

# **Inter-jurisdictional Coordination of EA: Challenges and opportunities arising from differences among provincial and territorial assessment requirements and processes**

Report for the Environmental Planning and Assessment Caucus,  
Canadian Environmental Network

East Coast Environmental Law Association  
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This report is prepared based on provincial and territorial legislation and policy documents as of January 2009, updated to November 2010. Any changes since that date are not reflected. The research does not include an analysis of federal statutes such as the *Canadian Environmental Assessment Act*, nor does it cover the practice of federal panels such as the National Energy Board or the Offshore Review Boards. Our thanks to Meinhard Doelle and John Sinclair for the use of their research.

This report is intended as a draft for circulation for information and for comment to members of the Environmental Planning and Assessment Caucus, Canadian Environmental Network and to the Canadian EA Agency.

## Summary

Improved inter-jurisdictional coordination of EA is receiving more attention in Canada, as well as other jurisdictions, as a means of enhancing the effectiveness and efficiency of EA in Canada. Mechanisms potentially available for such improvements range from informal cooperation between administrative authorities through full standardization of requirements and processes across the country. Considerable attention is now being paid to possible expansion of formal cooperation agreements between the federal government and individual provinces and to deferral from one level to the other in cases where the relevant obligations are judged to be equivalent. One key factor affecting the practicality of such arrangements is the extent and nature of differences among the assessment requirements and processes involved, especially where these differences involve conflicts between key expectations and timing.

Overlap and duplication are common features of federal systems of government and are often blamed for regulatory aggravations. There is broad agreement that action is needed to prevent or remove unhelpful inefficiencies as well as to minimize opportunities for conflict, cost shifting and responsibility avoidance. At the same time, however, federal systems have advantages that are worthy of preservation. The following conclusions from a review of responses to EA overlap and duplication in Australia are no doubt relevant to the Canadian debate:

... in their quest to eliminate duplication and overlap, policy makers have imposed artificial divisions on a complex policy domain. By limiting the opportunities for political engagement, they have also surrendered some of the strengths of a federal system of government and removed important failsafe mechanisms which provide valuable insurance against policy failure. (Hollander, 2010)

In this light, cooperative coordination is an attractive approach to applied federalism.

This paper provides an initial examination of:

- the key categories of assessment requirements and process that may affect the potential for improving inter-jurisdictional coordination;
- in each of these categories, the actual assessment provisions of the provincial and territorial processes with which federal assessment law and process would be coordinated;
- the key resulting challenges and opportunities for improving inter-jurisdictional coordination; and
- possible responses to these challenges and opportunities.

## I Inter-jurisdictional coordination of EA

Environmental assessment (EA) coordination between or among jurisdictions can involve a range of actions. At the minimum, coordination entails arrangements for cooperation in cases of applications where two or more assessment processes apply to the same undertaking(s), cover overlapping issues and require overlapping studies, submissions and associated deliberations. At the more ambitious end of the spectrum are efforts to harmonize EA requirements and processes through standardization – the adoption of similar and compatible, if not entirely identical, provisions – and consolidation. Related initiatives to defer assessment responsibilities from one jurisdiction to another are also worth considering here, though they involve some stretching of the definition of coordination.

Cooperative arrangements have been a common feature of EA in Canada for many years. Among the most common initiatives are the gradual development of informal accords, case-by-case negotiation of joint reviews including public hearings, and signing of formal agreements for more general cooperation, typically between the federal government and a province. Arrangements and satisfaction levels have varied across the country (Lawrence, 1999). It is safe to say there is room for expansion and strengthening of the current arrangements. But while potential gains through enhanced cooperation under existing EA laws and processes may be considerable, significant limitations are posed by the differences among the many existing EA regimes in Canada.

In addition to the *Canadian Environmental Assessment Act (CEAA)*, other federal level EA regimes (e.g., under the *Export Development Act*) and overlapping regulatory processes (e.g., by the National Energy Board), every province and territory has EA legislation or the equivalent, sometimes spread through various statutes covering different sectors, and sometimes permitting further requirements to be specified by regional and/or municipal governments. As well, a variety of other EA processes have been established under Aboriginal land claim agreements (e.g., under the *Inuvialuit Final Agreement* and the *James Bay and Northern Québec Agreement*). The requirements and processes of these regimes are diverse in purpose, structure, scope, timing and a variety of other features that pose challenges for cooperation. Harmonization proposals therefore often involve advocacy of changes to existing laws and administration to increase the similarity, or at least compatibility, of EA requirements.

Finally, some proponents of greater inter-jurisdictional coordination advocate deferral of EA responsibilities from one jurisdiction or process to another – most often deferral of federal responsibilities to the provincial level.<sup>1</sup> Whether such steps qualify as coordination is open to question. While federal and provincial constitutional responsibilities for broadly environmental matters overlap, they are different, and provincial powers and expertise generally do not cover all federal matters (Kwasniak, 2009). Simple deferral can therefore amount to federal abandonment of assessment requirements, not coordination with the provinces. Deferral of lead responsibility, with specified means of consolidating assessment scope, opportunities and capacities in ways that ensure comprehensive attention to both federal and provincial concerns could serve the interests of effectiveness and efficiency through better coordination.

The essential goal of all inter-jurisdictional coordination efforts should be overall enhancement of decision making and end results. The many EA regimes in Canada have co-evolved over several decades but under different circumstances and subject to different traditions and pressures. All of these regimes have their own strengths and limitations as well as conflicts and incompatibilities with each other.

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<sup>1</sup> These initiatives may be accompanied by proposals for deferral of responsibilities under EA legislation to a regulatory body. Recent federal level moves in Canada include substitution of National Energy Board hearings for hearings under the *CEAA*, though the core requirements of this *Act* still apply.

Addressing demands for better inter-jurisdictional coordination of EA is therefore also an opportunity to strengthen EA in Canada overall.

In this paper, we consider inter-jurisdictional coordination as a means to achieve upwards harmonization, to establish and meet a consistently high standard of assessment in application throughout the country. Upward harmonization means adopting and fostering more consistent and widespread use of the best EA requirements and process elements in current practice. It entails joint attention to how coordination may strengthen the quality of assessment work and the effectiveness of its contributions while also increasing process efficiencies. Certainly there is plenty of room and need for such improvements at both the provincial/territorial and federal levels in Canada.

## **II Basic principles for upwards harmonization through inter-jurisdictional EA coordination**

If inter-jurisdictional EA coordination is to contribute to upwards harmonization for effectiveness and efficiency, some basic principles must be applied. The following criteria are proposed as an initial working list:

- ensure comprehensive, integrated and effective consideration of matters within federal and provincial/territorial jurisdiction, recognizing that the Constitution of Canada has both created separate areas of authority and left some areas of overlap;
- respect process requirements of assessment processes established under Aboriginal claims agreements and, more generally, meet obligations to consult meaningfully with Aboriginal people and to accommodate their concerns where anticipated actions could have adverse effects on practices, customs and traditions;
- cover both strategic and project level undertakings and be clear about how, and with what limitations, strategic level assessments can guide project level assessments;
- be entrenched in law that ensures authoritative and enforceable decisions within the process and opportunity for appeal where principles or prescribed requirements seem not to have been satisfied;
- include a clear statement of process purposes, centred on commitment to sustainable development or the equivalent, with appropriate evaluation and decision criteria established in order to ensure that assessed undertakings meet the criteria; the core test for any approved undertaking is positive contribution to sustainability (through multiple, fairly distributed, mutually reinforcing and lasting gains) while avoiding significant adverse effects;
- entrench a definition of “environment” that covers social, economic, cultural and biophysical factors and their interrelations;
- include application provisions and rules designed to ensure that:
  - all significant strategic and project cases are covered;
  - careful attention is paid to cumulative effects, lifecycle issues and intergenerational implications;
  - assessments are initiated early enough to address initial purposes and alternatives and assessment work is fully integrated in the conception, selection and development of new or renewed undertakings;
  - broad public scrutiny and engagement are facilitated;
  - resulting decisions are enforceable; and
  - undertakings are designed with adaptive capacity; actual effects are monitored and provision are made to require adjustments where needed;
- provide a sufficient variety and flexibility of process streams to cover different sorts of strategic and project level assessment needs, with careful matching of assessment effort to the potential

significance of the case (use of more and less onerous streams of assessment, focusing assessment on most crucial issues, etc.);

- encourage effective attention to small as well as large undertakings, with emphasis on attention to cumulative effects, lifecycle issues and intergenerational implications;
- clearly delineate assessment roles and responsibilities, respecting the Constitutional division of powers, with evident mechanisms to ensure impartial administration, credible independence of assessment review, careful limitation of ministerial discretion, and sufficient resources, including for participant funding;
- provide openings for collaboration and/or consolidation with other processes (planning, regulatory, etc.), with equivalent objectives and approaches, with particular attention to using EA as a means of consolidating regulatory information gathering and presentation requirements, or at least providing a consistent basic framework for such consolidation;
- include procedures for monitoring, review, iterative learning and identification of needs for corrective action and implementation;
- ensure early and continuing opportunities for informed and effective public participation in open deliberations;
- facilitate transparent and accountable decision making;
- retain sufficient flexibility to deal with very different cases and contexts, while providing the predictability of a consistently high standard of core requirements; and
- include provisions for independent monitoring of coordination and harmonization experience and mandatory public review of the results at regular intervals.

### **III Immediate and underlying concerns driving attention to improved inter-jurisdictional coordination**

The broad set of criteria presented above provides guidance for treating inter-jurisdictional EA coordination as a means of achieving upwards harmonization of EA regimes for greater effectiveness and efficiency. This means considering EA coordination as a positive opportunity rather than merely a means of addressing immediate concerns about process overlap, duplication and delay. There is, however, more to the story. While overlap, duplication and delay are the usual complaints spurring attention to improving inter-jurisdictional EA coordination, deeper and broader factors accompany the usual complaints. Consideration of these factors should help clarify the reasons for linking EA coordination with upwards harmonization.

The application of two or more EA processes to a single project may be less common than is generally assumed, but it happens often enough to raise concern about unhelpful duplication of effort, confusion and delay (see, for example, Government of British Columbia, 2010).

Complaints typically centre on inefficiencies and associated costs resulting from:

- the unnecessarily inconsistent and sometimes incompatible requirements of overlapping processes;
- the unproductive preparation and presentation of essentially identical material in different forms to two or more proceedings; and
- poor coordination of process timing so that one regime's specific requirements are set out and addressed well before the second regime's requirements are established.

These inefficiency concerns are, however, often mixed with other substantive issues in ways that make well focused response difficult. Moreover, responses focused on these inefficiencies will fail to address other, perhaps more significant inefficiencies in EA process design.

#### ***Inefficiency concerns and resistance to EA obligations***

Many complaints related to duplication and delay are plausibly linked to other, broader considerations that involve matters of EA scope and standards, rather than merely matters of efficiency. Throughout the history of mandatory EA, assessment requirements that demand attention to previously neglected considerations, enhance public scrutiny and thereby threaten established approaches have been quite consistently resisted – chiefly by project proponents and government bodies that found the obligations too burdensome. This resistance to the substance of EA demands has been clearly evident in case practice as well as legislative deliberations and court actions. Over the past couple of decades, duplication and delay complaints have often emerged when major undertakings have been, or were at risk of being, assessed more rigorously under one process than under another, and especially where a later process was more demanding and/or more likely to be critical of a proposal than the earlier one.<sup>2</sup>

Resistance to EA obligations has been exacerbated by process inefficiencies, with the result that resistance to the EA demands and complaints about EA inefficiency are now difficult to separate. While there are fully legitimate concerns about EA inefficiencies that need to be addressed, responses to duplication and delay can also be covers for weakening or eliminating EA requirements in the interests of protecting business as usual.

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<sup>2</sup> Recent examples include mining projects in British Columbia that received quick approvals after undergoing a provincial EA, but which face a subsequent and apparently more demanding federal EA.

### ***Process overlap inefficiencies versus other EA inefficiencies***

For project proponents and some other EA participants, frustrations and costs arising from duplication and delay in practical case experience may be the most obvious and pressing problem in inter-jurisdictional EA. But from a larger perspective, the greatest EA inefficiencies may be those due to:

- the commonly narrow focus in EA on mitigation of potentially significant individual effects, rather than on interactive and cumulative effects, including situations where there are opportunities for mutually reinforcing gains as well as needs for mitigation;
- failure to address major environmental and sustainability issues at a suitably strategic level (through regional plans, sectoral programmes, etc.) where multiple public objectives, broad alternatives, and cumulative effects can be addressed more effectively and with less immediate pressure for approval decisions;
- persistent treatment of EA as an approval hoop rather than a constituent part of an approach to planning;
- problems of individual process design that lead to very late triggering and uncertainty about assessment scope;
- problems of individual process management that lead to protracted case specific negotiation of assessment requirements, as well as inadequate resources, capacities and incentives for timely reviews by government experts and panels;
- delays, inappropriately attributed to the EA process, that result from the time required to identify and correct inadequate assessment work by proponents; and
- the failure to do adequate monitoring and learn from EA experience.

Some major concerns about inconsistent and competing requirements associated with EA are actually centred on lack of regulatory coordination – such as related but different and conflicting information needs and substantive requirements, etc.

### ***Useful overlap, unhelpful duplication and positive integration***

Past reviews (e.g., Lawrence, 1999) have found surprisingly few cases of federal-provincial EA overlap, especially at the screening level where most federal EA cases lie. Moreover, overlap should not be equated with duplication. Given the differences between federal and provincial areas of constitutional jurisdiction, and the difference between these and the constitutionally entrenched Aboriginal rights underlying EA regimes based in land claim agreements, inter-jurisdictional EA is often appropriate in Canada.

While the constitutional realities of jurisdictional difference must be respected, the environmental realities of intertwined effects demand integrated approaches to the issues raised in overlapping assessments. The need for better attention to interactive effects and system behaviour has been recognized for at least 25 years (Beanlands and Duinker, 1983) but is still poorly addressed. Inter-jurisdictional EAs face special challenges in ensuring effectively comprehensive and integrated assessment and review. But that suggests that a key task in inter-jurisdictional EA coordination is to ensure that all key issues are addressed in ways that are well integrated and timely. Indeed, it may be that a positive focus on effective integration has good potential as a means of eliminating unhelpful duplication.

### *Overcoming difference*

Duplication of requirements should not be a problem where the requirements are coordinated and mutually supportive. Past coordination efforts that have focused on informal and formal cooperation agreements, particularly between federal and provincial EA authorities, have led to some recognized improvements. Fundamental differences among EA processes remain, and all Canadian processes have more or less serious deficiencies. Some of these differences and deficiencies lead to uneven expectations, timing differences, etc., that frustrate all parties.

Past efforts to reduce EA disparity in Canada have not been successful, though there has been some promise. In 1997, the Canadian Standards Association, with federal funding support, established a multi-stakeholder technical committee to develop a national standard/guideline for EA. Its work proceeded over three years and achieved surprisingly broad consensus. When the initiative was suspended in 1999 due to the withdrawal of provincial representatives, the participants had completed draft 14 of a guideline on EA best practices that reflected general agreement on most key issues. Whether a similar initiative, or a more focused effort of some sort, would be more successful in the foreseeable future is a matter of conjecture. Any useful step, however, is likely to need a base in understanding the nature of the differences to be overcome.

## **IV Provincial EA regime differences as a challenge and an opportunity for coordination and harmonization**

The provincial and territorial EA regimes with which federal assessment law and process may be coordinated differ significantly. Insofar as these differences represent incompatibilities, they are a barrier to effective coordination. But, as suggested above, they also represent opportunities for identifying which approaches are more effective and efficient, and consequently for determining what options to favour for upwards harmonization.

All provinces have EA processes required by provincial legislation. In the Yukon, the EA process is governed by a federal statute, the *Yukon Environmental and Socio-Economic Assessment Act*. In the Northwest Territories, EA is governed by territorial legislation as well as Land Claims Agreements. In Nunavut, EA is embedded in the *Agreement Between the Inuit and the Nunavut Settlement Area and her Majesty the Queen in Right of Canada*.

Certain categories of assessment requirements and processes that may affect the potential for improving inter-jurisdictional coordination were selected as the basis for comparing each jurisdiction. They are outlined below and form the basis of the ensuing analysis.

### **1. Basic purposes and core criteria**

What legislative purpose may be gleaned from the Preamble or purpose section? Is the purpose environmental protection, sustainable development, or public consultation?

### **2. Trigger and classes of undertaking affected**

What is the method by which an undertaking is brought into the EA process?

### **3. Focus of process**

Does the legislation contain a definition for “environment” that focuses the EA process?

### **4. Scope**

Scope of project: How is the scope of the project determined?

Scope of assessment: What is the scope of the project assessment?

### **5. Process options**

What is the required process for proceeding with an EA? For example:

- Public scrutiny and accessibility: Where are the entry points for public engagement in the EA process?
- Intervenor funding: Is funding available to support intervenors?
- Independence: If a panel or board is a part of the process, to what extent is it independent?
- Class Screening or other streamlining: Are there provisions for class screening or streamlining?

### **6. Decision making on process**

On whose authority are decisions on process made?

### **7. Basis for project assessment**

Is the overall basis for assessment sustainability, the significance of impacts or is it discretionary?

**8. EA results and governmental decision making**

At what point and on whose authority is a decision final and enforceable?

**9. Role of Aboriginal communities**

What role is given to Aboriginal communities?

**10. Right to appeal**

**11. Mediation and ADR options**

**12. Joint EA process**

What federal-provincial or other arrangements are in place?

## V Key characteristics of the provincial and territorial EA regimes

In the discussion below we present, in summary form, the key characteristics of the many provincial and territorial EA regimes in Canada. The data are organized under the major criteria categories outlined above.

### **British Columbia**

#### **Legislation**

- *Environmental Assessment Act*, S.B.C. 2002, c. 43 (*Act*)
  - *Reviewable Projects Regulation*, B.C. Reg. 370/2002
  - *Prescribed Time Limits Regulation*, B.C. Reg. 372/2002
  - *Public Consultation Policy Regulation*, B.C. Reg. 373/2002

#### **Agreements**

- *Canada–British Columbia Agreement for Environmental Assessment Cooperation*, 2004

#### **Government Guides**

- British Columbia Ministry of Environment: “Summary Guide to the British Columbia EA Process (Guide)”
- British Columbia Ministry of Environment: “Application Information Requirements Template” (Application Template)

### **1. Basic purposes and goals**

The *Act* contains no preamble or purpose section, nor is there mention of sustainability, sustainable development, environmental principles, or guidance on public participation.

The Guide suggests that the primary goal of the EA process is to identify and assess the potential effects that may result from development of a proposed project, and to develop measures for managing those effects.<sup>3</sup>

### **2. Trigger and classes of undertaking affected**

British Columbia has developed a fairly stringent triggering process. Before undertaking a reviewable project, a proponent (which may be an individual, corporation, government, or a First Nation)<sup>4</sup> must obtain an EA certificate or receive an exemption from the EA Office or the Minister.<sup>5</sup>

The EA process applies to “reviewable projects” and is triggered when:

- a project falls within a category of project that is included in the *Reviewable Projects Regulation* and meets or exceeds prescribed thresholds;
- the Minister (of Sustainable Resource Management) designates a project as reviewable;<sup>6</sup> or

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<sup>3</sup> British Columbia Ministry of Environment. (2003). Summary Guide to the British Columbia EA Process. Retrieved from [http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/360560/brochure\\_mar\\_03.pdf](http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/360560/brochure_mar_03.pdf) (Guide), p. 1.

<sup>4</sup> s. 1 *Act*, definition of “proponent”.

<sup>5</sup> s. 8 *Act*.

- the proponent requests that a project to be subject to the EA process and the EA Office designates it as reviewable.<sup>7</sup>

The *Reviewable Projects Regulation* is explicit and covers various projects and developments listed by category.<sup>8</sup> Projects range in scale and size, ranging from, for example, highway construction and resort developments at the low end to coal mines and power plants at the high end. Projects will only trigger review if they reach a certain threshold,<sup>9</sup> which differs depending on whether a project is a new project or a project modification.

Even if a project is determined to be reviewable under the *Reviewable Projects Regulation*, it may be exempted by the EA Office, either as a non-reviewable project or as a project that can proceed without the EA process, if the Executive Director of the EA Office is of the opinion that the project will not have significant environmental effects, after taking into account mitigation measures.<sup>10</sup>

Class EAs may be approved under the *Act* by the Executive Director for a category of reviewable projects.<sup>11</sup>

The *Act* provides that the Minister has the power to order an assessment of policies, plans and programs.<sup>12</sup>

### 3. Focus of process

The focus of the process appears to be on the biophysical and socio-economic impacts of a project, and reducing its impacts. The focus is ultimately at the discretion of the Executive Director or Minister, as they can determine the information and process requirements. The Guide suggests that the EA process allows consideration of “a broad range of environmental, health and safety, socioeconomic, community and First Nation issues.”<sup>13</sup> (See *Scope of assessment*, #4 below.)

The *Act* does not define “environment”.

### 4. Scope

#### *Scope of project*

The scope of a project is determined by the EA Office and is based on materials provided to it by the proponent. The EA Office has discretion in making the scope determination.<sup>14</sup> The definition of “reviewable project” includes:

- (a) facilities at the main site of the project;

<sup>6</sup> s. 6 *Act*.

<sup>7</sup> s. 7 *Act*.

<sup>8</sup> Categories include: Organic and Inorganic Chemical Industries, Primary Metals Industries, Non-metallic Mineral Products Industries, Forest Products Industries, Other Industries, Mine Projects, Electricity Projects, Petroleum and Natural Gas Projects, Water Management Projects, Hazardous Waste Management Projects, Solid Waste Management Projects, Liquid Waste Management Projects, Food Processing Projects, Transportation Projects, and Tourist Destination Resort Projects.

<sup>9</sup> Some thresholds are quite high – e.g., mine facilities that, during operation, will have a production capacity of >250,000 tonnes/year: s. 8 *Reviewable Projects Regulation*.

<sup>10</sup> s. 10 *Act*.

<sup>11</sup> s. 20 *Act*.

<sup>12</sup> s. 49 *Act*.

<sup>13</sup> Guide, p.3.

<sup>14</sup> s. 11 *Act*.

- (b) any off-site facilities related to the project that the Executive Director or Minister may designate; and
- (c) any activities related to the project that the Executive Director or Minister may designate.

The Guide suggests that the construction and operation/maintenance phases of project development always form part of the scope of a project for review and decision making purposes.<sup>15</sup> The decommissioning (dismantling and abandonment) phase may also be considered in cases where projects have a finite operating life, for example with mine projects. It is not addressed for permanent projects where the intended life is of an indefinite, long-term nature (e.g., a tourism resort).

There is no requirement to examine alternatives to a project, although the EA Office, in reviewing an application, may consider alternative means or methods to carrying out a project.

### ***Scope of assessment***

The scope of the assessment, including what information and impacts must be assessed and whether Terms of Reference (TOR) are required, is discretionary, as “an application for an EA certificate must contain the information that the executive director requires”.<sup>16</sup>

Specific impacts that a proponent should include in a TOR are those relating to the environment, social issues, economic issues, heritage and health. The TOR should also propose measures to reduce, avoid or otherwise manage these impacts. The Guide also recommends that TOR include potential project effects on First Nation issues. In addition, a proponent “should commit” to providing certain information on the existing biophysical, cultural, socio-economic and health settings of the project.<sup>17</sup>

## **5. Process options**

### ***Process summary***

1. Determining review path. Once a project is determined to be reviewable, the EA process is conducted by the EA Office. The *Act* allows the Executive Director to decide an EA is not required where he or she determines a project will not have a significant environmental effect, after taking into account mitigation measures.<sup>18</sup> The project may also be referred directly to the Minister to determine how the EA should be conducted. At this stage, the Minister has discretion to refer the project to a hearing panel, commission, or to any other person.<sup>19</sup>

2. Procedural Order and public participation. The EA Office (if determining the review path) will issue a Procedural Order that sets out the procedure for the EA, the methods required, and the information required (i.e., the scope of the project).<sup>20</sup> The Executive Director has the discretion to determine what effects may be considered, what information may be required, and what parties (e.g., the public, First

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<sup>15</sup> British Columbia Ministry of Environment. (2010). Application Information Requirements Template: With Respect to an Application for an EA Certificate. Retrieved from [http://www.eao.gov.bc.ca/pdf/AIR\\_Template\\_oct2010.pdf](http://www.eao.gov.bc.ca/pdf/AIR_Template_oct2010.pdf) (Application Template), p. 4.

<sup>16</sup> s. 16(2) *Act*.

<sup>17</sup> These settings include geophysical, aquatic, atmospheric, terrestrial environment, community conditions, economic conditions, land use context and navigable water use – see Terms of Reference Guide, p.15.

<sup>18</sup> s. 10 *Act*.

<sup>19</sup> ss. 14(3) *Act*.

<sup>20</sup> s. 11 *Act*.

Nations, other governments) may be consulted. The *Act* specifies that the Executive Director cannot delegate the scoping assessment to a commission or hearing panel.<sup>21</sup>

The Procedural Order generally sets the required public participation for the rest of the process. Although a public participation regulation has been developed, public participation and consultation is quite weak and discretionary in B.C. At least one “formal public comment period” of between 30 and 75 days must be provided at some point during the process, unless the Executive Director feels it is impracticable because of insufficient time, or unnecessary due to lack of public interest.<sup>22</sup> The public must be given notice of when it may review a proponent’s EA application and the details of any public meeting(s).<sup>23</sup> The regulation specifies that access must also be given to certain records that are generated throughout the assessment process.<sup>24</sup>

3. Terms of Reference. If the EA Office determines that TOR are required, the proponent must prepare draft TOR to determine what information will be required in the EA application.<sup>25</sup> Consultation with the public must occur in accordance with the Procedural Order. The EA Office must approve the final TOR.

4. Application for EA Certificate. After the TOR have been prepared, the proponent must conduct the required studies and submit an application for an EA Certificate.<sup>26</sup> The Executive Director must evaluate the application, and within 30 days determine whether to accept it for review.<sup>27</sup> Consultation must occur as per the Procedural Order, which can be amended if required. The EA Office has 180 days<sup>28</sup> to review the application and prepare an assessment report and recommendation to the Minister. The Executive Director must also assess whether a proponent has carried out adequate public consultation activities.<sup>29</sup>

5. Minister’s decision. After an assessment has been completed, the EA Office (or a commission, panel or other designated person) must forward an assessment report, the final report, and a recommendation on the project to the Minister. The Minister then must decide within 45 days whether to issue or refuse a Certificate or require further information.<sup>30</sup>

### ***Intervenor funding***

The *Act* and regulations do not provide intervenors or the public with funding options.

### ***Independence***

Under the *Act*, the Minister has the power to refer an EA to a hearing panel or commission, which must prepare a report and make a recommendation to the Minister. There is no body or entity established in B.C. to undertake assessments when referred from the Minister; the Minister appoints member(s) to the panel or commission.<sup>31</sup>

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<sup>21</sup> s. 12 *Act*.

<sup>22</sup> s. 7 *Public Consultation Policy Regulation*. The formal comment period usually takes place at the final stage during the review of the proponent’s application – see Guide, p.18.

<sup>23</sup> s. 5 *Public Consultation Policy Regulation*.

<sup>24</sup> The types of records are specified in s. 6 of the *Public Consultation Policy Regulation*.

<sup>25</sup> The preparation of draft TOR occurs in most cases as part of the application process under s. 16 of the *Act*.

<sup>26</sup> s. 16 *Act*.

<sup>27</sup> s. 2 *Prescribed Time Limits Regulation*.

<sup>28</sup> s. 3 *Prescribed Time Limits Regulation*. This period can be extended if more information required from a proponent.

<sup>29</sup> s. 4 *Public Consultation Policy Regulation*.

<sup>30</sup> s. 17 *Act*, s. 4 *Prescribed Time Limits Regulation*.

<sup>31</sup> ss. 14(3) *Act*.

A hearing panel may be joint with the federal government under the *Canada-British Columbia Agreement for EA Cooperation*, in which case the panel members are appointed by both the provincial and the federal governments.<sup>32</sup>

## 6. Decisions on process

1. Decision to exclude a reviewable project. The Executive Director can decide to exclude a reviewable project from the EA process where he or she is of the opinion that the project will not have significant environmental effects, after taking mitigation measures into account.<sup>33</sup> The Guide suggests that the test for waiving a review is strict and that it will occur only in limited circumstances: (i) when the primary purpose of the project is to implement an “impact management strategy”; (ii) when a project constitutes a minor change to a “grand-parented” project; or (iii) when the project is of a type where management practices to address the primary impact concerns have been codified or standardized in regulations or rules of practice.<sup>34</sup>

2. Decision to refer to a commission, hearing panel, or other person. This determination can be made by the Minister only after a reviewable project has been referred to him or her by the EA Office.<sup>35</sup> There is no guidance in the *Act* as to when the Minister should make this referral.

## 7. Basis for project assessment

The basis for project assessment is discretionary, as scoping and the contents of a proponent’s application are determined by the Executive Director or the Minister (or another body delegated by the Minister).

The provincial government website suggests that the focus of the review is “whether a project could potentially lead to unacceptable adverse impacts that cannot be prevented or sufficiently mitigated”.<sup>36</sup>

When reviewing an assessment application, the Guide states that the EA Office should consider the potential effects of the project and how adverse effects could be avoided or mitigated.

## 8. EA results and governmental decision making

In making a recommendation to the Minister on a project, the reasons for the recommendation are included.<sup>37</sup> The EA Office will recommend approval of a project where its environmental impacts “can be managed effectively by proven, affordable means.”<sup>38</sup>

The Minister has discretion in making the final decision on a project. He or she must consider the assessment report and recommendations from the EA Office or commission/panel/other person, and may consider other matters he or she considers relevant to the public interest.<sup>39</sup>

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<sup>32</sup> *Canada-British Columbia Agreement on EA Cooperation*, ss. 1, definition of “Joint review panel” and s.

15.

<sup>33</sup> s. 10 *Act*.

<sup>34</sup> Guide, p. 32.

<sup>35</sup> s. 14 *Act*. Section 12 provides that the Executive Director may not defer the decisions on a Procedural Order.

<sup>36</sup> British Columbia EA Office. (n.d.) *Frequently Asked Questions*. Retrieved from <http://www.eao.gov.bc.ca/FAQ.html> (Frequently Asked Questions).

<sup>37</sup> s. 17 *Act*.

<sup>38</sup> Frequently Asked Questions.

<sup>39</sup> s. 17 *Act*.

## 9. Role of Aboriginal communities

The government has extensive suggestions on how to involve Aboriginal communities in the EA process,<sup>40</sup> and states that they are usually consulted throughout the process. However, Aboriginal communities are not given a mandatory role in the EA process under the *Act* or regulations. The *Act* lists First Nations as a stakeholder that may need to be consulted during the EA process, but the decision to mandate First Nation consultation is at the discretion of the Executive Director.<sup>41</sup>

## 10. Right to appeal

The *Act* does not provide for a right of appeal from a Minister's decision.

## 11. Mediation and ADR options

Mediation is an option under the *Act*. Mediators and/or consultants may be retained by the Executive Director (or a commission, hearing panel or other person) and their advice may be used in formulating a recommendation to the Minister on a project.<sup>42</sup>

Another possibility for mediation exists under the *Act*. Under the Minister's power to delegate an assessment to another body, he or she may require the assessment to be conducted "by any other method or procedure that the Minister considers appropriate".<sup>43</sup>

## 12. Joint EA process

The *Act* allows the Minister to enter into agreements with other jurisdictions.<sup>44</sup> The federal government and British Columbia have signed the *Canada-British Columbia Agreement for EA Cooperation*. Under this *Agreement*, a single assessment occurs and information is shared. Although one government takes the lead on the process, both governments will still make their respective decisions on a project. Joint panels are also allowed under the *Agreement*.

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<sup>40</sup> See Appendix I of the Guide – Guidance on consulting with First Nations.

<sup>41</sup> s. 11 *Act*.

<sup>42</sup> s. 22 *Act*.

<sup>43</sup> s. 14(3)(a)(iii) *Act*.

<sup>44</sup> s. 27 *Act*.

## **Alberta**

### **Legislation**

- *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (*EPEA*)<sup>45</sup>
  - *EPEA* “Codes of Practice”
  - *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/1993
  - *Environmental Assessment Regulation*, Alta. Reg. 112/1993
- *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3 (*NRCBA*)
- *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (*ERCBA*)

### **Agreements**

- *Canada-Alberta Agreement for Environmental Assessment Cooperation*

### **Government Publications**

- Alberta Environment: “Environmental Assessment Program: Alberta’s Environmental Assessment Process” (Guide)<sup>46</sup>

## **1. Basic purposes and goals**

The purpose of the EA process under the *EPEA* is:

- to support the goals of environmental protection and sustainable development;
- to integrate environmental protection and economic decisions at the earliest stages of planning an activity;
- to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity; and
- to provide for the involvement of the public, proponents, the government and government agencies in the review of proposed activities.<sup>47</sup>

A guide to the EA process produced by Alberta Environment states that the three basic goals of EAs are: information gathering, enabling public involvement, and supporting sustainable development.<sup>48</sup>

The *NRCBA* also plays a limited role in EAs. The purpose of this *Act* is as follows:

... to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board’s opinion, the projects are in

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<sup>45</sup> Unless otherwise indicated, section numbers refer to the *Environmental Protection and Enhancement Act*.

<sup>46</sup> Available from Alberta Environment at <http://environment.alberta.ca/01509.html> (Guide).

<sup>47</sup> s. 40 *EPEA*.

<sup>48</sup> Guide, pp. 1-2.

the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment.<sup>49</sup>

The *NRCBA* applies only to forestry, tourism, mining and water management projects for which an EA is required under *EPEA*. Most of the projects reviewed under the *EPEA* do not fall within these categories, but rather fall within one of the two following project types:<sup>50</sup>

- 1) non-oil and gas projects that involve only Alberta Environment in the approval process; or
- 2) major oil and gas projects (e.g., oil sands, upgraders, refineries, major pipelines, etc.) that trigger joint review panels involving Alberta Environment and one or more of the Energy Resources Conservation Board and/or the Canadian EA Agency (because the projects have federal triggers such as *Fisheries Act* or the *Navigable Waters Protection Act*).

Other projects, such as major pipelines that cross provincial boundaries fall under the National Energy Board and CEAA and therefore are outside of provincial EA jurisdiction.

## 2. Trigger and classes of undertaking affected

The EA process in Alberta is triggered when individuals, governments or corporations carry on specific activities. There are two possible triggers for an EA under the *EPEA*:

### 1. *EA (Mandatory and Exempted Activities) Regulation*

- Activities listed in Schedule 1 are ‘mandatory activities’.
- Activities listed in Schedule 2 are exempt from the EA process under the *EPEA*.
- It is worth noting that oil and gas wells and small pipelines are exempt from the *EPEA*, and are approved by the Energy Resources Conservation Board under the *ERCBA* and the *Oil and Gas Conservation Act*.

2. Under s. 43, a Director (designated as such by the Minister) may give notice to the proponent that a proposed activity must be dealt with under s. 44, which gives the Director the authority to require further assessment.<sup>51</sup> Sub-section 44(3) lists guidelines for a Director when considering whether to order further assessment when the proposed activity is not in the ‘Mandatory Activity’ Regulation. Guidelines include: the location, size and nature of the proposed activity, the complexity of the activity, public concerns about it, etc.<sup>52</sup> This designation is seldom made.

The following projects are also subject to review under the *NRCBA*:<sup>53</sup>

- forest industry projects;
- recreational or tourism projects;

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<sup>49</sup> s. 2 *NRCBA*.

<sup>50</sup> The NRCB typically only gets involved in one or two EAs a year – typically quarry projects. In four of the last ten years, the NRCB has not been involved in any EAs at all.

<sup>51</sup> s. 44(1)(b)(i) *EPEA*.

<sup>52</sup> For a full list, see s. 44(3) *EPEA*.

<sup>53</sup> s. 4 *NRCBA*.

- metallic or industrial mineral projects;
- water management projects;
- any other type of project prescribed in the regulations; and
- specific projects prescribed by the Lieutenant Governor in Council.

### 3. Focus of process

The focus of the EA process is on the biophysical impacts of a project or activity. The *EPEA* defines environment such that it encompasses “the components of the earth” and includes: (i) air, land and water; (ii) all layers of the atmosphere; (iii) all organic and inorganic matter and living organisms; and (iv) the interacting natural systems that include the aforementioned components.<sup>54</sup>

The process also focuses socio-economic implications since an Environmental Impact Assessment (EIA) Report requires, among other elements, a description of positive and negative environmental, social and cultural impacts.

If an activity is considered by the Natural Resources Conservation Board (NCRB) or the Energy Resources Conservation Board (ERCB), the focus of the assessment is also on the public interest.<sup>55</sup>

The purpose section of the *EPEA* suggests sustainable development is a key consideration. The EA process requires considerations of alternatives to an activity, including not conducting the activity.

### 4. Scope

#### *Scope of project*

Based on the wording of the *EA (Mandatory and Exempted Activities) Regulation*, an entire activity could be caught under the assessment process.<sup>56</sup> If an activity is not listed, the Director has discretion to order an EIA, and thus would have discretion to determine the scope.

#### *Scope of assessment*

If an EIA Report is required, a wide variety of impacts are considered, including the “potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations”.<sup>57</sup>

Additionally, a proponent must include description of the proposed activity and an analysis of the need for it, alternatives to the project, and issues related to human health.

### 5. Process options

#### *Process summary*

1. Alberta Environment is informed of a project. Alberta Environment may require a disclosure document, and the Director will determine whether or not the EA process is triggered. (See Triggers, #2 above).

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<sup>54</sup> s. 1(t) *EPEA*.

<sup>55</sup> s. 2 *NRCBA*.

<sup>56</sup> E.g., the operation of a quarry – Schedule 1 (b) of *EA (Mandatory and Exempted Activities) Regulation*.

<sup>57</sup> s. 49(d) *EPEA*. See this section for a complete list of EIA Report requirements.

2. Screening report. If the proposed activity is not one which requires a mandatory assessment, but the Director has determined that further assessment is necessary, he or she must prepare a screening report regarding the need for an EIA and decide if one is required.<sup>58</sup> A person directly affected by the proposed activity has 30 days to comment on the Director’s decision to subject that activity to the EIA process.<sup>59</sup> The Director must give “due consideration to all statements of concern”.<sup>60</sup> The Minister may also order an EIA Report, even if a Director has not ordered one.<sup>61</sup>

3. Terms of Reference. The TOR for an EIA Report are to be drafted by the proponent,<sup>62</sup> and must conform with requirements specified by the Director. The proponent must notify the public regarding the TOR, and they should be made available for comment.<sup>63</sup> The Director should give due consideration to comments before issuing final TORs to the proponent, and should notify the public.

4. EIA Report. The draft EIA Report is submitted by the proponent to the Director for review, and within 10 days a proponent must publish notice of the Report.<sup>64</sup> The Director must then refer the EIA Report to the NRCB, the Alberta Utilities Commission, or the Energy Resources Conservation Board if required under their governing acts. If the proposed activity does not fall within the scope of a specialized board, the Minister makes the decision.<sup>65</sup>

5. Minister’s decision. Following the completion of the EIA Report, the Minister can make one of the following three decisions: (i) to allow a proponent to seek approvals for the activity; (ii) to refer the matter to the Lieutenant Governor in Council; or (iii) to determine that no approval should be issued where the Minister is of the opinion that the activity is not in the public interest.<sup>66</sup> (See EA results and governmental decision making, #8 below.)

### ***Participation under NRCBA***

Outside intervenors appear to be discouraged under *NRCBA*. ‘Persons directly affected’ shall be granted the opportunity to participate (by reviewing information, furnishing evidence, etc.); however, other persons will only be involved if the NRCB considers it necessary. No specific timelines are given – it is only provided that the public should be given a ‘reasonable opportunity’ to review information and furnish evidence.<sup>67</sup>

The “directly affected” test is a major point of contention under both the *NRCBA* and the *ERCBA*. Several court cases have been heard concerning the ERCB’s limited interpretation of “directly affected”.

### ***Intervenor funding***

Funding for “local” intervenors under *NRCBA* may be available. (“Local intervenors” are a subset of those “directly affected” who have an actual interest in land impacted by the project. Thus, the threshold to qualify as a “local intervenor” is even narrower than the “directly affected” test.) To receive intervenor

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58 s. 45 *EPEA*.  
59 s. 46 *EPEA*.  
60 s. 44 *EPEA*.  
61 s. 47 *EPEA*.  
62 s. 48(1) *EPEA*.  
63 s. 6 *EA Regulation*.  
64 s. 8 *EA Regulation*.  
65 s. 53 *EPEA*.  
66 s. 64 *EPEA*.  
67 s. 8 *NRCBA*.

funding, eligible persons must apply. Costs awards are also available.<sup>68</sup> Costs also may be available to certain intervenors under the *ERCBA*.<sup>69</sup>

### ***Independence***

If a matter is referred to the NRCB, there is some degree of independence from Alberta Environment. Although the Board reports to the Minister of Sustainable Development, it is a separate body. Additionally, no member of the Board who has a direct or indirect monetary interest in a project may participate in any of the proceedings related to it.<sup>70</sup>

### **6. Decisions on process**

If a screening report is prepared, the Director reviews it and has the discretion to determine whether to require an EIA Report.<sup>71</sup> The Minister may also order an EIA Report, even if the Director has not done so.<sup>72</sup>

If the EA process follows the NRCB route, the Board has discretion to make inquiries and investigations, prepare studies and reports, hold hearings and other proceedings and do anything else necessary to carry out the purpose of the NRCBA.<sup>73</sup> The Board has further discretion to invite technical specialists to sit on the Board.<sup>74</sup>

### **7. Basis for project assessment**

The basis for project assessment is the significance of potential impacts (environmental, social, economic and cultural).<sup>75</sup> This is specified within the requirements of the EIA Report.

### **8. EA Results and governmental decision making**

The Director shall advise the NRCB, the Energy Resources Conservation Board or Alberta Utilities Commission (if applicable) that the EIA Report is complete.<sup>76</sup> If these bodies are not involved in the EIA process, the Director submits the EIA Report to the Minister, along with any recommendations.<sup>77</sup> The Director appears to have discretion to make any recommendation he or she considers appropriate.

Upon receipt of the EIA Report and the Director's recommendations, the Minister then has power to advise the proponent that it can seek approvals or registration (as needed for the activity) under Part II of *EPEA*.<sup>78</sup> This might be necessary because, for example, a permit cannot be granted under the *Water Act* unless the requirements of *EPEA* have been satisfied.<sup>79</sup> The Minister can also make recommendations.<sup>80</sup>

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<sup>68</sup> s. 11 *NRCBA*.

<sup>69</sup> s. 28 *Energy Resource Conservation Act*.

<sup>70</sup> s. 13 *NRCBA*. The Board is to be composed of not more than six members, appointed by the Lieutenant Governor-in-Council, for a term of not more than 5 years.

<sup>71</sup> s. 45 *EPEA*.

<sup>72</sup> s. 47 *EPEA*.

<sup>73</sup> s. 6 *NRCBA*.

<sup>74</sup> s. 23 *NRCBA*.

<sup>75</sup> s. 49 *EPEA*.

<sup>76</sup> s. 53(a), (b) *EPEA*.

<sup>77</sup> s. 53(1) *EPEA*.

<sup>78</sup> s. 54(1) *EPEA*.

<sup>79</sup> s. 16(1), *Water Act*, R.S.A. 2000, c. W-3.

<sup>80</sup> s. 55 *EPEA*.

The Minister may determine that no approval or registration should be issued where he or she is of the opinion that the activity is not in the public interest having regard to the purposes of the *EPEA*.<sup>81</sup> The Minister can also refer the matter to the Lieutenant Governor in Council with a recommendation that it be made reviewable under the *NRCBA*.<sup>82</sup>

Where an activity is reviewed by the NRCB, it can grant or refuse an approval.<sup>83</sup> If the project is approved, the proponent still must obtain any necessary permits.

## **9. Role of Aboriginal communities**

Neither Alberta's EIA legislation nor the Guide set out a role for Aboriginal communities.

## **10. Right to appeal**

Part 4 of *EPEA* establishes an Environmental Appeals Board that deals with specific approval decisions made under *EPEA* (and the *Water Act*).<sup>84</sup> It is unclear whether an individual or interested party can appeal the Minister's decision to allow a proponent to seek approvals. There is no provision under the appeals section for an appeal of a Minister's decision to refuse approval because it is not in the public interest.

The *NRCBA* specifically provides for an appeal to the Court of Appeal on questions of jurisdiction or law; an application for leave must be brought within 30 days.<sup>85</sup>

## **11. Mediation and ADR options**

Mediation is not specifically mentioned provided for under the *EPEA*.

## **12. Joint EA process**

The *EPEA* allows the Minister to enter into agreements with other jurisdictions.<sup>86</sup> Alberta and the federal government have signed the *Canada-Alberta Agreement for Environmental Assessment Cooperation*. Under the *Agreement*, a single assessment occurs and information is shared. Although one government takes the lead on the process, both governments will still make their respective decisions on a project. Joint panels are also allowed under the *Agreement*.

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<sup>81</sup> s. 64 *EPEA*.

<sup>82</sup> s. 54(2) *EPEA*.

<sup>83</sup> s. 9 *NRCBA*.

<sup>84</sup> s. 91 *EPEA*.

<sup>85</sup> s. 31(1), (2) *EPEA*.

<sup>86</sup> s. 57 *EPEA*.

## Saskatchewan

### Legislation

- *Environmental Assessment Act, 1980*, S.S. 1979-80, c. E-10.1 (Act)<sup>87</sup>
- *Environmental Management and Protection Act, 2002*, S.S. 2002, c. E-10.21

### Agreements

- *Canada-Saskatchewan Agreement on Environmental Assessment Cooperation*

### Government Publications

- Saskatchewan Environment, “A Guide to the Environmental Assessment Process”<sup>88</sup> (Guidelines)

## 1. Basic purposes and goals

The *Act* does not contain a preamble. The provincial government states that “[t]he primary purpose of the EIA is to facilitate the consideration of environmental issues in project planning and design so that it is possible to arrive at decisions and take subsequent actions that are more environmentally sustainable.”<sup>89</sup> Sustainability is not mentioned in the *Act*.

## 2. Trigger and classes of undertaking affected

The EA process in Saskatchewan is triggered by the requirement for a person (which term includes government, corporation and individuals)<sup>90</sup> to receive Ministerial approval before proceeding with a development. Development is defined as:

any project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to:

- (i) have an effect on any unique, rare or endangered feature of the environment;
- (ii) substantially utilize any provincial resource and in so doing pre-empt the use, or potential use, of that resource for any other purpose;
- (iii) cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
- (iv) cause widespread public concern because of potential environmental changes;
- (v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or
- (vi) have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment.<sup>91</sup>

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<sup>87</sup> No regulations have been made under the *Act*.

<sup>88</sup> Saskatchewan Environment. (2007). A Guide to the EA Process. Retrieved from <http://www.environment.gov.sk.ca/Default.aspx?DN=51580b36-1575-4460-a9c8-2a3bf825ae9a>

<sup>89</sup> Saskatchewan Environment. (2008). Conducting and Environmental Impact Assessment. Retrieved from <http://www.environment.gov.sk.ca/Default.aspx?DN=20674930-47a0-455e-895b-c64ff6f0315e>

<sup>90</sup> See definition of “person”, s. 2(j) *Act*. Section 3 provides that the *Act* also binds the Crown.

<sup>91</sup> s. 2(d) *Act*.

If a project is not a 'development', it does not require an EIA. There is a screening process to ensure that only projects that 'might have a significant or substantial impact on the environment are assessed'. This screening process considers both biophysical and socio-economic elements.

There is no set list of projects that require a mandatory assessment, or projects that are exempted. Saskatchewan follows a case-by-case approach, although certain forest management plans are considered developments under the *Act*.<sup>92</sup>

Projects go through the following process to determine if an EIA is triggered:<sup>93</sup>

1. The proponent submits a proposal to the EA Branch of Saskatchewan Environment (SE). If a proponent is unsure if a proposal needs to be submitted, basic information for an Initial Environmental Evaluation (IEE) can be submitted to SE.<sup>94</sup>
2. SE circulates the proposal for technical review to the Saskatchewan EA Review Panel (SEARP),<sup>95</sup> whose job it is to advise on adequacy, accuracy and completeness. The proposal may also be directed to third parties and First Nations. In the case of an IEE, the proposal is also sent to the Canadian EA Agency for federal comment.
3. Proposals should include information on:
  - the possible environmental impacts of project;
  - proposed measures to reduce or avoid impacts (including specific commitments);
  - a project description, which details all phases from planning to decommissioning. Details must include: project location, nature, inputs, ancillary projects, by-products and alternatives;
  - a description of the environmental setting – details will vary depending on project, but should include biological, physical and human environment elements (as necessary); and
  - any additional information requested by SE.

Reviews should be completed within a reasonable time (30-45 days) and will determine whether or not an EIA is triggered.

4. The SEARP makes recommendations to the EA Branch, which then determines if an EIA is triggered.
5. If an EIA is not triggered, the project can proceed in accordance with the initial proposal.

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<sup>92</sup> s. 9.1 *Act*.

<sup>93</sup> See: Saskatchewan Environment. (2007). EA Process Flowchart. Retrieved from <http://www.environment.gov.sk.ca/Default.aspx?DN=e9182790-a79b-4292-9727-51435ced36b6>

<sup>94</sup> Note that there are sector specific guidelines for IEEs: Intensive Livestock Operations (which need approval from Saskatchewan Agriculture and Food); Mineral Exploration (which are subject to specific guidelines created by Saskatchewan Mineral Exploration and Government Advisory Committee); Oil and Gas Exploration and Development (differences between private and Crown Land, etc).

<sup>95</sup> The SEARP is "a standing panel of representatives, from provincial ministries and agencies with environmental and socio-economic interests or responsibilities assigned to the review aspect of the EA program by their respective Deputy Ministers": Saskatchewan Environment Process Overview, <http://www.environment.gov.sk.ca/Default.aspx?DN=1aeacd42-0d54-49d9-8d44-2c36fbbf712a>

6. If an EIA is triggered, then the EA Branch prepares Project-Specific Impact Assessment Guidelines (PSGs), which are reviewed by the SEARP in accordance with member agencies' concerns. The PSGs are to be made available for public review.

### 3. Focus of process

The focus of the process is on the biophysical impacts of a development on the environment and on social, economic and cultural conditions (see definition of 'development' above). The definition of environment provided in the *Act* includes: (i) air, land and water; (ii) plant and animal life, including man; and (iii) the social, economic and cultural conditions that influence the life of man or a community insofar as they are related to the matters described in (i) and (ii).<sup>96</sup>

The Guidelines state that a proponent should submit information on the socio-economic impacts of a development, especially in Northern Saskatchewan.

The oversight provided by the SEARP panel may make the process more interdisciplinary as it is composed of representatives from many different departments.<sup>97</sup>

### 4. Scope

#### *Scope of project*

Saskatchewan has not regulated what types of projects/activities that will count as developments. As set out in #2 above, the definition of development is quite broad and could apply to an entire project.

#### *Scope of assessment*

The specific impacts that must be assessed within a project are also not set out in the *Act*. Once it has been determined that an EIA is required, content guidelines are listed by SE. Note that 'alternatives' to a development and alternative methods of undertaking a development are stressed.

The Government Guidelines provide that the following elements should be assessed in an Environmental Impact Statement (EIS):

- cost/benefit analysis;
- project alternatives (non-structural alternatives, structural or process alternatives, and site selection alternatives);
- physical description of the project;
- description of the existing environment (biophysical, social, economic);
- an assessment of impacts; and
- identification and evaluation of mitigation and enhancement measures.<sup>98</sup>

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<sup>96</sup> s. 2(e) *Act*.

<sup>97</sup> SEARP members are drawn from the Departments for Advanced Education, Employment and Labour; Agriculture; Energy and Resources; Enterprise and Innovation; Environment; Finance; First Nations and Metis Relations; Health; Highways and Infrastructure; Municipal Affairs; Saskatchewan Water Corporation; Saskatchewan Watershed Authority; Social Services; Tourism, Parks and Culture and Sport.

Members of SEARP are responsible for providing technical expertise in their area of specialty and may provide guidance to the EA Branch for determining the scope of assessments.

## 5. Process options

### *Summary of process*

A proponent must conduct an EIA of the development and submit an EIS to the responsible Minister. The proponent bears all associated costs.<sup>99</sup>

The general steps are that SE prepares the Project-Specific Impact Assessment Guidelines (PSGs). They are then released for general review and public comment before final PSGs are prepared for the proponent. The proponent then conducts the EIA and creates an EIS, which is reviewed by the SEARP. Once the EIS is determined to be adequate, it is released for public review. After this period, SE submits their recommendations to the Minister, who makes the ultimate decision on whether to reject or approve a development.

### *Public participation*

Public participation is encouraged at different stages in the above process (see flowchart). Concurrently with the above process, when the Minister receives the EIS he or she 'shall cause a review' and then make the statement and review available for public inspection.<sup>100</sup> Any person may, after inspection, make a written submission to the Minister within 30 days (of when notice was given about the locations of statement and review). There is ministerial discretion to extend this period for another 30 days.<sup>101</sup> The Minister also may cause a public information meeting to be held, and may direct the proponent to make experts available to attend the meeting.<sup>102</sup>

Guidelines issued by SE suggest that a proponent should involve the public early and maintain two-way communication. The Guidelines also suggest that the proponent should use traditional and local knowledge where appropriate, and it should fully document public consultation and response.<sup>103</sup>

Although the tone of the *Act* and government materials includes an emphasis on public disclosure and information, the Minister has the power to limit disclosure:

7 Where, in the opinion of the minister, it is in the public interest or in the interest of any person, the minister may, subject to the regulations, withhold or limit production, public inspection or discovery of any information or document that relates to a development, other than any information or document that relates to pollutants, public health or human safety.<sup>104</sup>

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<sup>98</sup> For more details, see: Saskatchewan Environment. (2007). EIA Conduct – EIS Content. Retrieved from <http://www.environment.gov.sk.ca/Default.aspx?DN=2eea259e-3f48-41af-9cb7-0a9f650762b3>.

<sup>99</sup> s. 9 *Act*.

<sup>100</sup> s. 11 *Act*.

<sup>101</sup> s. 12 *Act*.

<sup>102</sup> s.13(a), (b) *Act*.

<sup>103</sup> Saskatchewan Environment. (2007). Proponent delivered public involvement. Retrieved from <http://www.environment.gov.sk.ca/Default.aspx?DN=bbf84220-4419-4d3c-82b5-dd9eab42955f>

<sup>104</sup> s. 7 *Act*.

## **6. Decisions on process**

Once a project is considered a development by SE, the EIA process is triggered and the Minister has discretion to require public meetings and strike a public inquiry.<sup>105</sup>

## **7. Basis for project assessment**

The definition of development suggests that the significance of a project's environmental impact is the main consideration to trigger the EIA process. (See discussion on Triggers, #2 above.)

## **8. EA results and governmental decision making**

Based on the evaluation of the technical review, the EIS, and recommendations from SE, the Minister makes the decision on an approval. He or she can impose terms and conditions on any approval. Within a reasonable time after making his decision, the Minister shall give notice of his or her decision and written comments to the proponent, anyone who made written comments under s. 12 and to any other persons the Minister considers advisable.<sup>106</sup>

## **9. Role of Aboriginal communities**

Aboriginal communities are not given a specific role in the EA process under the *Act*. Website guidelines suggest that project proposals submitted to SE may be circulated to local First Nations for consultation, if applicable. There is no other specific reference to First Nations or Aboriginal communities.

## **10. Right to appeal**

The SE website provides that decisions made under the screening process (whether or not a full EA is required) can be appealed by the proponent or a third party to the courts.<sup>107</sup>

There is no provision in the *Act* for appealing a Minister's decision.

## **11. Mediation and ADR options**

The Act does not provide specific ADR and mediation options.

## **12. Joint EA process**

Saskatchewan signed the *Canada Saskatchewan Agreement on Environmental Assessment Cooperation* with the federal government in 1999. (The *Agreement* was renewed 2005.) This *Agreement* established administrative processes for implementation of the *Sub-agreement on Environmental Assessment* and the *Canada-Wide Accord on Environmental Harmonization*. The *Agreement* forms the basis for continued effective and efficient cooperation where federal and provincial EA legislation applies to the same project.

The *Agreement* preserves each government's authority and legislative requirements. It also provides guidelines to determine the "lead party" responsible for the administration of each cooperative EA. The *Agreement* provides for the development of project-specific schedules to make the cooperative assessment process more timely and efficient and establishes a single contact in each jurisdiction to coordinate consultation, resolve process issues, and ensure parties meet established timelines.

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<sup>105</sup> s. 13 & 14 *Act*.

<sup>106</sup> s. 15 *Act*.

<sup>107</sup> Saskatchewan Environment. (2007). *Screening*. Retrieved from <http://www.environment.gov.sk.ca/Default.aspx?DN=81fd9d6f-05fa-427f-9758-d9499680a645>

The *Agreement* allows each party to use information generated through the cooperative process to make their own decisions and coordinate timing of the announcements on the proposed projects. It also provides for an ongoing review of its effectiveness and a thorough evaluation within seven years.<sup>108</sup>

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<sup>108</sup> Saskatchewan Environment. (2007). The Canada-Saskatchewan Agreement on EA Cooperation. Retrieved from <http://www.environment.gov.sk.ca/Default.aspx?DN=67fd3727-02d8-4589-a337-28b5a8cbcab>.

## **Manitoba**

### **Legislation**

- *Environment Act*, C.C.S.M. c. E125 (*Act*)
  - *Classes of Development Regulation*, Man. Reg. 164/88
  - *Licensing Procedures Regulation*, Man. Reg. 163/88
  - *Participant Assistance Regulation*, Man. Reg. 125/91
  - *Joint Environmental Assessment Regulation*, Man. Reg. 126/91

### **Agreements**

- *Canada - Manitoba Agreement on Environmental Assessment Cooperation*

### **Government Publications**

- Manitoba Conservation: “Information Bulletin – Environmental Assessment and Licensing under *The Environment Act*” (Information Bulletin)

## **1. Basic purposes and goals**

The *Manitoba Act* contains a purpose section which states:

The intent of this *Act* is to develop and maintain an environmental management system in Manitoba which will ensure that the environment is maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations.”<sup>109</sup>

Specific to the EA process, the purpose section goes on to state that the *Act* provides for the EA of projects which are likely to have significant environmental effects.<sup>110</sup> It also recognizes existing effective environmental review processes and it provides for public consultation in environmental decision making.

The language of sustaining a high quality of life and development, along with the reference to future generations, suggests that the *Act* is intended to address sustainability concerns and promote sustainable development. The reference to future generations is repeated in the description of Manitoba Conservation’s objectives:

The aims and objectives of the department are to protect the quality of the environment and environmental health of present and future generations of Manitobans and to provide the opportunity for all citizens to exercise influence over the quality of their living environment.<sup>111</sup>

There is also a strong emphasis on public participation, which is encouraged in various ways in the EA process under the *Act* and regulations.

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<sup>109</sup> s. 1(1) *Act*.

<sup>110</sup> s. 1(1)(b) *Act*.

<sup>111</sup> s. 2(1) *Act*.

## 2. Trigger and classes of undertakings affected

Under the *Act*, the EA process is triggered when any person (which may include individuals, corporations, or governments) wishes to “construct, alter, operate or set into operation” a Class 1, 2, or 3 development.

The *Act* provides that Class 1 developments generally have the effect of discharging pollutants. Class 2 developments have effects that are primarily unrelated to pollution or are in addition to pollution. Class 3 developments have effects which are “of such a magnitude or which generate such a number of environment issues that it is as an exceptional project”.<sup>112</sup>

The *Classes of Development Regulation* lists specific examples of what activities or projects will fall within each class. Certain developments within the following sectors are listed: agriculture, energy production, fisheries, forestry, manufacturing, transportation, waste disposal and treatment, habitat modification, mining, recreation, and water development and control.

The only types of developments that are specifically exempted under the *Classes of Development Regulation* are certain municipal developments which will not have environmental impacts beyond the municipality and which will undergo a municipal EA. Additionally, for Class 2 developments only, the Minister has the power to exempt developments from the licensing process if they are subject to an existing approval process.<sup>113</sup>

It is possible that developments not listed may still trigger the assessment process, as “development” is defined quite broadly under the *Act* to include “any project, industry, operation or activity, or any alteration or expansion of any project, industry, operation or activity which causes or is likely to cause...[a series of listed consequences].”<sup>114</sup> So, the *Act* has application well beyond provincial government undertakings or funded projects.

## 3. Focus of process

The focus of the EA process is on the biophysical effects of a project and how these effects impact “social, economic, environmental health and cultural conditions that influence the lives of people or a community”.<sup>115</sup>

These concerns are not evidenced in the definition of “environment” within the *Act*, which encompasses “air, land, and water, or plant and animal life, including humans”, and does not refer specifically to socio-economic conditions or other factors. The definition of “development”, however, is very broad and is intended to capture projects/activities that have the potential for significant environmental effects.<sup>116</sup> The definition specifically lists several effects that will cause an activity/project to be a development.

The purpose of the *Act* (described in Trigger and classes of undertakings affected, #2 above) suggests sustainability is also a focus. However, there is no requirement for a proponent to describe alternatives to the propose development.<sup>117</sup>

## 4. Scope

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<sup>112</sup> ss. 1(2) *Act*, definitions of “Class 1”, “Class 2”, and “Class 3” developments.

<sup>113</sup> ss. 11(2) *Act*.

<sup>114</sup> See definition of “development”, s. 1(2) *Act*.

<sup>115</sup> See definition of “development”, s. 1(2)(h) *Act*.

<sup>116</sup> ss. 1(2) *Act*.

<sup>117</sup> During the assessment process for Class 2 and Class 3 developments, the Director (or Minister, in the case of Class 3 developments) may require an Environmental Impact Statement that outlines the alternatives to the proposed development processes and locations. – ss. 11(9) and 12(5) *Act*.

### ***Scope of project***

An entire project has the potential to be captured by the EA process in Manitoba, by virtue of being listed within the *Classes of Development Regulation*. For example, potash mines and milling facilities are listed as Class 3 developments. This may mean that the operation, activity, alteration or expansion of a potash mine could be caught under the Class 3 EA process.

The scope of the EA may initially be set by what is included within a proponent's proposal, however, the public has opportunity to comment on the proposal and the Minister or Director can always require the proponent to submit more information. However, section 13 of the *Act* allows for staged licensing, which has proven problematic for many intervenors. For example, the Minister can issue a license for land clearing, another for project construction and a third for operations.

### ***Scope of assessment***

The *Act* and regulations are not specific about which impacts must be assessed. However, the *Licensing Procedures Regulation* provides that a development proposal for any class of development must include information relating to:

- the type, quantity and concentration of pollutants to be released into the air, water or on land;
- the impact on wildlife;
- the impact on fisheries;
- the impact on surface water and groundwater;
- forestry related impacts;
- the impact on heritage resources; and
- socio-economic implications resulting from environmental impacts.<sup>118</sup>

The Director or Minister can require any further information and he or she can also require a proponent to conduct specific studies for all three classes of development as part of the assessment process.

## **5. Process options**

The processes for Class 1, 2, and 3 developments are very similar. They involve mandatory public notification and comment periods, and the Minister has discretion to require a public hearing for all three. A few mandatory timelines exist and are outlined in the *Licensing Regulations*.

An EIS may be required for Class 2 and 3 developments but does not appear to be mandatory for either. A Class 1 development can be bumped up to a Class 2 development.

### ***Process summary***

1. Proposal for Development. A proposal for a development within Class 1, 2, or 3 must be filed with Manitoba Conservation and must contain certain information, including potential impacts and proposed environmental management practices, unless waived by the Minister.<sup>119</sup> The proposal is submitted to a

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<sup>118</sup> ss. 1(1) *Licensing Procedures Regulation*.

<sup>119</sup> ss. 1(1), (2) *Licensing Procedures Regulation*.

Technical Advisory Committee for review. If further information is required, this information is sent out for review to the Committee and the public.

- Class 1 and 2 developments. Within 30 days of receipt of a proposal, the Director (a designated Manitoba Conservation employee) must notify the public and provide an opportunity for comments and objections.<sup>120</sup> Within 60 days, he/she must notify the proponent of the form of assessment required and a tentative schedule.
- Class 3 developments. Within 45 days of receipt of a proposal, the Minister must notify the public and provide opportunity for comment and objections.<sup>121</sup> Within 120 days, the Minister must provide a summary of the proposal to the Clean Environment Commission (CEC) and notify the proponent of the assessment options and a tentative schedule.

2. Class 1 Developments. In order to screen a Class 1 development, the Director may require more information, issue guidelines for the proponent to conduct further studies, require an environmental protection and management plan, request the Minister to have a public hearing conducted, or elevate the proposal to a Class 2 development.<sup>122</sup> If the Director receives objections from the public, but decides not to recommend a public hearing, he or she must provide written reasons to the objector within 21 days, who can then appeal to the Minister.<sup>123</sup> The Director makes the final determination on whether to issue a license, accompanied by any necessary conditions and modifications, or to refuse to issue a license. Written reasons for a refusal must be issued within 30 days.<sup>124</sup>

3. Class 2 Developments. Before assessing the impacts of a Class 2 development, the Director may require more information, issue guidelines for the EIS and require public consultation (unlike for Class 1 developments), require the proponent to prepare and submit to the Director an assessment report, review the assessment report, and/or request the Minister to direct the chairperson of the CEC to conduct a public hearing. Similar to the Class 1 process, if the Director decides not to recommend a hearing after receiving objections from the public, he or she must provide written reasons within 21 days.<sup>125</sup> The Director makes the final decision on whether or not to issue a license. Written reasons for a refusal must be issued within 30 days.<sup>126</sup> If guidelines and an EIS are required, the Guide suggests 12 weeks of review time will be required.

4. Class 3 Developments. In order to assess a proposed Class 3 development, the Minister may require more information, issue guidelines for the EIS and require public consultation, require the proponent to prepare and submit to the Director an assessment report, review the assessment report, and/or require the CEC to conduct a public hearing. If objections by the public are received and the Minister decides not to require a hearing, he or she must provide written reasons within 60 days.<sup>127</sup> If guidelines and an EIS are required, the Guide suggests 12 weeks of review time will be required.

5. CEC hearing. If the Minister has determined that a hearing is necessary, the CEC will hold public hearing(s) to gather or disseminate information and/or gather evidence or information from the public.<sup>128</sup> It is responsible for notifying the proponent and the public of the hearing. Any person who would like to

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<sup>120</sup> ss. 3(1) *Licensing Procedures Regulation*.

<sup>121</sup> ss. 12(4) *Act* and ss. 6(1) *Licensing Procedures Regulation*.

<sup>122</sup> ss. 10(6) *Act*.

<sup>123</sup> ss. 10(7) *Act* and s. 4 *Licensing Procedures Regulations*.

<sup>124</sup> s. 5 *Licensing Procedures Regulations*.

<sup>125</sup> ss. 11(10) *Act* and s. 4 *Licensing Procedures Regulations*.

<sup>126</sup> s. 5 *Licensing Procedures Regulations*.

<sup>127</sup> ss. 12(6) *Act* and s. 7 *Licensing Procedures Regulations*.

<sup>128</sup> ss. 6(4) *Act*.

make submissions must notify the CEC. The Guide suggests that a hearing will add 15 weeks of review time to a proposal.

### ***Independence***

If a public hearing is required, the CEC conducts hearings and provides a report and recommendation to the Minister. The CEC describes itself as an “arms length provincial agency” and is made up of at least 10 members who are appointed by the Lieutenant Governor in Council and paid by the provincial government. This provides some measure of independence. The Director or Minister may decide not to follow the recommendations of the CEC when determining to approve or reject a development, and has done so in the past.

### ***Intervenor funding***

The *Act* specifically allows the Minister to require a proponent to provide funding to participants of the assessment process for Class 1, 2, or 3 developments or for joint panel hearings.<sup>129</sup>

The *Participant Assistance Regulation* establishes a Participant Assistance Program that is developed for a public hearing which is of “significant public interest”.<sup>130</sup> Any members of the public or groups can apply for funding after notice is given, and a Participant Assistance Committee will make a recommendation on who should receive funding and how much they should receive. The *Regulation* provides criteria to assess eligibility and also provides specific guidelines on what expenses can be covered.<sup>131</sup>

## **6. Decisions on process**

Neither public hearings nor mediation are mandatory under the *Act*. In the case of hearings, the Manitoba Conservation states that “generally [hearings] are called where a development Proposal is of general interest to, or will affect, a large number of Manitobans or where through the screening process there are significant public concerns identified.”<sup>132</sup>

The issuance of Guidelines and the completion of an EIS is also at the discretion of the Director (or the Minister, in the case of Class 3 developments).

## **7. Basis for project assessment**

The goal of EA process in Manitoba is to determine whether to license developments that “may have the potential for significant environmental effects.”<sup>133</sup> The language of significant effects also appears in the definition of “development”. This suggests that the basis for project assessment in Manitoba is the significance of environmental impacts, although the *Act* does not provide guidance for determining what qualifies as “significant”.

However, the *Act*, regulations and Guide do not detail what must (or may) be included within an EIS. The Director (or Minister) may require the inclusion of alternatives to the process and location of the development and details of environmental management practices.<sup>134</sup>

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<sup>129</sup> s. 13.2 *Act*.

<sup>130</sup> ss. 2(1) *Participant Assistance Regulation*.

<sup>131</sup> s. 6 and 7 *Participant Assistance Regulation*.

<sup>132</sup> Manitoba Conservation. (n.d.). Forest Management: Environment Act Licensing. Retrieved from [http://www.gov.mb.ca/conservation/forestry/manage/envir\\_act.html](http://www.gov.mb.ca/conservation/forestry/manage/envir_act.html)

<sup>133</sup> Information Bulletin, p. 1.

<sup>134</sup> ss. 11(9) and 12(5) *Act*.

There is also language in the *Act* to suggest that sustainability is a focus (see Focus of process, #3 above). However, there is no requirement for a proponent to describe the alternatives to a development or the prospect of not carrying out a development or to describe how the development will affect resource use.

## **8. EA results and governmental decision making**

For decisions made on the Class 1 and 2 development processes, it is the Director who makes the final determination on whether to approve or reject a development.<sup>135</sup> He or she must issue reasons to the proponent and the public if the decision is made not to issue a license.

For a Class 3 development, the Minister makes the final determination, but the approval of the Lieutenant Governor in Council is required to refuse to issue a license.<sup>136</sup>

If the decision is made to issue a license for any class of development, the Director or Minister can attach specifications, limits, terms and conditions or require modifications that the Minister “deems necessary to ensure appropriate environmental management”.

Following a public hearing, the Director (or Minister) is not required to adopt the recommendations of the CEC, but he or she must provide written reasons if the CEC’s recommendations are not adopted.<sup>137</sup>

The *Act* and regulations do not advise what criteria must be used by the Minister or Director when making a decision to approve or reject a development.

## **9. Role of Aboriginal communities**

There are no provisions in the *Act* that provide Aboriginal communities with a specific role in the EA process.

For coordinated federal-provincial EAs, the *Canada - Manitoba Agreement on Environmental Assessment Cooperation* does give Aboriginal communities the right to be notified of a project if it has the potential to cause adverse environmental effects.

## **10. Right to appeal**

The final decision made by a Director (for a Class 1 or 2 development) may be appealed to the Minister within 30 days by a person who is affected by the issuance or refusal to issue a license.<sup>138</sup> The imposition of conditions or terms imposed on a license may also be appealed. The Minister has discretion to refer the matter to the CEC for a public hearing, refer the matter back to the Director for reconsideration, vary or cancel the license, or dismiss the appeal.<sup>139</sup> The disposition of the appeal must be approved by the Lieutenant Governor in Council, and within 7 days of this decision the Minister must notify the appellant.

For decisions of the Minister to forego a public hearing or append terms and conditions on a Class 3 license, a person dissatisfied with the Minister’s decision can appeal to the Lieutenant Governor in Council within 6 weeks of the issuance of a license. The Lieutenant Governor in Council has discretion to

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<sup>135</sup> ss. 10(8) and 11(11) *Act*.

<sup>136</sup> ss. 12(7) *Act*.

<sup>137</sup> ss. 10(10), 11(13), 12(8) *Act*.

<sup>138</sup> s. 27 *Act*.

<sup>139</sup> ss. 27(2) *Act*.

refer the matter to the CEC for a public hearing, refer the matter back to the Director or Minister for reconsideration, vary or cancel the license, or dismiss the appeal.<sup>140</sup>

## 11. Mediation and ADR options

The *Act* gives the Minister discretion to appoint an environmental mediator to resolve a conflict if the he or she deems it advisable and if the conflicting parties concur.<sup>141</sup> The mediator must be acceptable to the parties. The Minister may request that the CEC act as a mediator.<sup>142</sup> The *Act* does not designate at which point during the EA process the Minister may refer parties to mediation, nor does it set a time limit on the mediation. The *Act* does specify that after the mediation is complete, the mediator has six weeks to provide a report to the Minister on the results of the process.

## 12. Joint EA process

The *Act* allows a Minister to enter into an agreement for joint assessments with another jurisdiction.<sup>143</sup> Certain EA components must remain the same, including the use of a public registry, comments on key documents, and public hearings if a panel is established. Further, there must be a joint appointment of members of a panel and the option to create a program to provide financial assistance if the Minister deems it desirable.

The *Canada-Manitoba Agreement on Environmental Assessment Cooperation* was finalized in 2007. Under the *Agreement*, proposed projects undergo one assessment, although each government retains authority to make a decision on a project.

The *Joint Environmental Assessment Regulation* provides additional details on the joint panel process under the *Agreement*.

Certain components of both the Manitoba *Environment Act* and *CEAA* are retained, such as the definitions of environment and environmental effects. A Lead Party is designated based generally on whether the project occurs in provincial or federal land,<sup>144</sup> and a Project Administration Team is established as the main administrative body. This body must develop a schedule that is mutually agreeable.<sup>145</sup>

The *Agreement* does not mention the opportunity for mediation between a proponent and participants, although it does contain dispute resolution provisions relating to the interpretation of the *Agreement*.

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<sup>140</sup> s. 28 *Act*.

<sup>141</sup> ss. 3(3) *Act*.

<sup>142</sup> ss. 6(5)(d) *Act*.

<sup>143</sup> s. 13.1 *Act*.

<sup>144</sup> s. 32 *Agreement*.

<sup>145</sup> s. 37 *Agreement*.

## **Ontario**

### **Legislation**

- *Environmental Assessment Act*, R.S.O. 1990, c. E.18 (*Act*)
  - *General*, R.R.O. 1990, Reg. 334 (*General Regulation*)
  - *Deadlines*, O. Reg. 616/98
  - *Electricity Projects*, O. Reg. 116/01
  - *Waste Management Projects*, O. Reg. 101/07

### **Agreements**

- *Canada-Ontario Agreement on Environmental Assessment Cooperation*

### **Government Publications**

- Ontario Ministry of the Environment: “Code of Practice: Preparing and Reviewing Environmental Assessments in Ontario” (Code of Practice)
- Ontario Ministry of the Environment: “Environmental Assessment Review and Approval Process”<sup>146</sup>

## **1. Basic purposes and goals**

There is no preamble to the *Act*, but the purpose section states:

“The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.”<sup>147</sup>

## **2. Trigger and classes of undertakings affected**

The *Act* and EA process in Ontario applies only to projects or activities that are considered “undertakings”, the result of which is that the process applies mainly to the provincial government, municipalities, and certain public bodies. The definition of an undertaking includes:<sup>148</sup>

- “an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity” if carried on by the provincial government, municipalities, and certain public bodies;<sup>149</sup>
- “a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or business enterprise or activity” carried on by the private sector, but only if designated by regulations; or
- “an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity” by the private sector, if an agreement is reached between the Minister and the proponent that the EA process should apply.

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<sup>146</sup> Ministry of Environment, <http://www.ene.gov.on.ca/en/eaab/approval-process.php>

<sup>147</sup> s. 2 *Act*.

<sup>148</sup> See definition of “undertaking”, ss. 1(1) *Act*.

<sup>149</sup> The relevant public bodies are listed in s. 3 of the *General Regulation*.

Unfortunately, unlike most other provinces, Ontario has not created a comprehensive single list of specific activities that are included or excluded within the definition of an undertaking.

There are few regulations that have been established to capture private sector projects (part (b), above). Regulations have established that certain private electricity projects will count as an undertaking,<sup>150</sup> and certain waste management projects<sup>151</sup> will also trigger the EA process. Within these regulations, there are exemptions based on size and the nature of the specific undertaking.

Private sector developers also must follow the Municipal Class EA process when a project is for residents of a municipality for roads, water, or wastewater.<sup>152</sup>

While the *Act* states that every proponent who wishes to proceed with an undertaking must apply to the Minister for approval,<sup>153</sup> the *General Regulation* offers exemptions. Certain municipal undertakings are exempt, such as certain projects with an estimated cost of under \$3,500,000 and projects that are governed by other acts.<sup>154</sup> Also, undertakings carried out by certain provincial government Ministers are exempt from the need to apply to the Minister for approval.<sup>155</sup>

### 3. Focus of process

Similar to Newfoundland, the definition of environment in Ontario's *Act* is quite broad and includes, among other components, "air, land and water", "plant and animal life, including human life", "the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community", or any combination of factors. It also includes the built environment.<sup>156</sup>

Sustainability is not a focus as it is not mentioned in legislation or policy documents.

### 4. Scope of project

Since Ontario's definition of an undertaking is quite broad and there is no list of which specific public sector projects will be included, it is hard to determine what kinds of projects will be included within an undertaking.

The scope of the undertaking would likely be initially determined by a proponent since it must prepare the TOR for the assessment, although the TOR may be commented on by the public and reviewed by the government.

#### *Scope of assessment*

A proponent's EA must include a description of the environment that may be affected by an undertaking and the environmental effects that may occur. The definition of "environmental effect" provided in the Code of Practice suggests that positive, negative, direct, indirect, short term and long term effects must be evaluated.<sup>157</sup>

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<sup>150</sup> *Electricity Projects*, O. Reg. 116/01.

<sup>151</sup> *Waste Management Projects*, O. Reg. 101/07.

<sup>152</sup> *Designation and Exemption – Private Sector Developers*, O. Reg. 345/93, s. 2.

<sup>153</sup> s. 5 *Act*.

<sup>154</sup> s. 5 *General Regulation*.

<sup>155</sup> s. 6 *General Regulation*.

<sup>156</sup> s. 1(1) *Act*.

<sup>157</sup> Ontario Ministry of the Environment. (2009). Code of Practice: Preparing and Reviewing Environmental Assessments in Ontario. Retrieved from <http://www.ene.gov.on.ca/publications/7258e.pdf> (Code of Practice), p.vi.

Given the broad definition of environmental effects, this would likely include biophysical impacts, impacts on the built environment, as well as impacts on social, economic and cultural conditions. However, the specific impacts that must be assessed are not described in the *Act* or in regulations.

The proponent must also include details on how the impacts will be mitigated.

Additionally, a proponent must provide the rationale for the undertaking, along with alternative methods of carrying out the undertaking and alternatives to the undertaking itself. The proponent's analysis must detail the advantages and disadvantages that may be caused to the environment by the undertaking and weigh the different alternatives.<sup>158</sup>

## 5. Process options

There are two broad categories of EAs in Ontario: individual EAs and streamlined self-assessment processes. The latter includes class EAs, certain electricity projects, waste management and transit projects.

### *Summary of individual EA process (timelines and public participation)*<sup>159</sup>

1. Terms of Reference. Once an undertaking has triggered the individual EA process, a proponent must submit TOR to the Minister for approval.<sup>160</sup> A proponent must consult with interested persons; however, these parties are not identified, nor are the means of consultation.<sup>161</sup> The TOR must describe how the EA that will be completed, the consultations that have occurred and the results of the consultations. The public is provided with 30 days to comment on the TOR, although this does not appear to be a legislated time period.<sup>162</sup> The EA Branch will solicit comments from the general public, municipalities, other government agencies, and Aboriginal communities.<sup>163</sup>

2. Decision on TOR. The decision to accept a proponent's TOR is made by the Minister when he or she is "satisfied that an EA prepared in accordance with the approved terms of reference will be consistent with the purpose of this Act and the public interest."<sup>164</sup> The decision must be made within 12 weeks of receiving the TOR or, if the matter is referred to mediation, within 7 weeks of receiving the mediator's report.

3. EA Review. Once the TOR are approved, the proponent prepares an EA in accordance with the TOR and submits it to the Ministry. The proponent must consult the public and report on the consultations,<sup>165</sup> although there are no legislated requirements on who must be consulted and how consultations must occur. The proponent must provide the public with notice of the submission within 14 days. Following the notice, there is a 7 week comment period where written submissions can be made to the Ministry. The Ministry then has 12 weeks to review the EA and comments and prepare a review document. Before a final decision is made, the public (and other government departments) are then given notice that the

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<sup>158</sup> ss. 6.1(2) *Act*.

<sup>159</sup> See: Ontario Ministry of the Environment. (2009). Ontario's Environmental Assessment Process Flowchart. Retrieved from <http://www.ene.gov.on.ca/en/eaab/ea-flow-chart.php>.

<sup>160</sup> s. 6 *Act*.

<sup>161</sup> s. 5.1 *Act*.

<sup>162</sup> ss. 6(3.6) *Act*. This sub-section requires the solicitation of public comments, but does not provide a timeline. The *Deadline Regulation* also does not specify a time period.

<sup>163</sup> The requirement for soliciting comments is not legislated, but is set out in provincial government publications: Ontario Ministry of Environment. (2010). Environmental Assessment Review and Approval Process. Retrieved from <http://www.ene.gov.on.ca/en/eaab/approval-process.php>.

<sup>164</sup> ss. 6(4) *Act*.

<sup>165</sup> s. 5.1 and 6.1(2)(e) *Act*.

review is complete and have a further 5 weeks to make written comments on the EA and the Ministry's review document. At this time, any person may request that the Minister refer the application to the Environmental Review Tribunal (the Tribunal) for a hearing and decision.

4. **Minister's decision.** After the public comment period has expired, the Minister must make a decision within 13 weeks of the submission of an EA. The Minister has three options: (i) refer the undertaking (or part of it) to the Tribunal; (ii) refer it to mediation; or (iii) make a final determination on the undertaking. The Minister's final determination can be to approve an undertaking with or without conditions or refuse it. This decision must be approved by the Lieutenant Governor in Council.<sup>166</sup> It is suggested that the whole process, without delays, takes approximately 30 weeks.

5. **Environmental Review Tribunal and Hearing.** If an undertaking is referred to the Tribunal, a hearing will proceed according to the Tribunal's processes and rules<sup>167</sup> the provisions in Part III of the *Act*. However, the Minister has the power to attach conditions to the referral and may even direct that the matter be determined without a hearing.<sup>168</sup> If a hearing takes place, a decision by the Tribunal is usually made within 60 days of a hearing. The Tribunal is authorized to make the same decisions as the Minister: to approve the undertaking with or without conditions or reject it. The Minister is given 28 days to review the Tribunal decision.<sup>169</sup>

6. **Mediation.** If and when the Minister refers a decision to mediation, the mediation must occur within 60 days. The mediator must produce a report on the conduct and results of mediation, which must be considered by the Minister (or by the Tribunal) when deciding on an application. The Minister then has 7 weeks to make a final determination.

### ***Intervenor funding***

There are currently no provisions that provide funding to intervenors or interested parties under Ontario's EA process. The province's *Intervenor Funding Project Act* previously served this function; however, it was repealed in 1996.

### ***Independence***

If an undertaking is referred to the Tribunal, the process and decision making proceeds independently from the Ministry. The Tribunal is established by provincial legislation and is a quasi-judicial entity, with members that are appointed by the Lieutenant Governor in Council and who are not employees of the Ministry.

### ***Class screening or other streamlining***

The use of Class EAs means that not all undertakings will trigger the "individual EA process" in Ontario. Once a class EA is approved, undertakings within the class will follow a separate process. There are 10 class EAs approved in Ontario, covering municipal and provincial public sector activities such as highway construction and maintenance, certain transit projects, minor transmission facilities, remedial

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<sup>166</sup> s. 8, 9 and 9.1 *Act*.

<sup>167</sup> See: Environmental Review Tribunal. (2010). A Guide to Hearings arising from Applications under the *EA Act*, the *Environmental Protection Act*, and the *Ontario Water Resources Act*. Retrieved from <http://www.ert.gov.on.ca/english/guides/index.htm>.

<sup>168</sup> s. 11(3) *Act*.

<sup>169</sup> s. 11.2 *Act*.

flood and erosion control projects, conservation and stewardship projects, forest management on provincial Crown lands in Ontario, and waterpower projects.<sup>170</sup>

### ***Summary of the class EA process***

The initial approval of a class EA follows a similar process to that of an individual EA.<sup>171</sup> TOR are prepared by the applicant and public consultation with interested persons is required. There is not a similar review period, however, before the TOR are accepted by the Ministry. The Class EA is prepared by the applicant and must contain certain required information.<sup>172</sup> The rest of the process unfolds in the same manner as for individual EAs. Public participation, Ministerial review and decision making (with or without referral to the Tribunal or to mediation) are all the same.

Once a project falls within an approved class EA, it does not require further approval under the *Act* if the process set out in a class EA document is followed. The Minister may, however, bump a class EA up to an individual EA by making a Part II Order.<sup>173</sup> Any person may also request that the Minister make a Part II Order. The Minister must consider certain criteria such as the purpose of the *Act*, factors suggesting the undertaking differs from others in the class, and the reasons given by a person requesting the Order.<sup>174</sup>

## **6. Decisions on process**

The *Act* provides the Minister with discretion to determine when an undertaking should be referred to mediation, although mediation can be requested by a proponent or other participant.

The decision to refer an undertaking (or part of an undertaking) to the Tribunal is also discretionary. However, if there has been a request for referral to the Tribunal, the Minister must refer it unless, in his or her “absolute discretion”, the Minister considers the request to be frivolous or vexatious, considers a hearing to be unnecessary, or considers that a hearing may cause undue delay.<sup>175</sup>

## **7. Basis for project assessment**

The basis for project assessment is discretionary – there is no mention of considering the significance of environmental effects in assessing a project, nor is there mention of sustainability. While the purpose of the EA process is to assess the effects a project will have on the environment, the *Act* and Code do not provide details on what effects must be considered and what level of effects are acceptable in making a final determination.

## **8. EA results and governmental decision making**

The *Act* stipulates that both the Tribunal and the Minister must consider the following components in deciding on whether to approve or reject an application:<sup>176</sup>

- (a) the purpose of the *Act*;
- (b) the approved TOR for the EA;
- (c) the EA;

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<sup>170</sup> For a list of Class EAs, see: Ontario Ministry of the Environment. (2010). Approved Class EAs. Retrieved from <http://www.ene.gov.on.ca/en/eaab/parent-class-ea-list.php>.

<sup>171</sup> Class EAs, Part II.1 *Act*.

<sup>172</sup> s. 14 *Act*.

<sup>173</sup> s. 16 *Act*.

<sup>174</sup> ss. 16(4) *Act*. The Code of Practice suggests other factors that the Minister may consider (p. 44).

<sup>175</sup> ss. 9.3(2) *Act*.

<sup>176</sup> ss. 9(2) and 9.1(3) *Act*.

- (d) the Ministry review of the EA;
- (e) the comments submitted on the EA and the Ministry’s review of the EA; and
- (f) the mediators’ report, if mediation was completed.

If the Minister is making the decision, any other matters that he or she considers relevant to the application must also be considered.

Following a Tribunal decision, the Minister may review the decision and with the approval of the Lieutenant Governor in Council. The Minister has authority to vary the Tribunal’s decision or to substitute his or her opinion for that of the Tribunal.<sup>177</sup>

## 9. Role of Aboriginal communities

Aboriginal communities are not given a distinct role in the EA process apart from the general public consultation requirements. The Code provides that within a TOR, a proponent must prepare a list of Aboriginal communities that may be potentially affected by or interested in the project.<sup>178</sup>

The Code is also clear that the Crown may have a duty to consult Aboriginal peoples when an undertaking has the potential to adversely affect existing Aboriginal and treaty rights. The Crown may also have consultation duties when they are the proponent, and guidance is given to all proponents when the duty to consult is engaged.<sup>179</sup>

## 10. Right to appeal

The *Act* does not provide a right of appeal from a Minister’s decision. The *Act* expressly provides that a decision of the Tribunal is final and not subject to appeal.<sup>180</sup> It also provides that a decision may only be set aside upon judicial review standard of review if it is unreasonable.

## 11. Mediation and ADR options

Mediation is expressly available under the *Act*, and the Minister may refer parties to mediation at any point during the process.<sup>181</sup> The province also encourages parties to engage in self-directed mediation. The *Act* specifically allows the Minister to appoint a mediator before TOR are developed.<sup>182</sup> Also, the *Act* states the Minister may appoint a mediator or ask the Tribunal to act as a mediator before a final decision on an application is reached.<sup>183</sup>

There is a 60 day time-limit on mediation, and the mediator must produce a report on the conduct and results of mediation, which must be considered by the Minister (or by the Tribunal) when deciding on an application.

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<sup>177</sup> s. 11.2 *Act*.

<sup>178</sup> Code of Practice, pp. 14-15.

<sup>179</sup> “The nature, scope, and content of the duty to consult and accommodate varies with the circumstances.

Meaningful consultation requires the Crown to listen with an open mind to what the Aboriginal communities have to say. ...Accommodation requires a process of balancing of interests. Responsiveness is a key element of both consultation and accommodation...”: Code of Practice, p. 16.

<sup>180</sup> s. 23.1 *Act*. The wording in the statute is “patently unreasonable”. However, in light of the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, this standard has been replaced with that of unreasonableness.

<sup>181</sup> See: Ontario Ministry of the Environment. (2009). Ontario’s EA Process Flowchart. Retrieved from <http://www.ene.gov.on.ca/en/eaab/ea-flow-chart.php>.

<sup>182</sup> ss. 6(5) *Act*.

<sup>183</sup> s. 8 *Act*.

Mediation can be initiated by the Minister or the Department, or requested by a proponent or participant, although the Minister has control over which parties participate in the mediation. All fees and expenses are borne by the proponent.

## 12. Joint EA process

Canada and Ontario have entered into an agreement, the *Canada-Ontario Agreement on Environmental Assessment Cooperation* (the *Agreement*), to coordinate the review process for EAs that require a federal screening and a provincial EA (an individual or class EA).

Under the *Agreement*, a single assessment occurs and information is shared. Although one government takes the lead on the process, both governments still make their respective decisions on a project. Provincial timelines also remain in place; the federal government has stated that federal authorities will be able to work within Ontario's timelines.<sup>184</sup>

The *Agreement* allows Ontario to initiate mediation under the *Act* to resolve disputes. Ontario must advise the Canadian EA Agency to determine if they would like to participate. Likewise, the federal government may refer a project to mediation under the *CEAA* and the Agency must similarly notify the Ontario EA Office.<sup>185</sup>

Harmonization provisions in the *Act* also give the provincial Minister the authority to dispense with any requirement of the *Act* in order to facilitate the requirements of both jurisdictions.<sup>186</sup>

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<sup>184</sup> *Canada-Ontario Agreement for Environmental Assessment Cooperation*, 2004. Retrieved from <http://www.ene.gov.on.ca/programs/4898e.pdf>.

<sup>185</sup> ss. 20 and 21 *Agreement*.

<sup>186</sup> s. 3.1 *Act*.

## Québec

### Legislation

- *Environment Quality Act*, R.S.Q., c. Q-2 (*Act*)<sup>187</sup>
  - *Regulation respecting Environmental Impact Assessment and Review*, R.Q. c. Q-2, r. 9 (*Regulation*)<sup>188</sup>

### Agreements

- *Canada-Québec Agreement on Environmental Assessment Cooperation*

### Government Publications

- Ministère Développement durable, Environnement et Parcs du Québec: “Overview: Environmental Assessment in Southern Québec, Overview”<sup>189</sup>
- Ministère Développement durable, Environnement et Parcs du Québec: “Environmental Assessment of Northern Projects”<sup>190</sup>

## 1. Basic purposes and goals

The *Act* does not contain a preamble, nor is guidance given within the EA sections. The legislation does provide everyone with a right to a healthy environment and to its protection, to the extent provided for by approvals and authorizations issued under the *Act*.<sup>191</sup>

Although sustainability concerns are not explicit in the *Act* or the *Regulation*, the EA process is described by the provincial government as a tool for sustainable development and a “development planning exercise aiming to ensure the sustainability of land and resources use.”<sup>192</sup> Also, generic provincial government guidelines for different sectors have a common section on sustainable development.<sup>193</sup>

## 2. Trigger and classes of undertakings affected

### *Southern Québec*

The *Regulation* lists the specific “constructions, works, plans, programmes, operations and activities” that are subject to the EIA and review process.<sup>194</sup> In many cases, descriptions of what is excluded are also

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<sup>187</sup> Chapter I, Division IV.1 relates to EIAs in Southern Québec; Chapter II, ss. 153-167 relate to EIAs in the James Bay region; and Chapter II, ss.187-204 relate to EIAs north of the 55<sup>th</sup> parallel (Northern Québec).

<sup>188</sup> This *Regulation* only applies to Southern Québec.

<sup>189</sup> Ministère Développement durable, Environnement et Parcs du Québec. (2002). Overview: Environmental Assessment in Southern Québec. Retrieved from <http://www.mddep.gouv.qc.ca/evaluations/procedure-en.htm> (EA in Southern Québec).

<sup>190</sup> Ministère Développement durable, Environnement et Parcs du Québec. (2002). Environmental Assessment in Northern Québec. Retrieved from <http://www.mddep.gouv.qc.ca/evaluations/mil-nordique/process.htm#projets> (EA in Northern Québec).

<sup>191</sup> s. 19.1 *Act*.

<sup>192</sup> EA in Southern Québec.

<sup>193</sup> In French only: Ministère Développement durable, Environnement et Parcs du Québec. (2002). Formulaire, guides, directives sectorielles et autres documents. Retrieved from <http://www.mddep.gouv.qc.ca/evaluations/publicat.htm>.

<sup>194</sup> s. 2 *Regulations*.

provided. There are around 40 activities listed, often with certain minimum thresholds required to trigger the EA process.<sup>195</sup>

The *Act* appears to give the government the power to exclude certain projects required to repair damage caused by a disaster or prevent damage from the EIA and review procedure by the government. Projects to establish certain landfills sites may also be exempted.<sup>196</sup>

### ***James Bay and Northern Québec***

The *Act* provides that “any project” not specifically exempt must undergo the assessment and review procedure. Schedule A to the *Act* lists projects that are automatically subject to the EA and review procedure if they are carried out in the James Bay region or Northern Québec. There are around 17 projects on this list. Some of these project descriptions are framed more broadly than for the projects and activities listed in the *Regulation* applicable to Southern Québec,<sup>197</sup> although some do contain minimum thresholds that must be met in order to be automatically subject to the EIA process.<sup>198</sup>

In contrast, Schedule B to the *Act* lists projects that are automatically exempt from the EIA and review process. There are 15 projects that are specifically exempt.<sup>199</sup> Additionally, projects are exempt if they are carried out within the territorial limits of a non-native community and do not impact the wildlife outside of that community.

If a project is not automatically exempt, it must either go through the assessment and review procedure or the Minister may exempt it from the process.<sup>200</sup> Guidelines provide that for projects which are not listed in Schedules A or B, the Minister may decide whether it will be subject to the review procedure, taking into consideration the recommendation of a Review Committee (made up of Cree and Québec members) for projects in James Bay.

For projects in Northern Québec, a separate Commission (made up of Inuit and Québec members) determines whether the project will be subject to the EA and review process.<sup>201</sup>

### **3. Focus of process**

The focus of the EA process in Québec is on the anticipated impacts of a project on the biophysical and human settings. The government states that the EA is a tool for sustainable development which allows for “consideration, analysis and interpretation of all factors affecting the ecosystems, the resources and the quality of life of individuals and communities”.<sup>202</sup> Socio-economic considerations are also independently assessed, as the government considers the justification for a project during its analysis and review of a project.

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<sup>195</sup> Examples include hydroelectric generating station exceeding 5 MW, construction of a mill with a yearly capacity over 50,000 m, aerial spray programs over 600 hectares or more, etc.

<sup>196</sup> s. 31.6 *Act*.

<sup>197</sup> E.g., all mining developments and all hydro-electric power plants.

<sup>198</sup> E.g., all land use projects which affect more than 65 km<sup>2</sup>, all electric power transmission lines of over 75 kV, and quarries with areas over 3 hectares.

<sup>199</sup> Most are small projects or activities, although some testing, preliminary investigation/research conducted before a project is excluded, as are generating plants below 3,000 kW and electrical transmission lines below 75 KV.

<sup>200</sup> s. 154 and 189 *Act*.

<sup>201</sup> s. 192 *Act*.

<sup>202</sup> EA in Southern Québec.

## *Southern Québec*

When assessing environmental impacts, an EIA Statement submitted under the *Regulation* may include “fauna, flora, human communities, the cultural, archaeological and historical heritage of the area, agricultural resources and the use made of resources of the area” as aspects of the environment.<sup>203</sup> The *Act* also provides a fairly broad definition of “environment” which includes “the water, atmosphere and soil or a combination of any of them or, generally, the ambient milieu with which living species have dynamic relations”.<sup>204</sup>

## *James Bay and Northern Québec*

The EA processes in James Bay and Northern Québec are centered more towards ascertaining the biophysical and socio-economic impacts of a project on Aboriginal communities and their way of life, while ensuring Aboriginal participation. The *Act* sets out principles which must be considered in any exercise of government jurisdiction and includes the protection of Aboriginal rights, the protection of the environment and social milieu, and the project of “the Native people, of their societies, communities and economy”.<sup>205</sup>

## **4. Scope**

### *Scope of project*

Both the *Regulation* (applicable to Southern Québec) and Schedule A of the *Act* (applicable to the James Bay Region and Northern Québec) provide a high level of detail as to what projects/activities will trigger the EIA process, which suggests that some projects may be scoped narrowly. Ultimately, the decision is discretionary.

## *Southern Québec*

The *Act* gives the Minister discretion to determine what will be included within the scope of a project.<sup>206</sup>

## *James Bay and Northern Québec*

Under the *Act*, for a project in James Bay an Evaluating Committee (made up of 6 persons appointed by the government, the Governor General in Council and the Cree Regional Authority) makes a recommendation to the Minister the scope and nature of the EIA Statement.<sup>207</sup> The Minister makes the ultimate decision but must consult the Committee if he or she does not follow its advice.

For projects in Northern Québec, the Minister has discretion to determine the scope of the EIA Statement, after having consulted the Kativik Environmental Quality Commission.<sup>208</sup>

### *Scope of assessment*

The *Act* allows the Minister to determine the nature, scope and extent of the EIA Statement that a proponent must prepare.<sup>209</sup> Under the *Regulations*, the environment which must be assessed for impacts includes “fauna, flora, human communities, the cultural, archaeological and historical heritage of the area,

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<sup>203</sup> ss. 3(b) *Regulation*.

<sup>204</sup> ss. 1(4) *Act*.

<sup>205</sup> ss. 152 and 186 *Act*.

<sup>206</sup> s. 31.2 *Act*.

<sup>207</sup> s. 158 *Act*.

<sup>208</sup> s. 195 *Act*.

<sup>209</sup> s. 31.2 *Act*.

agricultural resources and the use made of resources of the area.”<sup>210</sup> Indirect, cumulative, latent and irreversible effects and alternative means and methods of carrying out a project must also be described in the EIA Statement. However, alternatives to not doing the project are not specifically required.

## 5. Process options

### *Process summary (Southern Québec)*<sup>211</sup>

1. Written notice of a project and EIA Statement Guidelines. If a project is listed in the *Regulation*, a proponent must issue written notice to the Minister. The Minister must then issue Guidelines on the nature, scope and extent of the EIA Statement. The *Regulation* lists parameters that may be included.<sup>212</sup> The public is not involved at this stage.

2. EIA Statement. A proponent must submit the EIA Statement to the Minister in accordance with the Minister’s Guidelines. Once the Minister determines that the Statement is complete, public consultation can begin.

3. Public Consultation. Once complete, the Minister must make the EIA Statement public. The proponent then has 15 days to notify the public (by newspaper) of the project. The Minister must make the EA file available to the public for 45 days after the date when the EIA Statement was made public. Within this 45 day time period, any person, group or municipality may request a public hearing. The Minister must direct the “Bureau d’audiences publiques sur l’environnement” (the Bureau) to hold a public hearing, unless the application is frivolous.<sup>213</sup> At a public hearing, inquiries and comments about the project are made, following which the Bureau produces a report of its observations and analysis, which is forwarded to the Minister. The hearing process and the report must be completed within 4 months. Within 60 days of its reception by the Minister, the report is made public.

4. Minister’s decision. The Ministère analyzes a project and makes a recommendation to the Minister. The Minister considers the report provided by the Ministère and also by the Bureau (if applicable) and makes a recommendation to the government. The final decision on whether to issue a certificate of authorization may be made by the government or a committee of Ministers.

### *Additional timelines*

Other than the timelines provided for above, an additional time constraint exists for certain projects of an industrial nature.<sup>214</sup> The *Regulations* set a time limit of 15 months for the EA process.

### *Independence*

Although the Bureau can host public consultations and provide their observations to the Minister, it is the Ministère and the Minister which make the key recommendations on whether a project should be approved. Further, the Bureau is appointed by the Minister and paid by the government.

### *Intervenor funding*

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<sup>210</sup> s. 3(b) *Regulation*.

<sup>211</sup> See process flowchart in EA Assessments in Southern Québec.

<sup>212</sup> s. 3 *Regulation*.

<sup>213</sup> s. 31.3 *Act*.

<sup>214</sup> s. 16.1 *Regulation*. These projects include gas pipelines more than 2 km in length, the construction of certain plants, mills and mines.

There are no provisions in the *Act* or *Regulations* providing intervenor funding specifically for participation in the EA process, although the Minister does have the authority to establish and administer a fund designed to encourage the involvement of persons, groups and municipalities in public hearings.<sup>215</sup>

## **6. Decisions on process**

Once the EIA process is triggered, an EIA Statement must be prepared. However, the scope, form and content of the EIA Statement are determined at the discretion of the Minister. As described above, if a public hearing on a project is requested, it must be allowed if it is not frivolous.

## **7. Basis for project assessment**

There is no legislated guidance provided on how a project should be assessed. Sustainability may be a consideration, since in reviewing a project the government will consider why a project is necessary, along with its impacts on biophysical and human settings.<sup>216</sup>

## **8. EA results and governmental decision making**

See #5 above (section on Minister's Decision). The *Act* and *Regulation* do not provide specific guidance on when the government should approve or reject a project.

By order in council, the Government can authorize a project with or without conditions and modifications or it may reject the project. It may also stipulate that monitoring and follow-up reports be submitted to the Ministère.

## **9. Role of Aboriginal communities**

For projects in the James Bay Region or in Northern Québec, Aboriginal communities play a large role in the review and assessment of projects subject to the EA process. These areas have their own EA processes, separate from the general EA process applicable elsewhere in Québec.

For projects outside of these two regions, there are no special procedures for Aboriginal consultation and participation.

## **10. Right to appeal**

The *Act* allows a municipality or concerned person to contest the refusal to grant an authorization certificate (required to carry on a project) to the Administrative Tribunal of Québec.<sup>217</sup>

## **11. Mediation and ADR options**

The *Act* does not specifically provide for mediation or ADR options, although the overview to the process suggests that as part of the EA process, the Minister can ask the Bureau to hold an environmental mediation.<sup>218</sup>

## **12. Joint EA process**

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<sup>215</sup> ss. 2(d.1) *Act*.

<sup>216</sup> EA in Southern Québec.

<sup>217</sup> s. 96 *Act*.

<sup>218</sup> The function of the Bureau in the *Act* is broad: "inquire into any question relating to the quality of the environment submitted to it by the Minister" – s. 6.3 *Act*. However, the Bureau is not involved in the EA process applicable to James Bay or Northern Québec.

Canada and Québec have signed a *Canada-Québec Agreement on Environmental Assessment Cooperation*. Similar to other provinces, it requires Aboriginal groups to be notified of a potential project. It does not expressly allow for mediation.

## **New Brunswick**

### **Legislation**

- *Clean Environment Act*, R.S.N.B. 1973, c. C-6 (*Act*)<sup>219</sup>
  - *Environmental Impact Assessment Regulation*, N.B. Reg. 87-83 (*EIA Regulation*)

### **Government Publications**

- New Brunswick Department of Environment: “A Guide to Environmental Impact Assessments in New Brunswick”
- New Brunswick Department of Environment and Local Government: “Environmental Impact Assessment in New Brunswick”

### **1. Basic purposes and goals**

The *Act* has no preamble and does not mention sustainability concerns or other guiding principles such as the precautionary principle or polluter pays. There is also no guidance regarding the EA process within the *Act* or the *EIA Regulation*. A provincial government publication describes the EIA process as a “proactive, preventative approach to environmental management and protection.”<sup>220</sup>

### **2. Trigger and classes of undertakings affected**

The EIA process in New Brunswick is triggered when a proponent (which may be an individual, government agency, or private firm) proposes to carry on any enterprise, activity, project, structure, work or program that is listed as an undertaking in Schedule A of the *EIA Regulation*. This schedule lists over 20 undertakings, including projects ranging from highway construction to waste facilities, and commercial extraction of minerals, oil and natural gas. Activities include water basin transfers and the introduction of non-indigenous species, and any undertaking affecting rare or unique features of the environment or affecting wetlands over a certain size. Modifications, extensions, abandonment, demolition or rehabilitation of activities or structures listed in Schedule A are also deemed to be undertakings.

Before commencing an undertaking listed in Schedule A, a proponent must register it with the Minister.<sup>221</sup> If an activity is not listed in Schedule A, the EIA process is not triggered. For example, forest management plans for Crown lands, aerial spray programs, and new sector-specific policy initiatives are not included.<sup>222</sup>

### **3. Focus of process**

An EIA must be completed for any undertaking that the Minister believes will have “a significant environmental impact.”<sup>223</sup> The *Act* defines “environment” as: (i) air, water or soil; (ii) plant and animal life including human life; and (iii) the social, economic, cultural and aesthetic conditions that influence the life of humans or of a community insofar as they are related to the matters

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<sup>219</sup> This *Act* creates the power to make EA regulations (s. 31.1) but does not describe the EA process.

<sup>220</sup> New Brunswick Department of the Environment and Local Government. (n.d.). Environmental Impact Assessment in New Brunswick. Retrieved from <http://www.gnb.ca/0009/0377/0002/0020-e.pdf>, p. 1.

<sup>221</sup> s. 3 *EIA Regulation*.

<sup>222</sup> These activities were identified by the Conservation Council of New Brunswick in “Environmental Impact Assessment in New Brunswick - The Need for Reform” (April 2004).

<sup>223</sup> ss. 6(4) *EIA Regulation*.

described in (i) or (ii).<sup>224</sup>

A review of the information required for project registration suggests that the focus of the process is biophysical, with some consideration of the socio-economic and cultural impacts of a project. The guidelines state that a proposal should contain “[t]he market potential, benefit to society, economic benefits, job creation benefits, consumer and/or industrial demand, and other relevant issues that make the development of this project viable and desirable for the local and/or the New Brunswick economy.”<sup>225</sup> (See also *Scope of assessment*, #4 below)

#### **4. Scope**

##### ***Scope of project***

For the purposes of determining whether an EIA and a Comprehensive Review is required, the Minister has the discretion to view an undertaking in isolation or together with any enterprise, activity, project, structure, work or program that is likely to be carried on with the undertaking.<sup>226</sup> When providing registration information, a proponent must describe impacts of each phase of a project (i.e., construction, operation and maintenance).

The scope of an undertaking may also be determined by what is captured in Schedule A of the *EIA Regulation*. Some of the undertakings listed in Schedule A may require the assessment of only one component of a project, such as “all pipelines exceeding five kms in length.” The underlying project requiring the construction of pipeline may only be assessed if it was listed independently in Schedule A.

A provincial government guide to the EIA process specifies the information that must be provided in order to register an undertaking, including the rationale/need for a project as well as a consideration of the alternatives. An EIA report must also include a consideration of the alternatives to a project.<sup>227</sup>

##### ***Scope of assessment***

There is a baseline of impacts which must be included in a proponent’s registration. Additional information can be requested by the Minister. A proponent must provide information on how the project or related activities will affect the following environmental attributes: air quality, aquatic and terrestrial biology and ecology; physical attributes, including the climate/atmosphere, geology, geomorphology, groundwater, surface water; valued spaces and locations; socio-economic community structure; physical and functional community structure (including land use compatibility, traffic, etc.); and lifestyle and quality of life.<sup>228</sup>

An active decision on the scope of the assessment is made only if a Comprehensive Review is required. The Minister, in consultation with a review committee appointed by the Minister, drafts a formal EIA Guidelines document setting out the substance, scope and conduct of the assessment. The public is given the opportunity to comment on draft Guidelines and taking into consideration comments received, final Guidelines are developed by the Minister.

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<sup>224</sup> s. 31.1 *Act*.

<sup>225</sup> New Brunswick Department of the Environment. (2007). A Guide to Environmental Impact Assessments in New Brunswick. Retrieved from <http://www.gnb.ca/0009/0377/0002/07-12-05-e.pdf> (Guide), p. iv.

<sup>226</sup> ss. 6(4) *EIA Regulation*.

<sup>227</sup> Guide, pp. iii-xiv.

<sup>228</sup> Appendix B, Guide, pp. xxv-xxviii.

## 5. Process options

### *Process summary*

All registered undertakings in New Brunswick undergo a Determination Review and, if required, a Comprehensive Review. The Minister has fairly broad discretion to determine that a Comprehensive Review is not required and to approve a project based solely on information provided by a proponent during registration.

If a Comprehensive Review is required, the Minister determines what will be included within the scope of the study and the EIA Report. After the EIA Report is submitted, the public may provide written comments and one or more public meetings are held. A Summary of Public Participation is compiled by the Department and submitted to the Minister, to be considered in making his/her final recommendation to the Lieutenant-Governor in Council.

### *Process (timelines and public participation)*<sup>229</sup>

1. Registration. An undertaking is registered by the proponent.

2. Decision on whether an EIA is required (Determination Review). After an undertaking is registered and all required information is received, the Minister must decide within 30 days if an EIA is required.<sup>230</sup> This process, known as a Determination Review, is aimed at determining if a Comprehensive Review is required. The Minister has discretion to make one of three determinations: (i) that a Comprehensive Review is required (for any undertaking that the Minister believes will have “a significant environmental impact”);<sup>231</sup> (ii) the project may proceed without a Comprehensive Review, subject to any conditions imposed; or (iii) the project is denied (requires decision by Lieutenant Governor in Council).

The *EIA Regulation* does not mandate public involvement in this stage; however, the provincial government Guide to the EIA process directs that a proponent must demonstrate that the public and other stakeholders have been given the opportunity to become involved in reviewing the project.<sup>232</sup> Upon registration, the proponent is required to develop their own “Public Involvement Program”, which must include certain minimum standards, including identifying key stakeholders and groups and providing them with notice of the proposed undertaking.<sup>233</sup> A proponent must submit a public involvement report to the Minister indicating how it has considered or addressed any resulting questions and concerns from the public. If an EIA is required, the public is given notice.<sup>234</sup>

3. Decision on substance, scope and conduct of assessment (EA Guidelines). If a Comprehensive Review is required, the Minister, in consultation with a review committee that he or she has appointed, must prepare draft Guidelines on the substance, scope, and conduct of the EA within 60 days of the decision that an EA is required.<sup>235</sup> The public is notified of the draft Guidelines and given 30 days to provide comments. The Minister and the review committee will consider any comments received and prepare the final Guidelines, within 60 days of the date of public notification. The public and anyone who provided comments are given notice of the final Guidelines and they are provided to the proponent.

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<sup>229</sup> See diagram at pp. 8-9 of the Guide.

<sup>230</sup> ss. 6(3) *EIA Regulation*.

<sup>231</sup> ss. 6(4) *EIA Regulation*.

<sup>232</sup> This is allowed under ss. 6(1) of the *EIA Regulation*, which gives the Minister power to ask for information relating to the undertaking.

<sup>233</sup> Minimum standards are set out in “Minimum Proponent Sponsored Public Involvement”, Appendix C to the Guide, pp. xxix-xxxii.

<sup>234</sup> ss. 6(5) *EIA Regulation*.

<sup>235</sup> ss. 9(1) *EIA Regulation*.

4. Terms of Reference (TOR). In accordance with the final Guidelines, the proponent prepares TOR for the EIA.<sup>236</sup> The TOR must include the proposed methods to assess environmental impacts and the means by which public consultation will occur. While the TOR serves as the basis for the proponent's EIA report, the Government does not review or accept the TOR and there is no opportunity for the public to comment on them.

5. EIA report and public participation. The proponent is required to complete an EA study and based on these findings, prepare a draft EIA Report. The draft is reviewed by the Minister, in consultation with the review committee. The public is not given opportunity to comment on the draft EIA. The Minister may accept the EIA Report or require more information. Once the draft EIA Report has been accepted and the proponent has submitted the Final EIA Report, the Report, along with a Summary and General Review Statement, is made available to the public within 30 days.<sup>237</sup> The public is invited to submit written briefs to the Department and a public meeting (or meetings) is arranged after a 30 day review period. The meeting is chaired by a panel of independent experts appointed by the Minister. The panel accepts submissions, answers questions, and produces a report on public involvement and public comments. The meeting transcript is also provided to the Minister. Following the meeting, the public is provided an additional 15 days to provide written comments. Based on all written submissions and the public meeting(s), a summary of public participation is prepared by the Department and given to the Minister, the public, and specifically to anyone who provided written or oral comments.<sup>238</sup>

6. Final Decision. Sometime after the Summary of Public Participation is released, the Minister submits a report and recommendation on whether the undertaking should proceed to the Lieutenant-Governor in Council.<sup>239</sup>

### ***Intervenor funding***

Funding is not provided to the public to provide comments on an undertaking or participate in public meetings.

### ***Independence***

The New Brunswick EA process gives discretion to the Minister to determine whether a project will proceed. Although a panel of experts is assembled by the Minister to conduct public meetings, the panel does not provide the Minister with a recommendation on whether the project should proceed. They only provide a report on public involvement, based on input gathered at the public meetings and through written comments received during the process.

## **6. Decisions on process**

Two process options are available: (1) approve or reject a project without a Comprehensive Review; or (2) approve or reject a project after a Comprehensive Review.

This decision on whether to proceed with a Comprehensive Review is largely left to the discretion of the Minister. A Comprehensive Review must be completed for any undertaking that the Minister believes will have "a significant environmental impact."<sup>240</sup> What will constitute a significant environmental impact is not defined in the *Act* or *Regulations*. However, by virtue of being listed in Schedule A, the

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<sup>236</sup> s. 10 *EIA Regulation*.

<sup>237</sup> s. 13 *EIA Regulation*.

<sup>238</sup> s. 15 *EIA Regulation*.

<sup>239</sup> s. 16 *EIA Regulation*.

<sup>240</sup> ss. 6(4) *EIA Regulation*.

Lieutenant-Governor in Council has recognized that an undertaking may cause significant environmental impacts.

### **7. Basis for project assessment**

Broadly, the New Brunswick EA process is designed to assess the nature and significance of the potential impacts of an undertaking. However, *Regulations* and EA Guidelines do not describe the criteria that must be used to assess an undertaking, making the basis for project assessment discretionary.

### **8. EA results and governmental decision making**

The *Regulations* and Guidelines do not provide any guidance on when a project should or should not be approved. The Minister has discretion when submitting his/her report and recommendation to the Lieutenant-Governor in Council,<sup>241</sup> and the Lieutenant-Governor in Council has discretion in making the final determination on whether an undertaking will proceed.

The EIA process Guide states that:

Although the EIA Regulation grants the Lieutenant-Governor in Council the authority to prevent projects from proceeding, Regulation 87-83 is not intended to be a mechanism for stopping developments for which the anticipated impacts can be avoided or reduced to acceptable levels through mitigation.<sup>242</sup>

### **9. Role of Aboriginal communities**

While the *EIA Regulation* contains general provisions requiring public and stakeholder consultation, it does not contain provisions specific to Aboriginal participation in the EA process. Under the Guidelines, as part of the registration process a proponent is required identify the First Nations which they have contacted. The Guidelines also suggest that “where appropriate, consultation with First Nations is required”.<sup>243</sup> The degree or level of consultation that will suffice is not specified.

### **10. Right to appeal**

The *Act* provides that any person whose application for approval has been denied may appeal the refusal in the manner prescribed by regulation.<sup>244</sup> The *EIA Regulation* is silent on allowing a proponent (or the public) to appeal a decision made by the Minister or the Lieutenant-Governor in Council.

### **11. Mediation and ADR options**

The *Act* and *Regulations* do not provide options for ADR or mediation during the EA process. They are also not mentioned in the Guidelines.

### **12. Joint EA process**

The *Act* gives the Minister authority to enter into agreements with other governments.<sup>245</sup> New Brunswick has not entered into any EIA cooperation agreements with the federal government.

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<sup>241</sup> s. 16 *EIA Regulation*.

<sup>242</sup> Guide, p. 1.

<sup>243</sup> Guide, p. xii.

<sup>244</sup> s. 14 *Act*.

<sup>245</sup> s. 15 *Act*.

## **Nova Scotia**

### **Legislation**

- *Environment Act*, S.N.S. 1994-95, c. 1 (*Act*)
  - *Environmental Assessment Regulations*, N.S. Reg. 26/95
  - *Nova Scotia Environmental Assessment Board Regulations*, N.S. Reg. 27/95

### **Government Publications**

- Nova Scotia Department of Environment: “Amendments to Nova Scotia’s Environmental Assessment Regulations (a summary)”
- Nova Scotia Department of Environment: “Nova Scotia Regulatory Time Frames for Environmental Assessment”
- Nova Scotia Department of Environment: “Developments Requiring Environmental Assessment”

### **1. Basic purposes and goals**

Although there is no preamble to the *Nova Scotia Act*, the purpose stated in s. 2 is to “support and promote the protection, enhancement and prudent use of the environment”, while recognizing several more specific listed goals. These goals apply to the whole *Act* and not just the EA provisions in Part IV. Part IV does not contain its own purposes, goals, objectives, or other guidance on decision-making in the context of EAs.

In s. 2(h) of the *Act*, one of the specific goals relevant to the EA process is “providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment”. Other goals that are focused on sustainable development and environmental protection include:

- (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
- (b) maintaining the principles of sustainable development, including:
  - i. the principle of ecological value
  - ii. the precautionary principle (to be used in decision making);
  - iii. the principle of pollution prevention and waste reduction;
  - iv. the principle of shared responsibility;
  - v. the stewardship principle;
  - vi. the linkage between economic and environmental issues;
  - vii. the integration of sustainable development into public policy; and
  - viii. encouraging use of environmental technologies, innovations and industries.

### **2. Trigger and classes of undertakings affected**

In Nova Scotia, the EA process applies to any “undertaking” as prescribed in the regulations or

determined by the Minister.<sup>246</sup> An undertaking can be any enterprise, activity, project, structure, work or proposal, as well as a modification, extension, abandonment, demolition or rehabilitation of an undertaking.<sup>247</sup> The Minister has the discretion to classify a policy, plan or program as an undertaking if it causes or may cause an adverse effect or an environmental effect.

Schedule A to the *Environmental Assessment Regulations (EA Regulations)* designates specific undertakings that will trigger the EA process in Part IV of the *Act*.<sup>248</sup> Undertakings are divided into two classes:

- § Class I - are smaller in scale and have more predictable impacts, such as disrupting wetlands and creating rock quarries; and
- § Class II - are typically larger in scale and may cause significant environmental impacts, such as pulp mills and oil refineries.

Undertakings are further grouped into six broad categories: Industrial Facilities, Mining, Transportation, Energy, Waste Management and Other. The undertakings listed include certain manufacturing and rendering plants, mills, water reservoirs, on-shore pipelines, pits and quarries and mining facilities, construction of paved highways over a certain distance, transmission line corridors, energy production facilities, waste facilities, transfers of drainage basin water, and disruption of wetland.

Certain activities are specifically exempt from the EA process in Nova Scotia, including:

- (a) routine maintenance or repair of existing facilities;
- (b) policies, plans or programs developed after 1995 which “will not directly or indirectly cause an adverse effect or a significant environmental effect”; and
- (c) certain pits/quarries used for road building and maintenance.<sup>249</sup>

The EA process set out in Part IV of the *Act* will not apply if class EA are prescribed by regulation in the future.<sup>250</sup>

### 3. Focus of process

The focus of the EA process in Nova Scotia is aimed largely at the biophysical and socio-economic effects of a project. In assessing the “environmental effects” of an undertaking, consideration is given to changes that may occur to environmental health, socio-economic conditions, as well as physical and

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<sup>246</sup> ss. 31(1) *Act*.

<sup>247</sup> See definition of “undertaking” in s. 3(az) of the *Act*.

<sup>248</sup> s. 3 *EA Regulations*.

<sup>249</sup> ss. 4(1), (2) *EA Regulations*.

<sup>250</sup> ss. 31(2) *Act*.

cultural heritage.<sup>251</sup> The physical surroundings, as well as living organisms, are included within the definition of environment.<sup>252</sup>

Further, the *EA Regulations* provide that in making a decision, the Minister is required to consider the nature and sensitivity of the area, environmental baseline information, concerns held the public and Aboriginal people about the adverse effects and/or environmental effects, and potential and known adverse effects or environmental effects, including any effects on species at risk, species of conservation concern and their habitats.<sup>253</sup>

Sustainable development, which is defined as “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”,<sup>254</sup> is mentioned within the purpose of the *Act*. Further, provincial government materials describe EA as a “planning and decision-making tool used world-wide to promote sustainable development.”<sup>255</sup> However, whether an undertaking conforms to “sustainable development” does not appear to be a focus of the EA process. For example, the Minister is not required to consider whether an undertaking will compromise the ability of future generations to meet their own needs, nor is sustainable development or precautionary principle explicitly mentioned within Part IV of the *Act* or the *Regulations*.

## 1. Scope

### *Scope of project*

The EA process applies to any undertaking that is listed in Schedule A of the *EA Regulations*. However, these *Regulations* do not specify which components of an undertaking will be assessed. Some of the undertakings/triggers listed would likely have a broad scope, such as “a pulp mill”. Others may be narrower and may not capture all components of a project, for example “an undertaking that disrupts a total of 2 ha or more of any wetland.” In the latter example, it is not clear whether the underlying undertaking is assessable or whether the disruption of wetlands is the only component assessed.

### *Scope of assessment*

The *Act* and *Regulations* do not provide guidance on what impacts will be assessed under the EA process. Section 9 of the *EA Regulations* requires the Minister, in making a decision, to specifically consider the “potential and known adverse effects or environmental effects of the proposed undertaking, including identifying any effects on species at risk, species of conservation concern and their habitats”.<sup>256</sup>

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<sup>251</sup> See definition of “environmental effect” in ss. 3(s) of the *Act*, which encompasses “(i) any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance, and (ii) any change to the undertaking that may be caused by the environment, whether the change occurs inside or outside the Province [...]”

<sup>252</sup> See definition of “environment” in s. 3(r) of the *Act*, which means the components of the earth and includes “(i) air, land and water; (ii) the layers of the atmosphere; (iii) organic and inorganic matter and living organisms; (iv) the interacting natural systems that include components referred to in subclauses (i) to (iii), and (v) for the purpose of Part IV, the socio-economic, environmental health, cultural and other items referred to in the definition of environmental effect...”

<sup>253</sup> s. 12 *EA Regulations*.

<sup>254</sup> ss. 3(aw) *Act*.

<sup>255</sup> Nova Scotia Department of Environment. (2010). The Green Roots Symposium: Sessions. Retrieved from <http://www.gov.ns.ca/nse/greenroots/sessions.asp>.

<sup>256</sup> “Adverse effect” is defined in s. 3(c) of the *Act* as “an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property”.

If a focus report is required for a Class I undertaking, TOR for the preparation of the report will be provided to the proponent.<sup>257</sup> However, the *EA Regulations* do not provide guidance on what is required in either the TOR or the focus report. The public is not given an opportunity to comment on the proposed TOR.

If an EA report is required for a Class I undertaking, or if the undertaking falls within Class II, the TOR must include, among other things:

- (a) the environmental effects of the undertaking, including identifying any effects on species at risk, species of conservation concern and their habitats; and
- (b) a discussion of adverse effects or significant environmental effects which cannot or will not be avoided or mitigated through the application of environmental control technology.<sup>258</sup>

The public has the opportunity to provide written comments on the TOR for an EA report.<sup>259</sup>

Under provincial government guidelines, it is recommended that a proponent list the environmental effects of a proposed project within an EA Report, including information on the effects of the project on groundwater, surface water, flora, fauna, aquatic habitat and any other aspect of the environment. Additionally, the guidelines recommend that the proponent include any effects on environmental health, such as any contaminants that may affect human health that will be released into the atmosphere, water or land.

## 2. Process options

1. Project Registration. Every undertaking must be registered by the proponent by submitting a registration fee and providing the project information required by the *EA Regulations*.<sup>260</sup> This information includes details on the proposed undertaking and the surrounding area, the proposed construction and operating schedules, all authorizations and permits required, all steps taken to identify and address concerns of the public and Aboriginal people about the adverse or environmental effects of the undertaking, and a list of the concerns identified. A project will be registered 7 days after the receipt of the information and fees.

For Class I undertakings, the proponent must publish notice of the registration in the newspaper and the public can submit comments to the administrator within 30 days of the publication.<sup>261</sup>

Within 50 days of registration, the Minister must decide how the process will proceed. The Minister has the discretion to:

- (a) request more information;
- (b) approve the undertaking (if no adverse effects or significant environmental effects which may be caused by the undertaking or that such effects are mitigable);
- (c) require a focus report (if adverse effects or significant environmental effects which may be caused by the undertaking are limited);

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<sup>257</sup> s. 15 *EA Regulations*.

<sup>258</sup> ss. 19(1) *EA Regulations*.

<sup>259</sup> ss. 19(2) *EA Regulations*.

<sup>260</sup> s. 33 *Act*; ss. 9(1A) *EA Regulations*.

<sup>261</sup> s. 10 *EA Regulations*. The “Administrator” is appointed by the Minister to administer the *EA Regulations*.

- (d) require an EA report (if there may be adverse effects or significant environmental effects caused by the undertaking); or
- (e) reject the undertaking (if there is a likelihood that the undertaking will cause adverse effects or significant environmental effects which are unacceptable).<sup>262</sup>

The Minister also has the option to refer a Class I undertaking to alternative dispute resolution or to the EA Board if an EA Report is required.

For Class II undertakings, the Administrator must publish notice of the registration in the newspaper within 14 days of registration, following which the public has 30 days to comment on the proposed TOR for the EA report.<sup>263</sup> All Class II undertakings require TOR and an EA Report, and they must be referred to the EA Board.<sup>264</sup> The Minister also has the discretion to refer a Class II undertaking to ADR.

2. Focus Report. If the Minister determines a focus report is necessary for a Class I undertaking, the proponent will receive TOR for the preparation of the focus report within 25 days.<sup>265</sup> The public is not given opportunity to comment on the TOR. The proponent must submit the focus report within one year of receiving the TOR. At this stage, the public is given notice and may submit comments on the focus report within 30 days.<sup>266</sup>

An administrator reviews the comments and the focus report and makes a recommendation to the Minister, within 25 days of the closing of public comments, that the undertaking be approved or rejected. The Minister then has 14 days to:

- § approve the undertaking (if no adverse effects or significant environmental effects which may be caused by the undertaking or that such effects are mitigable);
- § require an EA report (if there may be adverse effects or significant environmental effects caused by the undertaking); or
- § reject the undertaking (if there is a likelihood that the undertaking will cause adverse effects or significant environmental effects which are unacceptable).<sup>267</sup>

3. EA Report. If the Minister decides an EA report is required for a Class I undertaking or if a project is a Class II undertaking, the administrator prepares the TOR for the EA report. For a Class II undertaking, the public has 30 days to provide comment on what should be included in the TOR.<sup>268</sup> For a Class I undertaking, the public has 30 days to comment on proposed TOR.<sup>269</sup> Certain TOR must be included for an EA report,<sup>270</sup> and the administrator must take into consideration comments received from the public, affected Aboriginal communities, jurisdictions outside of Nova Scotia, and federal and provincial departments. The proponent is also given an opportunity to comment on the proposed TOR and any comments received before the terms are finalized.<sup>271</sup>

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<sup>262</sup> s. 13 *EA Regulations*.  
<sup>263</sup> s. 10 *EA Regulations*.  
<sup>264</sup> s. 11 *EA Regulations*.  
<sup>265</sup> s. 15 *EA Regulations*.  
<sup>266</sup> s. 16 *EA Regulations*.  
<sup>267</sup> s. 18 *EA Regulations*.  
<sup>268</sup> ss. 10(1A) *EA Regulations*.  
<sup>269</sup> s. 19A *EA Regulations*.  
<sup>270</sup> See list in s. 19 *EA Regulations*.  
<sup>271</sup> ss. 19(5) *EA Regulations*.

After the TOR are finalized, a proponent has 2 years to submit a draft EA Report to the Administrator. Once the draft Report is received, the administrator can request more information from a proponent or can approve it if it meets the items set out in the TOR.<sup>272</sup> After receiving the approved EA Report, the Minister has the discretion to refer a Class I undertaking to the EA Board.<sup>273</sup> If a Class I undertaking is not referred to the Board, the administrator will notify the public of the EA Report and accept comments for 48 days.<sup>274</sup> Following this period, the administrator will, within 25 days, submit to the Minister a summary of comments and recommendations on whether to approve or reject the undertaking.<sup>275</sup> Within 21 days of the receipt of this information, the Minister will make a decision under s. 40 of the *Act* to approve the undertaking with or without conditions or reject it.

4. EA Board. For Class I undertakings the Minister decides to refer to the EA Board and for Class II undertakings, the EA Report is forwarded to the EA Board within 10 days of being accepted by the Administrator.

The EA Board is governed by the *Nova Scotia Environmental Assessment Board Regulations (Board Regulations)* and its 3 to 5 regular members are selected by the Governor in Council.<sup>276</sup> The general duties of the Board are to review EA Reports, consult with the public by inviting written comment and conducting a public hearing or public review, and submit a report with a recommendation to the Minister to approve an undertaking (with or without conditions) or reject it.<sup>277</sup>

Board hearings are non-adversarial, informal and do not apply the same evidentiary rules that are required by a court. The purpose of a hearing is to allow comments and submissions from any interested party (or their legal counsel), to allow a panel to ask questions on the environmental effects of an undertaking, and to provide information which will help a panel make recommendations to the Minister.<sup>278</sup> A panel is made up of 3 or 5 persons, who are appointed by the Administrator or the Chair of the EA Board.

The public must be notified at least 21 days in advance of a hearing date, and further notification is required before the hearing date. The *Board Regulations* allow intervenors to participate in hearings as long as they have pre-registered with the administrator,<sup>279</sup> and any person may make written submissions to the Board.<sup>280</sup>

The Hearing Panel Report must be submitted to the Minister within 110 days of the referral to the EA Board, unless that deadline is extended by the Minister.<sup>281</sup> The Minister then has 21 days to make the decision whether to approve the undertaking with or without conditions or reject it.<sup>282</sup>

## 6. Decisions on process

Generally, if a project is a Class I undertaking, after registration the Minister has discretion to approve or reject an undertaking, require more information, require a focus report, or require an EA Report.<sup>283</sup> If it is

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<sup>272</sup> s. 21 *EA Regulations*.

<sup>273</sup> s. 38(c) *Act*, s. 24(1) *EA Regulations*.

<sup>274</sup> s. 23 *Regulations*.

<sup>275</sup> s. 25 *Regulations*.

<sup>276</sup> s. 5 *Board Regulations*.

<sup>277</sup> ss. 6-8 *Board Regulations*.

<sup>278</sup> s. 8 and 11 *Board Regulations*.

<sup>279</sup> s. 19 *Board Regulations*.

<sup>280</sup> s. 11 *Board Regulations*.

<sup>281</sup> s. 34 *Board Regulations*.

<sup>282</sup> s. 40 *Act*, s. 26 *EA Regulations*.

<sup>283</sup> s. 13 *EA Regulations*.

a Class II undertaking, the process is set and will require TOR, an EA report, and will involve referral to the EA Board for a public review or public hearing. (See Process options, #5 above.)

After registration and when the Minister is deciding whether to approve or reject an undertaking, he or she must consider the factors listed in s. 12 of the *EA Regulations*. Among others, these include the location of the undertaking and the sensitivity of the surrounding area, concerns expressed by the public and Aboriginal people about adverse effects or environmental effects, and potential and known adverse effects or environmental effects, land use and other undertakings in the area, and whether compliance with other government requirements will mitigate the environmental effects.

## **7. Basis for project assessment**

The basis for project assessment is largely discretionary (see EA results and governmental decision making, #8 below), although under the *Regulations*, a Minister can approve a Class I undertaking if the information indicates that there are no significant environmental effects and adverse effects or that such effects can be mitigated.

“Significant” is defined in s. 1(1) of the *Regulations* as meaning:

... with respect to an environmental effect, an adverse effect that occurs or could occur as a result of any of the following:

- the magnitude of the effect;
- the geographic extent of the effect;
- the duration of the effect;
- the degree of reversibility of the effect; and
- the possibility of occurrence of the effect.

The effect of allowing mitigation is that an undertaking may be approved even if there are adverse effects or significant environmental effects, as long as those effects can be “mitigated”. Mitigation can include elimination, reduction, or control of the adverse effects or the significant environmental effects, as well as restitution for damage to the environment through replacement, restoration, compensation or any other means.<sup>284</sup>

## **8. EA results and governmental decision making**

The Minister possesses ample discretion to ultimately approve or reject an undertaking. In many cases, he or she will make this decision after having received recommendations from the Administrator, a report and recommendation from the EA Board, or the results of an ADR process.

After an undertaking is registered, the Minister has the discretion to determine whether further action is required (i.e., requiring more information, a focus report, an EA report, or ADR is required), that “a focus report or an environmental-assessment report is not required, and the undertaking may proceed”, or that “the undertaking is rejected because of the likelihood that it will cause adverse effects or environmental

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<sup>284</sup> See definition of “mitigate”, s. 2(1)(f) *EA Regulations*.

effects that cannot be mitigated”.<sup>285</sup> The Minister can select from a similar array of process options upon receiving a focus report.<sup>286</sup>

Where the Minister has determined that further action is required, and once additional process steps have been completed, he or she must make a decision whether to approve the undertaking, approve the undertaking subject to conditions, or reject the undertaking.<sup>287</sup>

Finally, although the language in s. 34 of the *Act* that allows the Minister to reject an undertaking because of the likelihood that it will cause adverse or environmental effects that cannot be mitigated, this may not be mandated requirement, since s. 40 of the *Act* does not impose any conditions on the Minister’s decision.

## 9. Role of Aboriginal communities

Formal Aboriginal consultation is not required during the EA process in Nova Scotia, but the option for Aboriginal input is specifically mentioned in the *EA Regulations* at several different stages of the process. Like consultation, it is not required for the process to continue and is not mentioned within the *Act*.

In registering an undertaking, a proponent must submit all steps taken to identify the concerns of Aboriginal people, a list of the concerns received, and the steps taken or proposed to be taken to address the concerns.<sup>288</sup> After an undertaking is registered, the Minister must consider several factors before making a decision on how the EA process will proceed. One of these factors is the steps taken by the proponent to address concerns expressed by Aboriginal people.<sup>289</sup> If TOR are required for an undertaking, the Administrator must prepare them taking into consideration comments from any affected Aboriginal people.<sup>290</sup>

## 10. Right to appeal

The *Act* does not provide a right of appeal from the Minister’s decision to approve or reject an undertaking.<sup>291</sup>

## 11. Mediation and ADR options

After a project is registered, the Minister has the discretion to refer it to alternate dispute resolution if he or she “believes an alternate dispute resolution technique is appropriate for the resolution of a dispute or an issue”.<sup>292</sup> The Minister may also refer an undertaking to ADR after submission of a focus report<sup>293</sup> or an EA report,<sup>294</sup> and may set timelines for the ADR process.

The *Board Regulations* allow the EA Board or a Hearing Panel Chair to refer a matter or issue that arises during a public hearing or a review process to an ADR procedure.

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<sup>285</sup> s. 34 *Act*, s. 13 *EA Regulations*.

<sup>286</sup> s. 18 *EA Regulations*.

<sup>287</sup> s. 40 *Act*.

<sup>288</sup> s. 9(1A) *EA Regulations*.

<sup>289</sup> ss. 12(d) *EA Regulations*.

<sup>290</sup> s.19(2)(d) *Regulations*.

<sup>291</sup> The *Act* explicitly disallows appeals under ss. 138(2).

<sup>292</sup> s. 34 *Act*, ss. 7 *EA Regulations*.

<sup>293</sup> s. 35 *Act*.

<sup>294</sup> s. 38 *Act*.

## **12. Joint EA process**

Unlike other provinces, Nova Scotia does not have an MOU with the federal government to govern joint EAs.

Section 47 of the *Act* allows the Minister to enter into an agreement with another government for a joint EA process, when another review process will apply to an undertaking. Section 48 allows for coordination for a single hearing process.

## **Prince Edward Island**

### **Legislation**

- *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9 (*Act*)

### **Government Publications**

- Prince Edward Island Department of Environment, Energy and Forestry: “Environmental Impact Assessment Guidelines” (Guidelines)

### **1. Basic purposes and goals**

The *Act* does not contain a preamble, nor does the “Environmental Impact Assessment” section of the *Act* provide guiding principles for the EIA process.<sup>295</sup>

The provincial government’s Environmental Impact Assessment Guidelines (Guidelines) state that the EIA review process “considers the physical and biological impacts of proposed developments on the environment: air, land, water, plants, animals and people. Its scope includes a review of the effects that could bring adverse changes to the natural environment and the resulting short- and long-term effects that these changes could have on people.”<sup>296</sup>

### **2. Trigger and classes of undertakings affected**

The EA process is triggered when a person wishes to initiate an “undertaking”, which is defined in the *Act* as:

“any construction, industry, operation or other project or any alteration or modification of any existing undertaking which will or may

- (i) cause the emission or discharge of any contaminant into the environment,
- (ii) have an effect on any unique, rare or endangered feature of the environment,
- (iii) have a significant effect on the environment or necessitate further development which is likely to have a significant effect on the environment, or
- (iv) cause public concern because of its real or perceived effect or potential effect on the environment, but excludes all undertakings mentioned in sections 10, 12 and 13.”<sup>297</sup>

The *Act* does not provide specific examples of undertakings. Appendix A of the Guidelines contains a List of Common Undertakings, which provides fairly general examples of undertakings in the agricultural, energy, fisheries, forestry, manufacturing, transportation, mining, recreation and waste management sectors.<sup>298</sup> There is no mention of class EAs and no specific provisions for analyzing

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<sup>295</sup> The EIA provisions are contained in s. 9 and 9.1 of the *Act*.

<sup>296</sup> Prince Edward Island Department of Environment, Energy and Forestry. (2010). Environmental Impact Assessment Guidelines. Retrieved from [https://www.gov.pe.ca/photos/original/eia\\_guidelines.pdf](https://www.gov.pe.ca/photos/original/eia_guidelines.pdf) (Guidelines), p. 1.

<sup>297</sup> s. 1(p) *Act*. Sections 12-13 of the *Act* involve certain watercourse alterations, bulk water removal, waste treatment, and water supply systems.

<sup>298</sup> Appendix A, Guidelines, p. 23.

policies, plans or programs, although the List of Common Undertakings does include large-scale forest clearing plans and seismic programs.

The EA process begins when a person wishing to initiate an undertaking files a written proposal with the Department of Environment, Energy and Forestry. The proponent must obtain approval from the Minister before proceeding.<sup>299</sup>

### 3. Focus of process

The EA process in P.E.I is focused almost exclusively on the impacts that an undertaking will have on the biophysical environment. The definition of an “undertaking” mentions environmental contamination and “environment” is defined to include:

- (i) air, land and water,
- (ii) plant and animal, including human, life, and
- (iii) any feature, part, component, resource or element thereof.<sup>300</sup>

Although “any feature” of human life could include economic and social factors, human life appears to be assessed narrowly. A proponent’s Environmental Impact Statement (EIS) must provide information on the human environment and must describe the impacts of a project on this environment. Examples of what is required include land use, infrastructure, community features, special land use designations, or significant cultural or heritage status.<sup>301</sup> Beyond this, social and economic considerations are not mentioned, nor are concerns regarding sustainability.

### 4. Scope

#### *Scope of project*

The scope of an undertaking is as broad or narrow as the government determines – the *Act* and Guidelines do not specify what will be assessed and included within an undertaking. Some of the examples within the List of Common Undertakings (Appendix A of the Guidelines) are framed broadly, such as hog operations, power plants, and aquaculture facilities. The definition of an undertaking is also framed broadly, as “any construction, industry, operation or other project.” However, the determination of what will be included is still discretionary.

#### *Scope of assessment*

Under the *Act*, the Minister has discretion to determine the contents of the EIA and EIS.<sup>302</sup> Under the Guidelines, the suggested content of an EIS includes potential impacts on the biological environment (i.e., vegetation, wildlife, fish and rare species), physical environment (i.e., unique landforms, slopes, soils, watercourses, groundwater and surface water) and human environment (i.e., land use, infrastructure, community features, special land use designations, or significant cultural or heritage status).<sup>303</sup> A proponent may be required to address other issues specific to a project.

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<sup>299</sup> s. 9 *Act*.  
<sup>300</sup> ss. 1(f) *Act*.  
<sup>301</sup> Guidelines, pp. 9-10.  
<sup>302</sup> ss. 9(3), (3.1) *Act*.  
<sup>303</sup> Guidelines, pp. 9-11.

Based on a review of the Guidelines, it does not appear that a proponent is required to describe alternatives to a project, nor does it appear to be required during the decision making process.<sup>304</sup>

## 5. Process options

The EA process in P.E.I is best described as basic and discretionary. There are few process options, no legislated timelines,<sup>305</sup> and much is left to the discretion of the Minister.

Under the *Act*, the Minister may require that a proponent carry out an EIA and submit an EIS.<sup>306</sup> The EIA and EIS can have whatever content and form the Minister directs.<sup>307</sup> Public participation is not guaranteed in the *Act* and is also left to the discretion of the Minister, making it weak compared to the federal process and some other provinces.

### *Process summary*<sup>308</sup>

1. Determination of whether a project is an undertaking. After a proponent submits a Project Information Form, the EA Branch of the Department will screen the project to determine if it is an undertaking. This involves a discretionary review of the information provided and the environmental issues surrounding a project.<sup>309</sup> If a project is screened out, it may still be reviewed as a “referral project”. In such a case, the Department may make recommendations to the proponent on environmental issues.

2. Environmental Impact Statement. If a project is deemed an undertaking, the Department may require an EIS to be prepared by the proponent. The Guidelines contain a description of what should be included in the EIS. Once received, the EIS is available for public review and comment.

3. Environmental Review Process. The EIS is distributed to a Technical Review Committee for review. The Committee is made up of representatives from various provincial government divisions, as well as federal government and “other organizations as required”.<sup>310</sup> Only those members with expertise relating to an undertaking will review the EIS. These members formulate individual responses, which may be that more information is required, that the undertaking should be approved with or without conditions, or that the undertaking should be approved. The proponent is then advised to provide more information, evaluate other issues, or move on to the next step (which is the Minister’s decision).

4. Public Consultation. Under the *Act*, the Minister may include public participation as part of the EA process. The Guidelines state that public consultation is required for all projects except manure storage facilities.<sup>311</sup> The Department determines whether a proponent must comply with Level I or Level II Public Consultation:

- Level I - used for projects that are of limited or no public concern and that have few expected negative environmental impacts. The public is notified (via website and newspaper) and

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<sup>304</sup> David Boyd suggests that P.E.I does require consideration of alternatives – *Unnatural Law*, p.157.

<sup>305</sup> The Guidelines suggest at p. 18 that 8-10 weeks is usually required for an *average* undertaking.

<sup>306</sup> s. 9(2) *Act*.

<sup>307</sup> ss. 9(3), (3.1) *Act*.

<sup>308</sup> The Process is not legislated and is described only in the Guidelines. See the process flowchart at p. 2 of the Guidelines for an overview.

<sup>309</sup> Guidelines, p. 6.

<sup>310</sup> Guidelines, p.13.

<sup>311</sup> Guidelines, p. 32.

comments and requests for additional information are accepted. It may be upgraded to Level II if there is significant public concern.<sup>312</sup>

- Level II – requires the proponent to advertise and host a public information session no sooner than 14 days after the EIS is submitted to the Department. The Proponent must provide materials and information on the undertaking and answer questions. Following the session, the public has 10 days to submit comments on the undertaking. Only “relevant” environmental concerns will be taken into account.<sup>313</sup>

5. **Minister’s Decision.** After reviewing a screening report prepared by the Department (containing background information, environmental issues, mitigating measures proposed, suggested terms and conditions, and a recommendation regarding approval), the Minister has full discretion to defer project approval and require more information; approve the project with or without terms and conditions; or deny project approval.

### ***Independence***

The review of an undertaking and decision-making is not independent and is done by the Department, the Minister, and a Technical Review Committee made up of various government department and division members. While the Committee may have members from outside organizations, this is not a requirement. The Minister may also request outside assistance in the decision making and review process, but again, this is not required.

### ***Intervenor funding***

The *Act* does not provide for intervenor funding.

## **6. Decisions on process**

Once a project is deemed an undertaking, the above process is the only one available, although the decision to require preparation of an EIS is discretionary.

In terms of public participation, the Department/Minister determines whether Level I or Level II Public Consultation will take place, based on the criteria described under #5 above.

## **7. Basis for project assessment**

The basis for project assessment is discretionary. The Guidelines provide what should be contained in an EIS, and includes listing measures to avoid, minimize or manage impacts. There is passing reference in the Guidelines of ensuring that projects do not have significant negative effects on the environment.<sup>314</sup> The assessment process is also partly triggered based on undertakings that will have a significant effect on the environment.<sup>315</sup>

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<sup>312</sup> Guidelines, p.15.

<sup>313</sup> Guidelines, p.16.

<sup>314</sup> “Most EIA approvals are conditional on requirements that the minister considers necessary to ensure the project does not have significant negative effects on the environment” – Guidelines, p. 21.

<sup>315</sup> See definition of “undertaking”, s. 1(p) *Act*.

## **8. EA results and governmental decision making**

The Minister has full discretion to determine whether a project will be approved.<sup>316</sup> Under the Guidelines, the Minister may defer project approval and require more information; approve the project with or without terms and conditions; or deny project approval.<sup>317</sup>

The Minister has the power to request assistance from outside sources to help in the EIA decision-making process.

As a condition to EIA approval, a proponent may have to develop an Environmental Protection Plan and an Environmental Management Plan. The former deals with mitigation measures and the later deals with potential environmental issues during the lifespan of the project.

## **9. Role of Aboriginal communities**

Aboriginal communities and First Nations are not given an explicit role in the EA process. The *Act* and Guidelines do not mention specific stakeholders or Aboriginal groups, although the requirement for a proponent to notify and/or consult Aboriginal groups could be imposed by the Minister under his or her general discretion under the *Act*.<sup>318</sup>

## **10. Right to appeal**

The *Act* does not contain any mechanisms to appeal the Minister's decision to accept or reject an undertaking.

## **11. Mediation and ADR options**

There are no mediation or ADR options provided for the EA process in the *Act* and Guidelines.

## **12. Joint EA process**

The federal government and P.E.I have entered into a *Memorandum of Understanding on Fish Habitat Management*, which includes implementing the EA provisions of the *Act*, however, the governments have not entered into an agreement or MOU on EA cooperation.

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<sup>316</sup> The only statutory guidance provided is in s. 9.1 of the *Act*, which states that the Minister may not issue an approval for a "construction and demolition debris disposal site".

<sup>317</sup> s. 28 *Act*.

<sup>318</sup> s. 9(2)(c) *Act*.

## **Newfoundland and Labrador**

### **Legislation**

- *Environmental Protection Act*, S.N.L. 2002, c.E-14.2 (*Act*)
  - *Environmental Assessment Regulations, 2003*, N.L.R. 54/03 (*Regulations*)

### **Agreements**

- *Draft Canada–Newfoundland and Labrador Agreement on Environmental Assessment Cooperation*

### **Government Guides**

- Newfoundland and Labrador Department of Environment and Conservation: “Environmental Assessment: A Guide to the Process” (Guide)

## **1. Basic purposes and goals**

The *Act* does not contain a preamble, but there is a purpose section found before the *Act*'s EA provisions in Part X. It states that the purpose of EA procedures is to: “(a) protect the environment and quality of life of the people of the province; and (b) facilitate the wise management of the natural resources of the province...”<sup>319</sup>

## **2. Trigger and classes of undertakings affected**

The EA process is triggered when a person, corporation or government department proposes to carry on an “undertaking”, defined as:

“an enterprise, activity, project, structure, work or proposal and a modification, abandonment, demolition, decommissioning, rehabilitation and an extension of them that may, in the opinion of the minister, have a significant environmental effect.”<sup>320</sup>

Part III of the *Regulations* lists specific undertakings that require or are exempt from registration with the Minister. There are over 20 categories of undertakings listed, giving the EA process an extensive range in Newfoundland.<sup>321</sup>

Undertakings not specifically listed may also trigger the EA process if they are deemed to have significant environmental effects.<sup>322</sup> Conversely, if it is determined to be in the public interest, the Minister (with approval of Cabinet) has the power to exempt an undertaking from the EA process.

Special provisions for class EA processes are allowed under the *Regulations*.<sup>323</sup> Although provisions to assess policies, plans and programs do not exist, certain forestry and logging plans are included as an undertaking, as well as provincial programs to introduce exotic species and to designate certain Crown lands for recreational development.

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<sup>319</sup> s. 46 *Act*.

<sup>320</sup> ss. 2(mm) *Act*.

<sup>321</sup> Categories include, among others, undertakings near salmon rivers, aquaculture projects, forestry and logging, mining, pipeline construction, food manufacturing, recreational facilities.

<sup>322</sup> Provided in s. 26 of the *Regulations* and allowed under the definition of an undertaking.

<sup>323</sup> s. 18 *Regulations*.

### 3. Focus of process

The focus of the EA process is on the biophysical and socio-economic impacts that a project will have on the environment. The definition of “environment” within the *Act* is very broad and includes, among other components, “air, land and water”, “plant and animal life, including human life, and “the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community.”<sup>324</sup>

### 4. Scope

#### *Scope of project*

The language used to list designated undertakings in Part III of the *Regulations* suggests that an entire project may be captured within the EA process. As an example, “an undertaking that will be engaged in crude oil, natural gas or petroleum production facilities” must be registered.<sup>325</sup> The definition of an undertaking includes an enterprise, activity, project, structure, work or proposal. Therefore, any activity proposed in relation to such a production facility would likely be caught.

What is included within the scope of a project may depend on what a proponent includes in their registration information, although the Minister has the power to require more information and also the public is given opportunity to comment on it.

#### *Scope of assessment*

When an EIS is required, there are a variety of impacts and considerations which must be included under the terms of the *Act* and *Regulations*. The rationale for the undertaking, as well as the alternatives to the undertaking and alternative means of carrying out the undertaking are required.<sup>326</sup>

All “significant environmental effects that are beneficial or harmful that are likely to be caused by the undertaking”, regardless of the proper application of remedial measures, must be described.<sup>327</sup> The specific effects and impacts that must be assessed are not listed, but would likely include biophysical impacts as well as social, economic, recreational, cultural and aesthetic impacts, based on the broad definition of environment.

The Minister may also require component studies to be completed.<sup>328</sup> These studies are typically done when data is needed on existing valuable ecosystem components (such as caribou, fish or rare plants), which may be significantly affected by the project.

The process for determining the scope of the assessment involves the preparation of Guidelines by a review committee. The public is given the opportunity to comment on the Guidelines. This process is further described under “Process options” below.

### 5. Process options

There are four levels of assessment possible in Newfoundland’s EA process: (1) registration of all undertakings listed in the *Regulations*, and if further assessment is needed; (2) an environmental preview report; (3) an EIS; or (4) a public hearing.

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<sup>324</sup> ss. 2(m) *Act*.

<sup>325</sup> s. 32 *Regulations*.

<sup>326</sup> s. 57 *Act*.

<sup>327</sup> s. 8 *Regulations*.

<sup>328</sup> s. 12 *Regulations*.

### ***Process summary***

1. Undertaking is registered with the Minister. A proponent must register an undertaking with the Minister, outlining the proposed project and how it will affect the biophysical and socio-economic environment. The registration document is released to the public and the public is given 35 days to make written comments to the Minister.<sup>329</sup> The *Act* also gives the Minister power to request written comments on the environmental effects of an undertaking from interested persons at any time during the EA process.<sup>330</sup>

2. Process Decision. Within 45 days of registration, the Minister must make a decision on an undertaking: the undertaking may be released from the assessment process, an Environmental Preview Report (EPR) may be required, an EIS may be required, or an undertaking may be rejected. A proponent can also elect to skip the submission of an EPR and proceed directly with an EIS.

3. EPR/EIS Guidelines. When it is determined an undertaking requires an EPR or EIS, the Minister appoints an assessment committee (made up of provincial and federal government employees) to review the proponent's documents and public comments, and advise the Minister. The Committee prepares Guidelines for the EPR or EIS, which must be issued to the proponent and the public by the Minister within 60 days of an EPR decision or within 120 days of the EIS decision. If the Guidelines issued are for an EIS, the public must be given 40 days to review and comment on them. The Guidelines may be varied before being approved.<sup>331</sup> The Minister may also require component studies to be completed as part of an EIS. The public is notified and given 35 days to comment on the component study.

4. EPR/EIS. The proponent is required to prepare the EPR or EIS. During the preparation of an EIS, the proponent is required to meet with interested members of the public to provide information and record and respond to any concerns.<sup>332</sup> Guidelines for an EPR may also require public consultation during the formulation of an EPR, although it is not guaranteed.

5. Review and Decision for an EPR. After a proponent submits an EPR, the Minister must notify the public within 7 days and the public then has 35 days to submit written comments to the Minister. After receiving the Committee's recommendation and within 45 days of receiving the EPR, the Minister may determine that the EPR requires further work, an EIS is required, or that the undertaking may be released.<sup>333</sup>

6. EIS Review. After a proponent submits an EIS, the Minister must notify the public within 7 days and the public is given 50 days to provide the Minister with written comments. The Committee then makes a recommendation to the Minister whether the EIS is deficient or whether the undertaking should be released. The Minister must notify the proponent if the EIS is complete within 70 days of receiving the EIS, then within 10 days, notify the public.<sup>334</sup>

7. Optional Public Hearing. If the Minister believes there is a strong public interest in an undertaking subject to an EIS, the Lieutenant-Governor in Council may appoint an EA board and order public hearings. The public hearings must be requested within 30 days of advising a proponent that their EIS is complete and a Board must be appointed within 30 days of this.<sup>335</sup> The Minister then has 10 days to

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<sup>329</sup> s. 3 *Regulations*.

<sup>330</sup> ss. 59(2) *Act*.

<sup>331</sup> s. 6 *Regulations*.

<sup>332</sup> s. 58 *Act*, s. 10 *Regulations*.

<sup>333</sup> s. 54 *Act*, s. 8 *Regulations*.

<sup>334</sup> s. 11 *Regulations*.

<sup>335</sup> s. 13 *Regulations*.

appoint members to the board. Hearings must begin between 30 and 90 days later and provide an opportunity for comments and questions to be asked of the proponents. Written briefs may also be filed. Within 45 days of the closing date of the hearing (unless otherwise extended by the Minister), the Board must submit a report to the Minister that includes the proceedings of the hearing, recommendations made at the hearing, and the recommendations of the Board.

8. **Final Decision.** When a public hearing has not occurred, the Minister must provide his/her recommendation to the Lieutenant-Governor in Council within 30 days of advising a proponent that their EIS is complete. If a public hearing has occurred, the Minister must provide his/her recommendation within 60 days of receiving the Board's report.<sup>336</sup> The decision to release a project is valid for 3 years.<sup>337</sup>

### ***Independence***

If a public hearing is required, the EA Board appointed by the Minister is fairly independent from government. It is made up of 2-5 persons not employed in the public service, and the Chairperson must not be a resident of the geographical area of the undertaking, although members of the Board may be given remuneration by the Government.<sup>338</sup> Otherwise, decision-making on the outcome of the process is entirely within the purview of the Lieutenant-Governor in Council.

### ***Intervenor funding***

There are no provisions in the *Act* or *Regulations* for intervenor or public participation funding.

## **6. Decisions on process**

If there is insufficient detail to determine the significance of the environmental effects, the Minister must require an EPR. Where the Minister determines that there may be significant negative environmental effects or there is significant public concern, the Minister must require an EIS.<sup>339</sup> If an EIS is required and the Minister believes there is strong public interest in an undertaking, the Lieutenant-Governor in Council may appoint an EA board and order public hearings.<sup>340</sup>

## **7. Basis for project assessment**

The basis for project assessments in Newfoundland is the significance of impacts on the environment. The EA process is triggered by undertakings which may have significant effects on the environment.<sup>341</sup> Further, the purpose of an EPR is to determine "the significance of the environmental effect of an undertaking"<sup>342</sup> and an EIS is required where there may be significant negative environmental effects (or public concern).<sup>343</sup>

## **8. EA results and governmental decision making**

After the Minister's recommendation has been provided, the Lieutenant-Governor in Council may release an undertaking subject to terms and conditions or not permit it to proceed.

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<sup>336</sup> s. 16 *Regulations*.

<sup>337</sup> s. 17 *Regulations*.

<sup>338</sup> s. 63 *Act*.

<sup>339</sup> s. 25 *Regulations*.

<sup>340</sup> s. 63 *Act*.

<sup>341</sup> Guide, p. 2.

<sup>342</sup> s. 24 *Regulations*.

<sup>343</sup> s. 25 *Regulations*.

The *Regulations* do not dictate when a Minister shall or shall not release an undertaking (i.e., approve an undertaking), however, they suggest that the Minister should release an undertaking when there are no environmental or public concerns or the environmental effects of the undertaking will be mitigated.<sup>344</sup>

Also, the Guide provides that an undertaking may be rejected when it has an unacceptable environmental effect, it is not in the public interest, or if the proposal is inconsistent with existing law or policy.<sup>345</sup> It also states that a decision to reject must be made by the Cabinet.

The *Act* does provide that at any time the Minister may halt the EA process (with approval from the Lieutenant-Governor in Council) and direct that it not proceed if he/she believes that an unacceptable environmental effect is indicated. Similarly, the Lieutenant-Governor in Council may halt the EA process if it is of the opinion that it is in the public interest.<sup>346</sup>

## 9. Role of Aboriginal communities

The *Act* does not give Aboriginal communities in Newfoundland and Labrador a special role within the EA process. For undertakings that take place on lands contained in the *Agreement-in-Principle Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Her Majesty the Queen in Right of Canada*, that Agreement provides that different considerations and a different EA process may apply.

## 10. Right to appeal

The *Act* allows a person who is “aggrieved by a decision or order made under this Act, may appeal that decision or order to the minister”.<sup>347</sup> The appeal must be in writing and within 60 days of the decision. The Minister must make a decision on the appeal within 30 days and may dismiss the appeal, allow it, or make another decision.

## 11. Mediation and ADR options

Although ADR is an option under the *Act* with respect to compliance orders, there is no mention of ADR options or mediation within the EA provisions of the *Act* or within the *Regulations*.

## 12. Joint EA process

The *Act* allows the Cabinet to approve agreements with Canada or other provinces on a cooperative EA process, including a joint review panel.<sup>348</sup> Also, Newfoundland and the Federal Government are parties to a Draft Agreement, the *Draft Canada–Newfoundland and Labrador Agreement on Environmental Assessment Cooperation*.

The *Draft Agreement* does not contain specific provisions that provide mediation options, although it seems to maintain mediation as an option under *CEAA*.<sup>349</sup> It also contains specific provisions requiring Aboriginal parties to be notified of proposed projects and participate in the assessment process.<sup>350</sup>

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<sup>344</sup> s. 23 *Regulations*.

<sup>345</sup> Guide, p. 5.

<sup>346</sup> s. 67 *Act*.

<sup>347</sup> s. 107 *Act*.

<sup>348</sup> ss. 72 and 73 *Act*.

<sup>349</sup> Contained within definition of “EA responsibility”.

<sup>350</sup> s. 35 Draft Agreement.

## **Northwest Territories**

### **Legislation**

- *Environmental Rights Act*, R.S.N.W.T. 1988, c. 8
- *Environmental Protection Act*, R.S.N.W.T., 1988, c. E-7
- *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 (*MVMRA*)
  - *Exemption List Regulations*, SOR/99-13
  - *Preliminary Screening Requirement Regulations*, SOR/99-12

### **Government Publications**

- Mackenzie Valley Environmental Impact Review Board: “Environmental Impact Assessment Guidelines” (Guidelines)<sup>351</sup>
- Mackenzie Valley Environmental Impact Review Board: “Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment”
- Mackenzie Valley Environmental Impact Review Board: “Socio-Economic Impact Assessment Guidelines”

### **Mackenzie Valley Environmental Impact Review Board**

The Mackenzie Valley Environmental Impact Review Board (Review Board) was established under s. 112 of the *MVMRA*. Land Claims agreements between the Gwich'in and Sahtu Dene and the federal government<sup>352</sup> required a greater degree of Aboriginal control in decision making relating to environmental protection and resource management in the Mackenzie Valley. The establishment of the Review Board fulfills this requirement in part.<sup>353</sup> The Review Board must operate independently of government.<sup>354</sup>

#### **1. Basic purposes and goals**

There is no applicable preamble in the *MVMRA*. However, there is a purpose section at the beginning of Part 5 of the *MVMRA*, which addresses EAs. The purpose of Part 5 includes:

- (a) establish the Review Board as the main instrument in the Mackenzie Valley for the EA and environmental impact review of developments;
- (b) ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them; and
- (c) ensure that the concerns of Aboriginal people and the general public are taken into account in that process.<sup>355</sup>

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<sup>351</sup> Mackenzie Valley Environmental Impact Review Board. (2004). Environmental Impact Assessment Guidelines. Retrieved from:

[http://www.reviewboard.ca/upload/ref\\_library/1195078754\\_MVE%20EIA%20Guidelines.pdf](http://www.reviewboard.ca/upload/ref_library/1195078754_MVE%20EIA%20Guidelines.pdf) (Guidelines).

<sup>352</sup> *Gwich'in Comprehensive Land Claims Agreement; Sahtu Dene and Métis Comprehensive Land Claim Agreement.*

<sup>353</sup> Guidelines, p. 1.

<sup>354</sup> Guidelines, p. 22.

<sup>355</sup> s. 114 *MVMRA*.

The guiding principles of the EA process are set out in s. 115 of the *MVMRA*:

The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to

- (a) the protection of the environment from the significant adverse impacts of proposed developments;
- (b) the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley; and
- (c) the importance of conservation to the well-being and way of life of the Aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

The *Environmental Rights Act* also emphasizes in its the preamble the ‘unique sense of the relationship’ between the people of N.W.T. and the land.<sup>356</sup>

## 2. Trigger and classes of undertaking affected

The preliminary screening process is triggered when an application is made for a license, permit, or authorization.<sup>357</sup> In cases where a license is not required, the screening process is only triggered where the body proposing to carry out that development is a governmental entity, including certain First Nations.<sup>358</sup>

The *Preliminary Screening Requirement Regulations* contain a list of the federal and territorial permits, licenses and authorizations that will trigger an EA. If proposed activity listed, then the preliminary screening process is mandatory. If an activity is listed in the *Exemption List Regulations*, then no preliminary screening required. This Regulation lists specific activities that do not involve large projects. Most projects will only require a preliminary screening.<sup>359</sup>

## 3. Focus of process

The definition of “environment” in the *MVMRA* suggests that biophysical impacts are considered:

"environment" means the components of the Earth and includes

- (a) land, water and air, including all layers of the atmosphere;
- (b) all organic and inorganic matter and living organisms; and
- (c) the interacting natural systems that include components referred to in paragraphs (a) and (b).<sup>360</sup>

The definition of “impact on the environment” suggests that impacts on the social and cultural environment are also considered:

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<sup>356</sup> Preamble, *Environmental Rights Act*.

<sup>357</sup> s. 118 *MVMRA*.

<sup>358</sup> s. 124(2) *MVMRA*.

<sup>359</sup> Guidelines, p. 8.

<sup>360</sup> s. 2 *MVMRA*.

"impact on the environment" means any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources.<sup>361</sup>

Sustainability is also focus, as the *MVMRA* requires that the EIA process include consideration of “the capacity of any renewable resources that are likely to be significantly affected by the development to meet existing and future needs.”<sup>362</sup>

#### 4. Scope of project and assessment

The Review Board has discretion to set the scope of the assessment, in consultation with the Tlicho Government and the federal and territorial Ministers.<sup>363</sup>

The *MVMRA* lists some factors that must be considered for both EAs and Environmental Impact Reviews (EIRs):

- (a) the impact of the development on the environment, including the impact of malfunctions or accidents that may occur in connection with the development and any cumulative impact that is likely to result from the development in combination with other developments;
- (b) the significance of any such impact;
- (c) any comments submitted by members of the public in accordance with the regulations or the rules of practice and procedure of the Review Board;
- (d) where the development is likely to have a significant adverse impact on the environment, the need for mitigative or remedial measures; and
- (e) for any other matter, such as the need for the development and any available alternatives to it, that the Review Board or any responsible minister, after consulting the Review Board, determines to be relevant.<sup>364</sup>

Additional factors must be included in the consideration of EIRs, including:

- the purpose of the development;
- alternative means, if any, of carrying out the development that are technically and economically feasible, and the impact on the environment of such alternative means;
- the need for any follow-up program and the requirements of such a program; and
- the capacity of any renewable resources that are likely to be significantly affected by the development to meet existing and future needs.<sup>365</sup>

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<sup>361</sup> s. 111 *MVMRA*.

<sup>362</sup> s. 117(3) *MVMRA*.

<sup>363</sup> s. 120(a) *MVMRA*.

<sup>364</sup> s. 117(2) *MVMRA*.

<sup>365</sup> s. 117(3) *MVMRA*.

## 5. Process options

### *Process summary*

1. Preliminary screening. Where an application is made to a regulatory authority or designated regulatory agency for a licence, permit or other authorization required for the carrying out of a development, the authority or agency shall notify the Review Board in writing of the application and conduct a preliminary screening of the proposal for the development. The purpose of this process is to determine whether the proposed development should be referred for an EA. This stage takes approximately 6 weeks, and the screening is generally conducted by a land and water board, a government agency or a First Nation. The Review Board conducts all preliminary screenings in the Mackenzie Valley.<sup>366</sup> The screening body must inform the Review Board of the screening.<sup>367</sup>

Public participation is not legislated at this step, although the Guidelines suggests that Aboriginal, municipal, territorial and federal governments and the Review Board can participate in the preliminary screening, as can communities and individuals.<sup>368</sup>

After the preliminary screening is complete, the local body reports to the Review Board on whether the development might have a significant adverse impact or might be a cause of public concern. If either of these criteria are met, the proposed development is referred to the Review Board.<sup>369</sup>

2. EA by the Review Board. The Review Board conducts EAs of proposed developments referred to it after the preliminary screening or by a First Nation, regulatory authority or government agency/department. The Review Board may also require an EA on its own motion.<sup>370</sup>

3. Consultation with the public or First Nations. Where an EA is to be carried out on a project on First Nations land, the Review Board must first consult with the First Nation.<sup>371</sup> Where a proposed project may have an impact on the environment, the Board has the discretion to determine whether to consult with the public.<sup>372</sup>

4. EA Report. After the EA is complete, the Review Board must write a Report of EA. In the Report, the Board can recommend one of three process options:

- that the project proceed (along with any mitigation measures);
- that the project be rejected because the environmental impacts and/or public concerns cannot be mitigated (note that this determination is made without ordering an EIR); or
- that the project undergo an EIR.

5. Environmental Impact Review. An EIR is triggered by the Review Board after it conducts an EA. Alternatively, the Minister of Indian and Northern Affairs Canada (INAC) can require an EIR upon receipt of the EA Report. An EIR is the highest level of review and is rare.

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<sup>366</sup> Guidelines, p. 4.

<sup>367</sup> s. 124 *MVMRA*.

<sup>368</sup> Guidelines, p. 10.

<sup>369</sup> s. 125 *MVMRA*.

<sup>370</sup> s. 126 *MVMRA*.

<sup>371</sup> s. 127.1 *MVMRA*.

<sup>372</sup> s. 123.1(b) *MVMRA*.

The Review Board selects and appoints at least three members of an EIR Panel, which conducts the EIR. The Review Board also sets the Panel's TOR.<sup>373</sup>

The components of EIR must include consultation with Ministers and First Nations, the submission of an impact statement by the applicant, public notification of the impact statement, and public consultations and hearings in communities that will be affected by the development.<sup>374</sup>

After the EIR is complete, the Panel must prepare a Report which includes comments from the public and its recommendation. The Report is submitted the required government entities.<sup>375</sup>

### ***Intervenor funding***

Intervenor funding may be available to participants and directly affected parties. It is distributed by the Review Board pursuant to a "Review Board Funding Program".<sup>376</sup>

## **6. Decisions on process**

1. Decision to require an EA by the Review Board. When deciding whether to refer a proposed development to the Review Board for an EA, the body charged with screening a development must do so if in their opinion the development may have a "significant adverse effect". The *MVMRA* does not provide guidance on what will constitute a significant adverse effect.<sup>377</sup>

2. Decision to require an EIR. After the Review Board's report has been forwarded to the relevant Ministers (or the Tlicho Government, if applicable), they may determine whether an EIR Review is required. This determination need not accord with the Review Board's recommendations.<sup>378</sup>

## **7. Basis for project assessment**

During an EA, the Review Board must consider the renewable resource capacity and the affect that the proposed development would have on their future use,<sup>379</sup> as well as the significance of the environmental impacts of the project.<sup>380</sup>

## **8. EA results and governmental decision making**

1. After EA by the Review Board. If the Minister agrees with the Review Board's recommendations to accept or reject a project, they are adopted. The Minister has discretion to make this determination, if applicable, in consultation with First Nations governments. If the Minister does not agree with the Review Board's recommendations, he or she can send a project back to the Review Board for further consultation, or, if no agreement can be reached, order an EIR.<sup>381</sup> Where the development is to be carried out on Tlicho lands, then the Tlicho government makes the final decision.<sup>382</sup>

2. After the EI Review by the Panel. The process is almost the same as the above; however, the Minister can reject the recommendations of the Report produced by the EIR Panel, giving the Minister the final

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<sup>373</sup> s. 134 *MVMRA*.  
<sup>374</sup> s. 134(1) *MVMRA*.  
<sup>375</sup> s. 134(3) *MVMRA*.  
<sup>376</sup> Guidelines, p. 40.  
<sup>377</sup> s. 125 *MVMRA*.  
<sup>378</sup> s. 130 *MVMRA*.  
<sup>379</sup> s. 117(3)(d) *MVMRA*.  
<sup>380</sup> s. 117(2) *MVMRA*.  
<sup>381</sup> s. 130 *MVMRA*.  
<sup>382</sup> s. 131.1 *MVMRA*.

decision. Where the project is to be developed on Tlicho Lands, the Tlicho government has the power to accept or reject the recommendations of the Panel.<sup>383</sup>

## 9. Role of Aboriginal communities

First Nations play a significant role in the EA/EIR process in the Northwest Territories. For example:

- One of the listed purposes of the EA Part of the *MVMRA* is to allow for greater First Nations control and ensure the concerns of Aboriginal people are taken into account.<sup>384</sup>
- The Review Board is co-managed by the government and First Nations; half of its members are nominated by First Nations, and half by the territorial government. (The members are ultimately appointed by the Minister of INAC.)
- Where an EA is to be carried out on First Nations land, the Review Board has a duty to consult with the affected First Nation.<sup>385</sup>
- The Gwich'in Tribal Council, Sahtu Secretariat Incorporated and the Tlicho Government can require an EA even where the preliminary screening finds that one is not necessary.
- In 2005, the territorial government issued guidelines for incorporating traditional knowledge into EA process. These are the first of their kind in Canadian EA legislation.<sup>386</sup>

## 10. Right to appeal

There is no specific right to appeal included in the *MVMRA*.

## 11. Mediation and ADR options

There are no specific ADR or mediation options under the *MVMRA*.

## 12. Joint EA process

The Northwest Territories and the federal government have not entered into a formal agreement on EA cooperation; however, the *MVMRA* provides some guidance for cooperation.<sup>387</sup> The *Act* also specifies that the *CEAA* does not apply in the Mackenzie Valley,<sup>388</sup> except:

- where the Minister of INAC, after receiving the report of the EA, refers the matter the Minister of the Environment for a joint review under the *CEAA*,<sup>389</sup> or
- in the case of certain trans-regional and external developments that span the Mackenzie Valley or the Northwest Territories and another territory or province.<sup>390</sup>

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<sup>383</sup> s. 137.1 *MVMRA*.

<sup>384</sup> s. 114 *MVMRA*.

<sup>385</sup> s. 127.1 *MVMRA*.

<sup>386</sup> Section 115.1 of the *MVMRA* requires that, in exercising its powers, the Review Board shall consider any traditional knowledge and scientific information that is made available to it.

<sup>387</sup> s. 138 *MVMRA*.

<sup>388</sup> s. 116 *MVMRA*.

<sup>389</sup> s. 130(c) *MVMRA*.

<sup>390</sup> s.141(2)(a) and 141(3)(c) *MVMRA*.

## Nunavut

### Agreements

- *Agreement Between the Inuit of the Nunavut Settlement Area and her Majesty the Queen in Right of Canada (Land Claims Agreement)*<sup>391</sup>

### Government Publications

- Guide 1-The to the Nunavut Impact Review Board
- Guide 2-Terminology and Definitions
- Guide 3- Filing Project Proposals and Screening Process
- Guide 4-Project Proposals Exempt From Screening
- Guide 5-The NIRB Review Process
- Guide 6a-Public Participation and Awareness Programs
- Guide 6b-A Proponents Guide to Conducting Public Consultation for the NIRB EA Process
- Guide 7-the Preparation of Environmental Impact Statements
- Guide 8-Project Monitoring

### 1. Basic purpose and goals

There is no preamble section in the *Land Claims Agreement*. The *Environmental Protection Act* applicable to Nunavut does not contain EA provisions.

### 2. Trigger and classes of undertaking affected

A proponent, in respect of a project proposal is defined as the person, body or government authority that proposes the project.<sup>392</sup>

When a project proposal is put forward for screening, the Nunavut Impact Review Board (NIRB) determines whether it requires an assessment. Schedule 12-1 lists exempted projects that do not require screening.

The following guiding principles assist NIRB in making its decision concerning the types of projects that need an EA. These include projects that:

- may have significant adverse effects on the ecosystem, wildlife habitat or Inuit harvesting activities;
- may have significant adverse socio-economic effects on northerners;
- will cause significant public concern; or
- involve technological innovations for which the effects are unknown.<sup>393</sup>

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<sup>391</sup> Unless otherwise noted, all section numbers refer to the *Land Claims Agreement*. Article 12 (“Development Impact”) applies to Inuit-owned lands.

<sup>392</sup> s. 12.1.1 *Land Claims Agreement*.

No review is required when no significant public concern is predicted, and the adverse ecosystem and socio-economic effects are not likely to be significant or are highly predictable and mitigable with known technology.<sup>394</sup>

### 3. Focus of process

The focus of the Nunavut EA process is biophysical and socio-economic impacts and sustainability.

In carrying out its functions, the primary objectives of NIRB shall be at all times to protect and promote the existing and future well-being of the residents and communities and to protect the ecosystemic integrity of the Nunavut Settlement Area.<sup>395</sup> The NIRB shall also take into account the well-being of residents of Canada outside the Nunavut Settlement Area.<sup>396</sup>

While socio-economic elements are considered in the process, NIRB specifically cannot establish requirements for socio-economic benefits.<sup>397</sup>

### 4. Scope

#### *Scope of project*

Projects are broadly defined. The definition applies to the whole process, not just to a single element.

A project proposal is defined in the *Land Claims Agreement* as:

a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or a physical activity that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in Section 12.11.1.<sup>398</sup>

#### *Scope of assessment*

One of the primary functions of the NIRB is to gauge and define the extent of regional impacts of a project for the Minister of Indian and Northern Affairs (INAC) to take into account when making his or her determination as to the regional interest.<sup>399</sup> The NIRB is also responsible for reviewing the ecosystemic and socio-economic impacts of project proposals.<sup>400</sup>

Base guidelines for an impact assessment include:

- a project description, including the purpose and need for the project;

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<sup>393</sup> s. 12.4.2(a) *Land Claims Agreement*.

<sup>394</sup> s. 12.4.2(b) *Land Claims Agreement*.

<sup>395</sup> The geographic details of the Nunavut Settlement Area are outlined in Article 3 of the *Land Claims Agreement*.

<sup>396</sup> s. 12.2.5 *Land Claims Agreement*.

<sup>397</sup> s. 12.2.3 *Land Claims Agreement*.

<sup>398</sup> s. 1.1.1 *Land Claims Agreement*.

<sup>399</sup> s. 12.2.2(b) *Land Claims Agreement*.

<sup>400</sup> s. 12.2.2(c) *Land Claims Agreement*.

- anticipated ecosystemic and socio-economic impacts of the project;
- steps which the proponent proposes to take, including any contingency plans, to avoid and mitigate adverse impacts;
- proposed steps to optimize benefits of the project with special consideration to community and regional preferences as to benefits;
- steps which the proponent proposes to take to compensate interests adversely affected by the project;
- the monitoring program that the proponent proposes to establish with respect to ecosystemic and socio-economic impacts;
- the interests in lands and waters which the proponent has secured, or seeks to secure;
- options for implementing the proposal; and
- any other matters that NIRB considers relevant.<sup>401</sup>

## 5. Process options

1. Screening. A proponent gives the project proposal to NIRB, who determines whether it has 'significant impact potential and therefore whether it requires a review.'<sup>402</sup> (See triggers, #2 above.) The NIRB must carry out the screening as per any timelines required by any licensing authority, or if no indication is given, within 45 days unless an extension is granted by the Minister.<sup>403</sup> After the screening is complete, the NIRB has four main options:

- notify the Minister that no review is required, and recommend terms to attach to an approval, where applicable;
- notify the Minister that the project requires a review by the NIRB (a Part 5 Review) or by the CEAA (a Part 6 Review), identifying key areas of concern;
- notify the Minister that the proposal was insufficient for proper screening and should be returned to the proponent for modification; or
- notify the Minister that the potential adverse impacts are so unacceptable that the project should be modified or abandoned (no review).<sup>404</sup>

2. Post-Screening. If the results of the screening indicate that a review should occur, the Minister refers it to the appropriate body (either federal Minister of Environment or back to the NIRB).<sup>405</sup>

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<sup>401</sup> s. 12.5.2 *Land Claims Agreement*.

<sup>402</sup> s. 12.4.1 *Land Claims Agreement*.

<sup>403</sup> s. 12.4.5 *Land Claims Agreement*.

<sup>404</sup> s. 12.4.4 *Land Claims Agreement*.

<sup>405</sup> s. 12.4.7 *Land Claims Agreement*.

Even if the NIRB determined that no review was necessary, the Minister has the authority to require one.<sup>406</sup>

3. Review by the NIRB. The Minister may identify particular areas or concerns for review, but NIRB is not limited by these.<sup>407</sup> Its mandate includes taking into account:

- whether the project would enhance and protect the existing and future well-being of the residents and communities of the Nunavut Settlement Area, taking into account the interests of other Canadians;
- whether the project would unduly prejudice the ecosystemic integrity of the Nunavut Settlement Area;
- whether the proposal reflects the priorities and values of the residents of the Nunavut Settlement Area;
- steps which the proponent proposes to take to avoid and mitigate adverse impacts;
- steps the proponent proposes to take, or that should be taken, to compensate interests adversely affected by the project;
- posting of performance bonds;
- the monitoring program that the proponent proposes to establish, or that should be established, for ecosystemic and socio-economic impacts; and
- steps which the proponent proposes to take, or that should be taken, to restore ecosystemic integrity following project abandonment.<sup>408</sup>

The NIRB shall issue guidelines to the proponent for the preparation of an impact statement. In issuing these guidelines, the NIRB may solicit any advice it considers appropriate.<sup>409</sup>

The NIRB may hold public hearings as part of the review process.<sup>410</sup> Although hearings are discretionary, all steps shall be taken by the NIRB (including notice, dissemination of information, scheduling and location) to promote public awareness and participation in hearings.<sup>411</sup> The NIRB's guidance documents state that the Board's goal is to encourage public

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<sup>406</sup> s. 12.4.6 *Land Claims Agreement*.  
<sup>407</sup> s. 12.5.1 *Land Claims Agreement*.  
<sup>408</sup> s. 12.5.5 *Land Claims Agreement*.  
<sup>409</sup> s. 12.5.2 *Land Claims Agreement*.  
<sup>410</sup> s. 12.5.3 *Land Claims Agreement*.  
<sup>411</sup> s. 12.2.27 *Land Claims Agreement*.

participation at all stages.<sup>412</sup> The Minister may propose timelines, but otherwise none are stated.<sup>413</sup>

Upon completion of the review, NIRB shall submit a report detailing its assessment and recommendations (including terms and conditions) and the Minister makes his/her decision.<sup>414</sup>

### ***Independence***

The NIRB is composed of nine members appointed by different levels of government:

- four appointed by federal Minister responsible for Northern Affairs, upon nomination by a Designated Inuit Organization<sup>415</sup>
- two appointed by federal Ministers
- two by Ministers of the Territorial Governments (at least one by the Minister responsible for renewable resources)
- the chairperson shall be nominated by the above, and appointed by the federal Minister responsible for Northern Affairs. (If there are equally qualified persons, preference will be given to a resident of Nunavut)<sup>416</sup>

### ***Review by a federal EA panel***

Part 6 details panel composition,<sup>417</sup> including the requirements that panel members are unbiased and have special knowledge relevant to the likely technological, environmental or social effects of the proposed project.<sup>418</sup> Opportunities for open and comprehensive public review exist.<sup>419</sup>

The panel may provide the proponent with guidelines, and where appropriate, should contain the same information as set out for NIRB guidelines. NIRB shall have the opportunity to review and provide input for the guidelines.<sup>420</sup>

The proponent shall write a statement on ecosystemic and socio-economic impacts,<sup>421</sup> and NIRB shall have adequate opportunity to review and comment on the impact statement before public

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<sup>412</sup> See, e.g., Nunavut Impact Review Board. (). Guide 6a – Guide to NIRB’s Public Awareness and Participation Programs: The Review Process. Retrieved from <http://ftp.nirb.ca/04-GUIDES/NIRB-F-Guide%206a-Public%20Participation%20and%20Awareness%20Programs-OT3E.pdf>, p.2.

<sup>413</sup> s. 12.5.4

<sup>414</sup> s. 12.5.6

<sup>415</sup> Defined in s. 1.1.1

<sup>416</sup> s. 12.2.6

<sup>417</sup> s. 12.6.2

<sup>418</sup> s. 12.6.4

<sup>419</sup> s. 12.61.1, opportunities should be at least the same as provided under the *EA and Review Process Guidelines order* (no longer valid for this process). It is unclear if this now reflects current *CEAA*.

<sup>420</sup> s. 12.6.5

<sup>421</sup> s. 12.6.5

hearings start.<sup>422</sup> The federal panel must also provide notice, dissemination of information, scheduling and location, to promote public awareness and participation in hearings.<sup>423</sup>

Upon completion of the assessment, the panel's report should be sent to the Minister of Environment and the Minister (who shall make it public and forward it to NIRB).<sup>424</sup> NIRB shall have 60 days to review the report and make recommendations to the Minister. The Minister can then accept or reject the Report (only as it applies to the Nunavut settlement area) or recommendations for the same reasons as he/she is able to do for a NIRB report.<sup>425</sup>

NIRB's involvement with the report and recommendations is geographically limited to the Nunavut Settlement area.<sup>426</sup>

Upon completion, if the project is to be accepted, NIRB shall issue a project certificate including terms and conditions.<sup>427</sup>

Post-Approval: If a project is approved, it is subject to monitoring,<sup>428</sup> and the terms of the certificates issued shall be implemented.<sup>429</sup>

## **6. Decisions on process**

Decision on method of review: NIRB's decision to require a hearing or public correspondence is discretionary. NIRB may select any process it deems appropriate.<sup>430</sup>

## **7. Basis for project assessment**

Generally, the basis is discretionary, however, the significance of socio-economic and environmental impacts also appears to be a consideration - see scope of assessment above.

## **8. EA results and governmental decision making**

There is Ministerial discretion relating to final decision making. The Minister can accept or reject NIRB's recommendations, or may refer the report back for reconsideration of the terms and conditions. In making his/her decision, the Minister may consider the national and regional interest, the appropriateness of the terms and conditions, or whether NIRB failed to sufficiently deal with ecosystemic and socio-economic issues.<sup>431</sup> If required, NIRB shall, within 30 days (or time agreed by the Minister) make alterations and return the report to the Minister and make the

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<sup>422</sup> s.12.6.6.  
<sup>423</sup> s.12.6.7  
<sup>424</sup> s.12.6.9  
<sup>425</sup> s.12.6.11  
<sup>426</sup> s.12.6.15  
<sup>427</sup> s.12.6.17  
<sup>428</sup> Detailed in Article 12, Part 7  
<sup>429</sup> Detailed in Article 12, Part 9  
<sup>430</sup> s.12.5.3  
<sup>431</sup> s.12.5.7

report available to the public.<sup>432</sup> The Minister may either accept the revised report or vary the terms and conditions based on the same grounds as mentioned earlier.<sup>433</sup>

If it has been determined that a project should proceed, NIRB shall issue a Project Certificate indicating any terms and conditions.<sup>434</sup>

### **9. Role of Aboriginal communities**

The nature of the Land Claims Agreement means that Aboriginal communities play a much stronger role in the EA process.

For example, in public hearings, the NIRB must give due regard and weight to the tradition of Inuit oral communication and decision making.<sup>435</sup> Additionally, designated Inuit organizations have a special role in nominating panel members.

### **10. Right to appeal**

The Right to Appeal is not mentioned in the *Land Claims Agreement* in relation to decisions made about the EA process.

### **11. Mediation and ADR options**

No mediation or ADR Options are mention in the *Agreement* in relation to decisions made about the EA process.

### **12. Joint EA process**

Besides the earlier process detailed (see #5 above), the NIRB may, if requested, review a project proposal outside the Nunavut Settlement that may have significant adverse ecosystemic or socio-economic effect on the Nunavut Settlement Area.<sup>436</sup> Best efforts shall also be used to negotiate agreements with other jurisdictions for cooperation.<sup>437</sup>

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432 s.12.5.8  
433 s.12.5.9  
434 s.12.5.12  
435 s.12.2.24(a)(ii)  
436 s.12.11.1  
437 s.12.11.2

## Yukon

### **Legislation**

- *Yukon Environmental and Socio-Economic Assessment Act*, S.C. 2003, c.7 (*Act*)
  - *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, SOR/2005-379
  - *Decision Body Time Periods and Consultation Regulations*, SOR/2005-380

### **Agreements**

- *Canada-Yukon Agreement on Environmental Assessment Cooperation*

### **Government Publications**

- Yukon Environmental and Socio-economic Assessment Board: “Guide to Socio-Economic Effects Assessments”
- Yukon Environmental and Socio-economic Assessment Board: “Proponent’s Guide to Project Proposal Submission to a Designated Office”
- Yukon Environmental and Socio-economic Assessment Board: “Guide to Interested Persons and the Public to Participate in Assessments”

## **1. Basic purpose and goals**

Sub-section 5(2) of the *Act* outlines its purposes, which include:

- creating a unified process for EAs in Yukon that considers environmental and socio-economic effects;
- protecting and maintaining environmental quality and heritage resources;
- protecting and promoting the well being of Yukon Indian persons and other Yukon residents; and
- promoting opportunities for public participation.

Supporting sustainable development is also one of the purposes of the *Act*, as embodied in sub-sections 5(2)(e) and (f):

- (e) to ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities and their residents, and societies in general, depend;
- (f) to recognize and, to the extent practicable, enhance the traditional economy of Yukon Indian persons and their special relationship with the wilderness environment [...]

## **2. Trigger and classes of undertaking affected**

The EA process is triggered when a proponent wishes to carry on an activity that is listed in the *Assessable Activities, Exceptions and Executive Committee Projects Regulations (Assessable Activities Regulations)*. Schedule 1 to the *Regulations* lists activities that may be assessed along

with specific exceptions. Schedule 2 lists general exemptions. Schedule 3 lists activities that must be submitted to the Executive Subcommittee of the Board (not the designated office). The regulations are very detailed.

Activities listed in Schedule 1 of the *Assessable Activities Regulations* and which are not specifically exempted may be subject to an EA where:

- (a) a federal agency or federal independent regulatory agency is the proponent receives an application for financial assistance for the activity;
- (b) a territorial agency, municipal government, territorial independent regulatory agency or First Nation is the proponent and an authorization or grant of interest would be required for the activity to be undertaken by a private individual;
- (c) an authorization or grant of interest in land is required from a government agency, independent regulatory agency or First Nation is required for the activity to be undertaken; or
- (d) an authorization by the Governor in Council is required for the activity to be undertaken.<sup>438</sup>

Even where an activity would otherwise be exempted, if significant environmental or socio-economic impacts might result from that activity, a federal agency or minister, territorial minister or First Nation may require an assessment. This is also true where these impacts are the result of cumulative effects with other activities.<sup>439</sup>

### **3. Focus of process**

The focus of the Yukon EA process is on the socio-economic and environmental impacts of an activity. These impacts often mentioned together in the *Act*.

According to the *Act* socio-economic effects include “effects on economies, health, culture, traditions, lifestyles and heritage resources.” “Environment” in the *Act* 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 and living organisms; and
- (d) the interacting natural systems that include the components referred to in paragraphs (a) to (c).<sup>440</sup>

### **4. Scope of project and assessment**

At each level of assessment, the scope is set out in the *Act*, and shall include:

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<sup>438</sup> s. 47(2) *Act*.

<sup>439</sup> s. 48(3) *Act*.

<sup>440</sup> s. 2 *Act*.

- purpose of project and its stages;
- the significance of the environmental and socio-economic effects of the project, including effects of malfunctions or accidents;
- the significance of adverse cumulative effects that might occur in connection with the effects of other projects or activities;
- alternatives to the project;
- mitigation measures and measures to compensate for any significant adverse environmental or socio-economic effects;
- information relating to the interests of Yukon Indians, Yukon residents and other Canadians;
- any matter requested by the decision body; and
- any other matter required by regulation.<sup>441</sup>

The *Act* also provides that the YESAB must take into account the need for effects monitoring and the impacts on renewable resources.<sup>442</sup>

The scope of project is determined by the designated district assessment office or the Executive Committee of the YESAB,<sup>443</sup> and shall include other activities undertaken in relation to the activity identified.

## 5. Process options

There are three types of EAs that may be conducted in Yukon. Each is performed by a differently constituted authority. Most EAs are performed by district assessment offices.<sup>444</sup> The next level of EA is conducted by the YESAB. Activities evaluated in this manner are those listed in Schedule 3 of the *Assessable Activities Regulations*, or which are referred by a district assessment office. The third type of review is conducted by a panel of the YESAB. The Executive Committee of the YESAB may establish a panel to review projects with the most serious potential environmental and socio-economic effects. The composition of the panel is determined by geography and whether the project's effects will occur mainly on settlement land.

In addition, a territorial government minister, federal minister, or a First Nation can make a request to the Executive Committee that a project be reviewed.<sup>445</sup>

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<sup>441</sup> s. 42(1) *Act*.

<sup>442</sup> s. 42(2) *Act*.

<sup>443</sup> s. 51 *Act*.

<sup>444</sup> Yukon is divided into 6 assessment districts with a designated office in each district.

<sup>445</sup> s. 60 *Act*.

### ***Process summary***

1. District Office Evaluation. The district office conducts the preliminary evaluation of project proposals.<sup>446</sup> The district office can seek any information or views that are relevant to its evaluation,<sup>447</sup> but shall seek views from any affected First Nation, or First Nation or government that has indicated an interest.<sup>448</sup>

The YESAB shall make rules about the conduct of evaluations by district offices. Where there is a regional land use plan in effect and there is a proposed project, the district office, the Executive Committee or the YESAB must ask the planning commission if the project is in conformity with the plan. If it is not, then the planning commission shall be invited to make representations with respect to the project.<sup>449</sup>

At conclusion of the EA, the district office can recommend to the decision maker whether to allow project to go ahead (if it does not have significant adverse environmental or socio-economic effects) or not go ahead (if it does). The district office and also recommend terms and conditions should be attached to mitigate these effects.<sup>450</sup> The district office can also refer the project for assessment by the Executive Committee of the YESAB if it cannot determine whether the project will have significant adverse environmental or socio-economic effects.<sup>451</sup> No specific timelines are given to guide this process.

2. Executive Committee screening. Projects come before the Executive Committee because they are required to do so under paragraph 122(c) of the *Act*, or because they are referred by the district office.<sup>452</sup> The Executive determines whether a review is necessary, and may make recommendations to the decision body. (See EA Results and Governmental Decision Making, #8 below.)

The Executive Committee may seek any information and views that it believes to be relevant to the screening,<sup>453</sup> but must seek the views of First Nations groups consulted by the proponent.<sup>454</sup>

At the end of the screening process, the Executive Committee has the same options that were available to the district office, except that instead of referring a proposal to the Executive Committee, it can recommend that the project be subject to a review.<sup>455</sup> Reviews are required where the Executive Committee determines:

- (a) [...] after taking into account any mitigative measures included in the project proposal, that the project might contribute significantly to cumulative adverse environmental or socio-economic effects in Yukon or that the project is causing or is likely to cause significant public concern in Yukon; or

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<sup>446</sup> s. 55(1) *Act*.

<sup>447</sup> s. 55(3) *Act*.

<sup>448</sup> s. 55(4) *Act*.

<sup>449</sup> s. 44 *Act*.

<sup>450</sup> s. 56 *Act*.

<sup>451</sup> ss. 56(d) *Act*.

<sup>452</sup> ss. 57(2) *Act*.

<sup>453</sup> ss. 57(3) *Act*.

<sup>454</sup> ss. 57(4) *Act*.

<sup>455</sup> s. 58 *Act*.

- (b) that the project involves technology that is controversial in Yukon or the effects of which are unknown.<sup>456</sup>

The latter criterion is an example of the application of the precautionary principle. Again, no specific timelines are given to guide this process.

3. Panel review. Panel review is the highest level of assessment in the Yukon. Panels are appointed by the Executive Committee. Joint Panels may also be formed in consultation with the federal Minister of Environment (Joint Panel), or by the Executive Committee.<sup>457</sup> Where a request is made for a Joint Panel, the Minister of Environment has 30 days to respond to the request.<sup>458</sup>

The public must be notified about the establishment of a Panel and how to acquire the Panel's TOR.<sup>459</sup>

The Panel shall provide and publicize opportunities for interested persons (which are defined as 'any person or body having an interest in the outcome of an assessment for a purpose that is not frivolous or vexatious')<sup>460</sup> and the public to participate in any EA.

The Panel determines schedule for the review process, and can acquire information from the proponent.<sup>461</sup> It has the same powers as a superior court in terms of compelling witness attendance and examination and the production and inspection of documents and other evidence.<sup>462</sup>

At conclusion of the review, the Panel make recommendations that:

- (a) the project be allowed to proceed, if it determines that the project will have no significant adverse environmental or socio-economic effects in or outside Yukon;
- (b) the project be allowed to proceed, subject to specified terms and conditions, if it determines that the project will have significant adverse environmental or socio-economic effects in or outside Yukon that can be mitigated by those terms and conditions; or
- (c) the project not be allowed to proceed, if it determines that the project will have significant adverse environmental or socio-economic effects in or outside Yukon that cannot be mitigated.<sup>463</sup>

## 6. Decisions on process

See #5, above.

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<sup>456</sup> s. 58(2) *Act*.

<sup>457</sup> s. 65 and 67 *Act*.

<sup>458</sup> s. 62(1) *Act*.

<sup>459</sup> s. 66(2) *Act*.

<sup>460</sup> s. 2 *Act*.

<sup>461</sup> s. 70 *Act*.

<sup>462</sup> s. 71 *Act*.

<sup>463</sup> s. 72(4) *Act*.

## 7. Basis for project assessment

The basis for project assessment in Yukon is to determine the significance of environmental or socio-economic effects. In conducting an assessment, all bodies must also consider the significance of any adverse cumulative environmental or socio-economic effects.

## 8. EA results and governmental decision making

1. Assessment by district office. At the conclusion of an EA, the district office can recommend to the decision body that a project go ahead (if it does not have significant adverse environmental or socio-economic effects) or that it not go ahead (if it does), and what terms and conditions should be attached to mitigate these effects. It can also recommend a screening by the Executive Committee.<sup>464</sup>

2. Screening by the Executive Committee. At the conclusion of its screening, the Executive Committee has the same options as the district office, except it can also require a review by a Panel.

3. Panel Review. At the conclusion of a Panel review, the Panel can recommend whether or not to allow a project to go ahead, and what terms and conditions should be imposed.

4. Decision Body. A wide range of ‘decision-bodies’<sup>465</sup> exist depending on location and type of project. This is important because the final approval does not necessarily come from the federal government – decision-making has been legislated to other groups. The decision body must consider the recommendation it receives and must give ‘full and fair consideration to scientific information, traditional knowledge and other information provided with the recommendation’.<sup>466</sup>

If the decision body does not agree with a recommendation, they must refer it back to the Executive Committee or Panel for reconsideration within 30-120 days.<sup>467</sup> After one referral, a decision body may reject the recommendations.<sup>468</sup> A decision body must make their decision

## 9. Role of Aboriginal communities

Aboriginal communities play a strong role in the process, and there are frequent references to First Nations in the *Act*:

- one of the purposes of the *Act* is to emphasize the importance of First Nations involvement, in accordance with the Umbrella Final Agreement. This includes the need to promote the well-being of Yukon Indians, to recognize and, to the extent practicable, enhance the traditional economy of Yukon Indians and their special relationship with the wilderness environment, and to guarantee opportunities for the participation of Yukon Indians — and to make use of their knowledge and experience — in the assessment

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<sup>464</sup> s. 56 *Act*.

<sup>465</sup> s. 2 *Act*.

<sup>466</sup> s. 74(1) *Act*.

<sup>467</sup> s. 76(1) *Act*. The timelines are prescribed by the *Decision Body Time Periods and Consultation Regulations*.

<sup>468</sup> s. 75 *Act*.

process.<sup>469</sup>

- The YESAB is established under the *Act*.<sup>470</sup> The YESAB has an Executive Committee of 3 persons – one must be appointed upon nomination of the Council for Yukon Indians or a successor group.<sup>471</sup> The Council must also nominate half the other members of the YESAB. It is the Council's responsibility to consult with First Nations before submitting its nominations.<sup>472</sup>
- Before the district office, the Executive Committee or a Panel makes a recommendation on a project that might have significant environmental or socio-economic impacts on a First Nation's territory, that First Nation must be consulted.
- Traditional knowledge is to be given full and fair consideration in the review process.<sup>473</sup>
- The district offices must consult with First Nations in budget preparation.<sup>474</sup>
- The district offices, Executive Committee and Panels must seek the views of affected First Nations.

## 10. Right to appeal

No specific right to appeal is provided in the *Act*; however, judicial review is available. Anyone directly affected by a decision may make an application in the Supreme Court of the Yukon Territory for relief against the decision maker by way of an injunction, declaration, or by way of an order in the nature of certiorari, mandamus, quo warranto or prohibition.<sup>475</sup>

## 11. Mediation and ADR options

There are no specific mediation or ADR options provided.

## 12. Joint EA process

The *Canada-Yukon Agreement on EA Cooperation* seeks to foster cooperation between Canada and the Yukon, achieve greater efficiency and to establish accountability and predictability.<sup>476</sup>

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<sup>469</sup>

s. 5 *Act*.

<sup>470</sup>

s. 8 *Act*.

<sup>471</sup>

s. 2 *Act*.

<sup>472</sup>

s. 8(6) *Act*.

<sup>473</sup>

s. 39 *Act*.

<sup>474</sup>

s. 26 *Act*.

<sup>475</sup>

s. 116 *Act*.

<sup>476</sup>

*Canada-Yukon Agreement on EA*, s. 1.

## VI Provincial and territorial EA regimes compared: A challenge for harmonization

In this section, we present a horizontal analysis of the differences and similarities of processes and requirements in each of the selected categories. It is very evident that there is a wide variety of approach to EA among the jurisdictions.

### 1. Purpose and goals

Legislative purpose may be gleaned from a statutory preamble, or from the declaratory content of a section that sets an overarching purpose. Each jurisdiction's EA legislation was examined for such a statement of intent, with an interest in determining where it might fit on a continuum: from examining the biophysical effects of a project effects; through environmental protection; to recognising environmental principles such as stewardship, polluter pays, the precautionary principle; to integration of environmental, social, and economic decision-making; to supporting sustainability or sustainable development.

At one end of this continuum, the British Columbia, Saskatchewan, Québec, New Brunswick and P.E.I.'s legislation contain no preamble or purpose section, nor is there mention of sustainability, sustainable development or environmental principles. Ontario, Newfoundland & Labrador, and the N.W.T.'s purpose sections speak of environmental protection, conservation and management but do not integrate sustainability. In N.W.T., there is an additional principle expressed focussing on the protection of the social, cultural and economic well-being of residents and communities. The Yukon's EA legislation links socio-economic and ecological principles in its purpose section.

Sustainable development is referred to specifically as the primary purpose of EA only in Alberta's legislation. However, Manitoba has developed its own language around a statement of intent that essentially equates to sustainability. It ties environmental management to sustaining "a high quality of life, including social and economic development, recreation and leisure for this and future generations."<sup>477</sup>

Nova Scotia's EA provisions do not include a separate purpose section; however, the general purposes of the *Environment Act* include a broad range of principles such as sustainable development, ecological value, the precautionary principle, shared responsibility, stewardship and the integration of sustainable development into public policy. However, whether an undertaking conforms to "sustainable development" does not appear to be a focus of the Nova Scotian EA process.

Another purpose of EA legislation can be to facilitate public consultation. Legislation in Alberta, Manitoba, Nova Scotia, the N.W.T. and the Yukon refer to this goal explicitly.

### 2. Triggers and classes of undertaking affected by EA

The method by which an undertaking is brought into the EA process is a significant feature that can affect timing and coordination, scope of assessment, inclusion of cumulative effects, etc.

There are two aspects to the "trigger" determination. The first is the mechanism by which EA commences:

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<sup>477</sup> s. 1(1) *Act*.

- Is EA applied on a case by case approach dependent on certain conditions?
- Does legislation create mandatory class(es) of undertakings to be subject to EA?
- Is the trigger related to a regulatory process (e.g. a licence requirement)?
- Does legislation create automatic exemptions?
- Can the Minister or director exempt an otherwise included project from EA?
- Is there an alternate route by Ministerial designation?

And second, the determination of what type of undertaking is included by virtue of its characteristics, size, ownership, etc.:

- Does the process apply to physical projects only? Large projects only? Public projects only?
- Does the process apply to activities, strategic level policies, plans or programs?

### **Case by case determination**

Saskatchewan, Ontario, P.E.I. and Nunavut are the only jurisdictions without a mandatory list of projects that fall automatically into an EA process. The Saskatchewan and P.E.I. *Acts* provide a descriptive set of conditions that allow a determination to be made. Similarly, in Nunavut the screening process is guided by principles to assist the Nunavut Impact Review Board (NIRB) in making its decision. The Agreement also provides a list of reverse onus requirements on the NIRB to the effect that it shall not require a review when it does not predict significant public concern and the adverse ecosystemic and socio-economic effects are not likely to be significant, or the potential adverse effects are highly predicable and mitigable with known technology.<sup>478</sup> The Ontario *Act* applies principally to “undertakings” of, or involving, the provincial government, municipalities, and certain public bodies.

The Saskatchewan *Act*’s descriptive list of projects to be caught uniquely includes any that involve a new technology concerned with resource utilization and that may induce significant environmental change and any that substantially utilize a provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose.

### **Mandatory EA for identified categories**

Typically, jurisdictions provide stringent lists of classes of activities or projects that require EA. These jurisdictions include B.C., Alberta, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland & Labrador and the Yukon.

Distinctions among jurisdictions lie in the inclusiveness of these classes. Large resource and industrial projects (energy production, mining) are always in the “in box”. There are other categories of activities that vary among jurisdictions such as transportation, waste disposal and treatment, habitat modification, recreation, and water development and control.

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<sup>478</sup> s. 12.4.2(b).

For example, Nova Scotia provides for two classes of undertakings (with differing process options attached), with the first being smaller in scale with more predictable impacts, such as disrupting wetlands and creating rock quarries, and the second typically larger in scale, such as pulp mills and oil refineries. In B.C., highway construction and resort developments are included. In Alberta recreational or tourism projects are included under the *NRCBA*. Saskatchewan's legislation specifically includes forest management plans.

Manitoba has a very broad catchment of undertakings in its triggering provisions. Its legislation links the classification list to likelihood of pollution: Class 1 developments have the effect of discharging pollutants; Class 2 developments have effects that are primarily unrelated to pollution; and Class 3 developments have effects which make the development an exceptional project".<sup>479</sup> Only municipal developments which will not have environmental impacts beyond the municipality and which will undergo a municipal EA are exempted.

### **Ministerial designation**

Frequently, there is also a route whereby the Minister or Director can require that an otherwise unlisted project be subject to EA, (e.g., B.C., Alberta, Newfoundland & Labrador and Nunavut). The designation may be based on location, size and nature of the proposed activity, complexity, public interest or likelihood of significant environmental effects.<sup>480</sup> In Nunavut, the *Land Claims Agreement* provides that even if an activity is exempted, if significant environmental or socio-economic effects might result from the activity, an assessment may be required. This is also true if these results are from cumulative effects.<sup>481</sup> B.C. has the curious additional provision that a proponent may request that a project be subject to assessment.

### **Triggering by regulatory process**

In the N.W.T., as in the federal process under the *CEAA*, an EA screening is triggered when an application is made for a listed license, permit, or authorization.<sup>482</sup> In cases where a license is not required, it is only triggered where the body proposing to carry out that development is a governmental entity including certain First Nations.<sup>483</sup>

### **Legislated exemption**

The Québec legislation affecting James Bay and Northern Québec takes the reverse approach to most jurisdictions: any project not specifically exempt must undergo the assessment and review procedure. In addition to the listed exemptions, projects are exempt if they are carried out within the territorial limits of a non-native community and if they do not impact the wildlife outside of that community. However, the Review Committee for projects in James Bay and the Commission for projects in Northern Québec play a role in deciding whether the EA process applies.

Some other provinces with mandatory classes for EA also list exemptions. Manitoba exempts municipal or Class 2 developments if they are subject to an existing approval process. P.E.I. exempts certain activities related to watercourse alterations, bulk water removal, waste treatment,

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<sup>479</sup> s. 1(2) definitions of Class 1, 2, and 3 developments.

<sup>480</sup> Provided in s. 26 *Regulations* and allowed under the definition of an undertaking.

<sup>481</sup> s. 48(3) Nunavut *Land Claims Agreement*.

<sup>482</sup> s. 118 *MVMRA*.

<sup>483</sup> s. 124(2) *MVMRA*.

and water supply systems. An activity can also be exempted by listing in the N.W.T. *Exemption List Regulations* or in the Nunavut *Land Claims Agreement*.

### **Discretionary Exemption**

Ministerial or directorial discretion to exempt a listed project from assessment exists in certain jurisdictions. B.C.'s legislation confers the broadest discretionary powers: a project may be exempted if the executive director is of the opinion that it will not have significant environmental effects. The Québec *Act* limits the power to exclude certain projects to those required to repair damage caused by a disaster or prevent damage. In Newfoundland & Labrador, if it is determined to be in the public interest, the Minister (with approval of Cabinet) has the power to exempt an undertaking from the EA process.

### **Characteristics of undertakings**

Legislation uses a variety of terms to describe what it is that must be assessed: a project, undertaking, activity, operation or development, for example. Some legislation, such as Saskatchewan and New Brunswick, also specifically states that an alteration, modification or expansion is included. B.C. does as well, but with different thresholds than if the project were a new one.

Size matters. The bigger the project, the more likely it is automatically “in” the EA stream. However, just how big varies from jurisdiction to jurisdiction. In B.C. and Québec mandatory class lists will only trigger review if they reach a certain threshold. In Ontario, regulations under the Municipal Class EA process exempt certain projects below a dollar value. Nova Scotia exempts small pits and quarries such as those used for road building and maintenance.

For the most part, EA does capture both public and private sector projects. However, as has been stated, the Ontario legislation may not adequately cover private sector projects (except certain private electricity, roads, water and waste management projects).<sup>484</sup> Within these regulations, there are exemptions based on size and the nature of the specific undertaking.

### **Strategic level policies, plans or programs**

As far as can be determined from this legislative review, strategic EA (SEA) has not made its way into the provincial level legislated framework for EA. Only the B.C. *Act* specifically provides that the Minister has the power to order an assessment of policies, plans and programs.<sup>485</sup> This is not to say that SEA is not in use at a policy level. In New Brunswick and Nova Scotia, for example, a SEA approach has been taken to examination of the opportunities for development of Bay of Fundy tidal power. The Ontario Energy Board's 2007 review of the Ontario Power Authority's Integrated Power System Plan also used a SEA approach. However, an analysis of SEA as a policy based processes is not within the scope of this report.

## **3. Focus of Process: The meaning of “environment”**

As a focus to the EA process, it would be highly desirable to entrench a common definition of “environment” that covers social, economic and cultural as well as biophysical factors and their interrelations. Provincial and territorial legislation differs on this at present.

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<sup>484</sup> *Ontario Regulation 101/07 Waste Management Projects.*

<sup>485</sup> s. 49 *Act*.

The only province whose *Act* that does not contain a definition of “environment” is B.C. Of the other jurisdictions, the definition provided is entirely biophysical in Alberta, Manitoba, P.E.I, the N.W.T. and Yukon. However, reading beyond the definition section into the requirements listed for the content of the EA process, the focus of the process in all of these jurisdictions appears to be on the both biophysical and socio-economic impacts of an undertaking.

A broader definition of “environment” that includes biophysical, social, economic and cultural conditions is found in the legislation of Saskatchewan, Ontario, Québec, New Brunswick, and Newfoundland & Labrador. In Nova Scotia the definition of “environment” is narrow, but “environmental effect” is defined more broadly to include socio-economic matters.

Sustainable development and sustainability is clearly a focus of the legislation in Alberta, Manitoba and the northern territories.

#### **4. Scope**

##### ***Scope of project***

Determination of the scope of the project that will be subject to assessment has come under recent scrutiny at the federal level as a result of the decision of the Supreme Court of Canada in *MiningWatch Canada v. Canada* (2010). In this case, the SCC determined that, for the purposes of the *CEAA*, the proponent’s project description should not be reduced in scope. However, less central to the decision were comments that encouraged combining projects to include all aspects or phases beyond those included by the proponent.

Provincial and territorial legislative provisions on project scoping vary. The scope of a project is initially based on information provided by the proponent. The project thereafter may be deemed to include additional onsite or offsite features or earlier or later phases. The determination can be made by the director or Minister.

The scoping decision could also be the entry point for the consideration of project alternatives, although this is generally a later consideration as part of the scope of the assessment.

A number of provinces provide little or no legislative direction around scope, including Saskatchewan, Ontario, southern Québec, Alberta, Manitoba, and Nova Scotia.

Very few jurisdictions give specific attention to project scope and the inclusion of additional aspects of a project. In B.C., specific provisions describe the reviewable project as including the facilities at the main site of the project, as well as any off-site facilities or any other activities related to the project that the executive director or the minister may designate. A B.C. EA Office guide suggests that the construction, operation and decommissioning phases are part of the project. In New Brunswick, the Minister has the discretion to view an undertaking in isolation or together with any enterprise, activity, project, structure, work or program that is likely to be carried on with the undertaking.<sup>486</sup> When providing registration information, a proponent must describe impacts of each phase of a project (i.e., construction, operation, maintenance). Under the Guidelines, registration of an undertaking requires certain information to be provided, including the rationale/need for a project as well as a consideration of the alternatives. An EIA report must also include a consideration of the alternatives to a project.

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<sup>486</sup> s. 6(4).

Generally, in the North, EA provisions recognize the significance of the scoping decision and provide that the Minister concerned receive a recommendation on project scope from the Environmental Quality Commission (northern Québec) Evaluating Committee (James Bay), or Review Board (N.W.T.).

Scope may also be implied by the way that the classes of undertakings to be assessed are described. When framed broadly, all aspects of a project may be included. However, the determination of what will be included is still discretionary. For example, the description of a potash mine and milling facility listed as a Class 3 development in Manitoba implies that the entire activity is intended to be caught under the Class 3 EA process. Newfoundland & Labrador's legislation implies by its broad definition of an "undertaking" that it shall include the entire project. On the other hand, in New Brunswick, some of the undertakings listed may be assessed separately despite being one component of a larger undertaking: e.g., "all pipelines exceeding five kms in length."

### *Scope of assessment*

The scope of the assessment determines the bundle of information, impacts and effects that is to be examined for each project: that is the depth and breadth of the analysis. Comparison of the legislation of each jurisdiction reveals significant differences related to what impacts are required to be considered, such as:

- biophysical and socio-economic effects;
- direct versus indirect effects;
- lifecycle and cumulative effects;
- alternatives, either optional or mandatory, including a zero project alternative;
- regional effects;
- impacts on First Nations;
- impacts on human health; and
- impacts on heritage.

Despite inconsistencies in definition of the word "environment", all provinces and territories recognize that the EA process includes some analysis of both biophysical and socio-economic effects. However, the scope of assessment will depend on the level of EA process to which the particular project is subject. All jurisdictions include some process by which the scope of assessment is to be actively determined if it requires a full Environmental Impact Assessment, comprehensive review or hearing (for example by developing Terms of Reference). The determination of scope at that point may involve technical advice from a panel or committee and may include an opportunity for public comment (see below in Process Options).

This section compares the legislative requirements of each jurisdiction with respect to the initial information to be provided by the proponent for the purpose of screening the project. Because a

very large majority of projects are approved at this stage, the scope of assessment at this point is critical.

The Alberta, New Brunswick, and Newfoundland & Labrador legislation provides a broad list of matters to be considered, and includes potential positive and negative environmental, social, economic and cultural impacts of the proposed activity. The governing *Acts* in the N.W.T., and Yukon and the Nunavut *Land Claims Agreement* also include a mandatory list of requirements for EA.

On the other hand, the EA *Acts* of B.C., Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia and P.E.I. do not list specific impacts to be considered. In Québec and P.E.I, the respective *Acts* allow the Minister to determine the scope and extent of the EA Statement that a proponent must prepare.<sup>487</sup> Scope is left to the discretion of the Executive Director in B.C. Published guidelines provide scoping direction to the proponent in B.C., Saskatchewan, Ontario and Nova Scotia (and possibly others).

Additional to the normal requirement to consider impacts on air quality, aquatic and terrestrial biology and ecology, groundwater, surface water, etc., some jurisdictions require or suggest that a proponent also consider: human health (B.C. and Nova Scotia guidelines); heritage, historic, or archaeological resources (B.C. guidelines, Manitoba regulations and Québec regulations); community structure and land use (New Brunswick and P.E.I. guidelines); lifestyle and quality of life (New Brunswick). Consideration of the interests of First Nations is required in N.W.T., Nunavut and Yukon, and is suggested in the B.C. Guidelines (see also the section on Aboriginal Interests, below).

The emphasis in New Brunswick's guidelines is towards an economic cost-benefit analysis with a requirement for including a discussion of market potential, job creation benefits, consumer and/or industrial demand, "and other relevant issues that make the development of this project viable and desirable for the local and/or the New Brunswick economy". Saskatchewan's guidelines also require a cost-benefit analysis.

At the narrow end, the scope of assessment may be linked to the capacity of the proponent to manage or mitigate adverse effects. This is the case in the guidelines provided in B.C. At its widest, the scope of assessment should involve consideration of project alternatives. Alternatives within the project (non-structural, structural or process alternatives, and site selection alternatives) are stressed in the legislation of Alberta, Québec and Newfoundland & Labrador, in Guidelines in Saskatchewan and in the Ontario Code of Practice.

Only Newfoundland & Labrador, N.W.T. and the Yukon, and the Ontario Code of Practice require that a proponent consider alternatives to the project as a whole.

As discussed earlier, an effective and harmonised EA regime should pay careful attention to cumulative effects, lifecycle issues and intergenerational implications. At the provincial level, only the legislation in Alberta, the N.W.T., Nunavut and Yukon, and the regulations in Québec, require a consideration of cumulative effects. Additionally, the N.W.T. *Agreement* specifically

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<sup>487</sup> s. 31.2 *Act*.

requires consideration of the capacity of any renewable resources that are likely to be significantly affected by the development to meet existing and future needs.<sup>488</sup>

At its broadest, EA would also engage with the regional effects of an undertaking. In Nunavut, one of the primary functions of NIRB is to gauge and define the extent of regional impacts of a project. Regional effects are also a required consideration in the N.W.T. None of the provinces require a proponent to consider regional effects.

## **5. Process options**

The mechanics of the various provincial and territorial assessment processes vary greatly from one jurisdiction to the next, although there are several common themes and recurring elements. In all jurisdictions, the proponent launches the assessment process by giving notice of its proposed development to the province or territory. In some cases, the assessment authority may request a proposal from a proponent where it is apparent that a proposed development might require approval under assessment legislation.<sup>489</sup> The form and content of the notice varies between jurisdictions. For example, in B.C., Manitoba, Saskatchewan, Québec, Nunavut and Yukon, developers must file a proposal for development containing the information specified in each jurisdiction's respective guidelines and regulations. In Ontario, the proponent provides notice to the assessment authority in the form of draft terms of reference for the conduct of the assessment. In the four Atlantic provinces, proponents initiate the process by registering a proposed development with the province.

Following the notification/registration stage, most jurisdictions engage in some form of preliminary screening to determine whether an undertaking warrants an EA. The particular screening mechanisms are highly variable. A number of jurisdictions have distinct screening phases (Yukon, Nunavut, the Northwest Territories, Alberta and P.E.I.), while others appear to incorporate preliminary review into the notification/registration phases. The entity responsible for conducting the screening may be the responsible minister (Newfoundland & Labrador, Nova Scotia, New Brunswick and Québec), the assessment authority (B.C., Alberta, Manitoba and P.E.I.), a specialized tribunal (Nunavut), or a local or Aboriginal government office (Yukon and N.W.T.). Typically, the threshold for advancing a project to the next level of the assessment process is where it poses significant or adverse environmental impacts and/or is a matter of significant public concern. Generally speaking, at the completion of the screening process, the screening body may: (a) release an undertaking from the review process; (b) allow or recommend that an undertaking be allowed to proceed, with or without conditions or modifications; or (c) refer the undertaking to the next level of assessment.

Once the need for an assessment has been identified, the scope and methodology of that assessment must be determined. Often referred to as 'terms of reference' or 'guidelines', these may be formulated by the assessment authority (Saskatchewan, Manitoba, Québec, Nova Scotia, Newfoundland, Nunavut and Yukon) or by the proponent (B.C., Alberta, Ontario, and New Brunswick). In all cases where the proponent formulates the terms of reference, they must be approved by the assessment authority. The terms of reference may or may not be subject to

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<sup>488</sup> s. 117(3).

<sup>489</sup> **GUIDELINES FOR THE PREPARATION OF A PROJECT PROPOSAL: Saskatchewan EA Review Process, PDF available for download at:**  
<http://www.environment.gov.sk.ca/Default.aspx?DN=81fd9d6f-05fa-427f-9758-d9499680a645>

public comment during their development. Each of Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia and Newfoundland & Labrador must solicit public input during the development of the terms of reference. By contrast, B.C., N.W.T. and Nunavut may solicit public comment, but it is not legislatively mandated that they do so. Québec and New Brunswick do not permit any opportunity for public input into terms of reference. P. E.I.'s legislation, which is relatively basic and which relies heavily on the exercise of ministerial discretion, provides little guidance with respect to the formulation of the terms of reference.

In Nova Scotia, Manitoba and Newfoundland & Labrador, projects are diverted into different assessment pathways depending on the nature and characteristics of the project. Depending on the pathway, a project will undergo differing levels of scrutiny. Typically, where it appears that the environmental effects of an undertaking are limited or capable of mitigation, the undertaking will be subjected to a preliminary and more streamlined assessment process. At the completion of this first-level review, projects may be referred to the more comprehensive second-level review process where it appears that the environmental impacts warrant further study. The remaining provinces and territories employ only a single level of review process whereby the proponent conducts the environmental impact assessment in accordance with the terms of reference, then submits it to the assessment authority for review and public comment.

As will be discussed further below, there is a lot of variation between jurisdictions with respect to the availability and form of public consultation. Most jurisdictions provide multiple opportunities for consultation at different points of the process. A number of jurisdictions provide for discretionary public hearings of varying scope (Newfoundland & Labrador, Nunavut, Yukon, N.W.T., Manitoba, Québec and Ontario). In Ontario and Québec, members of the public can request a hearing. In Nova Scotia, public hearings are mandatory for certain classes of undertakings. New Brunswick mandates that hearings be held into all undertakings that have resulted in Environmental Impact Assessments. The scope and procedure for public hearings is particular to each jurisdiction, but hearings generally involve an open review an undertaking by a specialized tribunal, the opportunity for public comment and questioning of proponents, and additional information-gathering where necessary.

Following the hearing, the tribunal makes a recommendation to the ultimate decision-maker regarding the final outcome. Most often, this decision-maker is the responsible minister, but in some cases it may be the Lieutenant Governor in Council (Newfoundland & Labrador) or a committee of ministers (Québec). Typically, at the end of the process the decision-maker can decide to allow a project to proceed (with or without conditions or modifications), refuse it, or send it back for further study and information gathering.

### ***Public scrutiny and accessibility***

There is great discrepancy between jurisdictions with respect to the availability, timing, scope, duration and form of public consultation during the assessment process. Accordingly, it is difficult to identify many consistent trends between jurisdictions. However, a few general observations can be made with respect to the different approaches. Most jurisdictions solicit public input relatively early in the process and provide multiple opportunities for public consultation at successive stages. Often, the public consultation period is mandated by the legislation and must be completed before an undertaking can proceed to the next stage in the process. The typical duration of the consultation period is on the order of ten to 30 days which, depending on the scale and complexity of a proposed development, may be inadequate to provide

interested members of the public with the opportunity to conduct a fulsome review of a project. Ontario stands out in this regard, with an assessment framework that requires consultation periods on the order of five to seven weeks.

Typically, input is solicited by notifying the public that it has an opportunity to provide comment on a particular aspect of the process and making available whichever document(s) are relevant to that aspect. Few of the provinces or territories have established a centralized registry or repository for assessment documentation to facilitate public access, and there is little or no consideration given to whether and how members of the public might go about accessing and reviewing any underlying documents used in drafting the material made available for public comment. For example, although Saskatchewan's *EA Act (1980)* and accompanying government guidelines emphasize the importance of public disclosure, the province has broad discretion to restrict disclosure where "it is in the public interest or in the interest of any person..."<sup>490</sup>

The form of the consultation is highly variable. P.E.I. and Alberta do little more than publish a document accompanied by an open-ended request for public input. New Brunswick combines this tactic with more structured events such as public meetings and information sessions. Many jurisdictions have assembled administrative tribunals capable of conducting hearings into a proposed development.

Finally, on a positive note, on the whole in Canada there are very few restrictions on who may comment on the assessment process. Most jurisdictions explicitly provide that "any person" may comment and do not require that a person or organization be 'directly affected' by a proposed development in order to have standing to comment.

With respect to particular assessment frameworks, there is a broad spectrum in the approach to public consultation. At one end of the spectrum, the legislative schemes in each of B.C., Alberta and P.E.I. provide limited opportunities for meaningful public engagement in the assessment process. In each of these jurisdictions, mandatory consultation periods are limited in scope, of relatively short duration, and tend to occur later in the process. For example, B.C.'s assessment legislation requires only a single "formal public comment period" which can occur at any point during the assessment process. The province can elect to forego the comment period where it deems it impracticable, that there is insufficient time to solicit comments, or that it is unnecessary due to lack of public interest.<sup>491</sup>

Similarly, the frameworks in place in Alberta and P.E.I. provide few opportunities for meaningful public engagement. Only when the proponent has completed the initial stages and submitted the results of its EA is the public is given a limited opportunity for review and comment. Both provinces also confer discretion on decision-makers to assign little or no weight to certain viewpoints. P.E.I.'s provincial guidelines provide that only "relevant" environmental concerns will be taken into account in the final determination concerning the undertaking.<sup>492</sup> Alberta's assessment framework appears to discourage intervenor input by limiting participation in certain

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<sup>490</sup> s. 7.

<sup>491</sup> s. 7 *Public Consultation Policy Regulation*; this formal comment period usually happens at the final stage during the review of the proponent's application – see Guide p.18.

<sup>492</sup> Guidelines, p.16.

facets of the review process to ‘persons directly affected’ by the project. Other persons will only be involved where the Board considers it “necessary”.<sup>493</sup>

Towards the middle of the public consultation spectrum, Québec’s regulatory framework provides greater opportunity for public consultation than any of the provinces discussed above, but only relatively late in the process once the proponent has submitted an Environmental Impact Statement. However, unlike in other jurisdictions where the government has considerable discretion to determine whether to grant a hearing, upon receiving a request the responsible minister must direct that a hearing be held unless the application is frivolous. Somewhat like Québec, New Brunswick’s assessment framework allows for relatively fulsome public comment but only after the responsible minister has exercised considerable discretion with respect to the early stages in the process. New Brunswick also requires that an assessment include a public meeting or meetings by a panel of independent experts appointed by the minister.

Further along the consultation spectrum, Newfoundland & Labrador, Nova Scotia, Ontario, Manitoba and Saskatchewan each provide multiple opportunities for public consultation beginning relatively early and proceeding throughout the process. Nova Scotia and Newfoundland & Labrador have similar assessment processes. Both provinces solicit public input at each of the registration, guideline development, assessment and review stages. In addition, Newfoundland & Labrador’s *Environmental Protection Act* also gives the Minister power to request written comments from interested persons at any time during the EA process.<sup>494</sup> Both Nova Scotia and Newfoundland & Labrador also provide for public hearings into an undertaking to be conducted by specialized boards. In Nova Scotia’s case, hearings are mandatory for certain classes of undertakings. Manitoba’s assessment legislation provides for mandatory public notification and comment periods, and the minister has discretion to order a public hearing. Uniquely among the provinces and territories, where the province receives objections from the public to a development but decides not to recommend a public hearing, she is required to provide written reasons for the refusal the objector within a relatively short period. As with the other provinces, Manitoba invites hearing submissions from any person.

Saskatchewan’s framework is notable for its emphasis on encouraging a proponent to engage the public during the initial planning stages of a project. The province’s EA guidelines recommend that a proponent involve the public early and maintain two-way communication during the preparation of its screening submission, and it should fully document its public consultation and response. The guidelines also suggest that a proponent should use traditional and local knowledge where appropriate.<sup>495</sup> As in the other provinces, a proponent’s completed Environmental Impact Statement is made available for public inspection and comment. The minister may also call for a public information meeting to be held, and may direct the proponent to make experts available to attend the meeting.<sup>496</sup>

Ontario also provides multiple opportunities for public consultation throughout the assessment process, although it allows a much more generous time-frame for the public to comment during the assessment process than in other jurisdictions (review periods are five to seven weeks, instead

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<sup>493</sup> s. 8 *NRCBA*.

<sup>494</sup> s. 59(2) *Act*.

<sup>495</sup> <http://www.environment.gov.sk.ca/Default.aspx?DN=bbf84220-4419-4d3c-82b5-dd9eab42955f>

<sup>496</sup> ss. 13(a) and 13(b).

of the more typical 10-30 days). Ontario also allows “any person” to request that the Minister refer a project to the Environmental Review Tribunal for a hearing and decision.

Finally, the three territories each place a strong emphasis on the role of public participation in the assessment process, particularly from First Nations people. In each of Nunavut and N.W.T. public participation encouraged but generally not mandated at the preliminary screening stage.<sup>497</sup> By contrast, in the Yukon it is mandatory for the government to seek the views of any affected First Nation and any other First Nation or government that has indicated an interest in the development, even at the preliminary screening stages.<sup>498</sup> In N.W.T., when it is determined that an assessment is to be carried out on land belonging to a First Nation the tribunal must consult with that First Nation,<sup>499</sup> and may also consult with the public where the development may have an environmental impact.<sup>500</sup> In Nunavut, all steps taken by the review tribunal (including notice, dissemination of information, scheduling and location) should be taken with the goal of promoting public awareness and participation in hearings.<sup>501</sup>

### ***Intervenor funding***

Public consultation is unlikely to be full and fruitful unless provision is made for intervenor funding. However, in B.C., Ontario, Québec, New Brunswick, Nova Scotia, P.E.I. and Newfoundland & Labrador, the legislation and regulations do not provide intervenors or the public with funding.

Intervenors may receive funding in Alberta under the *NRCBA* (if “directly affected”), and in Manitoba and N.W.T.

Manitoba has particularly detailed regulations that require a proponent to provide funding for participants and establish a Participant Assistance Program for a public hearing which is of “significant public interest”.<sup>502</sup> Any members of the public or groups can apply for funding after notice is given, and a Participant Assistance Committee will make a recommendation on who should receiving funding and how much they should receive. The Regulation provides criteria to assess eligibility and also provides specific guidelines on what expenses can be covered.

There is also specific provision for costs to be awarded to intervenors in Alberta under the *NRCBA*.

### ***Independence***

The constitution and powers of the various committees, panels, commissions and tribunals tasked with reviews and hearings under EA processes also differ among jurisdictions. Their independence depends on whether they are an ad hoc panel or an independent Board.

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<sup>497</sup> For example, N.W.T.’s guidelines suggest that Aboriginal, municipal, territorial and federal governments can participate in the preliminary screening, as can communities and individuals: Mackenzie Valley Impact Review Board: Environmental Impact Assessment Overview, at 11.

<sup>498</sup> ss. 55(4) and s. 57(4).

<sup>499</sup> s. 127.1.

<sup>500</sup> s. 123.1(b).

<sup>501</sup> s. 12.2.27.

<sup>502</sup> s. 2(1) *Participant Assistance Regulation*.

Committees with limited advisory powers exist under some legislation, for example in P.E.I., a Technical Review Committee made up of various government officials provides advice, and may have members from outside organizations. In New Brunswick, the Minister may appoint a hearing panel; however, it has no decision making power or power to make a final recommendation but merely reports on public consultations.

In B.C., Newfoundland & Labrador and the Yukon, the Minister appoints a commission or EA panel on *ad hoc* basis if a hearing is required.

Permanent Boards exist by legislative requirement in Québec, Alberta and Ontario. In Québec, the Bureau is under control of Ministry; although it can host public consultations and provide observations, it is the Ministère de l'Environnement who makes the key recommendations. The Bureau members are paid appointees of the Minister.

In Alberta, the NRCB is an independent entity that reports to and makes recommendations to the Minister of Sustainable Development. It is composed of not more than six members, appointed by the Lieutenant Governor-in-Council, for a term of not more than 5 years.<sup>503</sup>

The Ontario Environmental Review Tribunal is a quasi-judicial body, and its process and decision-making proceed independently from the Ministry. The Tribunal is established by provincial legislation with members that are appointed by the Lieutenant Governor in Council and who not employees of the Ministry.

At the highest level of authority and independence are the permanent NIRB in Nunavut and the Yukon Environmental and Socio-Economic Assessment Board, composed of members appointed by different levels of government and communities. Each of these Boards may hold hearings and makes final recommendations to the Minister or relevant decision-maker.

Also of note are the provisions for joint hearing panels under the various federal-provincial Agreements for EA Cooperation, in which the panel members are appointed by both the province and the federal government on an *ad hoc* basis.<sup>504</sup>

### ***Class screening or other streamlining***

Only Ontario, Newfoundland & Labrador and B.C. appear to have legislation that deals with class-based EA. In B.C. and Newfoundland & Labrador, class EAs may be approved under the provinces' respective *Acts*, but do not appear to be in use.

The Ontario *Act* provides for 10 categories of class EAs covering municipal and provincial public sector activities such as highway construction and maintenance, certain transit projects, minor transmission facilities, remedial flood and erosion control projects, conservation and stewardship projects, forest management on provincial Crown lands in Ontario, and waterpower projects.<sup>505</sup>

The initial approval of a class EA follows a similar process to that of an individual EA with public consultation, Ministerial review and decision-making. Once a project falls within an

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<sup>503</sup> s. 13 *NRCBA*.

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<sup>505</sup> List of Class EA documents available online, Ontario Ministry of Environment <<http://www.ene.gov.on.ca/en/eaab/parent-class-ea-list.php>>.

approved class, it does not require further approval under the *Act* if the process set out in the class EA document is followed. The Minister may, however, bump up a class EA to an individual EA, and any person may request that the Minister make an order to that effect.

## 6. Decisions on process

There are a number of points when optional courses of action may be taken during the EA process. The identity of the decision maker, together with the extent of his or her discretion and any legislative direction given to him or her, differs among jurisdictions.

The most significant entry level point in the EA process is the decision to require an EIA report or comprehensive review after registration or screening has occurred. In Alberta, Manitoba, P.E.I. and Newfoundland & Labrador, this decision can be made by the departmental director. In B.C., a significant area of discretion also lies with the executive director who may make a decision to exclude a reviewable project if he/she is of the opinion that it will not have significant environmental effects, after taking into account mitigation measures.<sup>506</sup>

The Guide suggests that the test for waiving a reviewable project is strict and only for use in limited circumstances.

The Minister has the absolute discretion at this point in the process in New Brunswick, in Nova Scotia for Class 1 undertakings, and in P.E.I. In Alberta and Manitoba, the Minister may act if the Director has not.

In other jurisdictions, the Ministerial discretion is not absolute, and direction is provided by legislation. In Québec and Nova Scotia for Class 2 undertakings, once the EA process is triggered, an EIA statement or report must be prepared. However, the scope, form and content of the EIA statement may be determined at the discretion of the Minister or the director in Nova Scotia. In Newfoundland & Labrador, where the Minister determines that there may be significant negative environmental effects or there is significant public concern, he or she must require an EIS. Similarly, in N.W.T., when deciding to refer a proposed development to the Review Board for an EA, the body charged with screening a development must do so if in their opinion the development may have a significant adverse effect.

The decision to refer to a hearing panel (or commission) lies with the Minister in B.C., Saskatchewan, Manitoba, Ontario, Québec, P.E.I. and Newfoundland & Labrador. In Nunavut, the NIRB's decision to require a hearing or public correspondence is discretionary. The NIRB may select any process it deems appropriate.

However, as described above, in both Ontario and Québec, after delivery of a proponent's EIA, any person may request that the Minister refer the project to a public hearing. In both provinces, the Minister's ability to refuse this request is limited, in Ontario to situations that are frivolous or vexatious, where the Minister considers a hearing to be unnecessary, or that a hearing may cause undue delay.<sup>507</sup> In Québec, the Minister has less discretion and must allow a hearing if it is not frivolous.

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<sup>506</sup> s. 10 Act.

<sup>507</sup> s. 9.3(2) Act.

## **7. Basis for project assessment**

The analysis above has considered how each jurisdiction's legislation (the preamble, purpose section, definitions) provide a focus for the EA process. Examination of the scoping requirements, process options and decision making authority leads to a conclusion respecting the overall basis for assessment in each of the provinces and territories, as either:

- highly discretionary (that is a different approach may be required for each project);
- based on the significance of potential impacts as described in legislation and guidelines;  
or
- focused on sustainability.

We conclude that largely discretionary regimes exist in:

- British Columbia;
- Ontario;
- Québec;
- New Brunswick;
- Nova Scotia;
- P.E.I.; and
- Nunavut.

The significance of potential impacts is the overriding basis for assessment in:

- Alberta;
- Saskatchewan;
- Newfoundland & Labrador; and
- Yukon.

A mixed approach that considers the significance of potential impacts with a sustainability lens exists in:

- Manitoba; and
- N.W.T.

## **8. EA results and governmental decision making**

This section examines at what point the EA Process is complete and therefore enforceable. Whether the EA process has resulted in a report or a hearing, a recommendation may be made to the Minister by the department concerned or a panel or Board.

Legislation may provide the Minister with alternatives around the final decision to approve a project. This section examines whether the department or Board's recommendation is enforceable on its own, whether there is discretion in the Minister to accept or reject the recommendation, and what legislated limits exist with respect to that discretion. May the Minister consider matters outside of the report or recommendation in exercising that discretion, for example?

A further issue that is not addressed in this report is the implication of the EA process after approval of a project. After the decision to approve, and the expiry of any judicial review or appeal, a proponent will enter the next level of governmental decision-making involving industrial permitting, licensing, etc. Does legislation require that the results of the EA be reflected in that process? For example, a project approval frequently carries conditions. To what extent are they enforceable under the legislation going forward?

In two jurisdictions, the Director appears to have final discretion to complete the EA process and approve or reject a project: in Alberta after an EIA Report is completed, and in Manitoba on Class 1 and 2 developments. However, the Director must provide reasons if there is a refusal to approve in Manitoba.

The Minister makes the final decision in Manitoba for Class 3 development, and has full discretion to make the decision in BC, Saskatchewan, Nova Scotia, P.E.I., N.W.T. and Nunavut.

In Québec, New Brunswick and Newfoundland & Labrador, the final decision on an EA lies with the Lieutenant Governor in Council. The approval of the Lieutenant Governor in Council is also required to refuse to issue a license in Manitoba. And in Ontario, the Minister may vary a decision of the Environmental Review and substitute his/her opinion but only with approval of the Lieutenant Governor in Council.

Other decision makers are included in the North. In N.W.T., a development to be carried out on Tlicho lands can only be approved by the Tlicho government. In the Yukon, a range of 'decision-bodies'<sup>508</sup> exist depending on location and type of project.

When an activity is reviewed by a Board or Panel, the authority of the Board can vary. The Alberta Natural Resources Conservation Board has the final authority to grant or refuse an approval. (In practice, however, the NRCB plays a limited role in the EA process.) In all other jurisdictions it appears that the Minister may refuse to accept the decision.

In Manitoba, for example, the Director (or Minister for Class 3) is not required to adopt the recommendations of the Commission, but he/she must provide written reasons if the commission's recommendations are not adopted. The Ontario Environmental Review Tribunal decision is final unless the Minister varies it (with approval of the Lieutenant Governor in Council). In N.W.T., if the Minister does not agree with the Review Board's recommendations,

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he or she can send it back to the Review board for further consultation, or, if no agreement can be reached, order an Environmental Impact Review. The Minister can also reject the recommendations of the Report produced by the EI Panel, giving the Minister the final decision. In Nunavut, the NIRB issues a Project Certificate indicating any terms and conditions, however the Minister has discretion to accept or reject NIRB's recommendations, or may refer the report back for reconsideration of the terms and conditions.

In many instances, the legislation does not provide specific guidance or place conditions on the Minister's exercise of discretion. However, several jurisdictions do require the Minister to consider certain factors. In B.C., the Minister must consider the assessment report and recommendations from the EA Office or the commission, panel or other person. In Ontario, the Minister (and the Tribunal) are required to consider a variety of matters including the EA, the Ministry review of the EA, comments submitted on the EA and the Ministry's review of the EA. In Newfoundland & Labrador, the *Regulations* do not dictate when a Minister shall or shall not approve an undertaking; however, they suggest that the Minister should approve when there are no environmental or public concerns or the environmental effects of the undertaking will be mitigated.<sup>509</sup> In the Yukon, the decision body must consider the recommendation it receives and must give "full and fair consideration to scientific information, traditional knowledge and other information provided with the recommendation".

Legislation in B.C. and Ontario specifically allows the Minister the latitude to consider other matters he or she considers relevant to the public interest in making his or her decision. In Nunavut, the *Land Claims Agreement* provides that the Minister may consider the national and regional interest, the appropriateness of the terms and conditions, or whether NIRB failed to sufficiently deal with ecosystemic and socio-economic issues.

Other criteria for refusal or acceptance may be revealed in Guidelines. For example, both the B.C. and New Brunswick Guidelines suggest that approval will occur if the environmental issues identified can be managed or mitigated.

It is normal practice for the approval of a project to attach conditions, however not all jurisdictions have legislative authority for the addition of conditions. Alberta, Saskatchewan, Manitoba, Québec, Nova Scotia and P.E.I. legislation all provide broad authority for the Director or Minister to add conditions to an approval.

## **9. Role of Aboriginal communities**

Consideration of Aboriginal communities in the EA process varies among jurisdictions from no role, to provision of guidelines around potential involvement, to regulated obligations to list communities affected, to regulated or legislated obligations to actively seek input or involvement.

There is no role for Aboriginal communities mentioned in the legislation or guidelines of Alberta, Saskatchewan, Manitoba, P.E.I. or Newfoundland & Labrador (except, in the last, undertakings that take place on lands contained in the *Agreement-in-Principle Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Her Majesty the Queen in Right of Canada.*)

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<sup>509</sup> s. 23 *Regulations*.

Discretionary involvement occurs in B.C., where the *Act* lists first nations as a stakeholder that may be required to be consulted. In B.C., Ontario and New Brunswick there are no mandatory legislative requirements, however published guidelines provide suggestions on how to involve first nations in the EA process and require the proponent to list those that may be affected or interested. In Ontario, the Code is also clear that the Crown may have a duty to consult.

Legislated obligations to consider Aboriginal communities exist in Nova Scotia, Québec, the Yukon, Nunavut and N.W.T. In Nova Scotia, Aboriginal input is specifically mentioned in the *Regulations* at several different stages of the EA process and it is implied that input will be sought but there is no absolute requirement to seek comment.

In the northern jurisdictions of Québec, N.W.T., Nunavut and the Yukon, Aboriginal communities play a large role in the review and assessment of projects subject to the EA process. Each has a detailed process that ensures that first nations and Aboriginal communities are involved in management of the process through membership on Boards and Panels, incorporation of traditional knowledge and decision-making. All recognize either explicitly or implicitly that a central purpose of EA is to recognize the traditional economy and enhance the well being of these communities.

## **10. Right to appeal**

For the most part, Ministerial discretion is paramount in the EA process. The availability of a right to appeal a decision on an EA varies widely from silence (B.C., Alberta, Saskatchewan, New Brunswick, P.E.I., N.W.T., Nunavut and Yukon) to the provisions of the Manitoba legislation that provide routes for appeal at various points starting at the screening level and culminating with a right to appeal a Ministerial decision to the Lieutenant Governor in Council. Manitoba's *Act* has the most explicit appeal provisions.

In other jurisdictions, appeal and review is strictly controlled and the decisions of Minister and bureaucracy protected. In Nova Scotia, a right to appeal a decision of the Minister is explicitly disallowed. In Ontario, the *Act* does not provide a right to appeal a Minister's decision and expressly provides that a decision of the Environmental Review Tribunal is final and not subject to appeal. It also provides that a decision may only be set aside upon judicial review standard of review if it is unreasonable.

In some jurisdictions, there are rights to appeal to the Minister at various levels, but in some cases the right is limited to the proponent only. The Newfoundland & Labrador *Act* implies that the right is not limited to the proponent: it allows a person who is "aggrieved by a decision or order made under this Act, may appeal that decision or order to the minister".<sup>510</sup>

A specific right of Appeal to the Courts is only found in the Alberta *NRCBA*, which provides an appeal to the Court of Appeal on questions of jurisdiction or law.<sup>511</sup>

## **11. Mediation and ADR options**

A few jurisdictions provide for mediation or alternate dispute resolution, but the point at which this opportunity is available varies. There are also differences as to who can initiate mediation.

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<sup>510</sup> s. 107 *Act*.

<sup>511</sup> s. 31 (1)(2).

The decision to appoint a mediator is generally that of the Minister. However, in B.C. a mediator may be retained by the executive director (or a commission, hearing panel or other person) and their advice may be used in formulating a recommendation to the Minister on a project.<sup>512</sup> In Nova Scotia, the EA Board Regulations allow the EA Board or a Panel Chair to refer a matter to an ADR procedure.

In Nova Scotia, the Minister may refer the undertaking to alternate dispute resolution as early as registration of the project, after the focus report, or after an EA report. The Manitoba *Act* gives the Minister discretion to appoint an environmental mediator to resolve an environmental conflict but does not designate when during the EA process a Minister may do so.

The Ontario *Act* has the most extensive mediation provisions. Mediation may be used at any point during the process and can be initiated by the Minister, the Department, or requested by a proponent or participant. Timelines are provided and the cost is borne by the proponent.

Legislation in Alberta, Saskatchewan, Québec, New Brunswick, P.E.I., Newfoundland & Labrador, N.W.T., Nunavut and the Yukon does not provide for mediation.

## **12. Joint EA process**

An essential precursor to harmonization is the provision through policy-based or legislated opportunities for collaboration or consolidation with other processes.

The government of Canada has signed bilateral EA Cooperation Agreements under the *Canada-Wide Accord on Environmental Harmonization* with all provinces except New Brunswick, Nova Scotia and P.E.I. The Yukon is also a signatory to a bilateral agreement.

The Cooperation Agreements generally provide for a single assessment process under one lead, with shared information, the option of a joint panel and with both governments will still make their respective decisions on a project. The Parties may, or may not, have attempted to resolve obvious differences in processes between the federal and provincial jurisdictions. The Ontario *Agreement* is interesting in that it specifically deals with the mediation provisions of its *Act*. Ontario and Canada must notify each other if there is a proposed referral.

Detailed analysis of each of the bilateral arrangements was beyond the scope of this report. Therefore we do not have information on whether they are in parallel with respect to such issues as:

- the principles for carrying out cooperative EA;
- the roles and responsibilities of the parties;
- appointment of a project team;
- the development of project-specific schedules to make the cooperative assessment process more timely and efficient;

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<sup>512</sup> s. 22 *Act*.

- appointment of a single contact in each jurisdiction to coordinate consultation, to resolve process issues, and to ensure parties meet established timelines; and
- coordination of timing of the announcements on the proposed projects.

Only a few provinces (Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland & Labrador) have legislation that speaks to the possibility of a joint EA process, let alone the need to harmonize. In Ontario, the *Act* gives the Minister the authority to dispense with any requirement of the *Act* in order to facilitate the requirements of both jurisdictions.<sup>513</sup> In recognition of the need to harmonize upwards, the Manitoba *Act* requires that certain EA components, mostly to do with public accessibility, must remain the same.

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<sup>513</sup> s. 3.1 *Act*.

## **VII Available response options**

Inter-jurisdictional coordination of EA regimes cannot be simple when the fundamental characteristics of the regimes differ greatly. As has been demonstrated above, the current differences among federal and provincial, territorial and Aboriginal EA regimes in Canada are indeed profound. They include wide divergence on basic matters of application, substance of scope and purpose, and timing that must inevitably frustrate hopes for reasonable consistency of expectations and efficiency of process, however agreeable and well intentioned the participating authorities may be. That is not to say that no improvements are possible in the absence of major changes in law and administration to increase the compatibility of the existing regimes. But cooperative measures alone have limited potential.

It is also evident that EA regime differences in Canada cover a wide range of EA design elements and that each regime has its own peculiar strengths and deficiencies. The review above does not reveal one regime to be an ideal model to which the others might aspire. And all of them are weak in some areas – including effective attention to cumulative effects and efficient linking of strategic and project level application – with broadly recognized potential for improving the effectiveness and efficiency of assessment effort.

It follows that adequate responses to the current challenges of inter-jurisdictional EA coordination in Canada are likely to involve both immediate, ameliorative steps to strengthen cooperative application of existing requirements and more ambitious, longer term initiatives for revision and upward harmonization of the regimes.

Proper identification and assessment of the response options here should be based on a comprehensive understanding of the major, systemic areas wherein EA regimes could and should be more effective and efficient. This should be complemented by attention to matters on the periphery of EA, including the relations between EA and broader sustainability objective setting and strategy development, and relations between EA and more specific regulatory permitting. The review presented here is just a beginning and tells only part of the story. However, it is possible now to sketch out the main general response categories and to consider the implications of the regime differences identified above.

### **Option 1: Take no action**

As in EA generally, the null option merits consideration. For inter-jurisdictional EA, that would involve refraining from any further action on EA coordination at this time. Possibly the grounds for this position are as follows:

- other EA deficiencies should be addressed first because they are more significant and in some cases (e.g., strengthening of strategic and cumulative effects assessment) would make a more positive contribution to efficiency gains than would coordination efforts;
- the actual inefficiencies to be addressed by coordination efforts are not yet well documented; and
- many of the recent calls for EA coordination seem to be aimed at lowering EA standards rather than addressing inefficiencies; consequently action now is more likely to lead to a weakening of EA than to significant strengthening through efficiencies.

The null option may, however, be unrealistic. Most if not all stakeholders in inter-jurisdictional EA have expressed dissatisfaction with the current situation, and although the critics have proposed highly divergent solutions (from elimination of EA requirements to consolidation into a single powerful regime), the need and pressures for improvements are significant. If the leading proponents are unlikely to be dissuaded from further initiatives in the area, the null option is less attractive than options that give serious attention to the main EA process inefficiencies and quality deficiencies and find ways of addressing both.

### **Option 2: Deferral of EA responsibilities from one level of government to another**

Deferral of EA responsibilities from one level of government to another has been attractive to some stakeholders who have focused on inefficiencies arising from process overlap and different process timing problems. Most proposals are for federal deferral to provincial processes, though typically with federal retention of its current decision making responsibilities. Deferral options have been judged problematic because federal and provincial constitutional authority differs (though it also overlaps, including on environmental matters) and these differences extend to differences in mandates and expertise (Kwasniak, 2009). This leads to doubts about the potential adequacy of provincial attention to matters of federal responsibility.

The significant differences among federal and provincial regimes raise further problems because, as documented above, on many important matters the federal and provincial regimes are not equivalent. Moreover, without federal regime application to provide some basic consistency, extensive deferral to provincial EA regimes would worsen the inconsistency of EA requirements and performance across the country.

### **Option 3: Enhanced cooperation through joint process application**

Cooperation between and among administrators of the various EA regimes has been the main approach to inter-jurisdictional EA coordination in Canada. Such cooperation can be informal or entrenched in official federal-provincial EA cooperation agreements and can apply to many EA process elements:

- joint hearings, based on federal, Aboriginal, provincial and or territorial authorities, can work well but the option applies only to the tiny minority of cases that go to hearings; moreover these are often initiated too late in the development of a proposed undertaking to ensure adequate influence on early decision making on purposes and alternatives;
- joint assessments in cases not involving hearings are also possible and already done under formal and informal relations, but they do not easily overcome the significant discrepancies between and among current EA regimes and may not address the associated confusion of regulatory requirements; and
- collaboration among EA administrators, reviewers and other players in two or more jurisdictions has been pursued for many years. No doubt plenty of opportunities for improvement remain, though here too the basic differences among EA regime requirements and timing can limit the effectiveness and efficiency of the results.

The established mechanism in Canada for joint process coordination is the negotiation of bilateral federal-provincial agreements. In an earlier review of inter-jurisdictional EA enhancement

options in Canada, Fitzpatrick & Sinclair (2009) have argued for expanded and enhanced use of the established mechanism of bilateral federal–provincial agreements. They note, however, that these agreements need to be more carefully specified to address the significant differences among the provincial EA regimes, clearer about each jurisdiction’s responsibilities, and developed through open processes with much more effective public engagement.

For immediate improvements in inter-jurisdictional EA, coordination may be the most promising means of reducing duplications and facilitating common understanding of requirements. By itself, however, it cannot overcome the problems of regime difference.

#### **Option 4: Pilot collaborations in emerging areas**

As noted above, some of the most significant needs and opportunities for enhancing EA effectiveness and efficiency lie in areas not currently address well in any Canadian EA regime. One of these is assessment of strategic level undertakings (policies, plans and programmes, etc.). Strategic EA, which is now a focus of EA attention internationally, has a long but *ad hoc* and erratic history in Canada. Its demonstrated potential includes much more effective consideration of cumulative effects and assessment of broad alternatives, as well as significant efficiency gains from clear and authoritative guidance for project level planning and assessment.

Because strategic EA will often involve overlapping authority, inter-jurisdictional coordination will be crucial. This should be a key factor in the current early stages of process design. An attractive means of fostering such coordination is pilot collaborations on strategic EA cases involving federal, Aboriginal, provincial and/or territorial authorities. Such pilot cases could test and demonstrate upward harmonization of assessment practice in a realm where the proponents would typically be the governments and government agencies that are main collaborating authorities.

Strategic EA is not the only possible venue for such pilot collaborations. Arguably, there is still plenty of room for such initiatives at the project level. Indeed, these could be used to test a variety of new approaches to inter-jurisdictional coordination that would test and demonstrate ways of integrating application of two or more current regimes for assessment at the project level. In some cases this could be linked to collaborative strategic assessment initiatives. More generally, such pilots should focus on upward harmonization – ways of strengthening both the efficiency and effectiveness of EA by combining the best aspects of the coordinated regimes and integrating emerging best practice in, for example: integrated attention to social and ecological systems; proper attention to Aboriginal rights and interests; and application of the positive contribution to sustainability test rather than mere mitigation of significant adverse effects.

#### **Option 5: Targeted regime change**

Some of the most frequent and significant grievances about EA regime conflicts and inefficiencies centre on particular elements of EA law and process design that could be repaired without comprehensive change of entire regimes.

One example is the longstanding problem of late assessment triggering under the federal law list. The purposes of *CEAA* anticipate that federal EA requirements will be recognized and applied from the outset of project conception, selection and planning. For projects of federal agencies, on federal lands and with federal money, such early triggering should be automatic. Under the law

list, however, assessments may be triggered very late in project planning, at the point when specific permits are sought. This is generally incompatible with good EA. In inter-jurisdictional cases it also adds to inefficiencies and frustrations because the federal EA requirements are defined and applied after the provincial requirements have been defined and, sometimes, met. Late triggering under the law list would probably be largely avoidable under the present law if the relevant responsible authorities had the necessary motivations and resources. Failing that, it should be possible to make a targeted revision of the law to ensure early application of federal EA requirements to the projects of concern.

### **Option 6: Establishment of the federal EA regime as the Canadian standard**

The Canadian Parliament's Standing Committee on Environment and Sustainable Development is expected to undertake the mandatory seven year review of the *CEAA* and the associated federal EA regime in 2010. If the current Committee members attend to the recommendations of the Committee's five year review reports (SCESD, 2003a and 2003b), the new review will address not only the strengths and limitations of the current project-centred Act, but also the evident need for improvement of strategic level EA performance at the federal level. Matters of inter-jurisdictional application and coordination are likely to be among the key issues raised. These proceedings do not represent the only opening for deliberations on revision of the federal EA regime. However, the seven year review is a suitable moment for consideration of whether and how revision of the Canadian EA Act could set a consistently high standard of federal EA, including strategic level assessment that would provide a suitable benchmark for EA practice in Canada.

Establishing the federal regime as a best practice Canadian standard should eliminate many of the complaints attributable to poor federal EA design (e.g., the late triggering problem noted above) and reduce many of the contributing causes of EA process inefficiency (including lack of strategic guidance, ineffective treatment of cumulative effects, inconsistent inclusion of socio-economic considerations, limited application of sustainability objectives, etc.). This initiative could then be combined with efforts to collaborate with other jurisdictions that harmonize their laws and processes with the new higher standard to ensure regime equivalency and facilitate process coordination.

Integration of inter-jurisdictional coordination and harmonization issues into the suite of matters to be addressed in the seven year review would seem to be a reasonable way of setting these issues in an appropriate larger context and introducing greater prospects for open discussion.

### **Option 7: Development of a Canadian EA standard**

In the 1990s, the Canadian Standards Association devoted some years to a multi-stakeholder initiative that aimed to produce a Canadian EA "standard". The objective was not a standard in the sense of a set of mandatory obligations but a best practices guideline that would serve as a foundation for upward harmonization of federal, provincial and territorial EA laws and processes. The work proceeded through 14 drafts, reflecting admirably broad agreement considering the diversity of represented interests; but in the end the provincial representatives withdrew, citing needs to devote their energies to the then upcoming five year review of the *CEAA*. Whether a renewed "standard" setting initiative today would be more successful is an open question. Also debatable is whether having a best practices guide in place would substantially enhance prospects for major upward harmonization of the many existing regimes. Certainly a best practices guide

would not be enough by itself. It would not address, much less eliminate, all EA coordination problems (or the associated regulatory ones), but some form of collaborative effort to design an upwards harmonization target would likely be a useful long term contribution.

## VIII Conclusions

Improving inter-jurisdictional EA coordination in Canada is an important objective and a major challenge. It is an important objective because of the potential and the reality of inefficient and inadequately effective EA, not just where two or more regimes' requirements apply but also where none of the relevant regimes ensures timely and beneficial EA.

It is challenging because of the major difficulties that arise from the number and diversity of EA regimes in Canada. The review of EA regime differences provided here establishes clearly that the regimes differ in all the key areas of EA design, that the differences are profound, and that no regime stands as an ideal model that the others might emulate. For example:

- there is divergence in the declared purpose and goals of legislation, with the *Acts* of four provinces containing no preamble or purpose section at all;
- there is no common definition of “environment” that encompasses social, economic and cultural as well as biophysical factors and their inter-relations;
- sustainability or sustainable development is referred to in the legislation of only three provinces and, by inference, the territories. Only one of the provinces explicitly applies a sustainability test to the EA process;
- in mandating the EA “trigger”, four of the provinces and territories describe the general characteristics of projects that are required go through the EA process; the rest provide a mandatory list;
- legislation uses a variety of terms to describe what it is that must be assessed: a project, undertaking, activity, operation or development. Only a few jurisdictions specifically state that an alteration, modification or expansion is included;
- a number of provinces provide little or no legislative direction around project scope;
- in considering the scope of assessment, three provinces and the three territories provide a mandated list of matters to be considered, including potential positive and negative environmental, social, economic and cultural impacts of the proposed activity. On the other hand, the EA *Acts* of seven provinces do not provide any such list;
- alternatives to the project as a whole, cumulative effects and regional impacts are not addressed by most jurisdictions;
- strategic EA is generally given little or no attention in provincial EA legislation;
- there is great discrepancy between jurisdictions with respect to the availability, timing, scope, duration and form of public consultation during the assessment process;
- meaningful public engagement is limited by the lack of mandated intervenor funding in seven jurisdictions;

- the constitution and powers of the various committees, panels, commissions and tribunals tasked with reviews and hearings under EA processes differ among jurisdictions depending in part on whether they are constituted as an *ad hoc* panel or an independent Board; and
- on the whole, based on the EA decision making route, one can characterize the requirements in seven jurisdictions as highly discretionary.

While some improvements in inter-jurisdictional coordination may be achieved through pursuit of additional cooperation within the frameworks of the current laws and processes, the wide divergence among EA regimes will continue to limit coordination success.

Several more and less ambitious options are available for reducing the disparities among EA regimes in Canada thereby facilitating coordination, some of which are mutually complementary. Whichever options are applied, the end goal is to foster upwards harmonization that strengthens overall EA effectiveness and efficiency in Canada. While the Standing Committee on Environment and Sustainable Development undertakes the mandatory seven year review of the *CEAA* in 2010, it has an opportunity to take a strong lead by insisting that the federal regime set a high standard for EA and provide a benchmark for EA practice throughout Canada.

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## Appendix 1 List of Provincial and Territorial Legislation and Documents

### British Columbia

- *Environmental Assessment Act, S.B.C. 2002, c. 43*
  - § *Reviewable Projects Regulation, B.C. Reg. 370/2002*
  - § *Prescribed Time Limits Regulation, B.C. Reg. 372/2002*
  - § *Public Consultation Policy Regulation, B.C. Reg. 373/2002*
- *Canada–British Columbia Agreement for Environmental Assessment Cooperation, 2004*
- British Columbia Ministry of Environment: “Summary Guide to the British Columbia EA Process”
- British Columbia Ministry of Environment: “Application Information Requirements Template”

### Alberta

- *Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12*
  - § *EPEA “Codes of Practice”*
  - § *Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta. Reg. 111/1993*
  - § *Environmental Assessment Regulation, Alta. Reg. 112/1993*
- *Natural Resources Conservation Board Act, R.S.A. 2000, c. N-3*
- *Energy Resources Conservation Act, R.S.A. 2000, c. E-10*
- *Canada-Alberta Agreement for Environmental Assessment Cooperation*
- Alberta Environment: “Environmental Assessment Program: Alberta’s Environmental Assessment Process”

### Saskatchewan

- *Environmental Assessment Act, 1980, S.S. 1979-80, c. E-10.1*
- *Environmental Management and Protection Act, 2002, S.S. 2002, c. E-10.21*
- *Canada-Saskatchewan Agreement on Environmental Assessment Cooperation*
- Saskatchewan Environment: “A Guide to the Environmental Assessment Process”

### Manitoba

- *Environment Act, C.C.S.M. c. E125*
  - § *Classes of Development Regulation, Man. Reg. 164/88*
  - § *Licensing Procedures Regulation, Man. Reg. 163/88*
  - § *Participant Assistance Regulation, Man. Reg. 125/91*
  - § *Joint Environmental Assessment Regulation, Man. Reg. 126/91*
- *Canada - Manitoba Agreement on Environmental Assessment Cooperation*
- Manitoba Conservation: “Information Bulletin – Environmental Assessment and Licensing under The Environment Act”

### Ontario

- *Environmental Assessment Act, R.S.O. 1990, c. E.18*
  - § *General, R.R.O. 1990, Reg. 334*
  - § *Deadlines, O. Reg. 616/98*
  - § *Electricity Projects, O. Reg. 116/01*
  - § *Waste Management Projects, O. Reg. 101/07*

- *Canada-Ontario Agreement on Environmental Assessment Cooperation*
- Ontario Ministry of the Environment: “Code of Practice: Preparing and Reviewing Environmental Assessments in Ontario”
- Ontario Ministry of the Environment: “Environmental Assessment Review and Approval Process”

### **Québec**

- *Environment Quality Act , R.S.Q., c. Q-2*
  - § *Chapter I, Division IV.1 relates to EIAs in Southern Québec;*
  - § *Chapter II, ss. 153-167 relate to EIAs in the James Bay region; and*
  - § *Chapter II, ss.187-204 relate to EIAs north of the 55th parallel (Northern Québec)*
  - § *Regulation respecting Environmental Impact Assessment and Review, R.Q. c. Q-2, r. 9*
- *Canada-Québec Agreement on Environmental Assessment Cooperation*
- Ministère Développement durable, Environnement et Parcs du Québec: “Overview: Environmental Assessment in Southern Québec”
- Ministère Développement durable, Environnement et Parcs du Québec: “Environmental Assessment of Northern Projects”

### **New Brunswick**

- *Clean Environment Act, R.S.N.B. 1973, c. C-6*
  - § *Environmental Impact Assessment Regulation, N.B. Reg. 87-83*
- New Brunswick Department of Environment: “A Guide to Environmental Impact Assessments in New Brunswick”
- New Brunswick Department of Environment and Local Government: “Environmental Impact Assessment in New Brunswick”

### **Nova Scotia**

- *Environment Act, S.N.S. 1994-95, c. 1*
  - § *Environmental Assessment Regulations, N.S. Reg. 26/95*
  - § *Nova Scotia Environmental Assessment Board Regulations, N.S. Reg. 27/95*
- Nova Scotia Department of Environment: “Amendments to Nova Scotia’s Environmental Assessment Regulations (a summary)”
- Nova Scotia Department of Environment: “Nova Scotia Regulatory Time Frames for Environmental Assessment”
- Nova Scotia Department of Environment: “Developments Requiring Environmental Assessment”

### **Prince Edward Island**

- *Environmental Protection Act, R.S.P.E.I. 1988, c. E-9*
- Prince Edward Island Department of Environment, Energy and Forestry: “Environmental Impact Assessment Guidelines”

## **Newfoundland & Labrador**

- *Environmental Protection Act, S.N.L. 2002, c.E-14.2 (Part X)*
  - § *Environmental Assessment Regulations, 2003, N.L.R. 54/03*
- *Draft Canada–Newfoundland and Labrador Agreement on Environmental Assessment Cooperation*
- Newfoundland and Labrador Department of Environment and Conservation: “Environmental Assessment: A Guide to the Process”

## **Yukon**

- *Yukon Environmental and Socio-Economic Assessment Act, S.C. 2003, c.7*
  - § *Assessable Activities, Exceptions and Executive Committee Projects Regulations, SOR/2005-379*
  - § *Decision Body Time Periods and Consultation Regulations, SOR/2005-380*
- *Canada-Yukon Agreement on Environmental Assessment Cooperation*
- Yukon Environmental and Socio-economic Assessment Board: “Guide to Socio-Economic Effects Assessments”
- Yukon Environmental and Socio-economic Assessment Board: “Proponent’s Guide to Project Proposal Submission to a Designated Office”
- Yukon Environmental and Socio-economic Assessment Board: “Guide to Interested Persons and the Public to Participate in Assessments”

## **Northwest Territories**

- *Environmental Rights Act, R.S.N.W.T. 1988, c. 8*
- *Environmental Protection Act, R.S.N.W.T., 1988, c. E-7*
- *Mackenzie Valley Resource Management Act, S.C. 1998, c. 25*
  - § *Exemption List Regulations, SOR/99-13*
  - § *Preliminary Screening Requirement Regulations, SOR/99-12*
- Mackenzie Valley Environmental Impact Review Board: “Environmental Impact Assessment Guidelines” (Guidelines)
- Mackenzie Valley Environmental Impact Review Board: “Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment”
- Mackenzie Valley Environmental Impact Review Board: “Socio-Economic Impact Assessment Guidelines”

## **Nunavut**

- *Agreement Between the Inuit and the Nunavut Settlement Area and her Majesty the Queen in Right of Canada (Land Claims Agreement) (Article 12: Development Impact)*
- Guide 1-The to the Nunavut Impact Review Board
- Guide 2-Terminology and Definitions
- Guide 3- Filing Project Proposals and Screening Process
- Guide 4-Project Proposals Exempt From Screening
- Guide 5-The NIRB Review Process
- Guide 6a-Public Participation and Awareness Programs
- Guide 6b-A Proponents Guide to Conducting Public Consultation for the NIRB Environmental Assessment Process
- Guide 7-the Preparation of Environmental Impact Statements
- Guide 8-Project Monitoring

