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The Evolution of Federal EA in Canada: One Step Forward, Two Steps Back?

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History of federal environmental assessment (EA) in Canada

Jurisdiction over environmental assessments (EAs) in Canada is shared among the federal and provincial levels of government. Environmental assessments are carried out under provincial legislation in all 10 provinces. All three territories have their own EA process. Most provinces and territories enacted EA legislation in the 1980s.

Federal environmental assessment efforts in Canada began when the federal Cabinet decided in the early 1970s to establish the Federal Environmental Assessment Review Office to oversee the newly established non-legislative EA process. The focus was on a screening process to identify proposed federal projects that had the potential to cause unacceptable pollution. Proposed projects identified through the screening process were expected to go through a more thorough environmental assessment process.

The initial Cabinet decision was followed-up with a broader Cabinet policy directive in 1973 to carry out an environmental assessment of significant new proposals. The main implication of the 1973 directive was to broaden the application of the process from federal projects to private projects with federal involvement in the form of federal financial support, land, or regulatory oversight. Federal EAs continued to be non-legislative. The determination of whether a full assessment was needed, as well as the design and implementation of the EA process was left in the hands of those responsible for the ultimate project decision.

The Environmental Assessment and Review Process (EARP) Guidelines Order was passed in 1984[1], providing for a more formalized process following both an internal and external review. The guidelines order applied to "initiatives, undertakings, and activities" for which the federal government had a "decision-making responsibility."[2] During the implementation of the EARP Guidelines Order, it became clear that proposals included not only physical projects and activities, but also policies, plans and programs.

In response to ongoing criticism of the federal EA process under the EARP Guidelines Order and the growing number of successful court challenges involving the federal EA process, the government introduced a bill in 1990 to entrench the federal EA process in legislation in the form of the *Canadian Environmental Assessment Act* (CEAA)[3]. The Act was passed in 1992 by the Conservative Government, but proclamation was delayed pending the development of key regulations. A change in government in

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[1] *Environmental Assessment and Review Process Guidelines Order,* SOR/84-467.
[2] *Ibid*.
[3] *Canadian Environmental Assessment Act*, SC 1992, c 37 [CEAA 1995]. For a detailed assessment of CEAA 1995, see M. Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, Ont.: LexisNexis Butterworths, 2008)

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1993 resulted in further changes by the new Liberal Government and led to proclamation of CEAA in January, 1995. A number of modest adjustments were made to CEAA 1995 in 2003 and 2010.[4]

CEAA 1995: When did the Act Apply?

The application of CEAA 1995 was determined through a legal test in the form of a combination of definitions and project lists. There were three principle reasons for this approach in CEAA 1995.

The dominant influence on the approach was constitutional. It was thought to be difficult to come up with a list of all projects, or all types of projects, that warrant an environmental assessment and for which there is a sufficient federal role to justify an assessment at the federal level. The second was a concern that a list would tend to exclude unanticipated and new projects, which are sometimes the projects most in need of environmental assessments. The third consideration was to ensure consistent and predictable application of the process, rather than a discretionary one influenced by political considerations.

The definition of "project" was central to determining whether the CEAA 1995 process applies. If a proposed activity did not meet the definition of project in section 2 of the Act, the process did not apply. If the proposed activity did meet the definition, the process applied only if additional requirements discussed below were met. The definition of project had two branches, one for undertakings in relation to a physical work, and one for physical activities not in relation to a physical work.

Undertakings related to a physical work (such as construction, operation modification and abandonment) were considered to be projects unless they were excluded through exclusion list regulations[5]. Activities not related to a physical work were only considered to be projects if they were listed in an inclusion list regulation[6]. Not all activities that meet the definition of project were assessed. Some were excluded for national security reasons, some in case of emergencies, and some were excluded due to insignificant environmental impacts.

Projects that were not excluded required an assessment before a federal authority, as defined in section 2, were made a decision under section 5 of the Act. The requirements of section 5 were central to the application of the CEAA 1995 process. They identified the federal decisions that trigger an assessment under the Act. They also set an expectation that the EA process be carried out early, before federal project decisions were made. If no section 5 decision was required, the project did not trigger an assessment under CEAA.

The requirements of section 5 created practical difficulties in cases where it was unclear for one reason or another whether a section 5 decision would be required. For example, section 35 of the *Fisheries Act* required an approval in cases of alteration of fish habitat[7]. Whether a project would cause an alteration of fish habitat may not be known for certain until the late design stages of the project, much later than an EA process should ideally be initiated.

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[4] *An Act to amend the Canadian Environmental Assessment Act,* SC 2003, c 9; *Jobs and Economic Growth Act*, SC 2010, c 12.
[5] *Exclusion List Regulations*, SOR/94-639 (repealed) and SOR/2007-108.
[6] *Inclusion List Regulations*, SOR/94-637
[7] *Fisheries Act*, RSC 1985, c F-14.

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Alternative triggers to section 5 were available in sections 46 to 48, generally referred to as the transboundary provisions of the Act. Under these sections, the Minister could, in certain circumstances, initiate an environmental assessment of a project even in the absence of a section 5 decision, if the project was expected to have environmental effects across provincial or international boundaries or on federal lands.

In summary, the Act generally applied to projects that involved decisions by one or more federal authority. Some projects were excluded from the application of the Act, either through exclusion lists in regulations or through statutory provisions. Not all decisions of federal authorities that relate to projects triggered an environmental assessment. Only decisions included in Section 5 of the Act triggered assessment of a project. Sections 46 to 48 provided alternative triggers for projects with transboundary implications.

CEAA 1995: Process Options

There were four process options under the CEAA 1995. Assessments were carried out by way of a screening, a comprehensive study, a panel review, mediation, or some combination of these four processes. More than 99% of all projects that triggered the EA process under CEAA underwent a screening level assessment only[8]. The screening process was designed to impose minimal process and substantive requirements, thereby offering maximum flexibility to federal decision makers responsible for the EA process of a particular project. At any time before, during or after a screening of a project, a responsible authority or the Minister of the Environment could decide that a panel review was the more appropriate process option and refer the project to a panel. Screening level assessments could be further streamlined through the use of model and replacement class screening options.

Key mandatory steps in the screening process included public notice of commencement of the assessment, determination of the scope of project and assessment, preparation of the screening report, and the final project decision. Coordination among federal decision makers and with other jurisdictions depended on the nature and extent of the involvement of multiple decision makers and jurisdictions. Transparency and public engagement obligations were limited to certain notice requirements and minimum waiting periods before decision-making. Active public engagement in scoping, the preparation of the screening report and the final decision was discretionary.

The requirement, design and implementation of follow-up programs for screenings were within the discretion of federal decision makers on a project by project basis. Process and final project decisions were made by responsible authorities, defined in the Act to be any federal authority with section 5 decision making responsibility for the project being assessed. Responsible authorities were required to make final decisions in light of the outcome of the EA process. A fundamental question in the EA process was whether the project was likely to cause significant adverse environmental effects. Depending on the answer to this question, responsible authorities had different options to exercise their powers, duties or functions, to refuse to do so, or to impose conditions.

About 5 to 10 comprehensive studies were carried out under CEAA 1995 in an average year[9]. Comprehensive studies were required as the minimum level of assessment

[8] Meinhard Doelle & Chris Tollefson, "The Federal Environmental Assessment Process", *Environmental Law: Cases and Materials*, 2d ed (Toronto: Carswell, 2013) at 504.
[9] *Ibid* at 505.

for all projects that met the description of projects listed in the comprehensive study regulations. A comprehensive study was a hybrid between a screening and a panel review. It was similar to a screening in the sense that the responsible authorities retained control over some of the process and the final project decision. In 2010, responsibility for the process was shifted to the Canadian Environmental Assessment Agency. A comprehensive study was similar to a panel review in that it included mandatory public engagement at critical steps in the process, as well as a participant funding program. The minimum standard for the scope of the assessment of a comprehensive study was also the same as for a panel review.

The mandatory steps in the comprehensive study process included and built on those required for a screening. After the notice of commencement of the EA, a comprehensive study included mandatory public engagement at the scoping stage, during the preparation of the environmental assessment report and before the project decision. In addition, from 2003 to 2010, a comprehensive study involved a final track decision. This means that contrary to the screening process, a formal decision was made early in the comprehensive study process to either continue with the comprehensive study or refer the project to a review panel. The decision was usually made in conjunction with the scoping decision. The public had to be given an opportunity to comment before the decision was made, and the decision, once made, was final.

Comprehensive studies carried out after 2003 were coordinated by the Canadian Environmental Assessment Agency. This means the agency coordinated among various responsible authorities and with other jurisdictions interested in collaborating in some form with the federal EA. Coordination included the identification of responsible authorities, the scoping decision, the preparation and review of the environmental assessment report and the project decision. It is important, however, to note that the power of the Agency as coordinator was limited to process. It could not impose decisions, just coordinate among the decision-makers.

The Minister of the Environment, who was not involved in screenings other than to decide whether a panel review was warranted, played an oversight role in the comprehensive study process. Most notably, the Minister was required to review the comprehensive study report, seek public input, and essentially give the green light for responsible authorities to make final project decisions. Responsible authorities were then required to make final decisions in light of the outcomes of the EA process, and in particular, consider whether the project was likely to cause significant adverse environmental effects. As was the case for screenings, responsible authorities had different options to exercise their powers, duties or functions, to refuse to do so, or to impose conditions. Follow-up was mandatory for all comprehensive studies.

Panel reviews made up between one and five environmental assessments initiated under the Act in a given year[10]. Key differences between comprehensive studies and panel reviews included the following:

- The process was taken out of the hands of responsible authorities and placed in the hands of independent panel members;
- Panel reviews, as a matter of practice, always involved public hearings, while public hearings were optional for comprehensive studies;

[10] *Ibid* at 506.

- Panel reviews involved an enhanced role for the Minister of the Environment, most notably with respect to scoping; and
- The final project decision in case of a panel review was subject to Cabinet approval.

The key process decisions in a panel review were made by the Minister, while the implementation of the process was left to an independent panel. Once the decision to refer a project to a panel was made, the Minister determined the scope of the project, the scope of the assessment, set the terms of reference of the panel, and appointed panel members. In practice, the panel was often involved in the scoping process, and frequently held scoping hearings. Once the scope determinations were made, the review panel took control over the process in accordance with the terms of reference issued by the Minister. It established procedures, held hearings, reviewed oral and written submissions, and prepared recommendations for decision makers. Section 34 of CEAA 1995 outlined the key responsibilities of the panel:

- Ensure that the required information is obtained and made available to the public;
- Hold hearings in a manner that offers the public an opportunity to participate in the assessment;
- Prepare a report that includes conclusions, recommendations and a summary of comments received from the public; and
- Submit the report to the Minister and the responsible authority.

A review panel had the power to summon any person to appear as a witness to give evidence and produce documents considered necessary for the assessment. The panel had the same powers as a court of record, and its orders could be enforced in the Federal Court.

At the conclusion of the EA process, the panel prepared a final report on the results of the environmental assessment. The report usually identified whether the project was likely to cause significant adverse environmental effects, and whether it should be allowed to proceed. If the panel recommended that the project be permitted to proceed, it would usually propose conditions and make other recommendations on how to minimize any adverse effect and maximize expected benefits. Panels, commonly, also commented on the contribution the project was expected to make to sustainable development.

The Minister had the responsibility to make the panel report available to the public. The report was then used by the responsible authority, with the approval of the Governor in Council, to determine whether to exercise its powers, duties and functions to allow the project to proceed. The determination that the project could proceed could be made either on the basis that the project was not likely to cause significant adverse environmental effects, or that significant effects were justified in the circumstances. If the Governor in Council decided that the project could proceed based on the environmental assessment carried out by the panel, responsible authorities still had the discretion to decide whether to exercise their powers, duties and functions under section 5.[11] The panel's recommendations beyond the "likely significant" were generally intended to assist

[11] The section 5 powers included the powers to make a regulatory decision with respect to the project, financially support the project, offer an interest in land for the project, and to propose the project.

responsible authorities in make determinations consistent with the purposes of the Act, such as the promotion of sustainable development.

Public participation is a key feature of panel reviews. The importance of public participation was reflected in part in the additional transparency measures incorporated in CEAA 1995. Included in the concept of transparency were public notices of important steps in the process, direct access to the panel through hearings, and access to relevant information and documentation through the electronic and paper registries. Intervenor funding and the ability to adjust the nature of the hearing to the cultural norms or preferences of those interested in participating were other strengths of the public participation process for panel reviews under CEAA 1995.

In addition to the standard panel review process, CEAA provided for joint panel reviews with other jurisdictions and for panel substitutions. A joint panel process allowed for cooperation between the federal government and other jurisdictions, such as provinces. It generally involved each jurisdiction appointing some of the panel members and an agreement on how the joint process would meet the legal requirements of all the jurisdictions involved. Issues covered in such agreements for joint panel reviews commonly included the scope of the assessment, timelines, intervenor funding, and other procedural issues. These agreements most commonly took the form of project-specific memorandums of understanding.

Panel substitution under CEAA 1995 was different from joint panels in a number of ways. First of all, substitution was only possible under the Act with other federal processes. Secondly, a substitution was only possible if the Minister of the Environment was of the opinion that an alternate federal process was suitable and would adequately address the factors required for a panel review under section 16 of CEAA 1995. The power to accept a substitute process was set out in subsection 43(1) of CEAA 1995.

Mediation was available informally in most EA processes. Its function in those circumstances was to complement rather than replace the formal process. Most EA processes could accommodate a mediation process as part of the traditional EA process[12]. In CEAA 1995, for example, there was nothing in the Act to prevent a responsible authority in the context of a screening or a comprehensive study, or a panel in case of a panel review, from appointing a mediator to resolve a particular issue. In addition to this informal use of mediation, CEAA also provided for mediation as a separate process option. In such cases, mediation could replace any other process requirements, and the mediation report could be used like any other EA report by the responsible authority to make its final project decision. The discretion to refer a project to mediation rested with the Minister of the Environment. The Minister could exercise this discretion if the interested parties have been identified and are willing to participate in the mediation.

The New *Canadian Environmental Assessment Act* (CEAA 2012)[13]

In March 2012, the Canadian government announced fundamental changes to the federal EA process to be introduced as part of the 2012 Budget Implementation Bill[14]. The Bill was introduced in April 2012, and was passed by the House of Commons in June,

[12] Meinhard Doelle & A John Sinclair, "Mediation in Environmental Assessments in Canada: Unfulfilled Promise?" (2010) 33 Dalhousie L.J. 124-125 [Doelle & Sinclair].

[13] This overview of CEAA 2012 is adapted from M. Doelle, "CEAA 2012: The End Of Federal EA As We Know It?" (2012) 24 J Envlt L & Prac 1.

2012. It introduced a completely new *Canadian Environmental Assessment Act* (CEAA 2012). The following is an overview of CEAA 2012 and how it differs from the previous EA process in the form of CEAA 1995.

In the following sections, the key features of CEAA 2012 are highlighted. A thorough assessment of the implications of CEAA 2012 will only be possible once all the regulations are in place and once there is some practical experience with the implementation of the Act. The latter is particularly critical due to the high degree of discretion introduced into CEAA 2012, most notably with respect to the triggering of the EA process, various forms of delegation to other jurisdictions, and the scope of federal assessments.[15]

CEAA 2012: Who is Responsible for Federal EAs?

Under CEAA 2012, the primary responsibility for the EA process is limited to three agencies, the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC) and the Canadian Environmental Assessment Agency (CEA Agency). Under section 15, in addition to these three agencies, there is an option for other federal regulatory authorities, if they hold public hearings, to be designated to carry out the EA process. The NEB and the CNSC carry out assessments of projects within their regulatory authority. Section 15 allows for other regulators who hold regulatory hearings to do the same. All other federal EAs under CEAA are to be carried out centrally by the CEA Agency.

With the exception of EAs carried out by the NEB and the CNSC, this approach spells the end of the self-assessment experiment that was so fundamental to CEAA 1995. Self-assessment, in this context, refers to the idea that the federal decision-maker itself is asked to oversee the gathering of information about the broader environmental implications of its decision, and the evaluation of the information gathered, rather than a more independent agency. To be fair, this experiment was controversial from the start, and it has been questioned throughout the life of CEAA 1995, including in the previous parliamentary review in 2000[16].

CEAA 2012: When does the Act apply?

Under CEAA 2012 there is no longer a legal test for whether a project requires an assessment under the Act, but a definition of "designated project", which refers to a regulation that lists all projects that require registration.[17] Once registered, however, designated projects, other than those under the control of the NEB or the CNSC, are not automatically assessed[18]. Instead the CEA Agency is given broad discretion to determine

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[14] *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures,* SC 2012, c 38 [CEAA 2012].

[15] Government of Canada, "Canadian Environmental Assessment Act: Overview" (27 March 2013), online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/default.asp?lang=en&n=16254939-1>.

[16] Canadian Environmental Assessment Agency, *Year 2000 review of the Canadian Environmental Assessment Act* (2000); Minister of the Environment , *Strengthening Environmental Assessment for Canadians* (Canadian Environmental Assessment Agency, 2001); Meinhard Doelle, *The Federal EA Process: A Guide and Critique* (Markham: LexisNexis Canada, 2008), 199-237.

[17] *Regulations Designating Physical Activities*, SOR/2012-147.

[18] For additional commentary see Robert B Gibson, "In full retreat: the Canadian government's new

whether a federal EA is required. The Act offers no clear direction on how this discretion is to be exercised. The preamble, the purpose section, and some general factors to be considered by the Agency offer the only guidance in this regard. The main limitation imposed on the CEA Agency is that it must consider the information provided by the proponent and the comments received by members of the public.

For projects not listed as designated projects, the Minister has discretion to require an EA under section 14(2). The Minister can exercise this discretion on the basis of the expected adverse environmental effects of the project or on the basis of public concern, but cannot be required to exercise this power. This approach is comparable to the Minister's discretion under CEAA 1995 to refer a project to a review panel.

Projects on federal lands and outside Canada are addressed in sections 67 and 68 of CEAA 2012. These provisions are fundamentally different from the transboundary provisions of CEAA 1995. First, sections 67 and 68 do not apply to projects with interprovincial effects, whereas the transboundary provisions in CEAA 1995 did. More fundamentally, sections 67 and 68 do not require federal decision-makers to carry out an EA at all; they only require a decision as to whether the project is likely to cause significant adverse environmental effects and if so, whether those effects are justified in the circumstances. There is no requirement to follow the EA process set out in CEAA 2012 or any EA process before making these determinations.

Whether a federal environmental assessment is required of a designated project listed in regulations is ultimately left to the discretion of the CEA Agency, unless the NEB or CNSC are responsible for the EA. Whether a federal environmental assessment is required of a project not listed as a designated project in regulations is left to the discretion of the Minister. The result is a triggering process with considerable uncertainty and a federal EA process that at best will apply to less than 10% of projects assessed under CEAA 1995[19].

CEAA 2012: Process Options and Features

CEAA 1995 involved four basic process options: screenings, comprehensive studies, mediation, and panel reviews. Screenings and comprehensive studies were alternative forms of self-assessment, whereas mediation and panel reviews could either replace or follow the screening or comprehensive study process. Under CEAA 2012, there are only two process options: one is referred to as a standard "environmental assessment", the other is the "panel review" option. In essence, most process options including mediation have been eliminated as process options under CEAA 2012, leaving a generic EA process and the option to refer EAs to a panel review[20].

The "Standard" EA Process

The following are the key features of the "standard" EA process under CEAA 2012. The process is initiated when the proponent of a designated project registers its project with the CEA Agency. The information required to be included with the

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environmental assessment law undoes decades of progress", Impact Assessment and Project Appraisal, (2012) 30:3, Impact Assessment and Project Appraisal, 181-182 [Gibson].

[19] *Ibid* at 179.

[20] For a discussion on how mediation might be used in EA, see Doelle & Sinclair, *supra* note 12.

registration of the project is set out in regulations.[21] The proponent of a designated project is not permitted to take measures to implement the project that would have an impact on the environmental effects listed in Section 5 of the Act until the CEA Agency has decided that no EA under CEAA is required or the proponent complies with the conditions imposed at the conclusion of the EA process[22].

The timelines from registration to the triggering decision are tight. The CEA Agency, on receiving the registration documents from the proponent, has 10 days to decide if it requires more information from the proponent. The CEA Agency has to post notices to the public on an electronic registry, allow 20 days for public comments, and make its decision within 45 days[23]. Within these 45 days, the CEA Agency is also empowered to seek input from expert federal departments to inform its decision[24]. A notice of the CEA Agency's decision at the end of this 45-day period has to be posted on the electronic registry[25].

If a decision is made to require an environmental assessment of the project under the Act, a notice of commencement has to be posted on the electronic registry. The responsible authority takes over at this stage. For projects for which the NEB or the CNSC is designated as the responsible authority, the respective designated regulatory agency is responsible for the EA process. For projects without a regulatory agency designated as the responsible authority for the EA process, the CEA Agency acts as the responsible authority for purposes of the EA process.

The EA process to be followed is not set out in detail in the Act. Legislative provisions focus on the ability to delegate or coordinate with other jurisdictions, and the power to request additional information from the proponent and from expert federal departments, not on the actual process requirements of an environmental assessment under CEAA 2012. The scope of the EA to be carried out is set out in section 19 and is discussed below. The main process parameters in the Act are the public notice requirements already discussed and the timelines for completing the process.

Under section 27, the responsible authority is given 365 days to complete the standard environmental assessment. Time spent by the proponent to fulfill its obligations in the process does not count toward the 365 days nor are timelines imposed on the proponent. The Minister may grant an extension of up to three months. Process requirements for EAs carried out by the NEB are tailored to the specific NEB regulatory processes.

Panel Reviews

The only alternative to the standard EA process under CEAA 2012 is a panel review. There is limited guidance in the Act on the process steps for a panel review, so only practice will tell whether and how much the panel review process may change from the process under CEAA 1995. Based on legislative changes, key changes include fewer panels, less public participation, narrower focus, and shorter timelines. The key legislative provisions for panel reviews are now briefly reviewed.

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[21] *Prescribed Information for the Description of a Designated Project Regulations*, SOR/2012-148.
[22] CEAA 2012, *supra* note 14 at ss 6-7.
[23] CEAA 2012, supra note 14 at s 9.
[24] *Ibid* at s 11.
[25] *Ibid* at s 12.

The Minister has 60 days from the notice of commencement of the EA process under CEAA 2012 to decide whether to refer an environmental assessment to a panel review[26]. This is a significant departure, as the Minister previously had the discretion to refer any project to a panel review anytime during the EA process. Sixty days is a short time frame both for the public to gain sufficient understanding of the proposed project and voice their concerns, and for the Minister to make a final process decision.

No panel reviews are permitted for projects for which the NEB or the CNSC are identified as responsible authorities in the designated project regulations[27]. This is consistent with the general approach in CEAA 2012 that deems that the regulatory processes of the NEB and the CNSC, which include public hearings, are sufficient to meet the objectives of CEAA.

Given the narrow scope and expected limited application of CEAA, it is likely a fair conclusion that not much would be gained by allowing a CEAA panel review instead of an NEB or CNSC regulatory process, because the scope requirements for the panel review process under CEAA 2012 is sufficiently restricted that it covers little more than the regulatory processes of the NEB and the CNSC. However, this does not mean that the NEB and CNSC are well suited as regulators to engage the public in a true planning process that considers whether the proposed project is the most appropriate way to meet societal needs and how its contribution to sustainability can be maximized[28]. It rather suggests that the federal EA process has been turned into a much narrower process with a regulatory rather than a planning focus.

Another change to the panel review process is that one-person panels are now permitted, whereas previously a minimum of three panel members was required[29]. There is potential for this to be a positive change, but only if one-person panels are used instead of the standard process. The independence of the panel has the potential to enhance the EA process and its credibility to intervenors. If, however, one-person panels are used for large projects that otherwise would be subject to three-person panels, the ability to appoint one-person panels could signify a further step backward for the panel review process. In other words, whether the options to appoint one-person panels is a positive step depends on whether it results in more panel reviews being carried out.

The Minister is specifically authorized under the new Act to seek further information from the proponent after reviewing the panel report and before making a final project decision[30]. While this could allow the Minister to fill information gaps left at the conclusion of a panel review, this new Ministerial power takes the public and the panel out of the critical final stage of the EA process. The Minister will not have the benefit of the perspectives of the public or the panel in evaluating the information provided by the proponent at this crucial stage.

CEAA 2012 imposes an overall timeline of 2 years for panel reviews[31]. As with the timeline for the standard EA process, time spent by the proponent to provide information requested by the panel does not count toward the two-year limit[32]. The time

[26] *Ibid* at s 38.
[27] *Ibid* at s 38(6).
[28] Gibson, *supra* note 17 at 185.
[29] CEAA 2012, *supra* note 14 at s 42(1).
[30] *Ibid* at s 47(2).
[31] *Ibid* s 38(3).
[32] *Ibid* at ss 48 and 54.

limit can be extended for up to three months by the federal project decision-maker, or by the GIC on recommendation from the Minister[33]. The Minister is required to specify time limits for individual steps in the panel review process that collectively do not exceed the two-year timeline. In cases where the panel does not conclude its work within the required timeline, the process is to be terminated by the Minister[34]. In this case, the EA will be completed by the CEA Agency, which is then required to file a final report with the Minister in place of the panel report[35].

Many of the other features of panel reviews, such as the requirement for public hearings, access to relevant documents, notice and publication of the panel report, and final project decision, are retained in CEAA 2012. At the same time, federal review panels will be unrecognizable to anyone familiar with panel reviews under CEAA 1995, mainly due to the narrow scope of EA under CEAA 2012.

The power to establish a joint review panel with another jurisdiction is retained in CEAA 2012. This joint panel review option is now the most promising mechanism through which any environmental assessment under CEAA will be sufficiently comprehensive to serve as a planning tool and as a basis for determining whether the proposed project can reasonably be expected to make a contribution to sustainable development. All other process options under CEAA 2012, including federal panel reviews, are too limited in scope to serve anything close to the function panel reviews served under CEAA 1995.

CEAA 2012: Decision-making

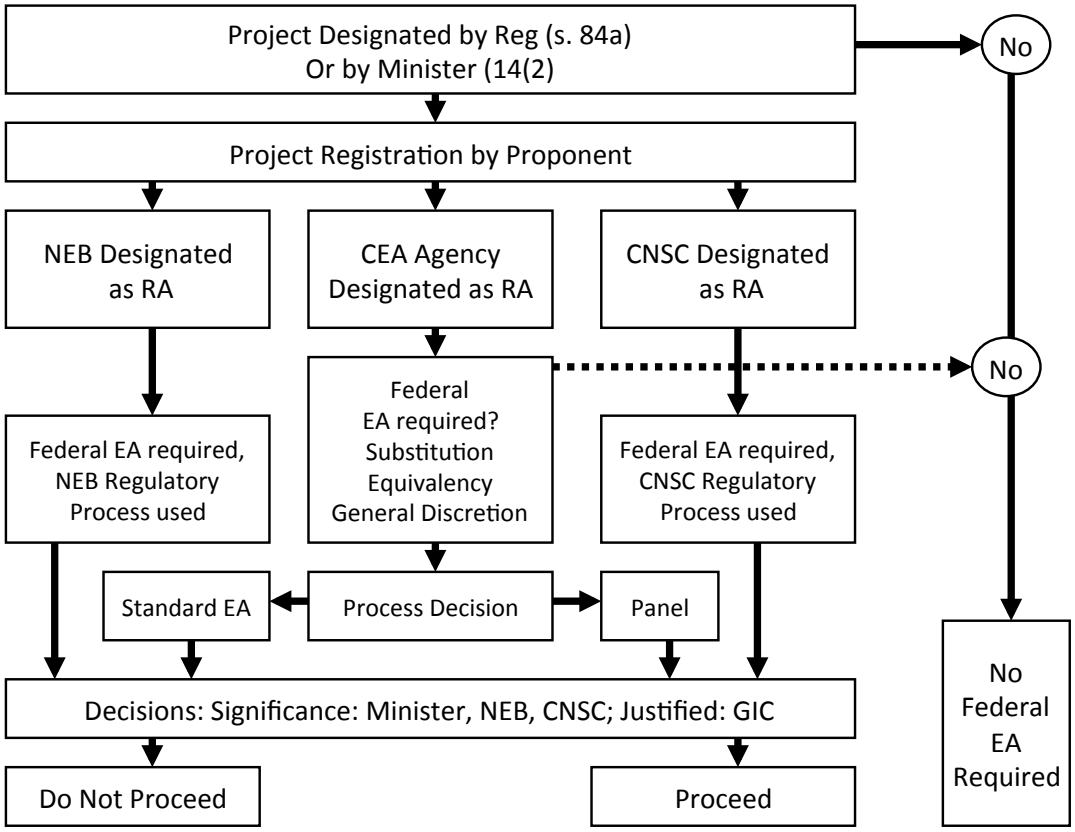
There are important changes in CEAA 2012 to the way project decisions will be made. They largely reflect this move away from EA as a planning tool to inform comprehensive project decisions. The basic approach in CEAA 2012 is that responsible authorities determine whether a project is likely to cause significant adverse environmental effects as defined in section 5(1) and (2). Where the responsible authority is the CEA Agency, that decision is made by the Minister. In case of a panel review, the "significance" determination is also made by the Minister. If the project is found to result in significant adverse effects under section 5, the Governor in Council (GIC) then determines whether those effects are justified in the circumstances. The EA process does not inform this GIC determination, and there are no provisions for transparency or accountability for this determination.

If it is determined that significant effects are justified, the responsible authority or Minister in charge of the EA process determines the conditions for approval of the project, not the GIC. Conditions are to be limited to those that are "directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority"[36]. This means that the ability to impose conditions has been considerably narrowed under CEAA 2012. The decision statement, which has to include conditions regarding mitigation measures and follow-up programs, is required under section 54 to be made public. The statement is to include the decision regarding significance, the decision on whether significant effects are justified and the conditions for approval. CEAA 1995

[33] *Ibid* at ss 54(3) and 54(4).
[34] *Ibid* at s 49.
[35] *Ibid* at s 50.
[36] *Ibid* at s 53(2).

required public reasons for a decision that significant effects are justified, CEAA 2012 does not.

The concept of equivalency, discussed below, also has implications for the federal decision making process. The basic concept is that in cases where a provincial process is found to be equivalent to the federal process, the federal process does not apply[37]. In case of an equivalency finding under section 37 with respect to a provincial EA process, there will therefore be no federal process, and there will be no legal requirement to consider the results of the equivalent provincial EA process, and no federal EA decision, though there may still be federal regulatory decisions. What is not clear is whether federal decision-makers responsible for regulatory decisions, in case of a project subject to a provincial EA process declared to be equivalent, are expected to consider the results of the provincial EA process in making their regulatory decisions.



CEAA 2012: The Scope of EA

Along with the reduction of the number of EAs to be carried out and the discretion introduced into the triggering process, the changes to the scope of federal EAs have the potential to be among the most significant changes to the federal process. The Act narrows the scope of the project, the definition of environmental effect, and the factors to be considered.

[37] *Ibid* at s 37.

The scope of the project to be assessed, which had recently been determined by the SCC in the *Red Chris* decision to be quite broad[38], has been significantly narrowed in CEAA 2012. The definition of 'designated project' includes "any physical activities incidental" to the physical activity that triggered the EA[39]. A key difference between CEAA 1995 and CEAA 2012 in this regard is that CEAA 1995, as interpreted by the SCC in *Red Chris*, required that the scope of the project be at least the full project as proposed by the proponent. CEAA 2012 allows projects to be scoped much more narrowly.

Under CEAA 2012, depending on the interpretation of "incidental", the scope of the project could be limited to the specific component of the project listed on the designated project list. In other words, CEAA 2012 is potentially a step back to the situation in the *TrueNorth* decision[40], where an oil sands development was scoped as a river destruction project, because it was the destruction of the river that triggered the federal EA. The only specific provision regarding the scoping of a project in CEAA 2012, other than the definition of a designated project, is section 16, which provides for coordination in case of two related designated projects.

The definition of environmental effect to be considered for some assessments has been severely narrowed, making it the most drastic of the various changes to the scope of assessment under the new Act. Under CEAA 1995, environmental effects included any effect a project had on the biophysical environment, and it included the social, economic and cultural effects of those biophysical changes[41]. Under CEAA 2012, the definition of environmental effect for some assessments is limited to a small number of environmental components specifically listed in section 5(1). Given the critical importance of the definition of environmental effect for the scope of EA, a summary of the components included in Section 5(1) is included here:

- a change to the following components within the legislative control of Parliament:
    - fish and fish habitat as defined in the *Fisheries Act*,
    - aquatic species as defined in the *Species at Risk Act*,
    - migratory birds as defined in the *Migratory Birds Convention Act*,
    - any other component in Schedule 2 (which can be amended by the GIC);
- a change that may be caused to the environment that would occur
    - on federal lands,
    - across a provincial boundary,
    - outside Canada,
- with respect to aboriginal peoples, an effect of any change that may be caused to the environment on
    - health and socio-economic conditions,
    - physical and cultural heritage,
    - the current use of lands and resources for traditional purposes, or
    - any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

[38] *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2 [Red Chris]
[39] *Canadian Environmental Assessment Act*, SC 2012, c 19, s.2(1).
[40] *Prairie Acid Rain Coalition v Canada (Minister of Fisheries & Oceans)*, 2006 FCA 31 [TrueNorth].
[41] CEAA 1995, supra note 3 at s 2(1).

In case of an existing federal regulatory decision for the project assessed, 5(2) provides for some requirement to consider other effects directly linked to the regulatory responsibility to be exercised, and to consider social, economic and cultural effects of the environmental effects included in 5(1). Given the significant changes to the federal regulatory approach, including changes to the *Fisheries Act*[42] and to the *Navigable Waters Protection Act,*[43] it is difficult to assess the role of Section 5(2) at this early stage of the implementation of CEAA 2012.

The factors to be assessed are set out in section 19, replacing section 16 of CEAA 1995. The changes to the factors are more subtle than the change to the definition of environmental effect, but they signal a further erosion of the federal EA process. Most notably, the references to alternatives to the project and to the need for the project have been taken out. These references in CEAA 1995 were not mandatory, but they had become standard for comprehensive studies and for panel reviews. An assessment of the effect of the project on the capacity of renewable resources is also no longer required. On a positive note, the result of regional studies carried out under sections 73 and 74 are included in the list of factors to be taken into account. There is, however, no requirement to carry out such studies[44].

CEAA 2012: Harmonization with Provincial EAs

CEAA 2012 represents a rejection of the view that harmonization is best achieved through inter-jurisdictional cooperation leading to one comprehensive EA process that provides the basis for decisions at all levels of government. Instead, CEAA 2012 makes every effort to ensure that the federal process does not apply whenever there is a concern about overlap with a provincial or other process. The approach in CEAA 2012 involves picking one jurisdiction to carry out an EA process, with no direct involvement by the other levels of government and few other safeguards to ensure that the EA will provide a solid basis for decision-making at all relevant levels of government.

The discretion to decide on a case by case basis whether a designated project should undergo a federal EA under CEAA 2012, and whether the EA should take the form of a standard EA process or a panel review already is a powerful tool to limit the application of the federal EA process and to avoid any overlap with provincial EA processes. The narrow scope of the federal EA process and the harmonization of the EA process with federal regulatory processes further reduces any risk of overlap with provincial EAs.

To add further opportunities for harmonization, CEAA 2012 includes provisions for substitution and equivalency. Substitution to provincial EA processes is framed in mandatory language and linked to a request by a province[45], while substitution to federal and aboriginal processes is framed in more permissive language[46]. In both cases, however, the substitution is dependent on the Minister forming an opinion that the process in

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[42] *Fisheries Act*, *supra* note 7; *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19; *Jobs and Growth Act*, 2012, SC 2012, c 31.
[43] *Navigable Waters Protection Act*, RSC 1985, c N-22; *Jobs and Growth Act*, 2012, SC 2012, c 31.
[44] For a discussion on how these studies could be incorporated see Robert Gibson et al, "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" (2010) 20 JELP 175.
[45] CEAA 2012, *supra* note 14 at s 37.
[46] *Ibid* at s 32.

question "would be an appropriate substitute"[47]. In the absence of an exclusive list of substantive criteria, this language, in the end, still leaves substitution in the discretion of the Minister. Substitution can be approved for an individual designated project or a class of designated projects. Substitution is not an option for panel reviews or for EAs carried out by the NEB or the CNSC. Once a substitution is approved, the approved process is deemed to meet the EA requirements under CEAA. The responsible authority or the Minister, as appropriate, must then make a project decision based on the final report prepared at the conclusion of the substitute process[48].

Equivalency takes the substitution process one step further by permitting the Governor in Council to fully exempt a designated project or class of designated projects from the application of CEAA. The power for this complete exemption is limited to approved provincial substitution processes. The only two additional requirements currently identified in section 37 are that the provincial process must identify significant adverse effects and that it must ensure the implementation of mitigation measures. The section makes provision for the Minister to add additional conditions.

In summary, when it comes to harmonization, CEAA 2012 has shifted from a cooperative approach designed to encourage one comprehensive environmental assessment process, involving all jurisdictions with decision making responsibilities, to one that sees delegation to the provinces and narrowing of federal EAs as the primary tools for avoiding duplication among jurisdictions involved in project EAs. This will place significant new burdens on provincial and other EA processes in Canada, such as those carried out under Aboriginal self-government agreements, to ensure a comprehensive consideration of the environmental, social and economic implications of proposed new developments.

CEAA 2012: Public Engagement

The standard EA process in CEAA has few legislative requirements regarding public participation when compared to the comprehensive study process under CEAA 1995. Strict timelines tend to put members of the public at a disadvantage. Furthermore, fewer federal EAs mean fewer opportunities for members of the public to have input into project planning or decision-making.

Public engagement is also reduced through the new triggering process. By starting the CEAA 2012 process with the registration document filed by the proponent that will seek to convince federal decision-makers that the project does not warrant an EA, the proponent is encouraged to complete and defend the project design before the EA process starts. The public is thereby essentially excluded from the project planning process. This in turn further minimizes the value of the process by pushing it further to the technical regulatory stage, and further away from an EA planning process.

The new concept of "interested party" may further reduce public engagement. CEAA 2012 has the potential to create two classes of the public, those with a direct interest who will be full participants, and those who do not qualify as having a direct interest, who will be excluded from some parts of the federal EA process. To appreciate this concern, it is perhaps helpful to start with the definition of "interested party" in section 2(1). This definition is linked to designated projects. The determination of who is an interested party

[47] *Ibid*.
[48] *Ibid* at s 36.

is not resolved in the definition, but is rather left to the discretion of the NEB or the review panel under section 2(2).

The implication is that for review panels and for EAs carried out by the NEB, it matters whether a member of the public is considered to be an "interested party". Section 19(1)(c) uses the term interested party, re-enforcing the idea that two classes of members of the public are created. Everyone will get notice and will be able to participate in the standard EA process; however, only interested parties will have the right to fully participate in EAs carried out by the NEB and EAs referred to review panels.

Section 43 is particularly troubling in this regard. It requires a review panel to hold hearings in a manner that provides an opportunity to participate only to interested parties. This suggests members of the public that do not meet the definition of interested party can be excluded from the EA process. Given that under section 2(2) it is the panel that determines who is an interested party, CEAA 2012 clearly puts panels in a position of determining who will be permitted to participate in hearings and who will not. This may seem harmless given the independence of panels; however, when taken in combination with strict timelines offered to panels in their terms of reference, it is clear that this will put panels in a position of limiting participation in order to meet the timelines imposed, or face having the panel review process terminated and completed by the CEA Agency.

CEAA 2012: Case Law

There are no reported cases that deal with the substance of CEAA 2012 to date. The new Act was carefully designed to reduce litigation through the increased use of discretion at critical points in the process. Nevertheless, given the substantial changes to the federal EA process, litigation to test the boundaries of the CEAA 2012 is inevitable.

A number of cases have already been filed following the completion of the Northern Gateway Panel Review process, one of the first panel reviews under CEAA 2012. The project involves a pipeline from the Alberta oil sands to the coast of British Columbia for the export of oil from the Alberta oil sands. The project has been particularly controversial because it is seen as enabling an expansion of the Alberta oil sands, because it will cause significant tanker traffic on the coast of British Columbia, and because the pipeline crosses many territories of first nations in BC.[49]

One case, brought by Ecojustice on behalf of Forestethics Advocacy, the Living Oceans Society and the Raincoast Conservation Foundation, challenges the reliance by the panel on upstream economic benefits in concluding that significant adverse environmental effects of the project are justified, while refusing the consider the upstream environmental harm caused by the oil sands development that would supply the proposed pipeline. The case also challenges the panel's conclusions regarding the significance of the impact of spills on the marine environment.[50]

A second case has been brought by the Environmental Law Center on behalf of the Federation of BC Naturalists. This application also challenges the panel's conclusion that the significant adverse effects of the project on caribou and grizzly bears are justified in the

[49] National Energy Board, "Enbridge Northern Gateway Project Joint Review Panel" (2013), online: National Energy Board < http://gatewaypanel.review-examen.gc.ca/clf-nsi/hm-eng.html>.

[50] *ForestEthics Advocacy et al v Attorney General of Canada, Minister of the Environment, National Energy Board and Northern Gateway Pipelines Limited Partnership*, Federal Court of Appeal, (17 January 2014) (Application for Judicial Review, Court File Number A-56-14).

circumstances. The basis of this application's challenge is that the panel failed to give adequate reasons for its conclusion by simply referring to its finding of public convenience and necessity under the National Energy Board Act as the basis for its conclusion under CEAA 2012. The application furthermore challenges the panel's approach to accidents and malfunctions and impacts on marine birds.[51]

These cases will offer important early insights into how much deference the courts will grant panels in the exercise of their duties under CEAA 2012.

[51] *Federation of British Columbia Naturalists v Attorney General of Canada, Minister of the Environment, National Energy Board and Northern Gateway Pipelines Limitied Partnership*, Federal Court of Appeal, (17 January 2014) (Application for Judicial Review, Court File Number A-59-14).