



## **A Model Environmental and Sustainability Assessment Law**

**Annotated Version**

Alberta **LAW**  
**FOUNDATION**

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**Brenda Heelan Powell**

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## **The Environmental Law Centre (Alberta) Society**

The Environmental Law Centre (Alberta) Society is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. Its vision is a clean, healthy and diverse environment protected through informed citizen participation and sound law and policy, effectively applied.

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## [Canadian/ Provincial] Environmental and Sustainability Assessment Act

### An Introductory Note

It should be noted that, for reading ease, the Model Environmental and Sustainability Law contains a federal model and a generic provincial model in one document. Differences between the federal and the provincial models are highlighted in red text.

The generic provincial model may need to be customized to accommodate particular provincial concerns and legislative regimes; however, the general concepts of the generic provincial model law would still be applicable.

### Discussion of the Preamble

The Model Law embraces several principles that were developed by environmental non-governmental organizations in anticipation of changes to federal environmental assessment laws.<sup>1</sup> These principles are:

- sustainability as the core objective,
- strong rights for public participation,
- meaningful involvement of Aboriginal governments as decision-makers,
- legal framework for strategic environmental assessment,
- legal framework for regional environment assessment,
- require comprehensive, regional cumulative effects assessments,
- multijurisdictional environmental assessment with no substitution,
- transparency and access to information,
- fair, predictable and accessible assessment procedures, and
- design principles applied throughout the Environmental Assessment process to ensure that focus and efficiency do not come at the expense of democratic and constitutional review.

Environmental and sustainability assessment (ESA) is a key mechanism for moving toward sustainability; however, it should be remembered that it remains only one piece of the puzzle. Achieving a sustainable society requires that the ESA process be situated in a larger context of sustainability analyses and initiatives. As stated by Professor Gibson:<sup>2</sup>

Broader efficiencies are promoted if sustainability assessment fosters construction of a more coherent and adaptive larger system linking the setting of overall sustainability objectives to the management and monitoring of ongoing activities.

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<sup>1</sup> These principles can be found on the [envirolawsmatter.ca](http://envirolawsmatter.ca) website.

<sup>2</sup> Robert Gibson et al., *Sustainability Assessment: Criteria, Processes and Applications* (London: Earthscan, 2005). See also Robert Gibson, "From Wreck Cove to Voisey's Bay: The Evolution of Federal Environmental Assessment in Canada" (2002) 20(3) *Impact Assessment and Project Appraisal* 151.

In other words, ESA will be most effective and efficient working within a regulatory and policy framework which strives for a sustainable society. ESAs would be used to replace or, at least, coordinate and guide the multiple regulatory approval processes that proponents currently face. Strategic ESAs would be used to guide and streamline the assessment process of more specific plans and projects.

#### **Preamble**

Whereas the Government of [Canada / the Province] seeks to create a positive social, cultural, economic and environmental legacy for current and future generations of [Canadians/ the Province], and

Whereas the Government of [Canada / the Province] acknowledges that environmental and sustainability assessment is internationally recognized as an effective tool for moving towards sustainability,

The Government of [Canada / the Province] enacts this legislation to facilitate the planning and design of undertakings in a manner that makes a positive contribution to sustainability.

#### **Discussion of Part 1: Interpretation**

This part of the Model Law provides definitions of key concepts and terminology. In the previous version of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA, 1992*), there were several key terms which were not defined in the legislation (for example, “significant adverse environmental effects” and “justified in the circumstances”). The Model Law strives to provide clear definitions of all key concepts and terminology used.

It should be noted that the Model Law provides definitions of “environment” and “environmental effect” which incorporate all aspects of sustainability - social, cultural, economic, environmental and interactive components. These terms as defined by the Model Law are more expansive than the definitions used in either *CEAA, 1992* or the *Canadian Environmental Assessment Act*, S.C. 2012, c. 19, s.52 (*CEAA, 2012*).

The concept of a “code of practice” is introduced in this part of the Model Law. This concept is similar to the class and model class environmental assessments which were possible under *CEAA, 1992*. The goal of enabling and developing codes of practice is to establish an effective means of dealing with ESA for numerous, similar small projects and addressing cumulative effects of such projects (rather than proceeding on a project by project basis which may not address cumulative effects effectively). Under the Model Law, a code of practice is enabled as a type of strategic ESA. It is essential that any codes of practice developed be very tightly prescribed so that any project with unusual characteristics – such as within critical habitat or sensitive ecosystems – should not be allowed to fit within the code of practice (unless the code of practice itself is designed for such purposes).

Another key concept addressed in this part of the Model Law is the relationship between the definitions of “adaptive management” and “mitigation”. The definition of mitigation clarifies that adaptive



management is not an acceptable form of mitigation. Rather, adaptive management is to be used only when follow-up data and monitoring demonstrates that mitigation measures are not working as originally planned. An important aspect of the ESA is developing an understanding of the ways in which an undertaking and its associated mitigation measures will adapt should predictions be wrong. An undertaking and its associated mitigation measures must be designed for adaptation in order for adaptive management to be feasible.

Adaptive management can play an important role in ESA and subsequent monitoring but it needs to be used properly.<sup>3</sup> The only appropriate role for adaptive management in ESA is to follow up with highly unpredictable uncertainties or to deal with adverse effects that are not significant. As well, adaptive management can be used in instances where predictions regarding mitigation measures prove to be wrong.

Adaptive management should not be used to make uncertain mitigation measures more certain or to temper significant adverse environmental impacts (for example, it would be inappropriate to argue that a tailings pond will be remediated to fish habitat because in 20 years that technology *might* exist). As well, adaptive management should not be used as a substitute to committing to specific mitigation measures.

It also needs to be recognized that precaution and adaptive management play distinct roles in ESA. Precaution applies to all aspects of ESA whereas adaptive management only applies to follow-up measures. Precaution applies to identified risks, that may, but are not scientifically certain to, occur. In contrast, adaptive management applies to highly unpredictable uncertainties which exist due to the complexity of ecosystems and interactions of human activities.

Adaptive management is a learning process which can reduce uncertainty but it does not necessarily reduce impacts. In order for adaptive management to work, basic conditions of environmental management and scientific knowledge must be met (otherwise serious, irreversible harm could occur). Before relying on adaptive management, a regulator must have a reasonable basis for concluding that uncertainty will actually be reduced (i.e., a rigorous and committed approach to adaptive management is contemplated) and must be satisfied that mitigation measures will be implemented.<sup>4</sup>

Adaptive management is a six step process<sup>5</sup>: clear and common purpose; design explicit model of your system; develop a management plan that maximizes results and learning; develop a monitoring plan to

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<sup>3</sup> See Arlene Kwasniak, *Adaptive Management in Environmental Assessment and Environmental Management: A Legal and Policy Analysis* (2009) available on the Canadian Environmental Network website at rcen.ca and Arlene Kwasniak, "Use and Abuse of Adaptive Management in Environmental Assessment Law and Practice: A Canadian Example and General Lessons" (2010) 12 (4) J. Environmental Policy and Management 425.

<sup>4</sup> Martin Olsynski, "Adaptive Management in Canadian Environmental Assessment Law: Exploring Uses and Limitations" (2010) 21 JELP 1.

<sup>5</sup> Martin Olsynski, *ibid.* See also "Steps in the Adaptive Management Process" from Nick Salafsky et al. *Adaptive Management: Tools for Conservation Practitioners* (Washington, D.C.: Biodiversity Support Program, 2001).

test your assumptions; implement management and monitoring plans; analyze data and communicate results.

At least one academic<sup>6</sup> suggests using **adaptive mitigation** under the *US National Environmental Policy Act*, which would authorize agencies to incorporate adaptive mechanisms into the mitigated FONSI (finding of no significant impact) itself, specifying in advance an expected range of uncertainties and offering a corresponding range of mitigation measures, to be triggered and adjusted in response to actual impacts subsequently revealed by monitoring data.

Finally, this part of the Model Law provides definitions for the various types of ESAs that may occur including regional ESA, strategic ESA, and project ESA. The intention is that both regional ESAs and strategic ESAs will provide a strategic framework for subsequent, more specific ESAs (including projects). In many cases, a regional ESA will be conducted and will be subsequently augmented with more specific and detailed strategic ESAs. The use of regional ESAs and strategic ESAs will streamline subsequent undertakings by providing specific guidance for planning and decision-making.

## Part 1

### Interpretation

#### Definitions

- (4) “**adaptive management**” means a systematic approach to addressing the uncertainties associated with mitigation measures which specifies, in advance, an expected range of uncertainties and offers a corresponding range of mitigation measures to be triggered and adjusted in response to actual impacts subsequently revealed by monitoring data

“**Agency**” means the [Canadian / the Provincial] Environmental and Sustainability Assessment Agency established by this Act

“**code of practice**” means a set of requirements - developed as a form of strategic environmental and sustainability assessment - which governs the planning, design aspects and follow-up program for a specific, defined class of project in specified, defined circumstances with particular regard to considering the cumulative impacts of numerous similar, small-scale projects

“**cumulative effects**” means those changes to social, cultural, economic, environmental and interactive components caused by an undertaking in light of existing background conditions, the range of possible additional stresses on valued ecosystem components and the potential future activities that will be foreclosed by approving the undertaking in combination with past, present

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<sup>6</sup> Bradley Karkkainen, “Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance” (2002) 102 Colum. L. Rev. 903

and reasonably foreseeable future human activities including those changes that cross jurisdictional boundaries

**“ecological services”** means the social, cultural, economic, environmental and interactive benefits arising from the vital resources and ecological processes provided by a healthy ecosystem

**“enhancement”** means augmentation of a likely positive social, cultural, economic, environmental or interactive effect of an undertaking to improve its positive contribution to sustainability

**“environment”** means the components of the Earth and includes:

- a. air, land and water,
- b. all layers of the atmosphere,
- c. all organic and inorganic matter,
- d. all living organisms,
- e. the interacting natural systems that include the above components, and
- f. social, cultural, economic, environmental and interactive features or conditions affecting the lives of individuals or communities

**“environmental and sustainability assessment”** means assessment of an undertaking having regard to social, cultural, economic and environmental components to determine if the undertaking will make a positive contribution to sustainability

**“environmental effect”** means any change to the environment caused by a project or a government plan, policy or program and includes short term and long term, direct and indirect, and cumulative changes to:

- a. human health and socio-economic conditions and trends,
- b. physical and cultural conditions and trends,
- c. the current use of lands and resources for traditional purposes by Aboriginal persons, or
- d. any structure, site or thing that is of historical, archaeological, paleontological or architectural significance

**“federal government”** means the Crown in Right of Canada and includes:

- a. all ministers appointed to the Governor in Council and their departments and agencies, and
- b. Crown corporations and other corporate bodies established in Canada whose board members are appointed by the Crown in Right of Canada or ministers of the Governor in Council

**“federal lands”** means

- a. lands that belong to Her Majesty in right of Canada or that Her Majesty in right of Canada has the authority to dispose of, and all waters on and airspace above those lands except

- those lands that are under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut,
- b. the internal waters of Canada, in any area of the sea not within a province,
  - c. the territorial sea of Canada, in any area of the sea not within a province,
  - d. the exclusive economic zone of Canada,
  - e. the continental shelf of Canada, and
  - f. reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the Indian Act, and all waters on and airspace above those lands

**“follow-up program”** means a program designed to monitor, evaluate and manage the entire life-cycle of project or other undertaking for which a certificate of environmental and sustainability assessment has been issued

**“life-cycle”** means all stages of an undertaking including planning, construction, operation, modification, expansion, decommissioning and abandonment

**“meaningful and effective public participation”** means the factual ability of members of the public to engage in the environmental and sustainability assessment process and to contribute to decision-making under this Act and requires, at minimum:

- a. notice of a matter to be decided be provided in sufficient form and detail to allow the preparation of public input on the matter,
- b. full and convenient access to information,
- c. a reasonable period of time to prepare public input,
- d. an opportunity to present public input,
- e. fair consideration of public input by the Agency and, if applicable, the Review Panel, and
- f. explicit consideration of information, comments and evidence provided by the public in the decisions made by the Agency and, if applicable, the Review Panel.

**“Minister”** means the Minister of the [Environment /Provincial Equivalent]

**“mitigation”** means the elimination of a likely adverse social, cultural, economic, environmental or interactive effect of an undertaking, through physical or operational technically feasible means to a point where the undertaking makes a positive contribution to sustainability but does not include restitution, compensation, monitoring, follow-up programs, adaptive management or future plans to determine courses of action

**“policy”** means a general course of action which guides ongoing decision-making<sup>7</sup>

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<sup>7</sup> The definitions of “plan”, “policy” and “program” are adapted from Barry Sadler, *International Study of the effectiveness of Environmental Assessment (Final Report), Environmental Assessment in a Changing World:*

**“plan”** means a purposeful, forward looking strategy or design that elaborates and implements policy

**“program”** means a coherent, organized agenda or schedule of commitments, proposals instruments or activities that elaborates and implements policy

**“project”** means a physical work or physical activity including construction, operation, modification, expansion, decommissioning, abandonment or other endeavour in relation to that physical work

**“project environmental and sustainability assessment”** means the process wherein sustainability objectives and criteria direct a review of purposes and alternatives to a proposed project to determine whether or not that project is likely to make a positive contribution to sustainability

**“proponent”** means the person, body or government that proposes the undertaking

**“provincial government”** means the Crown in Right of the Province and includes:

- a. all ministers appointed to the Lieutenant Governor in Council and their departments and agencies, and
- b. Crown corporations and other corporate bodies established in the Province whose board members are appointed by the Crown in Right of the Province or ministers of the Lieutenant Governor in Council

**“provincial land”** means all lands located in the Province, with the exception of federal lands, including all waters on and airspace above those lands

**“record”** means any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof

**“regional environmental and sustainability assessment”** means environmental and sustainability assessment of the interactions among all human activities - including past, current and reasonably foreseeable future undertakings - and natural systems within the geographical scope of the assessment with a particular regard to considering cumulative effects and to establishing regional thresholds of change to provide guidance for the planning and assessment of specific undertakings

**“strategic environmental and sustainability assessment”** means assessment at a high level to provide a strategic framework for subsequent environmental and sustainability assessment of more specific undertakings, including projects, and includes:

- a. assessment of options for a [federal/ provincial] government plan, policy or program to determine whether or not that plan, policy or program is likely to contribute positively to sustainability,
- b. a proposed Code of Practice, or
- c. environmental and sustainability assessment on a regional basis.

**“sustainability”** means 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

**“thresholds of change”** means the limit of tolerance of an environmental component to an effect and that, if exceeded, results in an adverse response by that environmental component

**“undertaking”** means a project or a [federal/provincial] government policy, plan or program

- (5) This Act is binding on Her Majesty in right of [Canada / the Province].

## **Discussion of Part 2: Purposes and Guiding Principles**

This part of the Model Law is designed to provide a clear delineation of purposes and principles that will assist in the implementation and interpretation of the Model Law.<sup>8</sup>

### **Part 2**

#### **Purposes and Guiding Principles**

- (6) The purpose of this Act is to allow only those undertakings that make a positive contribution to sustainability. To achieve this purpose, this Act:
- a. provides the framework for consideration and decision-making on undertakings that may have an impact on sustainability,
  - b. ensures that consideration of undertakings involves consistent, comprehensive and integrated attention to all factors affecting sustainability,

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<sup>8</sup> See chapter 7 in *Sustainability Assessment: Criteria and Processes*, supra note 2 at page 147 wherein the authors express the benefit of authoritative purposes being set out in the body of legislation.

- c. ensures that undertakings in [Canada/the Province] do not have direct adverse social, cultural, economic, environmental and interactive effects on other jurisdictions,
  - d. encourages cooperation and coordinated action between and among federal, provincial, territorial and aboriginal governments with respect to consideration and decision-making on undertakings that may have an impact on sustainability,
  - e. encourages meaningful and effective public participation in the conception, planning, approval and implementation of undertakings that may have an impact on sustainability,
  - f. fosters and facilitates innovation to achieve sustainability in [Canada/the Province], and
  - g. [Federal] ensures compliance with Canada's international commitments, including treaty obligations, customary international law and international principles of environmental protection and sustainability.
- (7) The implementation of this Act is guided by the following environmental principles:
- a. The precautionary principle which requires that, if there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.
  - b. The principle of pollution prevention requires the use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and wastes and promotes continuous improvement through operational and behavioural changes.
  - c. The principle of inter-generational equity requires that undertakings to meet the needs of the present must not compromise the ability of future generations to meet their own needs.
  - d. Public participation is essential to the environmental and sustainability assessment process and will be facilitated by ensuring transparency in process and decision-making and by providing full access to information.
  - e. The principle of integration which requires looking for ways to meet human needs and, at the same time, reduce environmental impacts of human activities.
  - f. This Act must be implemented in a manner that is constantly improving, that reflects and contributes to evidence-based best practices, and that is open, transparent and accountable.

### **Discussion of Part 3: Applicability of the Act**

A key issue to be addressed in any ESA legislation is which undertakings should be subject to formal ESA. In theory, all undertakings should be subject to ESA by the proponent of the undertaking regardless of whether or not that undertaking is subject to formal review under ESA legislation. The reality is that only a handful of undertakings will be subject to formal, legislated ESA. There are two aspects to consider: What should be in that handful? How big should the handful be?

#### **What should be in that handful?**

Both *CEAA, 1992* and *CEAA, 2012* have focused on project-based assessment with no requirement for strategic assessment. While there is a federal strategic environmental assessment directive in place, it

has not been applied consistently or in a transparent fashion.<sup>9</sup> Accordingly, there have been repeated recommendations that there be a legislated requirement for strategic assessment.<sup>10</sup>

The purpose of strategic assessments is to ensure effective integration of environmental and sustainability considerations into the conception, planning, approval and implementation of government plans, policies and programs.<sup>11</sup> In addition, strategic assessment is intended to facilitate attention to strategic issues, to provide guidance for subsequent undertakings and to improve decision-making. While project-based ESA can lead to more transparent and informed decision-making, it is typically not able to deal well with underlying concerns and issues (such as cumulative effects and broad public policy matters).

The Model Law includes a legislated requirement for strategic assessment enabling assessment of government plans, policies and programs, regional assessment and the development of codes of practice.

#### **How big should the handful be?**

Federally, the approach taken in *CEAA, 1992* was broad. All projects which “triggered” the Act were subject to assessment unless specifically excluded (often referred to as “all in, unless out” approach). The *CEAA, 1992* was triggered by virtue of a connection to the federal government (as a proponent, as a funder, involving federal lands or providing certain approvals under federal legislation). The *CEAA, 1992* also applied to projects with transboundary impacts.

The current approach under the new *CEAA, 2012* is far more restricted. The requirement for an assessment is limited to specific categories of projects as designated by regulation (a “project list” approach).

With respect to project-based assessments, the Model Law has adopted a hybrid of the trigger and list approaches. The Model Law sets out triggers designed to identify those projects that may impact aspects of shared jurisdiction, as well as federal jurisdiction and matters of “national concern”. The idea is to move away from a tight connection to federal actions and decision-making as was the case with the law list triggers under *CEAA, 1992*. The goal is to rely on the federal jurisdiction to deal with

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<sup>9</sup> Commissioner of the Environment and Sustainable Development, *Status Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (Ottawa: Commissioner of the Environment and Sustainable Development, 2008)

<sup>10</sup> For a few examples, see: Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Ontario: LexisNexis, 2008); Ecojustice, *Towards Sustainability: The Seven Year Review of the Canadian Environmental Assessment Act* (Ecojustice, 2011); Standing Committee on Environment and Sustainable Development, *Sustainable Development and Environmental Assessment: Beyond Bill C-9* (Ottawa: Standing Committee on Environment and Sustainable Development, 2003); and Hugh Benevides et al. *Law and Policy Options for Strategic Environmental Assessment in Canada* (Canadian Environmental Network, 2008 (amended 2009)).

<sup>11</sup> Hugh Benevides et al., *ibid.* See also Robert Gibson et al. “Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options” (2009) 22 JELP 175.



environment under specific heads of power and as a matter of national concern under the general federal authority for peace, order and good government.

Under *CEAA, 1992*, late triggering was often a problem<sup>12</sup> and it is suggested that a focus on impacts on matters of federal jurisdiction rather than a focus on decision-making will alleviate that problem (e.g., the trigger will be effects on fisheries rather than the Department of Fisheries and Oceans' decision to issue a harmful alteration, disruption or destruction approval). This approach may be even more important given recent changes to the *Fisheries Act* and *Navigable Waters Protection Act*.

The project list would identify clearly those projects that should be assessed due to a likelihood of having significant effects on sustainability and, as such, require ESA with the need for an initial screening. The project list would be found in regulations which deem certain projects to be matters of national concern. The regulations should be expansive (while the *Comprehensive Study List Regulations* under *CEAA, 1992* might be a starting point, it is likely additional project categories would need to be included and project thresholds reassessed). In addition to identifying particular types of projects, the regulations could identify any projects with particular impacts as being a matter of national concern (as an example, a project that contributes greenhouse gas emissions greater than a particular threshold).

Additional regulations could be developed to identify those projects required to undergo a panel review. As well, transitional regulations could be used to identify small scale projects which would benefit from the development of a Code of Practice.

Given the provincial constitutional power to deal with "property and civil rights" within the province, the province can choose to subject any undertakings within the province to formal ESA. As such, there is a provincial project list – which should be housed in regulations – to clearly identify those projects which should be assessed due to a likelihood of having significant effects on sustainability and therefore can go straight to assessment without an initial screening. The project list is based loosely on the Activities Schedules under *Alberta Environmental Protection and Enhancement Act*.

Since a "project list" approach runs the risk of excluding projects with significant effects on sustainability (by virtue of being incomplete or out of date), the Model Law also establishes provincial triggers for determining which projects ought to be subject to formal ESA under the act.

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<sup>12</sup> Arlene Kwasniak, "Slow on the Trigger: The Department of Fisheries and Oceans, the Fisheries Act and the Canadian Environmental Assessment Act" (2004) 27(2) *Dalhousie Law Journal* 349.

## Part 3

### Applicability of the Act

- (8) The environmental and sustainability assessment process applies to all undertakings that may have a significant impact on [Canada's/ the Province's] progress to sustainability, the prospects for sustainability globally or both.

#### Strategic Environmental and Sustainability Assessment

- (9) The goals and purposes of strategic environmental and sustainability assessment are to:
- a. design, plan and implement government policies, plans and programs in a manner that contributes positively to [Canada's/the Province's] progress to sustainability,
  - b. provide a strategic framework for subsequent environmental and sustainability assessment of specific undertakings, including projects, through the use of government plans, policies or programs, codes of practice, and regional environmental and sustainability assessments,
  - c. facilitate other initiatives which situate environmental assessment in a larger system that identifies broad sustainability needs, goals and indicators, monitors conditions and trends and evaluates responses to options, and
  - d. facilitate the use of information garnered from environmental and sustainability, assessments and follow-up programs in the continuous review and adjustment of broadly identified sustainability needs, goals and indicators.
- (10)(1) The Agency must conduct a screening to determine whether a strategic environmental and sustainability assessment is required in the following circumstances:
- a. the [federal/provincial] government is proposing a plan, policy or program that may have important impacts on sustainability,
  - b. the government of another Canadian jurisdiction, including an aboriginal government, is proposing a regional environmental and sustainability assessment or a joint plan, policy or program that involves the government of Canada/the province,
  - c. a non-governmental body is proposing a Code of Practice, regional environmental and sustainability assessment or a government plan, policy or program that may have important impacts on sustainability, and
  - d. a participant in an environmental and sustainability assessment of a project identifies one or more high level, strategic issues in the course of the project-based assessment which would benefit from authoritative direction developed by a strategic environmental and sustainability assessment.
- (2) The Agency must encourage and facilitate strategic environmental and sustainability assessment between and among federal, provincial, territorial and aboriginal governments on a cooperative and coordinated basis.

- (11)The Minister must initiate at least one strategic environmental and sustainability assessment on a matter of [national/provincial] importance on which government plans, policies or programs are lacking or obsolete.
- (12)The Minister – on his or her own initiative, at the request of the Agency or in response to a petition made under this Act – has the authority to require an environmental and sustainability assessment of any other [federal/ provincial] government plan, policy or program.
- (13)The Minister – on his or her own initiative, at the request of the Agency or in response to a petition made under this Act – has the authority to require an environmental and sustainability assessment on a regional basis.
- (14)The Agency - on its own initiative, at the request of the Minister or in response to a petition made under this Act – has the authority to develop Codes of Practice applicable to a particular class of projects which will consequently be exempt from environmental and sustainability assessment.

### **Environmental and Sustainability Assessment of Projects**

#### **[Federal]**

- (15)(1) The Agency must conduct a screening of any anticipated project or class of project that:
- a. is located on federal lands or may impact on federal lands,
  - b. is proposed by the federal government,
  - c. is funded by the federal government, or
  - d. the federal government may exercise a power or perform a duty under an Act of Parliament, other than this Act, that would permit the undertaking to proceed,
- to determine whether an environmental and sustainability assessment is required.
- (2) The Agency must conduct a screening of any anticipated project or class of project that may affect a matter of national concern to determine whether an environmental and sustainability assessment is required.
- (3) A project or class of project affects a matter of national concern where the project:
- a. is located within Canada and may have transboundary impacts within Canada or outside Canada,
  - b. may impact on matters related to multilateral agreements or international treaties that promote environmental stewardship or progress towards sustainability,
  - c. may impact on an at risk, threatened or endangered species,
  - d. may impact on threatened or endangered ecological communities,
  - e. may impact on species that are migratory or that have transboundary distributions,
  - f. may have a significant impact on Canada's contribution to climate change, or
  - g. may impact on Canadian fisheries, marine areas or navigable waters.

- (4) Any project or class of project that is included in regulations made under this Act is deemed a matter of national concern and must undergo an environmental and sustainability assessment.

**[Provincial]**

- (16)(1) The Agency must conduct a screening of any project or class of project that may affect a matter of provincial concern to determine whether an environmental and sustainability assessment is required.
- (2) A project, whether located on public or private land, affects a matter of provincial concern where the project:
- a. is located on public lands or may impact on public lands,
  - b. is proposed by the provincial government,
  - c. is funded by the provincial government,
  - d. may impact on a federally or provincially listed at risk, threatened or endangered species located within the province,
  - e. may impact on threatened or endangered ecological communities located within the province, or
  - f. may have a significant impact on the province's contribution to climate change.
- (3) Any project or class of project that is included in regulations made under this Act is deemed a matter of provincial concern and must undergo an environmental and sustainability assessment.
- (17)(1) The Minister – on his own initiative, at the request of the Agency or in response to a petition made under this Act – may require an environmental and sustainability assessment of any project located within **[Canada/the Province]**.
- (2) If the Minister determines that the project is likely to have a significant impact on sustainability, then he or she must require an environmental and sustainability assessment of that project.

**Exclusion from Environmental and Sustainability Assessment**

- (18) An environmental and sustainability assessment is not required for undertakings:
- a. carried out in response to a national emergency for which special temporary measures are being taken under the **[Emergencies Act, R.S.C. 1985, c. 22 (4<sup>th</sup> Supp.)/ Provincial Equivalent]**, or
  - b. carried out in response to an emergency and carrying out the project forthwith is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.

**Discussion of Part 4: The Environmental and Sustainability Assessment Process**

Given the constitutional division of powers between the federal and provincial governments in Canada, multi-jurisdictional assessment is an issue to be dealt with. It has been suggested that a standardized

process throughout Canada will improve coordination, cooperation and efficiency in multi-jurisdictional assessments.<sup>13</sup> Accordingly, the federal and provincial Model Law use identical processes.

The assessment process consists of 5 steps: screening; initial assessment; environmental and sustainability assessment review; decision-making by Agency or Panel; and follow-up and monitoring. The level of assessment shall be appropriate for the significance of the anticipated undertaking as determined by sustainability-based criteria.

### **Screening**

The purpose of the screening step is to determine whether or not an environmental and sustainability assessment is required for a particular undertaking (it's meant as more of an administrative step rather than a substantive step). Undertakings identified in the regulations or directed by the Minister would skip screening and go straight to the initial assessment stage (as the need for an ESA would already be decided). The screening could have a few outcomes:

- Any undertaking that has the potential for more than insignificant negative impacts on the environment or sustainability must proceed through all assessment stages.
- If screening demonstrates that a project fits within a code of practice established by the Agency and the project and its context involve no exceptional characteristics, then an assessment would not be required.
- If screening demonstrates that an undertaking does not have the potential for other than insignificant negative impacts on the environment or sustainability, then assessment is not required and the Agency would issue a statement to that effect and would include any necessary design requirements, including the follow-up program.

### **Initial Assessment**

The purpose of the initial assessment is to create a public process for scoping, setting scientific standards and methodologies, establishing terms of reference and determining the appropriate type of assessment. Scoping includes a critical review of the purposes and identification of an appropriate range and set of alternatives to examine. There is a requirement for public notice at this stage, including the option of a meeting with stakeholders to discuss these items. At minimum, the scope of the alternatives for the undertaking includes associated undertakings chiefly to facilitate or complement the core project alternative as described by the proponent. The assessment should be scoped to focus attention on the most significant alternatives for serving the purposes identified and justified for the undertaking and on the most significant social, cultural, economic, environmental and interactive components, issues and effects.

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<sup>13</sup> See, for example, Andrew Gage, *The Goal: "One Process" that Complies with Canada's International Commitments* (April 20, 2012 blog post on wcel.org).

## Decision-making

The decision-making provisions of the Model Law reference sustainability criteria and trade-off rules that are to be applied in the ESA review. Although general sustainability criteria and trade-off rules should be established in regulations, elaboration will be required on a case by case basis in order to respond to contextual differences.

The basic sustainability criteria which ought to be considered have been set out by Robert Gibson et al. in *Sustainability Assessment: Criteria, Processes and Applications*:<sup>14</sup>

- socio-ecological system integrity,
- livelihood sufficiency,
- intragenerational and intergenerational equity,
- resource maintenance and efficiency,
- socio-ecological civility and democratic governance,
- precaution and adaption, and
- immediate and long-term integration.

Similarly, general trade-off rules which ought to be applied in the context of an ESA review are proposed by Robert Gibson et al.<sup>15</sup> These general trade-off rules are:

- acceptable trade-offs must deliver net progress towards meeting the requirements for sustainability,
- trade-offs that involve acceptance of adverse effects are undesirable unless proven otherwise by the proponent,
- a significant adverse effect cannot be justified unless the alternative is acceptance of an even more significant adverse effect,
- there should be no displacement of a significant adverse effects from the present to the future, unless the alternative is displacement of an even more significant negative effects from the present to the future, and
- explicit justification of proposed trade-offs is required.

## Follow-Up Programs

It has been suggested that environmental assessment follow-up is comprised of four activities:<sup>16</sup>

1. **Monitoring** (the collection of data and comparison with standards, prescriptions and expectations),
2. **Evaluation** (the appraisal of the conformance with standards, predictions or expectations as well as the environmental performance of the activity),
3. **Management** (making decisions and taking appropriate action in response to issues arising from monitoring and evaluation activities), and

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<sup>14</sup> *Sustainability Assessment: Criteria, Processes and Applications*, supra. note 2 at chapter 5.

<sup>15</sup> *Sustainability Assessment: Criteria, Processes and Applications*, supra. note 2 at chapter 6.

<sup>16</sup> Sarah Macharia, *A Framework for Best Practice Environmental Impact Assessment Follow-up: A Case Study of the Ekati Diamond Mine, Canada* (Saskatoon: University of Saskatchewan, 2005).

4. **Communication** (informing the stakeholders as well as the general public about the results of the EIA follow-up).

Generally, most environmental assessment processes have failed to provide adequate post-decision follow-up.<sup>17</sup> In Canada, the previous *CEAA, 1992* did provide for follow-up programs but this was not well-developed in the legislation.

One commentator has suggested that, in the context of the *National Environmental Policy Act*,<sup>18</sup> environmental assessment post-decision monitoring occur only in three circumstances (because it is too cost prohibitive to always require it and to require it retroactively):<sup>19</sup>

- impacts determined to reach the level of “significant” in an environmental impact statement,
- any impacts that would be significant but for the mitigation measures taken in a finding of no significant impacts statement, or
- any impacts identified in an environmental assessment or environmental impact statement for which sufficient uncertainty exists as to their likelihood of occurrence or degree that the determination whether they are “significant” lies within the range of expected uncertainty in the analysis, including uncertain environmental benefits of mitigation measures or impact avoidance strategies.

Other commentators, however, suggest that all proponents be subject to follow-up monitoring.<sup>20</sup> An effective follow-up program requires that there be definition and clarification of financial responsibility, definition of proponent and government roles, appointment of an independent environmental checker, and addressing of public and stakeholder concerns. The follow-up program must also cover the entire scope of the environment (biophysical, cultural, economic and social).

#### **Part 4**

##### **The Environmental and Sustainability Assessment Process**

(19)(1) The proponent of an undertaking that is subject to this Act must ensure that the undertaking undergoes an environmental and sustainability assessment beginning at a development stage which is early enough to allow effective consideration and evaluation of purposes and alternatives.

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<sup>17</sup> See *supra* note 7 and Jos Arts et al., “Environmental Impact Assessment Follow-up: Good Practice and Future Directions – Findings from a Workshop at the IAIA 200 Conference” (2001) 19 (3) *Impact Assessment and Project Appraisal* 175.

<sup>18</sup> *National Environmental Policy Act of 1969*, 42 U.S.C. §§ 4321- 4347.

<sup>19</sup> *Supra*, note 6 at 942.

<sup>20</sup> *Supra*, note 16.

(2) The proponent is responsible for preparing an environmental and sustainability assessment prior to submitting its proposal for formal environmental and sustainability assessment under this Act.

(3) When preparing an environmental and sustainability assessment, the proponent has a duty to provide public notice of the proposed undertaking and to consult with such persons as may be interested in the proposed undertaking.

(20) The Agency may develop guidelines or other materials to assist proponents with meeting their obligations for public notice, consultation and preparation of environmental and sustainability assessments under this Act.

### **Factors to be Considered**

(21) Every strategic environmental and sustainability assessment conducted under this Act must consider and address the following factors:

- a. the purpose of the strategic initiative and its justification in light of sustainability objectives,
- b. the need for a strategic undertaking with the identified purpose,
- c. alternatives to be examined in the selection and design of a strategic undertaking with this purpose,
- d. the specific sustainability-based criteria adopted for evaluation,
- e. the social, cultural, economic, environmental and interactive effects of those alternatives,
- f. the relative merits of those alternatives judged in light of these effects and the sustainability criteria and the justification for selection of the preferred alternative for the undertaking,
- g. the measures that will maximize the social, cultural, economic, environmental and interactive benefits of the strategic undertaking,
- h. the measures that will mitigate any adverse social, cultural, economic, environmental and interactive impacts of the strategic undertaking,
- i. comments made by members of the public and other interested parties,
- j. community knowledge and aboriginal traditional knowledge,
- k. other relevant project or strategic environmental and sustainability assessments, and
- l. specific guidance for decision-making regarding on-going, anticipated and potential undertakings in the strategic area; means by which the guidance may be delivered and considered; and time limits and exceptions to its authority.

(22) Every environmental and sustainability assessment of a project conducted under this Act must consider and address the following factors:

- a. the purpose of the project level assessment,
- b. the need for a project with the identified purpose,
- c. the specific sustainability-based criteria adopted for evaluation,
- d. alternatives for serving the purpose and need that are technically feasible at the time of the assessment, including the alternative of not proceeding with a project; a comparative evaluation of those alternatives in light of the social, cultural, economic, environmental and



- interactive effects using the sustainability-based criteria; and justification for selection of the preferred alternatives as the proposed project,
- e. alternative means of carrying out the project that are technically feasible at the time of the assessment, and the social, cultural, economic, environmental and interactive effects of those alternative means,
  - f. a comparative evaluation of those alternatives in light of their social, cultural, economic, environmental and interactive effects, including:
    - i. the effects of malfunctions or accidents that may occur in connection with the project,
    - ii. a cumulative effects analysis of the effects of the project in combination with past, present and reasonably foreseeable future human activities having regard to an appropriate range of future development scenarios, and
    - iii. for projects with potentially limited life expectancies, the legacy effects of the project including lasting positive and negative effects, the extent to which the project will avoid lasting damage, remediation or perpetual care obligations, and will contribute to sustainable livelihood opportunities,
    - iv. considered using the sustainability-based criteria and justification for selection of the preferred alternative means in the design of the project,
  - g. the measures that are technically feasible at the time of the assessment to maximize the social, cultural, economic, environmental and interactive benefits of the project,
  - h. the measures that are technically feasible at the time of the assessment that would mitigate any adverse social, cultural, economic, environmental and interactive impacts of the project,
  - i. the capacity of renewable resources that are likely to be affected by the project to meet the needs of the present and those of the future,
  - j. comments made by members of the public and other interested parties,
  - k. community knowledge and aboriginal traditional knowledge,
  - l. relevant regional environmental assessments and strategic environmental assessments, and
  - m. monitoring and follow-up measures required throughout the entire life-cycle of the project.

### **The Environmental and Sustainability Process**

(23)The environmental and sustainability assessment process for all undertakings subject to the Act consists of several stages:

- a. Screening,
- b. Initial Assessment,
- c. Environmental and Sustainability Assessment Review,
- d. Decision-making by Agency or Panel Review, and
- e. Follow-up and Monitoring.

(24)Sustainability-based criteria must be applied throughout the environmental and sustainability process. These criteria include:

- a. selection of appropriate sustainability oriented purposes and reasonable options for consideration in the assessment,

- b. identification of valued cultural, social, economic and environmental components,
- c. identification of means to enhance positive effects on sustainability, in addition to the means to avoid and mitigate negative effects on sustainability,
- d. consideration of the nature and significance of uncertainties inherent in predicting effects, mitigations and enhancement,
- e. determination of the relative merits of the alternatives prior to the selection of a preferred alternative as the undertaking and the justification of the selection of the preferred alternative,
- f. identification of appropriate conditions for approval of an undertaking including post-decision follow-up program design and implementation, and
- g. creation of guidance, both substantive and process, for subsequent undertakings.

### **Screening**

(25)(1) All undertakings subject to this Act must undergo screening, except those undertakings which appear in regulations made under this Act or are directed by the Minister both of which must proceed directly to the initial assessment stage.

(2) The Agency must provide public notice of each undertaking that is submitted for screening.

(3) The purpose of the screening stage is to establish whether or not an undertaking has the potential for more than insignificant negative impacts on the environment or sustainability.

(4) If an undertaking does not have the potential to create more than insignificant negative impacts on the environment or sustainability, the Agency shall issue a written decision to that effect. The written decision shall include any design or follow-up elements required to ensure that the undertaking does not have the potential to create more than insignificant negative impacts on sustainability. No further steps in the environmental and sustainability process are required for the undertaking to proceed although permits, approvals, licences or other decisions may be required under other federal, provincial or territorial Acts or regulations.

(5) If an undertaking complies with a Code of Practice established by the Agency, the Agency shall issue a written decision to that effect. No further steps in the environmental and sustainability process are required for the undertaking to proceed.

(6) If an undertaking has the potential to create more than insignificant negative impacts on the environment or sustainability, then the undertaking must proceed through all steps in the environmental and sustainability assessment process.

(7) The screening decision of the Agency is subject to judicial review.

### **Initial Assessment**

(26)(1) The purpose of the initial assessment is to establish:

- a. The scope of the undertaking to be subject to environmental and sustainability assessment.
- b. The appropriate level of assessment.
- c. The appropriate body to conduct the assessment. The assessment may be conducted by the Agency or by Panel Review.
- d. The scientific standards, methodologies and terms of reference to be used through the assessment process.

- e. The strategic level gaps that need to be addressed.
- (2) The Agency must provide public notice of each undertaking that is submitted for initial assessment.
- (3) If appropriate, the Agency may conduct an initial meeting with the proponent, federal, provincial, territorial and/or aboriginal representatives, and other interested parties to discuss the items in s. 23(1).
- (4) The Agency will release a written decision, with reasons, addressing the items in s. 23(1). If appropriate, the Agency will also outline the process to coordinate with [federal], provincial, territorial, Aboriginal and foreign governments.
- (5) The initial assessment decision of the Agency is subject to judicial review.

### **Environmental and Sustainability Assessment Review**

- (27) Every environmental and sustainability assessment of an undertaking under this Act must:
  - a. focus on maximizing progress towards sustainability,
  - b. aim to select the option which enhances sustainability benefits, while avoiding or mitigating significant negative effects and minimizing trade-offs, and
  - c. consider and deliberate on all relevant cultural, social, economic and environmental aspects as components of complex and dynamic ecosystems.
  
- (28)(1) The environmental and sustainability assessment review may be conducted by the Agency or by Review Panel.
- (2) The environmental and sustainability assessment must proceed by Review Panel where:
  - a. there is significant public concern about the proposed undertaking,
  - b. another jurisdiction intends to hold a public hearing on the same undertaking,
  - c. the undertaking involves complex scientific or other evidentiary matters that would benefit from a public hearing, or
  - d. the undertaking is designated by regulation as requiring a Review Panel.
- (3) Where a matter is referred to a Review Panel, the Agency shall:
  - a. consult with the appropriate federal, provincial, territorial and aboriginal authorities to appoint members of the panel, and
  - b. appoint as members of the panel persons who are unbiased and free from conflict of interest, who have knowledge or experience relevant to the undertaking and who have experience with adjudication.
- (4) Where a matter is referred to a Review Panel, the Agency may direct that the panel review be conducted jointly with a panel review established by another federal, provincial, territorial or Aboriginal authority.
  
- (29) When conducting an environmental and sustainability assessment under this Act, the Agency or the Review Panel, as the case may be, shall:
  - a. ensure that information required for the assessment is obtained and made available to the public in a timely fashion,
  - b. maximize the transparency and accountability of the deliberations, and

c. facilitate and provide opportunity for meaningful and effective public participation.

(30)The Agency, the Review Panel or the Joint Review Panel, as the case may be, may direct non-disclosure of evidence, documents or other material evidence when the review panel is satisfied that such disclosure would cause specific and direct harm to the environment, to a commercial interest or an Aboriginal interest.

(31)The Review Panel or the Joint Review Panel, as the case may be, may summon any person to appear as a witness before the panel to give evidence, oral or written, and to produce documents or other material evidence necessary to conduct the environmental assessment.

(32)The Review Panel or the Joint Review Panel, as the case may be, may direct that evidence, documents or other material evidence are privileged when the review panel is satisfied that such disclosure would cause specific, direct and substantial harm to a witness.

### **Decision-Making**

(33)(1) The Agency, the Review Panel or the Joint Review Panel, as the case may be, must prepare a report setting out the rationale and conclusions related to the environmental and sustainability assessment. The report must include:

- a. a decision as to whether or not a certificate of environmental and sustainability assessment will be issued for the undertaking,
- b. if a certificate of environmental and sustainability assessment is to be issued, all design, enhancement, mitigation, monitoring and follow-up measures required for the undertaking,
- c. explicit justification of the decision, including elaboration of the decision criteria and trade-off rules applied in the review,
- d. explicit consideration of information, comments and evidence provided by the public, including establishing that the undertaking meets the needs and addresses the concerns of the public, and
- e. if Aboriginal interests are involved, consideration of whether or not the process and decision are sufficient to meet the Crown's obligations for consultation and accommodation of Aboriginal interests.

(2) If the report relates to a strategic environmental and sustainability assessment, it must provide clear substantive and process guidance for subsequent undertakings covered by the assessed policy, plan or program, code of practice, or region.

(34)If the Agency or the Review Panel determines that the undertaking subject to environmental and sustainability assessment is not likely to make a positive contribution to sustainability, then a certificate of environmental and sustainability assessment will not be issued by the Agency and the undertaking cannot proceed.

(35)If the Agency or the Review Panel determines that the undertaking subject to environmental and sustainability assessment review is the most desirable option and likely to make a positive

contribution to sustainability, then a certificate of environmental and sustainability assessment will be issued by the Agency. The certificate of environmental and sustainability assessment must include, as conditions:

- a. all design aspects, including enhancement, mitigation and avoidance measures, that are necessary to make the undertaking a positive contribution to sustainability, and
- b. a follow-up program which clearly sets out the obligations and responsibilities of the proponent and the relevant government agencies or bodies.

### **Follow-up Programs**

(36)(1) For each undertaking for which a certificate of environmental and sustainability assessment is issued, a follow-up program must be established and conducted by the proponent to monitor and address the potential social, cultural, economic, environmental and interactive impacts of the undertaking.

(2) The follow-up program must be proposed and assessed in the course of the environmental and sustainability assessment process.

(3) The follow-up program as described in the certificate of environmental and sustainability assessment constitutes an enforceable condition which must be met by the proponent and incorporated into licences, approvals, permits or other authorizations issued by the [federal/provincial] government.

(37)(1) The follow-up program must consist of:

- a. plans and mechanisms to collect and evaluate data for the purposes of monitoring potential social, cultural, economic, environmental and interactive impacts of the project,
- b. plans and mechanisms to evaluate and compare collected data with standards, predictions and expectations set forth in the environmental and sustainability assessment report, and
- c. plans and mechanisms to make decisions and take appropriate action in response to collected data and its evaluation.

(2) The follow-up program must be designed to address the entire life-cycle of the undertaking. In circumstances prescribed by regulation, the follow-up program may continue beyond the end of the undertaking in order to monitor, evaluate and manage continuing adverse social, cultural, economic and environmental effects.

(3) In designing follow-up programs, there must be consideration of the results of follow-up monitoring and response from previous, similar undertakings.

(4) At the time of issuance, the certificate of environmental and sustainability assessment may explicitly require adaptive management where there are unavoidable uncertainties in the event that proposed mitigation measures are not working as predicted. This means that, if data collected and evaluated during the follow-up program demonstrate that mitigation measures are not working to mitigate adverse social, cultural, economic, environmental and interactive impacts as anticipated, mitigation measures may be modified in accordance with collected data and evaluation. Adaptive management may only be allowed where the undertaking and associated mitigation measures are designed for adaptation.

(38)(1) The proponent of the undertaking must ensure that all data collected and evaluated during the course of the follow-up program are provided to the Agency. The Agency must publish these data and make them publicly available on the Agency's registry.

(2) If data collected and evaluated during the course of the follow-up project indicates that mitigation measures are not working to mitigate adverse social, cultural, economic, environmental and interactive impacts as anticipated, then:

- a. The proponent may advise the Agency of its decision, along with supporting evidence, to adaptively modify mitigation measures. The Agency must publish this decision and make it publicly available on the Agency's registry.
- b. The Agency, the Minister or a member of the public may request adaptive modification of the mitigation measures in accordance with the follow-up program. The Agency must publish this request and make it publicly available on the Agency's registry.

(3) If appropriate, the Agency may direct a process which includes opportunity for meaningful and effective public participation for consideration of the proponent's decision in subsection (2)(a) or of the request in subsection (2)(b) above.

#### **Judicial Review**

(39)The decision of the Agency or the Review Panel to not issue or to issue a certificate of environmental and sustainability assessment is subject to judicial review.

(40)The conditions set forth in a certificate of environment and sustainability assessment may also be subject to judicial review.

(41)Any person who

- a. made submissions, written or oral, in the environmental and sustainability assessment process,
- b. had intervenor status in the environmental and sustainability assessment process,
- c. is directly affected by the decision to issue or not issue a certificate of environmental and sustainability assessment,
- d. is directly affected by the undertaking, or
- e. represents a genuine public interest related to the undertaking

may seek judicial review of decisions made under this Act.

(42)An application for judicial review in connection with any matter under this Act shall be refused where the sole ground for relief established on the application is a defect in form or a technical irregularity.

(43)No action lies or shall be commenced against a member of a Review Panel for or in respect of anything done or omitted to be done, during the course of and for the purposes of the environmental and sustainability assessment by the Review Panel.

## **Discussion of Part 5: Public Participation in the Environmental and Sustainability Assessment Process**

Public participation is an essential element of any ESA process which should be encouraged as an asset. The ESA process should strive to accommodate as much public participation as there is public interest.

Accordingly, the Model Law sets out the minimum requirements for meaningful and effective public participation in Part 1. Part 5 of the Model Law expands upon these minimum requirements by setting out a variety of provisions designed to encourage and accommodate public participation. These provisions include process requirements (such as public notice), public participant funding, public participation assistance, petition rights and establishing a public registry of information.

The Model Law expands the right of public participation to include those persons with a genuine public interest. Currently, under *CEAA, 2012*, the right to participate in the environmental assessment process is limited to those persons who qualify as interested parties. An interested party is a person who is directly affected by a project or who has relevant information or expertise.<sup>21</sup>

The “genuine interest” approach to standing requires that the participant demonstrate a genuine, legitimate, tangible, or bona fide interest or concern in the matter to be decided. The genuine interest test strikes a balance between bringing issues forward and screening out frivolous, unmeritorious challenges. The Supreme Court of Canada holds that:<sup>22</sup>

...the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue.

The legal test for a genuine interest approach to determining standing before the courts is settled and comprises of three aspects:<sup>23</sup>

- a serious issue,
- a genuine or legitimate interest in the decision, and
- no other reasonable or effective way for the matter to be heard.

Courts do not grant public interest standing on issues that can be addressed by private litigants.

Demonstrating genuine interest generally requires a history of involvement in an issue or an established record of “legitimate concern” for the interest to be represented. An example in the Alberta context is provided by *Western Canada Wilderness Committee v. Alberta*.<sup>24</sup> A non-governmental organization was found to have a genuine interest in a timber resource agreement between government and a private party because the organization was incorporated for purposes related to wilderness in western Canada, including education, information, conservation, and protective status.

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<sup>21</sup> *CEAA, 2012* at s. 2(2).

<sup>22</sup> *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236.

<sup>23</sup> *Finlay v. Canada*, [1986] 2 S.C.R. 607.

<sup>24</sup> *Western Canada Wilderness Committee v. Alberta (Provincial Treasurer)*, [1994] 108 D.L.R. (4th) 495, 2 W.W.R. 378.

It is the view of the ELC that an enhanced and more inclusive approach to standing is justified for two primary reasons. First, the information needs for an appropriate public interest decision are high and should be reflected in an inclusive rather than an exclusive process. Second, a more inclusive approach to standing will minimize legal challenges that are otherwise likely in light of recent Alberta Court of Appeal judgments.

It should be noted that while the Model Law provides the legislative framework for encouraging and accommodating meaningful and effective public participation, the implementation of that framework will have a tremendous impact on public participation. For example, a very formal and legalistic process can be inaccessible to members of the public which results in less effective and less meaningful participation.<sup>25</sup> Careful consideration will be required in designing and implementing the ESA process to ensure an accessible process that enables meaningful and effective public participation.

## **Part 5**

### **Public Participation in the Environmental and Sustainability Assessment Process**

(44)(1) Meaningful and effective public participation is an essential element of the environmental and sustainability assessment process and there should be a level of public engagement equal to public interest.

(2) The Agency and, if applicable, the Review Panel must ensure that there is an opportunity for meaningful and effective public participation throughout the environmental and sustainability assessment process, especially with regard to:

- a. the identification of need, purposes and potential alternatives from which to select the undertaking,
- b. determining the scope of the environmental and sustainability assessment,
- c. selection of relevant cultural, social, economic, environmental and interactive components for assessment,
- d. specification of the sustainability-based criteria for the evaluations and decisions,
- e. comparative analysis of the anticipated and potential effects of the alternatives,
- f. selection of the preferred alternative for the undertaking,
- g. determination of whether or not the proposed undertaking is the most desirable option and is likely to make a positive contribution to sustainability and, where appropriate, what conditions need to be imposed in any approval, and
- h. development of the follow-up program, including the possibility of adaptive management.

(45)The process for public participation in the environmental and sustainability assessment process must include:

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<sup>25</sup> See, for example, G. Schneider et al. *Environmental Process Substitution: A Participant's View* published on the Canadian Environmental Network website at rcen.ca.



- a. Public notice of the initially defined purposes, need and alternatives for a proposed undertaking and the potential for assessment prior to any decision being made in relation to the undertaking under the Act.
- b. Additional public notice of the proposed undertaking at the commencement of each step of the environmental and sustainability assessment process.
- c. An opportunity for any member of the public to provide written comments to the Agency and, if applicable, the Review Panel at each step of the environmental and sustainability assessment process.
- d. An opportunity for any member of the public to attend and participate in informal conferences, meetings or information sessions held by the Agency or, if applicable, the Review Panel.
- e. An opportunity for members of the public to participate in written or oral hearings before the Agency and, if applicable, the Review Panel. Members of the public entitled to participate in such hearings include those persons who are directly affected by the proposed undertaking, those persons who represent a genuine public interest related to the proposed undertaking and those persons who have relevant information or expertise related to the undertaking. The Agency and, if applicable, the Review Panel may extend rights to participate in written or oral hearings to other persons.

(46)(1) The Agency and, if applicable, the Review Panel must ensure public notice is provided:

- a. by general notice via posting on the website of the Agency and the Registry, and
- b. by direct notice to those members of the public who may be directly affected by the proposed undertaking, those members of the public whom the proponent knows to have concern or interest in regard to the undertaking, and those members of the public whom the Agency or, if applicable, the Review Panel knows to have concern or interest in regard to the undertaking.

(2) The Agency or, if applicable, the Review Panel may also provide general public notice via traditional forms of advertising such as newspapers, radio and television, posting in public building or other prominent locations, mass direct mailings, holding open houses and so forth.

(47) The Agency and, if applicable, the Review Panel may decide to conduct informal conferences, meetings or information sessions where:

- a. members of the public have demonstrated a desire for access to the environmental and sustainability assessment process,
- b. there is a need to facilitate the participation of the members of the public, particularly to manage potential conflict in a non-adversarial setting,
- c. there is a potential to exchange information and to engage in a constructive dialogue, and
- d. there is a need to clarify roles and issues in the environmental and sustainability assessment process.

(48) In the course of written or oral hearings conducted by the Agency or, if applicable, the Review Panel, public participants must be granted the opportunity to:

- a. explain and answer questions pertaining to that participant's written submissions to the Agency or, if applicable, the Review Panel,
- b. attend all public sittings of the Agency or, if applicable, the Review Panel, and
- c. exchange information and proposals with the proponent, the Agency, the Review Panel (if applicable) and other participants.

(49)(1) The proponent of the undertaking –either on its own initiative or at the direction of the Agency – may develop and conduct its own public engagement programs.

(2) The Agency may develop guidelines or other materials to assist proponents with developing and conducting public engagement programs.

(3) Public engagement programs developed and conducted by the proponent do not discharge the requirement of the Agency and, if applicable, the Review Panel to provide an opportunity for meaningful and effective public participation throughout the environmental and sustainability assessment process.

### **Public Participation Funding**

(50)(1) The Agency must establish a public participation funding program to facilitate public participation throughout the entire environmental and sustainability assessment process, including participation in monitoring follow-up programs.

(2) Notice of the public participation funding program shall be provided in conjunction with notice of commencement of the screening or, if the undertaking is included in regulations to the Act, commencement of the initial assessment step.

(3) A person or group of persons that intends to participate in the environmental and sustainability assessment process may apply to the Agency for participant funding at any point in the environmental and sustainability assessment process or in the follow-up program.

(4) The application for funding shall be in a form and contain such information as the Agency may require.

(51)(1) Participant funding shall be provided to any applicant whom the Agency determines:

- a. has clearly demonstrated an interest in the social, cultural, economic, environmental and/ or interactive effects of the undertaking,
- b. if the applicant is a group of persons, has an established record of concern or demonstrated a commitment to the interest that it represents,
- c. the representation of the applicant's interest would contribute to and assist the Agency and, if applicable, the Review Panel in the environmental and sustainability assessment of the undertaking,
- d. the applicant does not have sufficient financial resources to enable adequate representation of its interest, and
- e. the applicant has a clear proposal for its use of any funding that may be provided and has appropriate financial controls to ensure that any funding is used for the purposes for which it is given.

(2) If the Agency determines that an applicant does not meet the requirements set out in 51(1), it may still determine that the applicant should be granted participant funding.

(52)(1) The level of participant funding must be sufficient to enable meaningful and effective public participation in the environmental and assessment process and in monitoring the follow-up program.

(2) In determining the level of participant funding, the Agency shall have regard to the reasonable need for legal fees, expert fees and undertaking independent studies.

### **Public Participation Assistance**

(53)(1) The Agency shall establish a program to provide education and guidance to those persons interested in participating in environmental and sustainability assessments and in monitoring follow-up programs.

(2) The program shall include training on the availability and the use of opportunities for public participation provided by the Act.

(3) The program shall include interpretation, educational and other material necessary to understand information in environmental and sustainability assessment reports and decisions.

### **Petitions**

(54) Any person resident in [Canada/the Province], who is 18 years or older, may petition the Minister to conduct an environmental and sustainability assessment of a proposed undertaking.

(55) The petition for environmental and sustainability assessment must

- a. state the name and address of the petitioner,
- b. state the proposed scope of the environmental and sustainability assessment, and
- c. state the rationale for requesting an environmental and sustainability assessment.

(56)(1) The Minister must, within 120 days of receipt of the petition, either submit the matter to the Agency for an environmental and sustainability assessment or deny the petition with reasons.

(2) If the Minister determines that the undertaking is likely to have a significant impact on sustainability, then he or she must require an environmental and sustainability assessment of that project.

### **[Canadian/Provincial] Environmental and Sustainability Assessment Registry**

(57)(1) There is hereby established a registry entitled the [Canadian/Provincial] Environmental and Sustainability Assessment Registry which shall consist of an internet site and physical environmental and sustainability assessment files.

(2) The purpose of the registry is to facilitate public access to records relating to environmental and sustainability assessments, to provide notice of those assessments in a timely manner and to provide information about and generated by follow-up programs.

(3) The registry must be maintained and operated in a manner that ensures convenient public access.

(4) The Agency must ensure that the following records and information are maintained in the registry and published on the internet site:

- a. any public notice that is issued by the Agency or the review panel,
- b. all petitions submitted to the Minister under the Act,
- c. any decisions made by the Minister pertaining to petitions made under the Act,
- d. a description of all undertakings submitted to the Agency for screening or pre-assessment,
- e. screening decisions issued by the Agency,
- f. pre-assessment decisions issued by the Agency,
- g. all information, comments and submissions provided by the proponent in the course of the assessment process,
- h. all information, comments and submissions received from the public or other participants in the course of the assessment process,
- i. environmental and sustainability assessment reports issued by the Agency or by Review Panels,
- j. certificates of environmental and sustainability assessment issued by the Agency,
- k. all data collected and evaluated in the course of follow-up programs established pursuant to the Act,
- l. all decisions, and supporting evidence, to adaptively modify mitigation measures,
- m. all requests for investigation under the Act,
- n. all enforcement actions taken pursuant to the Act,
- o. any information that could be obtained pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1/provincial equivalent,
- p. any information prescribed by regulations made pursuant to the Act, and
- q. any other information that the Agency considers appropriate.

(5) In order to facilitate the creation of substantive and process guidance for subsequent undertakings, records and information maintained in the registry shall not be destroyed or deleted at any time.

### **Discussion of Part 6: Multi-Jurisdictional Cooperation and Coordination**

Multi-jurisdictional cooperation and coordination is an issue in ESA legislation, not only when dealing with foreign nations, but also within Canada on a federal-provincial/territorial basis and between provinces/territories.

### **Cooperation and Coordination on a Federal-Provincial/Territorial Basis**

In Canada, the legislative powers of the federal and provincial governments are determined by sections 91, 92 and 92A of the *Constitution Act*.<sup>26</sup> The *Constitution Act* does not grant jurisdiction over

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<sup>26</sup> *Constitution Act, 1867*, (U.K.), 30 & 31 Vict. C. 3, reprinted in R.S.C. 1985, App. II, No. 5.

environmental matters *per se* to either level of government. However, each level of government is granted jurisdiction over heads of power which touch upon environmental matters.

Provinces have jurisdiction over the management and sale of provincial public lands (including timber), property and civil rights, matters of a local or private nature, and local works and undertakings. As well, the provinces have jurisdiction over non-renewable natural resources, forestry resources and electrical energy within the province. It should also be noted that, aside from legislative jurisdiction, each province owns most of the natural resources located within its borders.

The federal government has jurisdiction over navigation and shipping, sea-coast and inland fisheries, federal lands, trade and commerce, and criminal matters. In addition, the federal government has the power to make laws for the peace, order and good government of Canada (“POGG”) and to implement any international treaty which Great Britain entered on behalf of Canada (migratory birds).

Given the constitutional division of powers in Canada, discrete environmental matters often fall into the jurisdiction of both the federal and provincial governments. This is the case with environmental assessment. The Supreme Court of Canada - in its seminal decision *Friends of the Oldman River Society v. Canada (Minster of Transport)*, [1992] 1 S.C.R. 3 – confirmed that the federal government has constitutional authority to conduct environmental assessment of projects located within a province.

In *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 S.C.R. 6, the Supreme Court of Canada directly considered *CEAA, 1992*. In this case, a proposed copper and gold open pit mining and milling operation located in British Columbia was subject to both a provincial and federal environmental assessment process. While the Court’s decision primarily focused upon the appropriate use of tracking and scoping decisions under *CEAA, 1992*, it also considered inter-jurisdictional coordination of environmental assessment processes. The Supreme Court of Canada stated (paragraphs 41 and 42):

I should note that while, for federal environmental assessment purposes, a project will include the entire project as proposed, the RAs can, and should, minimize duplication by using the coordination mechanisms provided for in the Act. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments (s. 58(1)(c) and (d)). Full use of this authority would serve to reduce unnecessary, costly and inefficient duplication. Cooperation and coordination are the procedures expressed in the *CEAA* (see s. 12(4)).

In the present case, the federal environmental assessment should have been conducted for the project as proposed by Red Chris. The proposed project was described in the CSL. Therefore, the requirements of s. 21 applied. The RAs were free to use any and all federal provincial coordination tools available, but they were still required to comply with the provisions of the *CEAA* pertaining to comprehensive studies. The RAs in this case acted without statutory authority by conducting a screening.

In other words, the solution to problems of overlap and duplication is to improve coordination and cooperation between the provincial and federal governments. There is no indication that the federal

government ought to delegate its environmental assessment responsibilities to the provincial governments.

Arlene Kwasniak has written extensively on the issue of harmonization of federal and provincial environmental assessment processes.<sup>27</sup> Kwasniak makes a distinction between the concepts of overlap and duplication. Overlap is result of the constitutional division of powers between the federal and provincial governments. Overlap also results from the numerous, complex governmental ministries (even within one level of government). On the other hand, duplication may exist and cause inefficiencies. The efficiency of the environmental assessment process can be improved by addressing unnecessary duplication (not by attempting to eliminate overlap which is a constitutional reality).

Kwasniak indicates that harmonization of federal and provincial environmental assessment processes is acceptable when it requires coordination, cooperation and, in some cases, convergence of EA processes. However, harmonization that involves the elimination or erosion of one level of government's constitutionally authorized interest in a project is not acceptable. Unacceptable harmonization efforts would include the "equivalency" or "substitution" of provincial EA processes for the federal EA process.

Kwasniak warns of several issues that may arise out of attempts to harmonize federal and provincial EA processes:

- restraints on the exercise of jurisdiction due to harmonization requirements,
- one jurisdiction being cast into an inferior role (that is, acting as a consultant not as a decision-maker),
- interference with constitutional jurisdiction (including the failure of a level of government to exercise its exclusive area of jurisdiction),
- non-compliance with statutory authority due to harmonization requirements, and
- reduced environmental standards.

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<sup>27</sup> Arlene Kwasniak, *Harmonization in Environmental Assessment in Canada: The Good, The Bad and The Ugly* (March 2008) published on the Canadian Environmental Network website at rcen.ca; Arlene Kwasniak, *The Eviscerating of Federal Environmental Assessment in Canada*, 2009 blog post on ABLawg.ca; Arlene Kwasniak, *Reviewing the Canadian Environmental Assessment Act: A Citizen's Background* (February 2009) published on the Canadian Environmental Network website at rcen.ca; Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2009) 20 JELP 1; Arlene Kwasniak, *The Fading Federal Presence in Environmental Assessment and the Muting of the Public Interest Voice*, October 2011 blog post on ABLawg.

Harmonization in the classic sense will require EA processes throughout Canada to incorporate EA process standards into domestic law and policy.

### **Environmental Assessment in Other Countries: USA and Australia**

As is the case in Canada, the USA and Australia have both federal and state/provincial/territorial levels of government which have authority over environmental issues. In all three countries, legislative jurisdiction over environmental matters does not fit neatly into one level of government. The direction taken by the USA and Australia to address this overlap of jurisdiction is considered below.

In the USA, the federal EA process is set out in the *National Environmental Policy Act (NEPA)*.<sup>28</sup> The NEPA relates only to federal government projects which may have significant environmental effects. This includes a federal agency's decisions including financing, assisting, conducting or approving projects or programs; agency rules, regulations, plans, policies or procedures; and legislative proposals. NEPA operates only at the federal level and does not overlap with state or other local land-use controls.

Several states within the USA have introduced EA procedures which are very similar to NEPA which apply to activities taking place at the state level. However, many states do not have EA legislation (although these states often set requirements in addition to the NEPA requirements).

In Australia, issues of consistency and duplication have been concerns with EA. The response to these concerns was to adopt a national approach to EA: *A National Approach to Environmental Impact Assessment in Australia* (ANZECC).<sup>29</sup> The purposes of the national approach to EA are to:

- reach a common understanding and agreement on principles and, where appropriate, the practice of EIA in Australia,
- improve the EIA process, including increasing the efficiency of the contribution made by the process to environmental decision-making,
- reduce uncertainty about the application, procedures and functions of the process,
- promote public understanding, and provide and facilitate consistent opportunities for public involvement,
- improve consistency of approach between jurisdictions in Australia responsible for EIA and, where proposals may have environmental impacts across jurisdictions, to apply consistent environmental protection measures,
- avoid duplication where multiple jurisdictions apply, and
- identify and apportion responsibility for participants in the EIA process.

The federal EA process in Australia is governed by the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) which came into effect in 2000. Under the EPBC, proponents are required to seek a determination from the federal environment minister as to whether or not a proposed action

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<sup>28</sup> *Supra* note 18.

<sup>29</sup> Ian Thomas and Mandy Elliot, *Environmental Impact Assessment in Australia: Theory and Practice*, 4<sup>th</sup> ed. (Sydney: The Federation Press, 2005) at chapter 6.

is a controlled action. If the action is a controlled action, then the EPBC applies and an approval from the environment minister is required. The EPBC will be triggered where an action:<sup>30</sup>

- will have or is likely to have a significant impact on a matter of national environmental significance (and the action is not subject to an exception), or
- will have or is likely to have a significant impact on the environment associated with Commonwealth land (i.e. the action will take place on Commonwealth land, on land outside Commonwealth land where the significant impact will be on Commonwealth land or any land if the action is taken by the Commonwealth).

There are seven areas of national significance under the EPBC:

- world heritage properties,
- RAMSAR wetlands of international significance,
- listed threatened species and ecological communities,
- migratory species protected under international agreements,
- nuclear actions (including uranium mining),
- Commonwealth marine environment, and
- national heritage.

The government has published criteria in Administrative Guidelines to indicate when impacts will be considered significant.

The Model Law embraces the use of coordination and cooperation in instances of multi-jurisdictional assessment. Ideally, a national standard for environmental and sustainability assessment processes would be implemented throughout Canada with the result that proponents would have a single set of requirements responsive to federal, provincial and aboriginal jurisdictions. Hence, the Model Law provides for the same process federally and provincially. There is no process for substitution or delegation in the Model Law (which is in stark contrast to *CEAA, 2012* which proposes the use of both substitution and equivalency to allow the federal government to avoid involvement in assessment that raises multi-jurisdictional issues).

### **Cooperation and Coordination on a Canada/Other Nation Basis and Between Provinces/Territories**

It is well known that the environmental impacts of human activities do not respect political borders. Transboundary environmental assessment (“TEA”) aims to assess and address potential environmental harms across political borders. TEA can be applicable on a province-province basis or on a Canada-other nation basis.

Under international law, Canada has an obligation to perform TEA. Customary international law imposes the “harm principle” which has been expressed in the 1972 Stockholm Declaration as follows:

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<sup>30</sup> It should be noted that an “action” is a project, development, undertaking, an activity (or series of activities). It does not include decisions to grant government authorizations or to provide funding.



**Principle 21:** States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental (and developmental) policies and the *responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction*. [emphasis added]

Furthermore, Canada has entered into international agreements which impose an obligation to perform TEA. For example, Canada is a signatory to and has ratified the *United Nations Economic Commission for Europe Convention of Environmental Impact Assessment in a Transboundary Context (Espoo, 1991)* (the “*Espoo Convention*”). The *Espoo Convention* requires that parties undertake EA prior to authorizing a listed activity that is likely to cause significant adverse transboundary impact. If an activity is not listed under the *Espoo Convention*, a party may still request discussion of whether or not the activity is likely to have significant adverse transboundary impact. The *Espoo Convention* sets out requirements for notification, minimum contents of a TEA and dispute resolution mechanisms.

Canada also has agreed, pursuant to the *North American Agreement on Environmental Cooperation*, to:

**Article 10(7):** Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, with a view to agreement between the Parties pursuant to this Article within three years on obligations, consider and develop recommendations with respect to:

- (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;
- (b) notification, provision of relevant information and consultation between Parties with respect to such projects; and
- (c) mitigation of the potential adverse effects of such projects.

The parties to the *North American Agreement on Environmental Cooperation* – Canada, US and Mexico – have developed a draft *North American Agreement on Transboundary Environmental Impact Assessment (1997)*. However, negotiations on this matter have stalled and the TEA agreement has not moved beyond the draft stage.<sup>31</sup>

Aside from the *Espoo Convention* and the *North American Agreement on Environmental Cooperation*, Canada is a signatory to other international agreements that impose obligations for TEA. These include the *United Nations Convention on the Law of the Sea*, the *Convention on Biodiversity* and the *Antarctic*

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<sup>31</sup> According to Neil Craik, “Transboundary Environmental Assessment: International and Constitutional Dimensions” (2010) 21 JELP 107 at page 4, the negotiations regarding TEA under the *North American Agreement on Environmental Cooperation* “foundered on Mexican concerns over the reciprocal application of the agreement since the Mexican domestic laws were more inclusive than the requirements in the United States.”

*Protocol*. Canada also has entered into bi-lateral agreements with the US which are relevant to TEA: the *US-Canada Air Quality Agreement* and *Boundary Waters Treaty*.

In Canada, the international TEA requirements have been implemented by incorporating them into the domestic legal framework.<sup>32</sup> Essentially, transboundary environmental impacts are considered in the same manner as domestic environmental impacts. This approach does not recognize that the rights of sovereign states cannot be derogated unilaterally.<sup>33</sup> As well, transboundary situations create unique concerns with notification and consultation, access to information and remedies.<sup>34</sup>

At least one legal commentator – Neil Craik – has concluded that the structure of transboundary rules under *CEAA, 1992* fails to implement international legal requirements.<sup>35</sup> Under s. 47 of *CEAA, 1992*, a TEA can be triggered when requested by a province or state, or at the Minister’s discretion. According to Craik, the decision to conduct a TEA under s. 47 of *CEAA, 1992* should be more transparent. Increased transparency would be consistent with domestic public participation rights and emerging international rights to public participation. Craik argues that trading off environmental values for economic gain may be a valid domestic policy choice but, if there are significant transboundary environmental risks, that decision cannot be made solely by the source state. As such, processes for requesting TEA and consultation are important mechanisms for managing transboundary impacts. Craik argues that the best chance of success in managing transboundary impacts is through bilateral agreements that harmonize jurisdictions.<sup>36</sup> In Craik’s view, it is not appropriate to consider substitution as an approach because each jurisdiction is required to exercise its own jurisdictional authority.

According to another legal commentator – Kersten – the effectiveness of TEA can be improved by replicating the institutional setting that supports EA on a domestic basis in the international arena.<sup>37</sup> In other words, domestic EA is supported within a jurisdiction by political and legal accountability and by substantive environmental law. These institutional supports are not necessarily in place in the international arena. As such, Kersten suggest that arrangements for TEA need to incorporate several elements:

- Create political accountability by requiring notification of major environmental non-governmental organizations.
- Create a private right to challenge the procedural adequacy of TEA thereby ensuring legal accountability.

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<sup>32</sup> Craik, *ibid* and John Knox, “The Myth and Reality of Transboundary Environmental Impact Assessment” (2002) 96 *Am. J. Int’l L.* 291.

<sup>33</sup> Craik, *ibid*.

<sup>34</sup> Kees Bastmeijer and Timo Koivuriva, *Theory and Practice of Transboundary Environmental Impact Assessment* (Boston: Martinus Nijhoff Publishers, 2008) at chapter 5.

<sup>35</sup> Craik, *supra* note 33.

<sup>36</sup> Although standardization may be more desirable because it creates a standardized approach to environmental assessment across jurisdictions, Craik, *ibid*, concludes this is not likely to happen due lack of political will.

<sup>37</sup> Charles M. Kersten, “Note: Rethinking Transboundary Environmental Impact Assessment” (2009) 34 *Yale Journal of International Law* 173.

- Impose a duty of due diligence between states (rather than strict liability) to effectively regulate the manner in which development proceeds (rather than effectively disallowing development). Each state would be required to use the best available technology, choose the best location and take appropriate mitigation measures.

Another legal commentator – Kennett – has criticized the wholly discretionary nature of the transboundary provisions in *CEAA, 1992*.<sup>38</sup> Kennett notes that there is complete discretion as to whether or not to conduct a TEA and that there is not even a requirement to respond with reasons for any decision made. There is no requirement to conduct a TEA. Kennett concludes that, while the federal government has good constitutional authority to conduct TEA, it is unlikely to do so due to the lack of strong legal tools and political will. It is Kennett’s suggestion that the *Espoo Convention* be adopted as a model for a decentralized model of TEA within Canada. In this model, the provinces take the lead (as opposed to a centralized model where the federal government takes the lead). Kennett’s proposed model has six key features:

- mandatory requirement that transboundary effects be identified and taken into account in each jurisdiction’s EA regimes,
- requirements for notification of parties in other jurisdictions that may be affected by transboundary impacts and procedure for responding to such notification,
- guarantee the rights of government and the public in other jurisdictions that may be affected by transboundary impacts to participate,
- range of formal and informal mechanisms for consultation on transboundary EA,
- dispute resolution should be incorporated in legislation and intergovernmental agreements, and
- formally commit to taking transboundary impacts into consideration when reviewing projects.

To achieve this decentralized approach to TEA within Canada, the provincial EA regimes need to be amended. As well, interprovincial agreements must be made to effectively consider transboundary effects.

In the Model Law, the provisions regarding environmental effects on other jurisdictions are based on the commitments in the *Espoo Convention*. These provisions are meant to provide a broad framework for multi-jurisdictional cooperation and coordination (on a Canada-other nation basis or between provinces/territories). While *Espoo* limits effects to “environmental” effects, the Model Law considers all aspects of sustainability (i.e., social, cultural, economic, environmental and interactive components).

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<sup>38</sup> Steven Kennett, “The Canadian Environmental Assessment Act’s Transboundary Provisions: Trojan Horse or Paper Tiger” (1995) 5 JELP 263.

## Part 6

### Multi-Jurisdictional Cooperation and Coordination

(58)(1) Cooperation and coordinated action between federal, provincial, territorial and aboriginal governments is essential to advancing progress towards sustainability.

(2) In order to ensure cooperation and coordinated action, the [federal government must work with provincial, territorial and aboriginal governments/ the provincial government must work with the federal government, other provinces, territories and aboriginal governments located in the province] to develop agreements which harmonize environmental and sustainability assessment goals and processes. In particular, regard must be had to:

- a. creating predictable sharing of assessment responsibility among the governments,
- b. promoting efficient administration of assessment processes among the governments, and
- c. following the highest standards and best practices from among the governments, including the highest levels of public participation and funding.

(3) The [federal government must work with provincial, territorial and aboriginal governments/ the provincial government must work with the federal government, other provinces, territories and aboriginal governments located in the province] to conduct regional and strategic environmental and sustainability assessments to address issues that may impact on sustainability on a multi-jurisdictional basis.

(4) Nothing in this Act or in harmonization agreements negotiated pursuant to this Act abrogates or derogates from any existing Aboriginal or treaty rights of the Aboriginal peoples of Canada under s.35 of the *Constitution Act, 1982*.

### Sustainability Effects on other Jurisdictions

(59) Where an undertaking is likely to cause direct social, cultural, economic, environmental or interactive effects on another jurisdiction, the Minister shall:

- a. direct that an environmental and sustainability assessment of the undertaking be conducted under the Act,
- b. notify that other jurisdiction of the potential for direct social, cultural, economic, environmental or interactive effects no later than the notification to members of the [Canadian/ Provincial] public, and
- c. permit members of the public of that other jurisdiction to participate in the environmental and sustainability assessment process as though they were members of the [Canadian/ Provincial] public.

### Discussion of Part 7: Canadian/Provincial Environmental and Sustainability Assessment Agency

Given that environmental assessment is a process for guiding and informing decision-making, it is not uncommon for environmental assessment legislation to adopt a self-assessment model. Essentially, the task of environmental assessment is left in the hands of the regulatory decision-maker or, in many cases, even the government proponent of the undertaking. A self-assessment model was adopted in *CEAA*,

1992. In *CEAA, 2012*, federal assessment has moved away from the model of self-assessment although some elements of self-assessment remain.<sup>39</sup>

The model of self-assessment has often been criticized.<sup>40</sup> Self-assessment raises an inherent conflict of interest in that the department conducting the EA may want the project to proceed, may be promoting its own business interests and may be trying to limit its administrative burden.<sup>41</sup> In practice, the use of self-assessment has led to the use of letters of advice to avoid the EA process and late triggering of the EA process. As well, the avoidance of public involvement tends to be associated with self-assessment.

The alternative to self-assessment needs to address the problems of a lack of serious commitment to EA, diffuse accountability with no single body to enforce compliance and too much discretion.<sup>42</sup> The alternative should be a central, arms-length body with a means to enforce binding decisions.

To address the problems associated with the model of self-assessment, the Model Law establishes a central agency responsible for the conduct of the ESA process and for continuous improvement of ESA. It should be noted that, while there is already a central federal agency (the Canadian Environmental Assessment Agency), for many provinces this would be a new agency.

In addition to addressing the problems associated with the model of self-assessment, it is the view of the ELC that a central agency will improve overall efficiency and efficacy of ESA. The existence of a central agency to conduct the ESA process should address the frustration associated with governmental overlap (and having to deal with the expectations/requirements of several governmental agencies involved in the environmental assessment). It is expected that, with one central agency conducting ESA, consistency in expectations, requirements, procedures and decision-making would be improved. Further, with one central agency conducting ESAs, it is expected that the potential for strategic ESAs (including regional ESAs and codes of practice) will be recognized more easily leading to overall gains in efficiency and efficacy of ESAs.

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<sup>39</sup> Under *CEAA, 2012*, the National Energy Board and the Canadian Nuclear Safety Commission have authority for some environmental assessments. As well, federal authorities are allowed to conduct assessments of projects that affect federal lands or projects located outside Canada that are funded by the federal government (ss.66 to 72).

<sup>40</sup> See, for example, Michael Jeffery, "The New Canadian Environmental Assessment Act – Bill C-78: A Disappointing Response to Promised Reform" (1991) 36 McGill LR 1070; Ted Schrecker, "The Canadian Environmental Assessment Act: Tremulous Step Forward or Retreat Back into Smoke and Mirrors" (1991) 5 CELR(NS) 192; Hugh Benevides, *Moving Away from Self-Assessment: A Discussion Paper* (East Coast Environmental Law Centre, 2009); Teri Cherkewich, "Getting to "No" Through YESSA? A Look at an Alternative Federal Assessment Model Based Upon the Principle of Independence" (2010) 21 JELP 247; and Meinhard Doelle, *supra* note 10.

<sup>41</sup> Hugh Benevides, *ibid.*

<sup>42</sup> *Ibid.*

## Part 7

### **[Canadian/ Provincial] Environmental and Sustainability Assessment Agency**

(60)(1) There is hereby established an agency to be called the [Canadian / Provincial] Environmental and Sustainability Assessment Agency.

(2) The Minister is responsible for the Agency.

(61)The Agency is responsible for:

- a. advising and assisting the Minister in performing the duties and functions conferred on the Minister by this Act,
- b. administering the environmental and sustainability assessment process and any other requirements established by this Act and its regulations,
- c. coordinating the environmental and sustainability assessment process with federal, provincial and territorial authorities and Aboriginal peoples dealing with the same undertaking,
- d. promoting, monitoring and facilitating compliance with this Act,
- e. ensuring an opportunity for meaningful and effective public participation in the [federal/ provincial] environmental and sustainability assessment process,
- f. ensuring an opportunity for meaningful and effective public participation in the development of regulations, policies and other guidance pertaining to the Act which includes, but is not limited to, establishing a Regulatory Advisory Committee comprised of stakeholders which shall meet at least once each calendar year, and
- g. requiring and providing guidance for full and fair application of core sustainability decision criteria and trade-off rules.

(62)In addition to its powers for conducting environmental and sustainability assessments and decision-making under this Act, the Agency has the power to:

- a. undertake studies or conduct research relating to environmental and sustainability assessment,
- b. advise persons on matters relating to environmental and sustainability assessment,
- c. prepare guidelines or other documents relating to environmental and sustainability assessment, and
- d. require that persons or bodies provide information to the Agency or, if applicable, the Review Panel respecting environmental and sustainability assessments performed under this Act.

(63)In order for the Agency to recover its costs related to the environmental and sustainability assessment of an undertaking, the proponent must pay to the Agency any costs incurred for services prescribed by regulation provided by a third party in the course of the assessment and

any amounts prescribed by regulation that are related to the exercise of its responsibilities in relation to the assessment, including the provision of participant funding.

(64)(1) The Agency is required to submit an annual report to the Minister on its activities, and on the implementation and administration of the Act.

(2) The report must include a statistical summary of all environmental and sustainability assessments conducted under the Act.

(3) The report must include a record and assessment of public participation programs.

(4) The annual report must be made publicly available and published on the Agency's registry.

(65)The Agency will be subject to audit in accordance with the [*Auditor General Act*, R.S.C. 1985, A-17/ Provincial Equivalent]

## **Part 8**

### **Regulations**

(66)The Minister may make regulations

- a. to designate items subject to cost recovery pursuant to section 66 of this Act,
- b. providing delineation of the core sustainability criteria and trade-off rules,
- c. directing that certain undertakings must undergo environmental and sustainability assessment,
- d. directing that certain undertakings must undergo environmental and sustainability assessment by Review Panel,
- e. establishing criteria for the selection of indicator data to be used in follow-up programs,
- f. prescribing anything that, by this Act, is to be prescribed, and
- g. generally, for carrying out the purposes and provisions of this Act.

## **Part 9**

### **Offences and Penalties**

(67)A prosecution for an offence under this Act may not be commenced more than 2 years after the later of the date on which the offence was committed or the date on which evidence of the offence first came to the attention of the Agency.

(68)A person who takes actions designed to advance an undertaking without a required certificate of environmental and sustainability assessment is guilty of an offence.

(69)A person who fails to comply with the conditions set out in a certificate of environmental and sustainability assessment is guilty of an offence.

(70) A person who commits an offence is liable:

- a. In the case of an individual, to a fine of not more than \$250,000 or to imprisonment for a period of not more than 5 years or to both, or
- b. In the case of a corporation, to a fine of not more than \$1,000,000.

(71) No person shall be convicted of an offence if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.

(72) Where the person is convicted of an offence under this Act and the court is satisfied that as a result of the commission of the offence monetary benefits accrued to the offender, the court may order the offenders to pay, in addition to the fines in section 70, a fine in an amount equal to the court's estimation of the amount of those monetary benefits.

(73) When a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having all or any of the following effects:

- a. prohibiting the offender from doing anything that may result in the continuation or repetition of the offence,
- b. directing the offender to take any action the court considers appropriate to remedy or prevent any harm to cultural, social, economic or environmental components that results or may result from the act or omission that constituted the offence,
- c. directing the offender to publish, in the prescribed manner and at the offender's cost, the facts relating to the conviction,
- d. directing the offender to notify any person aggrieved or affected by the offender's conduct of the facts relating to the conviction in the prescribed manner and at the offender's cost;
- e. directing the offender to post a bond or pay money into court in an amount that will ensure compliance with any order made pursuant to this section,
- f. directing the offender to submit to the Minister any information with respect to the conduct of the offender that the court considers appropriate in the circumstances,
- g. directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action that was carried out or caused to be carried out by the Government and was made necessary by the act or omission of the offender,
- h. directing the offender to perform community service, or
- i. requiring the offender to comply with other conditions the court considers appropriate in the circumstances.

(74) Every person who is guilty of an offence under this Act is liable on conviction for each day or part of a day on which the offence occurs or continues.

(75) Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the



commission of the offence is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted for or convicted of the offence.

### **Investigations**

(76) Any 2 persons resident in Canada, who are 18 years or older and who are of the opinion that an offence has been committed under this Act, may apply to the Minister to have an investigation of the alleged offence conducted.

(77) The application for investigation must be accompanied by a solemn declaration that

- a. states the names and addresses of the applicants,
- b. states the nature of alleged offence and the name of each person alleged to be involved in its commission, and
- c. contains a concise statement of the evidence supporting the allegations of the applicants.

(78)(1) On receipt of an application for investigation, the Minister shall acknowledge receipt of the application and shall investigate all matters that the Minister considers necessary for a determination of the facts relating to the alleged offence.

(2) Within 90 days after receiving the application, the Minister shall report to the applicants on the progress of the investigation and the action, if any, proposed to be taken in respect of the alleged offence.

(3) The Minister may discontinue an investigation if the Minister is of the opinion that the alleged offence does not require further investigation.

(4) Where the investigation is discontinued, the Minister shall:

- a. prepare a written statement indicating the reasons for discontinuance of the investigation, and
- b. send a copy of the statement to the applicants and to any person whose conduct was investigated.

## **Part 10**

### **Administrative Matters**

(79)(1) Five years after the coming into force of this section, a comprehensive review of the provisions and operation of this Act shall be undertaken by [such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or both Houses of Parliament as the case may be, for that purpose/ such committee of the Legislative Assembly as may be designated or established by the Legislative Assembly of the Province.]

(2) The comprehensive review shall provide opportunity for meaningful and effective public participation and for public engagement.

(3) The committee referred to in (1) shall submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

(80)Transitional Provisions

(81)Consequential Amendments

(82)Coming into Force

### **Federal Project Regulations**

#### **Projects and Classes of Projects for which an Environmental and Sustainability Assessment is Required**

The regulations could identify:

- (1) Large scale projects which require an environmental and sustainability assessment by panel review.
- (2) Smaller scale projects for which an environmental and sustainability assessment is required but which may proceed by an agency or panel assessment as determined by the initial assessment.
- (3) Small scale project for which a code of practice applies (or, initially, should be developed)

The regulations could identify particular **types of activities/projects** for which assessment will be required. As well, the regulations could identify **particular impacts** associated with an activity or project (e.g. contribution of greenhouse gases at or above a set threshold) which will trigger the requirement for an assessment.

## Provincial Regulations

### Projects and Classes of Projects for which an Environmental and Sustainability Assessment is Required

1. The construction, operation or reclamation of a plant, structure or thing for the manufacture or processing of:
  - a. ethylene or ethylene derivative,
  - b. benzene, ethyl benzene or styrene,
  - c. chlor-alkali,
  - d. chemical fertilizer products,
  - e. petroleum products, or
  - f. explosives.
2. The construction, operation or reclamation of a plant, structure or thing for the manufacture or processing of pulp and paper products.
3. The construction, operation or reclamation of a plant, structure or thing for the production, manufacture or processing of:
  - a. natural gas, its products or its derivatives;
  - b. coal;
  - c. heavy oil;
  - d. oil sands; or
  - e. minerals.
4. The construction, operation or reclamation of a plant, structure or thing for the surface storage of brine associated with hydrocarbon storage facilities.
5. The drilling, construction, operation or reclamation of a well other than water well located within 200 m of a water well or surface water body, under a water body or in a protected area.
6. The construction, operation or reclamation of a pipeline or battery for oil or gas operations.
7. Oil or gas exploration operations that may result in surface disturbance.
8. The construction, operation or reclamation of a gas production project that uses multi-stage hydraulic fracturing.
9. The construction, operation or reclamation of a plant, structure or thing for the generating of thermal electric power or steam.
10. The construction, operation or reclamation of a plant, structure or thing for the generating of hydro-electric power.

11. The construction, operation or reclamation of wind-power generation facilities.
12. The construction, operation or reclamation of a plant, structure or thing for the storage, treatment, processing or disposal of hazardous waste.
13. The construction, operation or reclamation of a waste management facility.
14. The construction, operation or reclamation of a mine, quarry or pit.
15. The construction, operation or reclamation of a transmission line or telecommunication line.
16. The construction, operation or reclamation of an all-season highway, railway or aircraft landing strip.
17. The construction, operation or reclamation of facilities for recreational or tourism purposes – in or adjacent to Ecological Reserves, Provincial Parks, Wilderness Areas, Wildland Provincial Parks, Natural Areas, Heritage Rangelands and Provincial Recreation Areas - that is expected to attract more than 250,000 visitors per year.
18. The construction, operation or reclamation of livestock operations for which a permit is required under the *Agricultural Operation Practices Act*, R.S.A. 2000, A-7.
19. Any activity, diversion of water, operation of a works or transfer of an allocation of water under a licence for which an approval, licence or an approval of transfer of an allocation of water under the *Water Act*, R.S.A. c. W-3 is required.
20. The creation or renewal of forest management agreements.
21. The development of any plan, policy or program pertaining to land use management, including regional land use planning under the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 and urban development policies.
22. The development of any plan, policy or program pertaining to the sale, lease or other disposition of public lands, including mines and minerals.

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