…CEAA, as well as Alberta resource and environmental protection legislation, serves the interests of Albertans, and, consequently, its terms must be met as framed.

AWA, et al. v. *Minister of Fisheries and Oceans, et al.*
(4 April 1999) # T-2354-97, T-1790-98 (F.C.T.D.), at 40

SUBMISSION TO THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY and ALBERTA ENVIRONMENTAL PROTECTION on the DRAFT *CANADA-ALBERTA AGREEMENT FOR ENVIRONMENTAL ASSESSMENT COOPERATION*

ENVIRONMENTAL LAW CENTRE

April 19, 1999

Introduction

The Environmental Law Centre (Alberta) Society is a non-profit charitable organization operating in Alberta since 1982. The Society believes in making the law work to protect the environment and in support of this objective provides services in environmental law education and assistance, environmental law reform and environmental law research. The Society operates the Environmental Law Centre which is staffed by 4 full-time lawyers.

Funding is provided to the Society in part by the Alberta Law Foundation and through the generous support of the public. The Environmental Law Centre also accepts private and government research contracts for work relevant to and consistent with the Society's objectives.

The Environmental Law Centre has had a long-standing interest in the development of federal and provincial environmental impact assessment processes. Legal staff participated extensively in public consultation processes to develop the Alberta *Environmental Protection and Enhancement Act* (EPEA) and the *Canadian Environmental Assessment Act* (CEAA) and are currently involved in preparations for the five-year CEAA review. We also participated in public consultation processes preceding the release of the draft *Canada-Alberta Agreement for Environmental Assessment Cooperation* (Agreement) and we appreciate the opportunity to provide comments before it is finalized.

The ELC is supportive of federal-provincial processes designed to make environmental impact assessments of proposed projects by both levels of government as efficient as possible. In theory, joint hearings, provide a mechanism whereby both levels of

government can seek the information they need to meet their statutory obligations in an efficient manner. We acknowledge that duplicated processes can be costly for all participants, especially representatives of the public interest who typically have limited access to resources.

However, our support for coordinated federal-provincial environmental impact assessment processes is subject to there being in place rules and procedures that ensure that the lawful obligations of both governments are met through the process. This means to be acceptable the federal-provincial agreement must recognize and facilitate each party's meeting its legal obligations under its legislation. It also means that there must be sufficient resources, both financial and human, and commitment by the parties and their officials to the full application of both the provincial and federal environmental impact assessment processes. The ELC's goal in submitting this brief is to make constructive suggestions to ensure that these objectives are met.

Preamble

Recital 1 This Agreement opens with the declaration that the Parties respect one another's constitutional responsibilities, including a *shared* responsibility for the environment. It is commonly believed that the 2 levels of government "share" responsibility for the environment, and considering the common understanding of the word "share", they do. However, in a technical legal sense, the 2 levels of government have a concurrent responsibility for the environment. Each has the exclusive right to pass laws within the list of powers assigned to them in the Canadian constitution. In the area of the environment, as with many others, both levels of government have specific responsibilities. It is not an option for governments to change the arrangement through legislation or through agreements. What they can do, is to coordinate their legal processes, to make them operate more effectively. If this understanding is kept clearly in mind in the drafting and administration of this Agreement, there should be fewer difficulties with defending in court the outcomes of cooperative assessments where the legal requirements of the 2 governments were not met.

1.0 Definitions

"environmental assessment" In defining this term, the Agreement makes reference to only one provincial act, EPEA. Given that environmental impact assessments are reviewed provincially by either the Natural Resources Conservation Board or the Energy and Utilities Board, it may be prudent to refer to their legislation as well in this definition. This is important in light of the definition of "Parties" which refers to various boards and officials responsible under federal or provincial laws for *environmental assessment*.

"joint panel review" This definition includes a substantive provision in the second sentence indicating that a joint review panel may undertake other evaluations of the project within its legal authority. This should be moved to the body of the Agreement.

5.0 Determination of Lead Party

5.1 This provision refers to and incorporates the provisions in the *Sub-agreement on Environmental Assessment* (Sub-agreement) concerning the determination of who is a lead party. We have concerns with both the wording of clauses 5.6.0 and 5.6.1 of the Sub-agreement and the process for determining the Lead Party.

Clause 5.6.1 declares that the federal government will be the lead party for federal projects "on federal lands where federal approvals apply…". We interpret this to require that both conditions be met before the federal government will be the lead party: (1) the proposed project is on federal land, and (2) a federal approval is required. We are concerned that there may be a situation where a proposed project is on federal land and requires a provincial permit but not a federal approval. This would result in the province being the lead party for a project on federal land. This would seem to be a perverse result of the application of the rule and we would appreciate assurance that this would never occur in fact. In addition, the rule in this clause does not make reference to the other important triggers of a federal environmental assessment under CEAA, those being federal financing of a project and the federal government as the proponent of a project. Because these triggers are not dealt with in the clause, where they apply, the province would always be the lead party unless clause 5.6.4 applied. This also seems to be a unsatisfactory result.

Clause 5.6.2 of the Sub-agreement raises similar concerns. It states that the province will be the lead party where three conditions are met: (1) the proposed project is on lands within its provincial boundary, (2) the project is not covered under clause 5.6.1, and (3) provincial approvals apply. The concern is that there may be activities in Alberta which could trigger an environmental assessment under EPEA, but which do not require an "approval", even defining that term broadly.

Both drafting concerns in the Sub-agreement should be clarified and rectified in this Agreement.

The policy concern with these provisions arises from the fact that the determination of the lead party does not result from any enunciated process. Clause 5.3 of the Agreement refers to the "Party assuming the lead on the basis of clauses 5.6.1 and 5.6.2…" [emphasis added]. Given the issues of interpretation raised above, and others that may become apparent in the future, we believe that discussions between the parties to determine who is the lead party under this Agreement will inevitably take place. Accordingly, the other parties with legal rights under the federal and provincial environmental assessment processes, notably the proponent and other affected parties, should have an opportunity to be a part of this process and to have their opinions heard.

5.4 Consistent with our remarks above, we recommend that the proponent and other affected parties play a role in any discussions that take part under this provision.

5.5 This provision states that clause 2.2.0 in the Sub-agreement does not apply where a proposed project will be located on both federal land and other land in the province. Clause 2.2.0 declares that the Sub-agreement does not apply where an environmental assessment process exists pursuant to a land claim or self-government agreement. Should the requirements of clause 5.5 apply, it seems inconceivable that any discussions on matters concerning the lead party would take place without the direct participation of the Aboriginal people responsible for the relevant land claim agreement or self-government agreement. The Agreement should require this.

5.0 Cooperative Environmental Assessment

6.4 This provision creates a new body called a "project specific technical review team". With respect to the membership on the body, this clause refers to the "participants with an environmental assessment responsibility for the project…" [emphasis added]. "Participants" is not defined in the Agreement and its meaning is not clear from the context. If "participants" means the "parties", then this should be stated expressly. We assume that the proponent or its experts will not be a part of this team under any circumstances as this might amount to a breach of the parties' legal duty of fairness.

Given the importance of compliance with CEAA, EPEA and other relevant provincial legislation, we suggest that this committee include legal expertise from both parties.

6.15 It is unclear as to why the party which is not requiring a hearing would "complete any remaining analysis and provide its conclusions and recommendations to the panel prior to the date for the public hearing…". If the "conclusions and recommendations" are relevant to the hearing, should not they be presented to the panel as a part of the hearing? Any "conclusions and recommendations" presented to the panel prior to the hearing should be made available to all participants in the hearing.

6.16 This provision incorporates Appendix 2 which sets out the rules for joint panel reviews. Our specific comments on this Appendix follow directly. A more general question is: how will this Agreement deal with a decision under CEAA to proceed to mediation?

1.4 This provision addresses conflict of interest issues with respect to the panel. To comply with s. 41(b) of CEAA, this provision should read: "The Joint Panel members shall be unbiased and free from any conflict of interest relative to the project under review and shall have knowledge or experience relevant to the anticipated environmental effects of the project".

4.1 Whether the matter of "legal support" is dealt with expressly in this section, it is important that the Secretariat has legal expertise in both the federal and provincial environmental impact assessment processes to ensure that the legal requirements of both are met throughout the process.

6.4 This provision describes the final report of a joint panel. It is recommended that the second sentence be amended as follows to ensure compliance with the recent decision of the Federal Court of Canada in *Alberta Wilderness Association et al.* v. *Minister of Fisheries and Oceans, et al.*: "The Final Report will reflect the views of all the members of the Joint Panel and will substantiate its recommendations."

9.0 Timelines and Resources

9.2 The public should be advised of all changes in the schedule.

9.3 The wording of this section is especially awkward. Alternate wording is: "To facilitate efficient consultation between the federal government and Alberta proponents and the public, federal responsible authorities will be available in Alberta as required to conduct their business related to Alberta projects.

12.0 Aboriginal Considerations

12.2 This provision mirrors clause 2.2.0 of the Sub-agreement concerning the fact that the Agreement does not apply to environmental assessment processes existing pursuant to a land claim agreement or self-government agreement. As noted earlier, it is not clear how this clause and clause 5.5 can be applied consistently.

Appendix 3

2.0 This provision requires the consent of both parties before one party participates in the environmental assessment process of the other (a) except in respect to a proponent's consultation program before the environmental assessment report is prepared and written comments to the decision maker during the process (d). Given the high level and sometimes unique environmental expertise resting in the departments and agencies of both governments, it is essential that they have the opportunity to appear before environmental panels to give expert evidence in appropriate cases. This should not require the approval of the other level of government.

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