Legal Backgrounder

Canadian Environmental Assessment Act

Overview

Strong environmental laws protect the air, water and land we need to be healthy and keep us safe from pollution and toxic chemicals. The *Canadian Environmental Assessment Act* (CEAA) is one of the key federal laws that exist to promote sustainable development across Canada and prevent environmental degradation before it occurs. The key purpose of environmental assessment is to "look before you leap" — that is, to carefully consider the long-term environmental consequences of a development proposal before deciding whether or how to proceed. While other federal laws are often not engaged until damage to the environment has already occurred, environmental assessment under CEAA is one of the few legal mechanisms in place to prevent environmentally harmful activities or projects from being approved, and to identify better alternatives.

CEAA is meant to link specific project impacts to the legal requirements under other federal laws aimed at protecting fisheries, species at risk, migratory birds and Canada's national parks. It also links with Canada's constitutional obligations as it acknowledges the protection of treaty rights and aboriginal rights of indigenous peoples, and provides one mechanism through which aboriginal consultation may occur. CEAA has played a critical role in the regulatory approval and social licence for many major projects across the country, and is one of the most important federal laws for ensuring sustainable development in Canada.

How does the law work?

Environmental assessments are a planning tool used to ensure that projects are considered in a careful and precautionary manner, in order to avoid possible adverse environmental effects. They identify, evaluate and offer recommendations on the potential environmental and other (social, cultural, health, etc.) impacts of a project or activity before it begins, so that these issues are understood in advance and can be mitigated if a project proceeds. Environmental assessments emphasize the need to look at all of the opportunities and challenges associated with development in a modern industrial society.

CEAA operates where the federal government plays a role or has jurisdiction — for instance, if a proposed project or activity is on federally owned land, involves federal funding, or where federal permits are required. Other regulations identify specific physical activities that are covered by the Act (such as navigation), as well as projects that are excluded because their environmental effects are regarded as insignificant.

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Projects or activities that fall under CEAA are subject to one of three main levels of environmental assessment: Screenings, comprehensive studies or panel reviews. The extent of public participation required under CEAA, as well as the intensity of the assessment, depends on the type of assessment being conducted.

- **Screenings** provide the lowest level of scrutiny, as they do not require an assessment of important additional factors that are required in a comprehensive study or panel review. In some cases a screening may be a brief analysis of available information; in others, additional background work may be required. The majority of CEAA assessments are conducted by way of a screening. Public consultation is discretionary at this stage, and rarely occurs.

- **Comprehensive studies** must assess environmental and cumulative effects, plus additional factors including the purpose of a project, alternative means of carrying out the project, the need for follow-up programs, and the capacity of renewable resources to meet the needs of present and future generations. Public consultation is mandatory for comprehensive studies, although public participation is still limited compared to participation in a review panel. If a comprehensive study report causes the Minister of Environment to conclude that additional information is necessary or that public concerns must be further addressed, the Minister can take action to address these concerns.

- **Review panels** involve the appointment of independent experts to hold public hearings about a project and make recommendations to government. For review panels, the public has an opportunity to take part in public hearings; for both review panels and comprehensive studies, the federal government makes a limited amount of funding available to facilitate public participation. These panels are the highest level of scrutiny available and have been established for significant and contentious projects where more extensive review is warranted.

Another benefit of CEAA is that it requires an assessment of the cumulative effects of some projects**.** A cumulative effects assessment is important because evidence is increasing that the most damaging environmental effects may result from the combination of individually minor effects of multiple projects over time. This is the phenomenon of “death by a thousand cuts.” While cumulative effects have not always been adequately considered under CEAA before projects or activities are approved, CEAA helps ensure that decisions are being made with a fulsome and complete understanding of the true impacts of the project or activity. In contrast, the B.C. *Environmental Assessment Act* has no requirement for cumulative effects assessment.

Whatever the level of federal environmental assessment, the purposes are always the same: To identify whether projects will have serious environmental effects that can’t be mitigated to an acceptable level, and to provide recommendations to governments and proponents about how best to reduce or eliminate environmental and cumulative effects related to assessed projects.

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To learn more about the principles of effective environmental assessment, read 'Environmental Assessment Law for a Healthy, Secure and Sustainable Canada,' published in 2012 by West Coast Environmental Law.

CEAA in action — Case study
Proposed Taseko Gold-Copper Mine at Fish Lake, BC (Teztan Biny)

In July 2010, a CEAA panel found that Taseko's proposed Prosperity Mine at Fish Lake, B.C. — which would have turned Little Fish Lake and part of upper Fish Creek into a toxic waste area — would cause significant adverse environmental effects on fish and fish habitat, on navigation, on First Nations' current use of land and resources for traditional purposes, on cultural heritage and on potential or established Aboriginal rights and title. The federal panel also found that the proposed mine (in combination with past, present and future projects) would result in significant adverse cumulative effects on grizzly bears in the South Chilcotin region, and on fish and fish habitat. In particular, the panel found that the proposed project, which would have permanently destroyed Fish Lake, would have a serious, long-term and irreversible effect on the Tsilhqot'in First Nation. The federal government ultimately refused approval for the Taseko Prosperity mine under CEAA. Jim Prentice, then-federal environment minister, called the federal panel report one of the most "scathing" and "probably the most condemning" he had ever read.

The federal government's rejection of this mine project contradicted an approval that had already been issued by the B.C. Environmental Assessment Office earlier that year. The provincial assessment found that the proposed mine would have significant impacts only on fish and fish habitat, but that these impacts were justified and that the project should proceed.

Repealing CEAA
Since CEAA was established in 1995, it has been subject to two parliamentary reviews to evaluate its effectiveness. From the beginning, CEAA has had the benefit of a multi-stakeholder Regulatory Advisory Committee to make expert recommendations on efficient functioning and modifications. However, this expert body's role has been truncated recently and has not been consulted on proposed amendments to CEAA over the past couple of years. In February 2012, the Standing Committee on Environment and Sustainable Development completed its second review and released a report outlining recommended amendments to the Act. Following the release of that report, the 2012 federal Budget Implementation Bill was tabled for first reading on April 26.

The 2012 Budget Implementation Bill would actually repeal CEAA in its entirety and replace it with a new piece of legislation — the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012"). If the Budget implementation Bill is passed into law, CEAA as we currently know it will no longer exist. Instead, Canadians will be left with a federal assessment law that is significantly weaker than its predecessor.

CEAA 2012 makes it clear that the federal government's intention is to weaken the environmental assessment process in Canada. Even more troubling, the repeal of CEAA is only one example of the environmental deregulatory agenda that the federal government is pursuing with respect to other key federal environmental laws, such as the *National Energy Board Act* the *Fisheries Act*, and the *Species at Risk Act*.

Key provisions of concern in CEAA 2012

- **Federal environmental assessments would no longer be conducted where a province provides an "appropriate substitute"**
  Federal environmental assessments have long provided an important backstop or "sober second thought" to less rigorous provincial reviews. Many provincial assessments don't require a complete analysis of the significance of a project's environmental impacts. The Taseko Prosperity Mine environmental assessment, described earlier, provides a clear warning about what would happen in the absence of a federal government assessment. In this case, the federal assessment process under CEAA provided a superior level of scrutiny, and saved B.C., Canada and the Tsilhqot'in people from a provincial approval that likely would have created an expensive legacy of environmental and cultural degradation.

  Duplication of environmental assessments between the provincial and federal governments was eliminated more than a decade ago. As far back as 1997, the House of Commons Standing Committee on Environment and Sustainable Development, in studying the necessity of additional federal-provincial cooperation, indicated "…that there is insufficient evidence of overlap and duplication of environmental regulations or activities of the federal and provincial/territorial governments" and concluded that there were not likely any further efficiencies or costs savings to be achieved[1]. Documenting this success was the finding in 2001 by the Minister of the Environment that of the 7,000 federal assessments conducted annually, only 80-100 are subjected to any level of assessment provincially.[2] The Supreme Court of Canada also confirmed that the existing law has addressed duplication and promotes cooperation with the provinces.[3] The new law is therefore not intended to reduce cooperation but will allow the federal government to shirk its responsibilities to plan for environmental protection.

[1] Report of the House of Commons Standing Committee on Environment and Sustainable Development, Harmonization and Environmental Protection: An analysis of the harmonization initiative of the Canadian Council of Ministers of the Environment, 1997, at p.7.
[2] Canadian Environmental Assessment Agency, *Strengthening Environmental Assessment for Canadians: Report of the Minister of the Environment to the Parliament of Canada on the Review of the Canadian Environmental Assessment Act*, (Ottawa: Public Works and Government Services Canada, 2001).
[3] *Miningwatch Canada v. Canada*, 2010 SCC 2 at para.25.

- **Significantly fewer assessments will be conducted**
  CEAA 2012 shifts from a "trigger" approach, where an assessment is required when certain pre-conditions are met, to a "project list" approach, where an assessment is only required for projects included in the list of "designated projects." The type of projects that will be included is currently unknown, as that decision is left to Cabinet (through the enactment of future regulations) and the Minister of Environment (through an order of the Minister). Such an approach provides complete discretion to Cabinet and the Minister to determine which projects should be deemed to be subject to an assessment.

  Even for projects that Cabinet or the Minister decides to include in the list of "designated projects," there is no requirement that those projects be subject to anything more than a "screening" to determine whether an actual "environmental assessment" is required. The CEAA Agency has complete discretion to determine, based on the screening, whether an actual environmental assessment would be required.

  As a result of this high level of discretion, it is expected that there will be a dramatic drop in the number of environmental assessments conducted.

- **Reducing the number of factors that are required to be considered in assessments, thereby compromising the value of any analysis**
  For the projects that are subject to an environmental assessment, assessing the impacts of a project on renewable resources will no longer be required, even though it is an important indicator of whether we are overtaxing ecosystems. The environmental effects considered will also be limited to matters of federal jurisdiction, such as fish, aquatic species-at-risk, migratory birds, projects on federal lands and affects on Aboriginal people.

  Overall, the removal of this important factor from environmental assessment under CEAA 2012 could severely constrain the ability to evaluate a project from a sustainable development perspective.

- **Establishing binding timelines**
  Very short timelines are given under CEAA 2012 for the initial screening decision to be completed (45 days after posting to the Internet site), and for a decision to be made as to whether an environmental assessment is required. In many cases, it would not provide enough time for sufficient information to be gathered about the potential effects of the project and for the CEAA Agency to determine whether the project may cause adverse environmental effects, such that an environmental assessment is required.

  As for the timelines imposed for environmental assessments, there is a requirement to complete the actual assessment within 365 days, or 24 months if referred to a review panel, though these times can be extended up to three months by the Minister or longer by order of Cabinet. The construction of a major project or activity is subject to many factors. Imposing a rigid deadline onto a complex environmental assessment process could result in incomplete or sloppy

assessments. For example, more than 12 months of scientific data may be required to understand baseline environmental conditions. In some cases, a project proponent also needs extra time to consult with affected groups and communities in order to prepare robust analyses of potential environmental impacts. Finally, those responsible for evaluating a proposed project and its impacts may require expert consultants to study particularly complex aspects of the projects. The debate around "cutting bureaucratic red-tape" is a false one; while timely environmental assessments are important, the primary consideration should always be the delivery of a complete and fully considered environmental assessment report.

- **Public participation reduced**
  Under CEAA 2012, participation in assessments undertaken by the National Energy Board (NEB) or review panels would be limited to any "interested party". This includes those that are determined by the relevant authority to be "directly affected" by the project or to have relevant information or expertise.

  The old CEAA had ensured that the public be given the opportunity to participate in review panel hearings. Under CEAA 2012, the number of people permitted to participate in hearings, such as the Northern Gateway review panel, could be severely limited.

What are the potential impacts of CEAA 2012?

The proposed changes contained in CEAA 2012 would dramatically reduce federal oversight over the environmental impacts of its decisions.

Quite simply, the number of projects assessed would drop dramatically. This means that some projects and activities that would have otherwise been subject to an environmental assessment under the current CEAA will be approved without a government-mandated evaluation of their potential impacts on the environment. No environmental assessment means that there will be no requirement to implement mitigation measures to reduce impacts to a level of insignificance. Fewer federal assessments also means there will be less opportunity for public input and engagement regarding decisions that affect the environment and the health of Canadians. Significant environmental impacts will result from projects that have not benefitted from a CEAA review contributing to the "death by a thousand cuts" concern mentioned above.

For projects or activities that are still subject to an assessment under CEAA 2012, a streamlined process would result in inadequate assessments that do not consider sustainable development. Indeed, recent panels have been working to develop a "sustainability concept" whereby projects are considered for their "net contribution to sustainability." Two examples of this evolution are the joint review panels for the Mackenzie Gas Project in the Northwest Territories and the Kemess North mine in British Columbia. These advances will be lost. For example, if mandatory timelines for hearings are imposed, projects or activities could be approved before the evidence necessary to assess the effects of the proposed action has been collected, which will result in incomplete assessments. Of particular concern are the provisions which remove the requirement to assess cumulative effects and the capacity of natural

resources to meet future needs. This demonstrates the government's lack of commitment to ensuring that projects proceed in a sustainable manner.

By delegating the assessment to provincial governments, development projects will be subject to an inconsistent patchwork of reviews and a system that would be even more difficult for the public to comprehend or participate in. There is real concern that equivalency does not work (e.g. equivalency agreements under other federal legislation do not provide equivalent protection). Further, federal decision makers have different regulatory requirements than provinces, related to distinct federal responsibilities (e.g. fisheries and fish habitat, navigation, migratory birds) and hence different information needs.

Under CEAA 2012, participation in some instances will be limited to those that are determined to be "directly affected" by the project or to have relevant information or expertise, particularly for large oil and gas or pipeline projects that are assessed by the NEB or review panels.The use of the "directly affected" test to limit the scope of participation in Alberta provides a cautionary tale of the chilling affects that such an approach can put on public participation in environmental matters. The importance of public participation cannot be underestimated, and it is critical that the federal government facilitate a meaningful role for the public in federal environmental assessment.

Reform of Canada's federal environmental assessment is a necessary and worthy effort, deserving of an open and transparent discussion on how to improve not devolve assessment process and outcomes. Ecojustice believes that improvements to CEAA are achievable, but not by eviscerating the federal role in environmental assessment, devolving reviews to provincial/territorial governments, and by imposing artificial timelines on a much smaller number of projects. Canadians know that the costs of environmental damage associated with poorly evaluated (or non-evaluated) projects may far exceed the economic gains they produce. Environmental assessments must be designed to serve the long-term interests of all Canadians and the environment we depend on, not just the short-term interests of industry. However, if CEAA 2012 is passed into law we will have an assessment regime that caters to the needs of industry rather than protecting the environment for current and future generations.

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