: And there is a similar provincial process, is that correct?

Noble: Provincially the process will vary quite a bit. In Manitoba for example, the Clean Environment Commission serves in principle as the assessment panel for some of the larger environmental assessments in Manitoba. So each province has its own system and they have their own set of criteria in terms of who can be engaged. And for some of the larger projects, federal and provincial authorities merge and there's a joint assessment and a joint panel that represents both jurisdictions.

MLI: And what's the range of findings that these panelists can make, or these bodies?

Noble: In 99 per cent of cases, what these panels do is they simply make recommendations to the responsible authority, to the minister. They can outright recommend the project not be approved if the evidence that they've heard and their assessment work suggests that the impacts would simply be too severe. In most cases, the panel recommends that a project proceed, but they will often attach long list – dozens to hundreds – of conditions. And those conditions could be anything from enhanced monitoring measures, compensation to certain groups, or other ways of mitigating the impact of the project. It could even be a change in location of a project, if it's a pipeline route or an access road, for example. So, typically their recommendations are focused on improved impact management strategies. Sometimes they'll make recommendations for future programs or studies that are independent of the assessment but that will be useful for understanding impacts going forward into the future.

MLI: What effect have changes to the Environmental Assessment Act in 2012 had?

Noble: I think it's a little too early to say with absolute confidence what the real effects will be. When the new act was proposed, many speculated that it would mean the end of environmental assessment. But if you talk to those involved in some of the larger EA consulting firms, they will say that business has never been better and we're doing more EAs than ever.

So, it's a little hard to say, but there are some changes that I think we can observe. One I think is the

federal act is narrower in scope than the previous act so that a lot of smaller projects are now not subject to review – think of an individual petroleum or natural gas well site or access roads or expansion to mining operations under a certain capacity.

Now, I should say there's nothing stopping the provinces from assessing those projects and the intent is that the provinces would pick up the ball where the new act has left off. But the concern is that those smaller projects together can have major impacts on the environment. If you get one or two petroleum and natural gas wells, maybe it's not that significant. But if you have say 50 or 100, it starts to add up. And if you have, as we do here in southwest Saskatchewan, 1,500 wells in a 1,900 kilometre area, you look back and you say oops, that's not good. And so I think it's a dropping of the small projects that's probably the biggest impact that we see, which means there's fewer EAs, and fewer opportunities for those directly affected to be involved in those decisions.

MLI: How is the EA process meant to provide a forum for the concerns of affected Aboriginal communities, and how effective has it been in this regard?

Noble: The EA process really approaches Aboriginal peoples as another affected interest. It is not geared specifically toward Aboriginal interests, but it does provide a greater opportunity for them to be involved. Aboriginal communities are typically given priority in intervener status and participant funding programs, when they have traditional knowledge to bring forward, or when their traditional lands are being affected. So it sort of treats them as one of many stakeholders. But at the same time, there are certain rules, provisions and certain types of effects that are given a little more priority if they affect Aboriginal lands or resources.

MLI: Given the research you've done for MLI, it seems clear that there are ways that the engagement of Aboriginal communities can be handled differently and more effectively. Can you give us an idea of what needs to be improved?

Noble: I think that the key thing for industry and for governments is initiating early engagement with potentially affected Aboriginal communities, before we see an EA application come forward. Sometimes we point the finger at project proponents, at a business, when they go on to their community and there's a lot of conflict, and maybe the community's caught off guard because there wasn't early engagement. But I think government and government agencies have a role to play here in being the first in to resource development regions to make sure everyone knows what to expect. There may be existing tensions between government and Aboriginal communities or within Aboriginal communities. And sometimes these communities have no idea what to expect or who they should be speaking to and about what.

I mentioned in the MLI paper the Nexen water license process in British Columbia, where the decision to grant a licence was overturned by the Environmental Appeal Board. That's a really interesting example of where the assessment was deemed insufficient in terms of how it managed environmental effects. But one of the other key things that really came out of that process was that the Fort Nelson First Nation community wasn't properly engaged in the process, and part of the challenge was that they weren't sure who was responsible for what. They were left asking: "Is this an issue we should be going to government for, or should we be going to industry?"

We see here in Saskatchewan, as well, instances where we've spoken with EA practitioners and community members, and there is quite a bit of confusion in terms of roles and responsibilities between the government and industry over the question of when is it engagement? And when is it part of the Constitutional duty to consult and accommodate Aboriginal communities?

So, I think part of the process of improvement we need is clarifying roles, responsibilities and expectations. There are also examples where we've seen development projects come forward with Aboriginal communities as partners. The recent Keeyask hydroelectric project in Manitoba is one example where Manitoba Hydro was a proponent and the application was filed in partnership with the Aboriginal communities. The impact statement contained the science and the assessment, as well as assessments based on traditional knowledge, and what was really interesting is that sometimes they would be giving complete opposite assessments in terms of their predictions and whether they saw something as being significant. Now, there are some downsides and negative characteristics of that EA as well, but I thought it was a really, really neat example of where a proponent and a First Nation can come forward in partnership and even though they have very different views, presented that information openly and very clearly to a review panel. So, I think that early engagement is very important.

Also important is what happens after the EA. Much of what we've discussed is really piled up on the front end of an EA when there's life after the EA is completed. There are follow-up and monitoring processes and I think we also need to focus more on that long-term, sustained engagement of communities. Community-based monitoring programs like the ones Cameco and Areva have developed here in northern Saskatchewan are one example where there's a longer-term commitment to building capacity and training within the local communities as part of ongoing project management activities.

MLI: What are some of the consequences of poor engagement of Aboriginal communities in the EA process?

Noble: I think we see these quite often where projects are delayed. The EA process costs two times or 10 times as much for a project proponent when there are project delays, missed market opportunities, litigation, even project refusal. And we've seen some examples in the Mackenzie Valley where there were three applications for uranium exploration actually fairly recently and the projects were outright rejected because the board found that the proponents didn't adequately consider the First Nation community's concerns about the impacts of the project on caribou.

The stakes can be pretty high for project proponents, and they are high for the community because of the economic opportunity they can bring. Most Aboriginal communities are not opposed to development, but we've got to get the process right. Currently we have poor engagement processes, or too little concern for proper engagement, or inexperienced proponents, or maybe the communities themselves that are not well organized. Whatever the reason, it seems we are missing opportunities. And so I think it's not only a cost for a proponent, but I think it can be a cost for the communities in terms of missing out on longer-term economic development opportunities.

MLI: Do you believe it's possible for the process to serve the interests of both the Aboriginal community and the project proponents and business interests?

Noble: Yes, absolutely. I also believe they share equal responsibility in making sure that it is a good process. Businesses can't go into communities at the 11th hour and say "here's our application, give us your feedback", when many of these communities had no technical capacity or human resource capacity to do that. But at the same time, Aboriginal communities can't demand that their traditional land and resource uses are considered in the assessment if they're not willing to provide that information where it is available.

I've heard stories from consultants who have gone into EAs attempting to work with communities, and they simply were not able to access information. Now maybe it was because they went about it the wrong way, but whatever the reason, they weren't provided with information they could use. Those

issues did come up then during the hearing process as a part of a community challenge. So I think the onus is on both parties. We tend to focus a lot on the industry not doing its job, but I do think the Aboriginal community has to bear some of the responsibility as well for some of these processes.

MLI: Let's look at what each party or group of parties needs to do to make the EA process more effective, I would start with government. What changes to legislation or other government actions would help ensure better Aboriginal engagement with the EA processes?

Noble: I don't know if all of these are legislated changes really, other than the need for legislation to be clearer on the need for early engagement and who's responsible for doing that. And as I said, I think governments are ultimately responsible for good EA. It's not something that can be thrown out there to the industry and the community to figure out on their own. I think governments can't unload their responsibilities to business. They have to be in the area prior to development applications, paving the way for an effective or more collaborative EA process. I think practitioners and industry are quite quick to say that government has to own up to its responsibility and be the first in there on the ground. And with that, I think you can set a good context for a more effective and a more efficient EA process, because the parties involved know what to expect and can better prepare to be engaged.

MLI: What about capacity building for Aboriginal communities who are in some cases dealing with multiple proposed projects? One would think that the costs for research, legal fees, travel and whatnot would be substantial as a portion of their budgets.

Noble: Yes, it can be quite substantial. The intent in the participant funding programs was to provide communities with the resources they needed to be involved and engaged in the EA process. I think they have done a fairly good job of providing communities with resources. I think the challenge is that it comes too late in the EA process. When a project application has already been filed, an Aboriginal community can apply and receive some resources to do some basic work. They can hold a community meeting, maybe do some traditional use studies, but at that point there's very little time to accommodate that work.

I think these types of resources need to come up front and I think that's part of where business and government working with Aboriginal communities need to make sure that the building blocks are there for an effective EA process. We can't enter into an EA process and then all of a sudden decide we need traditional use data. If it doesn't exist, it's not something you can collect in three to six months. And so I think the capacity is needed to ensure that these Aboriginal communities have the resources they need to get their traditional land use plans and resource studies done regardless of whether or not there's an EA coming to town. I think that's an important capacity building requirement.

I also think training is required so that they have the technical knowhow to do this. Some First Nations are far more advanced in this area than others. And you can see this in the various applications that are filed. Some have the technical people on staff and with others, it's just not there. So, I think investing in some of these EA capacity building and training programs is needed to make sure that when they are engaged, it's effective.

MLI: So, do you find that things are very uneven, when you compare one EA to the other, in terms of how well Aboriginal interests are accounted for?

Noble: Yes, absolutely. And it's hard to say whether it reflects the existing capacity of the communities or whether it reflects the willingness and experience of the proponents. I think it's a pretty messy combination of those things. But yes, from one EA to the next, things do vary quite a bit. And as I

said, some of these First Nations have their house in order and they're maybe much wealthier or better positioned First Nations and have more project experience. Others simply don't have the resources or the knowhow.

MLI: We have spoken about the different expectations for the EA process and how some may see it as a forum for a broader discussion of Aboriginal rights related to resource development. Some might see it as a forum for opposition to an entire industry rather than a specific project. Do you see kind of an alternative means for airing those ideas or those concerns that can perhaps be conducted parallel to or outside the EA process and perhaps improve the efficiency of EAs by dedicating them to the specific attributes of a specific project?

Noble: Yes, I think we're slowly moving in a direction where we're starting to see some of these other initiatives unfold at a much more regional policy and land use planning scale. Many of the issues which are raised during project EAs that don't belong there can be addressed somewhere else. Back in the 1990s, Canada introduced its Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals, and really the intent there was to address some of these bigger issues. It was intended to ensure that environmental concerns about developments are integrated at that level so we could pave the way for better and more efficient EAs. But that directive has really been very narrowly applied at the federal level to federal policies.

Now, just recently, the Canadian Council of Ministers of the Environment and particularly a group between Nova Scotia, Saskatchewan and Alberta, developed this Regional Strategic Environmental Assessment which is really more of an informal way to do these regional policy land use plan assessments, outside the cabinet directive.

And we've seen some of this stuff emerge on the ground in the Western Arctic and the Beaufort Sea as another example. We have the Beaufort Sea Regional Environmental Assessment and Strategic Plan of Action, which is outside of the regulatory process, where these bigger issues and concerns can be addressed. In the Ring of Fire, a mineral rich region in northern Ontario, this kind of regional approach is being lobbied for. And in the Elk Valley of BC, the Ktunaxa First Nation, Teck Coal and local municipalities have all been working together to address cumulative impacts of a project, again, completely outside the regulatory process but an opportunity to streamline future development applications and streamline EA processes, which gives them the support that they need. And the interesting thing is that the Canadian Environmental Assessment Act does refer to these regional studies.

The problem is, I suppose, there's no legislative framework or legal trigger for these regional studies. So I think we're moving there and recognizing their value. But how we connect the outcomes to the regulatory process I think is going to be the challenging part.

MLI: And what can businesses, more specifically, do to improve the EA process?

Noble: I think for businesses they need to recognize that the expectations and understanding of what an EA is that a community has may not be the same as what the business expects and understands an EA is. And as I said earlier, I think that that early engagement with the community, and capacity support for their engagement, have led to some key success stories. Showing that they're committed to engagement and support in the community after the EA is over is also very important. I think that's a critical one, demonstrating that we're here for the long haul and this is not just engagement upfront, so we can understand what impacts we'll have on traditional land and how to manage them. But there's a commitment after the project is approved for an ongoing development partnership. And I think for industry, that's just really becoming the reality of doing business.

MLI: And finally, what can Aboriginal communities be doing differently or better to make a more effective EA process?

Noble: To be blunt, I think they need to get their own house in order, and I recognize it can be tough, because as I said, capacity varies. But we see communities that are quite divided in some cases on development issues, and sometimes this doesn't even come to the forefront until a project is proposed. And I think that's on the Aboriginal community. I think they need to make sure that they do have a representative community voice and if that is a divided voice and there are different views from within the community, that's fine. Not every community speaks together. But I think that these are issues that shouldn't come out when an EA application comes forward. These are issues that need to be dealt with in advance. Creating the land use plans and traditional use studies, being prepared for development as opposed to reacting to an application. When you think of it, it's interesting that it seems that all these EA applications and all these developments sometimes come as a surprise, when many of these communities are in pretty intense resource development regions. And I think it should almost be an expectation that applications are coming down the pike.

MLI was able to draw the following recommendations from its conversation with Prof. Noble:

1. Businesses need to be engaged with potentially affected Aboriginal communities before a project goes to Environmental Assessment to ensure that there is time for them to participate fully.
2. Government needs to be in first, to create processes in resource-rich regions to ensure that communities are prepared when specific proposals come from developers.
3. Aboriginal communities in development-heavy regions need to get ahead of the game. They must anticipate the possibility of project in their area and ensure their interests are represented in Environmental Assessments.

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