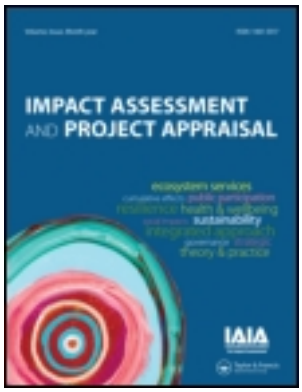

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In full retreat: the Canadian government's new environmental assessment law undoes decades of progress

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In full retreat: the Canadian government's new environmental assessment law undoes decades of progress

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The Canadian Environmental Assessment Act 2012, which came into force on 6 July 2012, virtually eliminates the core of federal-level environmental assessment in Canada. Under the new law, federal environmental assessments will be few, fragmentary, inconsistent and late. Key decision-making will be discretionary and consequently unpredictable. Much of it will be cloaked in secrecy. The residual potential for effective, efficient and fair assessments will depend heavily on requirements under other federal legislation and on the uneven diversity of provincial, territorial and Aboriginal assessment processes. This paper reviews the key characteristics of the new law in light of 10 basic design principles for environmental assessment processes, and considers the broader international implications of the Canadian retreat from application of these principles.

Keywords: environmental assessment; environmental law; Canada; design principles; federal states; substitution

Introduction

Over the more than 40 years since the first environmental assessment laws and processes were introduced, there have been reversals as well as advances around the world. Until recently, the dominant record has been one of gradually expanded application, scope, openness, understanding and ambition. Indeed, for some time it appeared that environmental assessment, like other areas of environmental law and policy, was firmly on a path to ever greater capability and influence. From the outset, however, assessment obligations were consistently resisted – by authorities opposing new obligations and scrutiny as well as by proponents fearing new costs, approval delays and potential rejections. In the realms of theory and professional practice, and in most jurisdictions, advances continue. Better attention to cumulative effects, precautionary needs, public engagement, strategic undertakings and sustainability objectives, for example, is now widely reported as well as advocated in the literature (e.g. *Impact Assessment and Project Appraisal*, 30 (1), 2012 special issue on the state of the art of impact assessment). However, pressures for retrenchment have also grown. In many jurisdictions, especially in times of economic uncertainty, responses to evident inefficiencies in assessment practice have been combined with moves to exempt more undertakings, narrow considerations and constrain participation (Bond and Pope 2012). In this international context, the Canadian government's new environmental assessment legislation stands as a particularly extreme example of regressive changes with important lessons for participants in law reform initiatives elsewhere.

The Canadian Environmental Assessment Act 2012 (CEAA 2012), which came into force on 6 July 2012, eliminates most federal government involvement in environmental assessments and sharply curtails the scope and potential effectiveness of what remains. Some assessment obligations are or will be deferred to provincial and territorial processes and some assessment-like federal review requirements continue under other legislation. However. application of the new assessment law is expected to cut the number of federally led assessments from several thousand to at most a few hundred annually. It will also narrow the scope of the assessments that are done. Lower-level assessments of relatively modest undertakings, which made up well over 90% of assessments under the old Act, will end. Those projects to which the new law still applies are all to be screened to determine whether and what assessment review requirements will be imposed. Only those judged by the government to have potentially significant environmental effects on matters of direct federal responsibility will be subject to assessment and only those limited matters will need to be addressed. Because the application and scope decision will come after a detailed project proposal has been submitted, any resulting assessment will be ill-timed to influence project planning. As well, the new law increases reliance on ministerial discretion in process decisions, a change likely to increase the role of political lobbying and to reduce process predictability. In sum, requirements under CEAA 2012 are to be few, uncertain, late and typically too narrowly scoped to qualify as environmental assessment.

The old Canadian Environmental Assessment Act (CEAA), which applied from 1995 to 2012, was certainly flawed. Despite minor amendments and adjustments over the years, it suffered from a variety of design limitations, including unwieldy and sometimes late triggering, an exclusive focus on projects (neglecting strategic-level undertakings), a confusing and incomplete approach to the scope of 'environmental' considerations to be addressed, merely discretionary requirements to examine purposes and alternatives, and ineffective mechanisms for ensuring adequate follow-up monitoring and enforcement.

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CEAA also faced significant implementation difficulties that undermined efficiency, effectiveness and credibility. Some of these difficulties arose from reluctant participation by federal authorities that were subject to assessment requirements or called upon to be assessment reviewers. Other implementation problems were rooted in the ill-defined and overlapping assignment of federal and provincial constitutional responsibilities for environmentally related concerns, and the need for federal assessment to fit with a plethora of other assessment processes – provincial, territorial and Aboriginal – no two of which are the same (Carver *et al.* 2010). In reviews of the old law, commentators variously proposed expanded application, scope and ambition and more efficient application through enhanced internal commitment and interjurisdictional harmonization (Gibson 2001, Standing Committee on Environment and Sustainable Development 2003, External Advisory Committee on Smart Regulation 2004, Doern 2007, Commissioner of the Environment and Sustainable Development 2009). Arguably, reforms were needed in all of these areas.

The strengths of the original CEAA were nonetheless considerable. It covered most projects of potential environmental concern within the federal ambit, provided clearly defined streams for major and minor undertakings, included imperfect but creditable opportunities for public engagement, required attention to cumulative effects, and could be used to ensure a comprehensive and sustainability-based approach. The federal government had negotiated agreements with several provinces providing for collaborative and joint assessments where both regimes applied. In addition, adjustments to the statute, regulations and policies had been made through largely open consultative processes, including a careful five-year review by the House of Commons Standing Committee on Environment and Sustainable Development and regular meetings with a multistakeholder Regulatory Advisory Committee.

This paper reviews the key characteristics of the new law in light of standard best practice design principles, and considers the broader implications. While CEAA 2012 does not represent the first weakening of environmental assessment law in Canada or elsewhere, the retreat in this case is particularly comprehensive and dramatic. Moreover, the factors involved are common to many other jurisdictions, especially federal nations or other contexts where assessment requirements of some sort are applied by different levels of government. At the same time, the need for effective environmental assessment, indeed the need for a new generation of considerably more ambitious assessment regimes, is apparent and growing. It is therefore important for the environmental assessment community to see what can be learned about the nature and drivers of this case and to consider appropriate responses to them.

The arrival of the new law

CEAA 2012 was introduced as part of an April 2012 omnibus budget implementation bill (Canada House of Commons 2012) along with many other controversial components, and was pushed quickly through the legislative process by a determined majority government. In contrast to the open deliberations leading to the original Canadian Environmental Assessment Act, CEAA 2012 was preceded by no preliminary proposals and no public consultations. Instead, in the years and months leading up to the tabling of the budget bill with CEAA 2012, the government had stopped meeting with its Regulatory Advisory Committee, used earlier omnibus budget bills (a device to limit parliamentary scrutiny of particular details) twice for initial incremental reductions of federal assessment requirements, and truncated the statutory Parliamentary review of the old law's implementation. Nonetheless, the general character of the new law was no great surprise. Indeed, the changes followed quite closely the contents of an internal briefing presentation from January 2009 (Canadian Environmental Assessment Agency 2009).[1] The presentation, leaked to a public interest group, outlined an agenda of narrowing the scope, number and duration of federal assessments, relying more heavily on provincial assessment processes and moving quickly to legislative drafting.

Government advocates of the new law presented it as a means of ensuring more timely assessments focused properly on the most significant projects. Natural Resources Minister Joe Oliver, defending the bill in the House of Commons on 2 May 2012, said, 'Mr. Speaker, the whole point of this exercise is to ensure that we have a robust environmental review of major projects' (Oliver 2012). The explicit thrust of both the assessment law changes and the overall budget bill, however, was facilitation of economic growth through more rapid resource exploitation (Canada Economic Action Plan 2012). The budget bill's assigned title was the Jobs, Growth and Long-term Prosperity Act, and in addition to the weakening of environmental assessment in CEAA 2012, the act included legislated changes to narrow and soften protection of fish habitats,[2] eliminated the National Round Table on the Economy and the Environment, loosened controls on ocean dumping, relaxed obligations to protect endangered species habitats and repealed requirements to report on climate change initiatives (Canada Economic Action Plan 2012, Canada House of Commons 2012).

In the course of debates surrounding the bill, in Parliament and beyond, the government emphasized its commitment to removing barriers to economically desirable ventures. Particular attention was paid to a proposed major pipeline, the Enbridge Northern Gateway project, designed to move bitumen from the deposits in Alberta (called oilsands by supporters and tarsands by detractors) to a Pacific coast inlet for export to Asian markets. The project, which was working its contested way through a formal federal–provincial assessment review, became a symbol of the larger contest, framed as economy vs environment, and accompanied by unusually florid and divisive political rhetoric. Opposition efforts to extend Parliamentary scrutiny and amend the legislation did little more than draw public attention to the issues. The government was unmoved. Debate was limited and the opposition's amendments were rejected. The bill passed quickly through the House of Commons and the Senate

and the new assessment law was proclaimed in force even though the key implementing regulations had not yet been published.

Government representatives excused the briskness of the process as a response to the urgency for repairs to a problematic process that was slowing project approvals. However, the legislation was initially to have been brought forth in spring 2009, according to the leaked January 2009 briefing document, and the government had repeatedly delayed the statutory review of the old law, which would have provided a more timely as well as conventional initiation of law reform. The more plausible explanation for pushing the legislation quickly through Parliament is that the government knew its agenda of weakening assessment law and other environmental provisions was controversial, waited until it had a governing majority (achieved in 2011) and used the omnibus budget bill, in the context of economic worries arising from global financial system turmoil, as the legislative vehicle offering the fewest openings for effective opposition (Doelle 2012).

Just how the new law will be applied and with what effects remains to be seen. Some key details have not yet been clarified in finalized regulations,[3] and the legislated openings for discretionary decision-making entail implementation uncertainties. The contents of the statute itself, however, provide a reasonably clear picture of the key process design principles, components and approach.

Key characteristics of the new process

The following summary does not attempt to compare in detail the provisions of CEAA 2012 and those of the law it replaces. For that analysis, see Doelle (2012). Instead, the objective is to present the key characteristics of the regime established under the new law with attention both to whether the changes strengthen or weaken the assessment regime and to the extent to which they meet the core process design requirements for effective, efficient and fair assessment. The discussion is organized into 10 sections that reflect the main design criteria for reasonably advanced environmental assessment, summarized in Table 1. These criteria integrate considerations from several sources (Sadler 1996, Working Group of the EIA Technical Committee 1999, Senécal *et al.* 1999, Lawrence 2003, Wood 2003, Gibson *et al.* 2005, Noble 2006, Macintosh 2010, Morrison-Saunders 2011, West Coast Environmental Law *et al.* 2012) with special attention to the particulars of the Canadian context, including the challenges of shared environmental jurisdiction also faced in other federal states, the EU and linked donor agencies and receiving nations.

Table 1. Basic environmental assessment process design principles.

The process must be designed to:
(1) apply to all potentially significant undertakings;
(2) ensure effectively integrated attention to biophysical, social and economic considerations;
(3) begin at the outset of deliberations on anticipated initiatives so as to inform decisions on purposes and alternatives as well as project selection and design;
(4) establish clear requirements and predictable process expectations;
(5) focus attention on the most significant undertakings, effects and opportunities for protection and enhancement;
(6) facilitate open public engagement and learning;
(7) aim for selection of most desirable options for enhancement of benefits as well as avoidance or mitigation of adverse effects;
(8) improve decision-making consistency, impartiality, transparency and accountability;
(9) integrate well with other objectives and processes;
(10) provide authoritative means of enforcing requirements and ensuring monitoring and adjustment.

Application to all potentially significant undertakings

The government's core statement about the application of CEAA 2012 is that the changes are meant to 'focus assessments on the major projects that have a greater potential for significant adverse environmental effects' (Canada Economic Action Plan 2012). This is accomplished under the new law chiefly by exempting from assessment most projects that were automatically covered under the old Act. Under the original CEAA, the application rule was generally 'all in unless exempted out' – all projects involving federal initiative, or federal lands or funding, or requiring permits under listed laws were covered. Of these, the vast majority (approaching 99%) were subject to minimally demanding self-assessment requirements that at least ensured some attention to environmental considerations and were tracked in a way that allowed for public scrutiny. The CEAA 2012 approach is 'all out unless specifically included' – only undertakings covered in the new project list regulation or specially designated by the Minister of Environment are potentially subject to assessment. The result cuts the number of active assessments from about 3000 in April 2010 to 70 in the first month of CEAA 2012 (Walton 2012). Because the latter number includes mostly transitional cases, it is probably misleadingly high.

While much attention has been focused on implications for private sector resource projects, a major effect of the new law, especially the end of the old low-level assessments, is to exempt almost all of the federal government's own projects from any environmental assessment. For the many projects now exempted from assessment, CEAA 2012 includes no provisions for generic environmental guidance for categories of small projects, and no mechanisms for considering the cumulative effects of multiple small undertakings.

The project list regulation (Canadian Environmental Assessment Agency 2012b), developed without public consultation and released after the new law was passed, sets out reasonably comprehensive categories of projects that are potentially covered by the Act, but establishes high thresholds for inclusion of particular undertakings. Commentators have noted, for example, that while large new open-pit bitumen extraction operations are covered, *in-situ* (steam-assisted below-surface extraction) operations, which have much higher greenhouse gas emissions, are not (Plecash 2012).

Moreover, listed projects are not necessarily to be assessed. Instead, each is to be screened (Canada 2012, ss. 8–12) and may be exempted from assessment if the Agency concludes that the project, with promised mitigation actions, is not likely to cause adverse environmental effects on specified matters of federal concern (Canada 2012, s. 10). Given the small opening for the Agency or public commentators to perform detailed evaluation of submitted project information in the period allowed (45 days or less overall; 20 days for public comments), and the likelihood of proponent insistence that mitigation efforts will eliminate all possibly significant adverse effects on the matters covered, it is reasonable to anticipate that many listed projects will be screened out of assessment, although that remains to be seen.

The projects that are to be assessed will not necessarily face any federal process, however. CEAA 2012 (ss. 32–37) provides for process substitution – delegation of federal assessment requirements to provincial processes, where these are judged to be adequate for the now very narrow federal purposes. Promotion of the new law has emphasized commitment to ensuring that, where both federal and provincial processes apply, only one process is to be used, but the federal government has not yet indicated which provincial processes it considers sufficient. The law sets out a list of process expectations, including public participation opportunities, to be met (Canada 2012, s. 34); however, the federal focus is limited to a narrow range of direct federal mandate concerns (see point 2, below). Because the fundamental characteristics of the provincial processes – e.g. the scope of 'environmental' factors and whether alternatives to the proposed project must be assessed – vary widely (Carver *et al.* 2010), there will be significant differences in the extent to which the substituted provincial processes can deliver comprehensive assessments integrating the immediate federal concerns.

Finally, like its predecessor, CEAA 2012 is focused on projects to the exclusion of strategic level assessments of policies, programmes and plans. Advocates of a legislated base for strategic level assessments in Canada and elsewhere have argued that the main cumulative effects of human undertakings including multiple projects are best recognized and addressed at the strategic level; that policy, planning and programme development processes typically offer a more appropriate scale than project assessments for examining broad options for bringing significant biophysical and socio-economic improvements; and that rigorous and open strategic level assessments can provide a credible base for authoritative guidance and greater efficiencies at the project assessment level (Benevides *et al.* 2009). In 2003, after its first statutory review of the old CEAA, the House of Commons Standing Committee recommended expansion of the law to cover strategic level undertakings (Standing Committee on Environment and Sustainable Development 2003). A sub-committee of the government's Regulatory Advisory Committee, assigned to examine design options for effective strategic level assessment, detailed a law and policy base for strategic assessments (Regulatory Advisory Committee, Strategic Environmental Assessment Subcommittee 2009, Gibson *et al.* 2010). Nonetheless, the government chose not even to provide a discretionary opening for strategic assessment in CEAA 2012.[4]

Integrated attention to biophysical, social and economic considerations

CEAA 2012 is not designed to ensure comprehensive or integrated attention to environmental considerations broadly or narrowly defined. Only effects on a tightly restricted range of 'environmental components' under federal legislative authority are to be considered – biophysical effects on fish,[5] aquatic life and migratory birds, effects on federal lands and Aboriginal communities, transboundary effects and 'changes to the environment that are directly linked to or necessarily incidental to any federal decisions about a project' – plus whatever may be recognized in a Schedule 2 in which Cabinet may identify additional components (Canada 2012, s. 5).[6] Uncertainties on details and interpretation remain and some projects (e.g. ones with many potential effects on Aboriginal communities or a range of transboundary implications) will face a bigger assessment agenda than others. However, the legislated list of components to be addressed in most cases covers only a small fraction of the interconnected biophysical effects that are included in the minimum usual scope of environmental assessments globally. The list is remarkably narrow even in the context of important matters clearly in federal jurisdiction in Canada. Effects on climate, for example, are not on the list.[7] For most cases, this tightly restricted and fragmentary scope effectively reduces CEAA 2012 to little more than an information-gathering exercise for permitting and other decisions in a limited set of areas where the federal government accepts exclusive responsibility (Doelle 2012).

CEAA 2012 also eliminates mention of possible requirements to assess 'alternatives to' the proposed project and focuses narrowly on biophysical effects and certain consequential socio-economic effects to the exclusion of direct social, economic and cultural effects and their interrelation with biophysical effects. Under the broad but vague discretionary powers given to the Minister of Environment in s. 19(1)(j), consideration of 'alternatives to' and a broader range of biophysical, social, economic, cultural and interactive effects could be introduced on a case-by-case basis. Such interventions would, however, go against the dramatically narrowing legislative character of CEAA 2012. Moreover, unless the additional requirements were announced before project conception, they would come too late for effective incorporation in proponent's decision-making about options and designs.

Assessment initiation at the outset of deliberations on anticipated undertakings

The basic purpose of environmental assessment law is to force integration of environmental considerations into

decision-making on new or renewed initiatives. If that is to be accomplished effectively and efficiently, the law must ensure that proponents know what is required before they begin analysis and decision-making on purposes, alternatives, project selection and design. When requirements are not easily predictable and firmly specified only after detailed project proposals have been developed, anticipatory inclusion of appropriate environmental considerations in planning is difficult, late decisions on requirements entail delay, and the process is more likely to be viewed as an impediment to approval than a spur to better decision-making.

Although CEAA 2012 has been presented as a means of speeding approvals (Canada Economic Action Plan 2012), its design means determining whether an assessment is required and specification of assessment requirements happens only after detailed project planning. For projects included in the project list regulation, the process begins when the proponent notifies the Minister and provides a project description covering matters included in the new 'prescribed information regulation' (Canadian Environmental Assessment Agency 2012b). Other than a requirement for information on anticipated waste generation, the prescribed information regulation offers no clarification of expectations about effects to be addressed beyond what is in the Act itself. The project description is evidently meant to provide sufficient detail about the already planned project and some specific environmental effects to allow the Canadian Environmental Assessment Agency to make an informed decision (after a maximum 45 day review) on whether an environmental assessment is to be required (Canada 2012, ss. 8–12). For non-listed projects, CEAA 2012 provides a designation process that begins when the Minister is persuaded, by evidence including public controversy, that a proposed (and presumably already planned) physical activity 'may cause adverse environmental effects or public concerns' (Canada 2012, s. 14).

Only after these late application decisions is the scope of factors to be addressed in required assessments determined by the relevant responsible authority or the Minister of the Environment (Canada 2012, s. 19(2)). Additional uncertainties will be in play where the federal authorities also need to determine whether substitution of a provincial process will be suitable. Over time, if the late case-by-case decision-making by federal authorities is reasonably consistent and supplemented by interpretive guidance, anticipatory assessment work will become more feasible. Insofar as they have liability or reputational concerns, or are moved by provincial, territorial or Aboriginal assessment requirements, or face expectations of investors or other outside interests, proponents may incorporate environmental considerations throughout project planning in any event. However, CEAA 2012 is clearly not designed to encourage early integration of environmental considerations in project planning. Instead, it positions assessment as a post-planning regulatory hoop inevitably under pressure for speedy decisions that do not require substantial changes to the established plans.

Clear requirements and predictable process expectations

The problem of late delineation of assessment requirements is exacerbated by provisions for case-by-case exercise of authoritative discretion. For all projects subject to assessment, CEAA 2012 gives discretionary power to the Minister or another specified authority to define the scope of assessment requirements (Canada 2012, s. 19(2)). The result is additional process uncertainties for proponents, and a less reliable base for anticipating what requirements must be met. Particular decision-makers may build a record of consistency and impartiality, but the history of discretionary decision-making in assessment and related fields in Canada, and surely elsewhere, suggests that undue attention to immediate pressures and case-by-case exercise of influence are likely to be more common than they would be where decision criteria are clearly specified. In such circumstances, rather than beginning early to address clear expectations for assessing relevant environmental considerations, proponents are tempted to put their energy into pressuring decision-makers to use their discretionary powers to minimize requirements.

Attention focused on the most significant undertakings, effects and opportunities for protection and enhancement

As noted above, CEAA 2012 applies only to specified major individual projects that could affect matters of exclusive federal jurisdiction. Strategic level undertakings, groupings of smaller projects that could have significant cumulative effects, and major projects of national significance, but no major implications for listed areas of federal interest, are not covered. The narrow range and fragmentary character of the listed federal matters establishes an assessment scope far smaller than the likely reach of potential significant effects. Assessments of projects with effects mostly on federal lands could be relatively comprehensive, as could assessments involving mostly transboundary effects, although those possibilities are untested. Taken together, the limited application and narrow jurisdictional focus, combined with inattention to alternatives and beneficial effects, leave few openings for important contributions from federal assessments that proceed under CEAA 2012 alone.

Brighter prospects depend on the application of other laws. Assessments that are undertaken also under the National Energy Board Act or the Nuclear Safety and Control Act will have a broader purview, despite the regulatory focus. Assessments that are delegated to the provinces will also benefit from a less constrained scope, although provincial requirements vary dramatically across the country. By itself, however, CEAA 2012 promises at best some useful, if late, review of effects in a few specified areas.

Open public engagement and learning

Public participants have historically been the actors most motivated and often most effective in ensuring careful

critical review of project proposals and associated environmental assessment work. CEAA 2012 maintains some openings for public involvement, but the main changes from the old law serve to restrict public participation opportunities. Most obviously, the sharp reduction in numbers of assessed projects and the dramatic narrowing of assessment scope eliminate many opportunities for public participation and limit the potential range of public contributions, probably excluding the most significant public concerns. The tight timelines introduced for assessment steps, and within those timed steps the narrower windows for public engagement (Canada 2012, s. 10, 27, 38), make effective public involvement more difficult.

For the few especially significant cases that proceed to public hearings – before review panels established under CEAA 2012 (Canada 2012, s. 43(1)(c)) or before National Energy Board for energy projects (Canada 2012, s. 19(1)(c)) – the restriction of hearing participation to 'interested parties' could sharply limit public assess to the review processes for the most significant cases. The term 'interested party' is defined in CEAA 2012 (s. 2(2)) as a person who is 'directly affected by the carrying out of the designated project or … has relevant information or expertise'. The evident intent is to exclude at least some members of the public and public interest organizations. Depending on interpretation of the term in practice, perhaps only a very narrow range of public participants would be allowed to engage in the hearings.

Finally, while the CEAA 2012 provisions for substitution of a provincial process for a federal process require some assurance of public opportunity to participate and have access to 'records' (Canada 2012, s. 34(1)(b) and (c)), the process equivalency requirements are few and vague. Permitted substitutions to the highly diverse provincial processes would almost certainly introduce great unevenness in participation opportunities. Moreover, requirements for participant funding[8] are apparently not to apply to substituted processes (Canada 2012, s. 58(2)).

Selection of most desirable options for enhancement of benefits as well as avoidance or mitigation of adverse effects

CEAA 2012 eliminates mention of assessing alternatives to a proposed project; it narrows assessment to a small range of federal mandate considerations and is apparently meant to focus exclusively on mitigating adverse effects in those areas. In other words, it aims only for less bad effects on a select number of receptors, given a proposed project. The normal scope of assessments under CEAA 2012 would not ensure a reasonably comprehensive review even of potential biophysical effects, much less consider the interactions among social, economic and biophysical effects. CEAA 2012 includes no mention of enhancing positive environmental effects. It provides no basis for comparing project options or for weighing positive against negative implications. For most applications it does not even support overall judgments about whether a proposed project could have significantly adverse biophysical effects, since only a few topics of federal interest are to be considered.

The original CEAA aimed generally to avoid significant adverse environmental effects. In its most ambitious applications, usually in combination with the authorities of other jurisdictions, CEAA provided a base for assessment reviews requiring 'positive contribution to sustainability' as well as avoidance of significant adverse environmental effects. In these cases, the proponents were expected to establish that their proposed project would serve the long- and well as near-term public interest, considering social, economic and cultural as well as biophysical effects and the relative merits of alternatives. Five joint review panels established under the CEAA plus other provincial, territorial and/or Aboriginal authorities, adopted and applied the 'positive contribution to sustainability' test.[9] Theoretically this may remain a possibility under CEAA 2012, which retains from the old CEAA a legislated purpose to 'promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy' (Canada 2012, s. 4(1)(h)), but it would require discretionary insertion of additional factors for consideration far beyond the normal scope of the new law.

Under CEAA 2012, a proposed project could be rejected on the grounds of 'significant adverse environmental effects', but apparently only if these effects involved the particular areas of federal concerns recognized in the law. Moreover, recognition of significant effects is undermined by provisions that allow restitution and compensation to qualify as mitigation measures (Canada 2012, s. 2(1)). Projects nevertheless found likely to cause significant adverse environmental effects may be still be approved if the decision-making authority believes that these effects are 'justified in the circumstances' (Canada 2012, s. 52–53). For reasons discussed below, this provision does not enhance prospects for reasoned selection of most desirable options.

Some of the projects covered by CEAA 2012 will also be subject to provincial, territorial and/or Aboriginal assessment requirements. There are also provisions for delegation of federal assessment responsibilities to selected provincial processes (see the next point), which could then carry out assessments with more comprehensive comparative evaluation of options. Unfortunately, few of the current provincial processes require attention to broad project alternatives (Carver *et al.* 2010, p. 101).

Improvement of decision-making consistency, impartiality, transparency and accountability

The general legislative strategy of CEAA 2012 is to shift most environmental assessment responsibility to the provinces. Limiting the scope of federal assessments to matters of exclusive federal jurisdiction leaves matters of shared environmental jurisdiction to provincial assessment processes, which may cover only some of the projects involved. Even for matters of exclusive federal concern, CEAA 2012 (ss. 32–37) provides for substitution of

'appropriate' provincial processes. This greatly expanded reliance of the provinces through deferral and substitution is meant to avoid subjecting proponents to separate federal and provincial processes.

Under the original CEAA, the federal government made sustained efforts to coordinate federal and provincial assessments. Whether or not process duplication under the old process remained a significant problem is debated (Kwasniak 2009), but certainly there were instances of poor coordination and inefficiency, in part because of significant differences in the design of the federal and provincial processes involved. The existing provincial (and territorial and Aboriginal) processes are wildly divergent, not merely in matters of regional peculiarity, but also in their basic purposes, rules and processes for application, the scope of assessment requirements, provisions for public engagement, capacities for enforcement of decisions, etc. (Carver *et al.* 2010). These differences have led to repeated calls for basic process harmonization in Canada (e.g. Canadian Council of Ministers of the Environment 1998) and at one point consensus on shared best practice guidance was nearly achieved (Working Group of the EIA Technical Committee 1999).

CEAA 2012 signals a rejection of both coordination and harmonization in favour of reliance on the provinces. While this strategy is an attractively simple means of streamlining, it is highly vulnerable to substantive problems arising from the great provincial differences on basic assessment components. Some provincial processes can deliver reasonably comprehensive assessment, including coverage of exclusively federal concerns. However, in general there are no grounds for expecting basic process adequacy or consistency in assessments of projects that were previously covered by federal requirements. Projects now exempted from federal assessment may or may not be captured by a provincial process and will be treated differently depending on the province involved. Projects allocated to substituted provincial processes will also be subject to divergent obligations. Proponents operating across Canada still face an unhelpful diversity of assessment requirements to the detriment of overall efficiencies. The public interest still suffers from inter-jurisdictional disparity in assessment basics, and the vaguely stated requirements to be met by substituted provincial processes (Canada 2012, s. 34) will not encourage moves towards basic national equivalency at a credibly high level.

Consistency and predictability issues also arise from CEAA 2012's provisions for the exercise of discretionary authority – for example, on what undertakings are subject to assessment and how assessment requirements will be scoped, when provincial processes are acceptable substitutes, and whether project approvals will be granted and with what terms and conditions. The discretionary powers are vested in the Minister and in Cabinet, where deliberations are cloaked in confidentiality. CEAA 2012 imposes little constraint on the discretionary authority granted to the decision-makers, does not ensure that decisions on key matters will be informed by tested public evidence, does not provide explicit criteria for the decision-making and does not require public rationales for the decisions made.

Even where discretionary provisions are retained from the old law, CEAA 2012 adds difficulties. For example, like its predecessor, CEAA 2012 empowers Cabinet to approve projects found likely to have significant adverse effects, if these effects are 'justified in the circumstances' (Canada 2012, ss. 52–53). Relevant circumstances are not identified and criteria for justifications are not provided. Countervailing positive effects would have to be involved. However, CEAA 2012 assessments, which cover only a few areas of potential adverse effects and do not examine positive effects, cannot provide any useful basis for comparative evaluation of positives and negatives of the project, much less other options. The law offers no route for public contributions to the deliberations and requires no public rationale for a decision to claim justification in the circumstances. The nature of the trade-offs considered, the quality of the information relied upon and adequacy of the analysis done are all invisible, cloaked in Cabinet secrecy.

Good integration with other objectives and processes

As we have seen, CEAA 2012 does not address strategic-level undertakings and takes only a tentative step towards considering regional cumulative effects. Because of the government's focus on streamlining approvals, the new law gives more attention to its links to regulatory permitting. Some commentators (e.g. Doelle 2012) have suggested that the late and narrow CEAA 2012 assessments introduce some duplication with existing federal regulatory processes. However, the main effect is that federal assessment now depends heavily on the potentially broader capabilities of other bodies.

Within the federal ambit, the main other legislated foundations for reviews are those of the two industry sector regulators who take over assessment responsibilities in their mandate areas under CEAA 2012 – Canadian Nuclear Safety Commission (CNSC), which normally applies the Nuclear Safety and Control Act, and National Energy Board (NEB), which normally applies the National Energy Board Act and the Canada Oil and Gas Operations Act. Assigning assessment responsibilities to the CNSC and the NEB puts the regulatory agencies in charge of both assessment and licensing processes for the affected undertakings. In the past for large projects, the processes were typically united under joint review panels. Under CEAA 2012, the CNSC and NEB take sole responsibility.

Both have respected expertise in the sectors they cover, but neither has a history of environmental assessment capability. Their focus has been narrowly regulatory (in contrast to capacity for attention to broader options and cumulative effects). Moreover, they have traditionally been close to the industries they regulate, and their proceedings are generally more formal and less friendly to public engagement than those of the old CEAA panels. The agencies may grow into their new assessment roles and, despite recent narrowing, the laws applied by the NEB and CNSC do offer some breadth. The NEB, for example, is

required to consider the 'public convenience and necessity' of proposed projects (Canada 2010, ss. 52, 58.16), which opens a broader range of public interest considerations than CEAA 2012's narrow list of federal concerns. The quality of the resulting assessments remains to be seen.

Beyond federal authorities, the main legislated foundations for reviews are assessment processes under provincial authority, processes established under land claim agreements and processes of other countries. In addition to substitution of suitable provincial assessment processes (Canada 2012, ss. 32–36), CEAA 2012 provides for joint review panels (Canada 2012, s. 40). Prospects for credibly comprehensive assessment by or with these other authorities are difficult to determine, in part because of the great diversity of non-federal processes, and the uneven capacities of provincial authorities to address matters of exclusive federal jurisdiction in addition to matters of shared or solely provincial jurisdiction. There are no present grounds for confidence that provincial capacities will be generally adequate to ensure reasonably comprehensive and integrated assessment of federal and provincial environmental effects, but it is clear that environmental assessment in Canada now relies on this.

Authoritative means of enforcing requirements and ensuring monitoring and adjustment

The only potentially significant advancement in CEAA 2012 is the introduction of an enforceable decision statement at the conclusion of the review process (Canada 2012, ss. 31, 54, 97–100). The absence of such a power has been a long-standing limitation of federal-level assessment in Canada (Gibson 2001) and a likely contributor to compliance failures. While the tightly constrained scope of assessment under CEAA 2012 limits the practical value of enforceable decisions, it offers a positive component to build upon in the future.

The decision statements are to set out any mitigation and follow-up monitoring requirements (Canada 2012, s. 53). CEAA 2012 does not address the need for responses to monitoring findings, although these could perhaps be included with mitigation measures. Although the purposes section of CEAA 2012 (s. 4) reiterates commitment to the precautionary principle, the law is otherwise silent about ensuring project design and implementation incorporate sufficient adaptive capacity to enable effective responses to problems revealed by monitoring. Nonetheless, in this category, CEAA 2012 takes a step forward.

Conclusions and implications

In his review of the global state of the art of environmental impact assessment, Richard Morgan (2012) warned of assessment process weakening by recession-wracked governments seeking speedier approval of development projects. CEAA 2012, enacted a few months after Morgan's paper was published, is a sobering confirmation of the peril. Its changes represent a substantial retreat from almost all of the reasonable expectations for assessment regime design. Environmental assessment in Canada retains admirable qualities in professional practice and in some non-federal processes. However federal-level assessment has been gutted and the pressures and temptations that led to CEAA 2012 apply as well to the other levels of government, some of which have already weakened their processes.[10]

There are three evident lessons for international observers. First, if this could happen in Canada, it could happen anywhere. Canada was once considered a leader in environmental assessment and, although it is, like all countries, vulnerable to the dry winds of the global economy, it is much less stressed than many other nations.

Second, we must now focus on how to enhance genuine efficiencies in environmental assessment. The new Canadian law was initiated and sold as an exercise in streamlining, eliminating unnecessary delay and duplication. In fact the residual assessment provisions of CEAA 2012 severely compromise potential effectiveness by narrowing scope and application, and add inefficiencies through reliance on late determination of whether and what assessment must be done. The new law gets its streamlining chiefly by undermining effectiveness. In environmental assessment law reform everywhere, a key question will be how to design processes that are more efficient in the delivery of more enlightened decisions, despite interests focused only on faster and cheaper.

Finally, the most positive response to the dramatic Canadian retreat would be vigorous global attention to next-generation environmental assessment. For several decades after its introduction, environmental assessment seemed inherently progressive. Processes became more ambitious and widely applied, more often mandatory and influential, more transparent and participative. Law and practice were increasingly informed by multiple sources of knowledge, by learning about uncertainty and surprise, and by experience with interactive and cumulative effects. Today, while advances continue in many places, powerful countervailing forces are clearly in play.

Some opposition has been with us from the beginning. Environmental assessment requirements have always faced resistance from proponents expected to integrate environmental assessment into their habitual thinking and deciding, from agencies expected to add assessment reviews to their existing set of obligations and from authorities concerned about offending supporters and discouraging investors. However, there are also powerfully emerging challenges. Environmental assessment has, unavoidably, become more demanding, requiring attention to multiple stakeholders, to complex system behaviours, to intertwined strategic, project and regulatory demands, to global as well as local concerns. Not surprisingly, all this has proved to be very difficult to administer efficiently, especially where the imperatives of integration crash against the boundaries of jurisdiction, mandate and expertise.

Essentially the same story can be told about health promotion, international aid, the management of financial institutions and a host of other areas. CEAA 2012 and similarly retrograde initiatives in these other fields are immediately attributable to public fears in a wobbly

economy and to the temporary attractions of simplistic fixes – cut the red tape, deny the perils and assume the future will take care of itself. Beneath these lies an apparent tension between dependency on current ideas and practices and recognition that new approaches are needed in a world where limited capacities for competent governance face rising demands and growing complexities, and where our room for failure is already filled with financial and ecological debts to the future.

In this international context, defending the strengths of existing assessment processes cannot be sufficient. We will need also to innovate – to show how in process design and in substantive results it is possible to deliver both stewardship and well-being, to be more effective and more efficient. CEAA 2012 is a global signal that an increasingly bumpy path lies ahead for environmental assessment. At the same time, the importance of broadly scoped, carefully informed and forward-looking public deliberation has never been greater.

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Notes

1. Canadian Environmental Assessment Agency, 2009, 'Renewal of the Canadian Environmental Assessment Act: Presentation to Agency Staff', 20–21 January 2009.
2. This move was condemned by four previous federal fisheries ministers (Siddon *et al.* 2012).
3. When the new legislation was declared in force on 6 July 2012, none of the implementing regulations was in place. The government did present three draft regulations – a list of what categories of projects would be covered, information to be provided in project descriptions, and rules on cost recovery – which were Gazetted later in the month (Canadian Environmental Assessment Agency 2012a). Other possible details, including clarification of matters of federal authority to be considered, have not yet been released.
4. CEAA 2012 does empower the Minister of Environment to establish a committee to study cumulative effects 'of existing or future physical activities' in a region (Canada 2012, ss. 73–77). The report of any such committee would be public and could be used to inform subsequent project assessments. However, the proposed law includes no provisions to ensure that a committee's work would involve a credibly open process, or to permit an agenda beyond studying potential effects (e.g. to consider implications for the development of new policies, plans or programmes), or to have the legal base to deliver authoritative guidance for future project level assessment processes.
5. Or perhaps only active fisheries, given the proposed Fisheries Act changes, also included in Bill C-38.
6. As of early August 2012, no immediate Cabinet action to issue Schedule 2 additions was expected (Tara Frezza, Senior Policy Advisor, Canadian Environmental Assessment Agency, personal communication, 8 August 2012).
7. The omnibus budget implementation legislation that included CEAA 2012 also repealed Canada's Kyoto Protocol Implementation Act.
8. CEAA 2012 (ss. 57–58) otherwise retains the established federal tradition of providing some funding support to facilitate public participation in major assessments reviews.
9. The five cases were the joint reviews of the Voisey's Bay Nickel Mine and Mill, Whites Point Quarry and Marine Terminal, Kemess North Copper–Gold Mine, Mackenzie Gas Project and Lower Churchill Hydroelectric Generation Project.
10. Initially very strong provincial environmental assessment laws were compromised by amendments in Ontario in 1996 and British Columbia in 2002.

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