Canada's Federal EA Legislation vs. A Model EA Law[1]

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The Environmental Law Centre (ELC) recently published *A Model Environmental and Sustainability Assessment Law* (the Model Law).[2] The Model Law incorporates environmentally sound principles, enabling sustainable decision-making to become part of Canada's landscape and strives to address concerns that exist with Canada's environmental assessment legislation. In preparing the Model Law, the ELC conducted a literature review and received advice, critique and feedback from an advisory committee.[3]

Shortly after the ELC began its work on the Model Law, the federal government introduced an omnibus budget bill which significantly altered Canada's federal environmental assessment legislation. Federal environmental assessment in Canada was previously governed by the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA 1992*).

With the passage of the federal budget bill, *CEAA 1992* has been repealed and replaced with the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*).[4] The *CEAA 2012* – along with the *Regulations Designating Physical Activities*, the *Prescribed Information for the Description of a Designated Project Regulations* and the *Cost Recovery Regulations* - came into force on July 6, 2012.

This paper will provide an overview of *CEAA 2012* and will highlight the changes it makes to the federal environmental assessment process. As well, this paper will compare Canada's federal environmental assessment legislation to the ELC's Model Law.

An Introduction to the New Federal Environmental Assessment Process

The new federal environmental assessment process adopts a project list approach for determining which projects will be subject to environmental assessment. Under *CEAA 2012*, only those projects designated by the *Regulations Designating Physical Activities* (*RDPA*) or designated by the Minister of Environment on a discretionary basis may be subject to federal environmental assessment.

A project that is not on the *RDPA* but is designated by the Minister of Environment on an *ad hoc* basis **must** undergo a federal environmental assessment.[5] As well, a limited number of projects on the *RDPA* are linked to either the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board (NEB) and **must** undergo a federal environmental assessment by the CNSC or NEB as appropriate.[6]

All other projects on the *RDPA* are linked to the Canadian Environmental Assessment Agency (CEA Agency) and **may or may not** undergo a federal environmental assessment. Proponents of such projects must submit a project proposal to the CEA Agency, the contents of which are dictated by the *Prescribed Information for the Description of a Designated Project Regulations*.

The CEA Agency has 10 days to review the project proposal for completeness. After the project proposal is declared complete, the CEA Agency then has 45 days to screen the project. This is **not** a form of environmental assessment but rather a determination as to whether or not a federal environmental assessment ought to occur.

Once the CEA Agency has determined that a federal environmental assessment is required, one of two kinds of environmental assessment may occur: a standard environmental assessment[7] or assessment by review panel. [8] Factors that must be considered in the course of an environmental assessment are enumerated in the Act.[9]

Once the environmental assessment is complete, the appropriate body (the CEA Agency, CNSC, NEB or the review panel) must prepare a report, which is used to determine whether or not the project will cause significant adverse environmental effects.[10] If the project is determined to cause significant adverse environmental effects, the matter is referred to the federal Cabinet to decide whether or not those effects are justified in the circumstances.[11] Finally, a decision statement which indicates the decision made in relation to the project (including any conditions that must be met by the project proponent) is issued.[12]

How Does *CEAA 2012* compare to *CEAA 1992*?

There are several significant differences between *CEAA 1992* and *CEAA 2012*. The number and scope of assessments conducted under *CEAA 2012* will be reduced compared to *CEAA 1992*. There are also significant procedural differences between *CEAA 1992* and *CEAA 2012*, including changes to the types of environmental assessment, who conducts the assessments and public participation opportunities. As well, *CEAA 2012* introduces legislated timelines and the mechanisms of substitution and equivalency.

Changes to the Number and Scope of Assessments

The previous *CEAA* applied to all projects that had a federal trigger (unless specifically excluded). This meant that a federal environmental assessment was required for all projects which triggered *CEAA 1992* by virtue of involving the federal government as proponent; federal lands; a prescribed federal permit; or federal financial assistance.

In contrast, under *CEAA 2012*, only those projects designated by the *Regulations Designating Physical Activities* may be subject to a federal environmental assessment. In addition, the Minister has the discretion to designate a particular project for federal environmental assessment on an *ad hoc* basis.

The *RDPA* links each particular project category to a particular federal authority (currently, these are the CEA Agency, CNSC or NEB). Projects linked to the CNSC or NEB **must** undergo a federal environmental assessment (8 of 39 designated project categories are linked to either the CNSC or the NEB). The remaining project categories are linked to the CEA Agency and **may or may not** be required to undergo a federal environmental assessment.

For those project categories linked to the CEA Agency, a federal environmental assessment might not occur for two reasons. First, the Agency may determine that a federal environmental

assessment is not required. Second, the federal government may decide not to conduct its own environmental assessment on the basis that the project is being assessed using a provincial process that is substituted for or deemed equivalent to the federal process.

Ultimately, the effect of these changes to federal environmental assessment law means that fewer projects will be assessed. Fewer projects will fall into the purview of *CEAA 2012* than with *CEAA 1992*. Further, even those projects which do fall into the purview of *CEAA 2012* may be excused from a federal environmental assessment at the discretion of the CEA Agency or the Minister.

In addition to reducing the number of federal environmental assessments, *CEAA 2012* also reduces the scope and content of federal environmental assessments. Federal environmental assessments are now confined by a narrow interpretation of federal jurisdiction. The consideration of environmental affects under *CEAA 2012* is limited to effects on fish and fish habitat, aquatic species at risk, migratory birds, federal lands and aboriginal peoples. As well, a federal authority[13] must consider changes to the environment that are "directly linked or necessarily incidental" to that federal authority's exercise of power in relation to the project. This contrasts with *CEAA 1992*, which considered effects to all aspects of the environment (land, water, air, organic and inorganic matter, all living organisms and interacting natural systems).

While the factors that must be considered in the course of a federal environmental assessment remain largely unchanged from *CEAA 1992*, there are a few significant differences. The previous *CEAA* required consideration of the **need for the project** and **alternatives to the project**. There is no longer a requirement to consider these factors in the course of a federal environmental assessment despite both factors being key considerations for achieving sustainable development. As well, the requirement to consider the **capacity of renewable resources** that are likely to be significantly affected by the project to meet present and future needs is removed from *CEAA 2012*.

Procedural Changes under *CEAA 2012*

As mentioned above, there are two kinds of environmental assessment under *CEAA 2012*: a standard environmental assessment or assessment by review panel. This contrasts with *CEAA 1992*, which had several forms of environmental assessment: screenings, comprehensive studies, panel reviews or mediation.

Under *CEAA 1992*, numerous federal departments were responsible for conducting environmental assessments. In contrast, under *CEAA 2012*, a federal environmental assessment may be conducted only by the CEA Agency, CNSC, NEB or review panel.[14]

Legislated timelines for completion of an environmental assessment have been introduced by *CEAA 2012*.[15] The Act requires that a standard environmental assessment be completed with 365 days, an environmental assessment by the NEB be completed within 18 months and an environmental assessment by review panel be completed within 24 months.[16]

The previous *CEAA* required that environmental assessments were to provide opportunities for public participation. The term **public** was not restricted in any manner. In contrast, under *CEAA 2012*, public participation in environmental assessment processes conducted by the NEB or a

review panel is limited to interested parties. An **interested party** is defined as any person who is directly affected by the project or has relevant information or expertise.

Under *CEAA 2012*, a federal environmental assessment may be avoided by allowing a provincial assessment process to be substituted or deemed equivalent. In the case of substitution, the federal government considers the provincial environmental assessment and makes its own decision (i.e., the provincial assessment alone fulfills the requirements of *CEAA 2012*). In the case of equivalency, the federal government relies entirely upon the provincial environmental assessment including the ultimate decision (i.e., the project will be exempt from *CEAA 2012*). The mechanisms of substitution and equivalency under *CEAA 2012* are a marked departure from the use of coordination and harmonization under *CEAA 1992*.

How Does Canada's Federal EA Legislation compare to the ELC's Model Law?

Recognizing the shortcomings of Canada's federal environmental legislation, the ELC developed a Model Law[17] with the goal of addressing concerns with *CEAA 1992* and *CEAA 2012*. For instance, the Model Law strives to provide strong rights for public participation; fair, predictable and accessible assessment procedures; and a legal framework for strategic and regional assessment.

The Model Law embraces, as its core objective, the principle of sustainability. Sustainability is defined in the Model Law[18] as "planning and development that acknowledges the inherent limitations of the environment, that is socially, culturally, economically and environmentally sound, and that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The Model Law requires environmental and sustainability assessment (ESA) of undertakings to determine whether a particular undertaking makes a positive contribution to sustainability. This differs from both *CEAA 1992* and *CEAA 2012* in which the test is whether a project is likely to cause "significant adverse environmental effects" and whether those effects can "be justified in the circumstances." It should be noted that neither *CEAA 1992* nor *CEAA 2012* defines these phrases despite their central importance to decision-making under the legislation.

The Model Law enumerates the factors to be considered in the course of an ESA.[19] These factors include examination of the purpose and the need for the proposed undertaking, as well as alternatives to the proposed undertaking. Also included is consideration of measures to **maximize** the proposed undertaking's contribution to sustainability (in addition to mitigating negative impacts). Another key factor to be considered under the Model Law is the monitoring and follow-up measures that are required throughout the entire life-cycle of the proposed undertaking. Other factors are listed in the Model Law and, as a whole, aim to focus attention on the choice and design of undertakings that will make a positive contribution to sustainability (rather than merely modifying proposed undertakings in an attempt to mitigate negative impacts).

The Model Law requires ESA of project-based undertakings. As well, the Model Law requires strategic and regional ESA. This contrasts with both *CEAA 1992* and *CEAA 2012* which focus on environmental assessment of project-based undertakings with no legislated requirement for strategic or regional environmental assessment.

With respect to project-based ESA, the Model Law has adopted a hybrid of the trigger and list approaches taken in *CEAA 1992* and *CEAA 2012*, respectively.[20] The Model Law requires ESAs of those projects involving: the federal government as proponent; federal lands; federal funding; or a federal decision that permits the undertaking to proceed. As well, the Model Law requires ESAs of projects that may affect a matter of **national concern**. A project affects a matter of national concern where it:

- is located within Canada and may have transboundary impacts within Canada or outside Canada;
- may impact matters related to multilateral agreements or international treaties that promote environmental stewardship or progress towards sustainability;
- may impact an at risk, threatened or endangered species;
- may impact threatened or endangered ecological communities;
- may impact species that are migratory or that have transboundary distributions;
- may have a significant impact on Canada's contribution to climate change; or
- may impact Canadian fisheries, marine areas or navigable waters.

The Model Law provides that regulations may list projects or classes of projects that are deemed to be matters of national concern.

The Model Law also sets out circumstances in which a strategic ESA may be required.[21] These circumstances include the federal government proposing a plan, policy or program that may impact on sustainability; another government proposing a joint plan, policy or program involving the federal government; a non-governmental body proposing strategic ESA or a government plan, policy or program; or identification of strategic issues in the course of project-based ESA. The Model Law also provides avenues for public petitions for strategic ESAs.

The Model Law's ESA process consists of 5 components: screening; initial assessment; environmental and sustainability review; decision-making; and follow-up and monitoring.[22] Under the Model Law, the ESA process is conducted by a central agency; in other words, the Model Law abandons the concept of self-assessment which was embraced in *CEAA 1992* and which stills exists to some extent in *CEAA 2012*. Throughout the ESA process, the Model Law provides opportunities for broad public participation.[23] These opportunities are bolstered by provisions requiring public participation funding and assistance, a petitions process and easy access to information.

[1] It should be noted that the author has previously published portions of this paper (dealing with *CEAA 1992* and *CEAA 2012*, infra.) in a similar format in the Environmental Law Centre's *NewsBrief* (2012), 27(3) (http://www.elc.ab.ca/Content_Files/Files/Vol27No3Web.pdf) and in *Law Now* (February 2013) at http://www.lawnow.org/canadian-federal-environmental-assessment-law.

[2] The Model Law – with or without annotations -is available for viewing and download on the ELC's website at http://www.elc.ab.ca/pages/WhatsNew/default.aspx?id=1161. The ELC thanks its funders - **Alberta Ecotrust Foundation** and the **Alberta Law Foundation** – for supporting this project.

[3] While preparing the Model Law, the ELC benefitted greatly from the outstanding scholarship in the area of environmental assessment. In particular, the ELC wishes to acknowledge the work of Robert Gibson et al. – particularly chapter 7 of *Sustainability Assessment: Criteria, Processes and Applications* (London: Earthscan, 2005) and "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" (2009) 22 JELP 175 – which provided excellent guidance on the design and drafting of the Model Law. The annotated version of the Model Law contains a bibliography of resources.

[4] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[5] Section 15, *supra.* note 3.

[6] Sections 13 and 15, *supra.* note 3.

[7] Conducted by the CEA Agency, the CNSC or the NEB.

[8] See section 38 of *CEAA 2012, supra* note 3. The decision to conduct the environmental assessment by way of review panel is made at the discretion of the Minister. It should be noted that the Minister cannot refer a project linked to the CNSC or the NEB to a review panel.

[9] Section 19, *supra.* note 3.

[10] Section 52, *supra.* note 3. The decision-maker depends upon which responsible authority is conducting the environmental assessment. If the assessment is conducted by the CEA Agency, then the Minister makes the decision (s. 27). If the assessment is conducted by the CNSC or the NEB, then that agency makes the decision (s. 27) unless the NEB is considering a pipeline application under s. 54 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 in which case the federal Cabinet makes the decision (s. 31).

[11] Section 52, *supra.* note 3.

[12] Section 54, *supra.* note 3.

[13] Section 2, *supra.* note 3, defines "federal authority". A federal authority includes Ministers, government agencies, parent Crown corporations, departments or departmental corporations, and designated bodies.

[14] Currently, the only designated authorities are the CEA Agency, CNSC and NEB. The Act leaves open the possibility of other federal authorities being designated by the *RDPA*.

[15] Under the previous *CEAA*, there were no timelines set by the Act itself. However, the *Establishing Timelines for Comprehensive Studies* Regulations SOR/2011-139 did place timelines on the completion of comprehensive studies.

[16] If a review panel fails to meet this timeline, the review panel is terminated and the environmental assessment is completed by the CEA Agency (ss. 49 and 50, *supra.* note 3).

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[18] *Supra.* note 2 at s.1.

[19] *Supra*. note 2 at ss. 17 and 18.

[20] *Supra*. note 2 at s. 12.

[21] *Supra*. note 2 at ss. 7 to 11.

[22] *Supra*. note 2 at Part 4.

[23] *Supra*. note 2 at Part 5.