

CEAA 2012: The End Of Federal EA As We Know It?

Meinhard Doelle*

This commentary assesses the key changes to the federal environmental assessment (EA) process contained in the 2012 Budget Implementation Bill. The resulting Canadian Environmental Assessment Act 2012 (CEAA 2012) is compared to the federal EA process that had been in place since the implementation of the original CEAA in 1995. The article concludes that the key changes brought about by the enactment of CEAA 2012, including the shift in responsibility for EA, the discretionary application of the process, the narrowed scope, new powers of delegation, substitution and equivalency, and the more restricted role of the public all function counter to the improvements to CEAA 1995 recommended in the academic literature.

Ce commentaire porte sur les changements importants apportés au processus fédéral d'évaluation environnementale (ÉE) dans le projet de loi d'exécution du budget pour l'année 2012. La loi qui en a découlé, la Loi canadienne sur l'évaluation environnementale (2012) (LCÉE de 2012), est comparable au processus d'ÉE fédéral qui était en usage depuis la mise en œuvre de la première LCÉE, en 1995. Dans cet article, l'auteur conclut que les changements importants apportés par l'adoption de la LCÉE de 2012, y compris le changement de responsabilité relativement aux ÉE, l'application discrétionnaire du processus, la portée restreinte, les nouveaux pouvoirs de délégation, de substitution et d'équivalence ainsi que le rôle plus limité du public vont tous à l'encontre des améliorations recommandées par la doctrine à propos de la LCÉE de 1995.

1. INTRODUCTION

The first sign that the current federal government was planning to alter the federal role in EAs was the 2010 Budget Implementation Bill.¹ In this Bill, the then-minority Conservative government introduced a number of changes to the *Canadian Environmental Assessment Act* (CEAA 1995) to streamline the process, add

* Meinhard Doelle is Professor of Law and Associate Dean Research at the Schulich School of Law, Dalhousie University.

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¹ Bill C-9, *An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures Statutes of Canada Chapter 12*, 3rd Sess, 40th Parl, 2010.

discretion to narrow the scope of the projects to be assessed, and reduce the number of projects to be assessed under the Act. The timing of these amendments was thought by some to be questionable, coming the same year a legislatively mandated seven-year review was to be commenced.

There was concern even in 2010 over the process of “hiding” fundamental changes to environmental legislation in a Budget Implementation Bill, which necessarily limits the time available for debate of those new changes.² The approach seemed motivated, at the time, by the minority Conservative government’s concern that these changes to *CEAA* 1995 might not receive the support from the opposition parties needed to be passed by Parliament. By including the amendments in the 2010 Budget Implementation Bill, opposition parties had to be more cautious, as opposition to the Bill would have triggered an election. This tactic resulted in the 2010 Budget Bill being passed with “help” from the Liberal party.³

The most substantive immediate impact of the 2010 changes to *CEAA* 1995 was to exempt infrastructure projects funded through the federal stimulus package from the federal EA process.⁴ More fundamental changes were not put forward until after the Conservative government won a majority in the May 2011 election. The process for altering the federal EA process more substantially started shortly after the 2011 federal election as part of an overall effort to reduce the impact of environmental regulation on resource development projects. With respect to *CEAA* 1995, the starting point for these more fundamental changes was the legislatively mandated seven-year review of the Act, initiated over a year late. The task of carrying out this review was assigned to the Standing Committee on Environment and Sustainable Development.⁵

The committee met for a few short weeks in the Fall of 2011, and only heard from a limited number of witnesses invited by government and opposition members of the committee. The committee abruptly halted the proceedings long before all interested witnesses had been heard and filed its report in early 2012. Opposition parties sought to extend the hearings, as many interested parties had not had a chance to appear before the committee. These efforts failed, and the two opposition parties then each submitted their own dissenting reports on the seven-year review of the Act in early 2012.⁶

² Ecojustice, “Conservatives gut key environmental law” (2010), online: <<http://www.ecojustice.ca/media-centre/press-releases/conservatives-gut-key-environmental-law>>.

³ Bruce Cheadle, “Conservative Budget passes thanks to 30 Liberal absentees” (2010) June 8 *The Canadian Press*, online: <<http://www.thestar.com/news/canada/article/820836—conservative-budget-passes-thanks-to-30-liberal-absentees>>.

⁴ Bill C-9, *An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures Statutes of Canada Chapter 12*, 3rd Sess, 40th Parl, 2010.

⁵ Richard Lindgren, *Legal Analysis of the Report of the Standing Committee on Environment and Sustainable Development Regarding the Canadian Environmental Assessment Act*, (Canadian Environmental Law Association, 2012).

⁶ House of Commons, “Statutory Review of the *Canadian Environmental Assessment Act*: Protecting the Environment, Managing our Resources” (2012); Dissenting Report from the Official Opposition New Democratic Party on the Seven-year Review of

In March 2012, in conjunction with the federal budget announcement, the government announced that fundamental changes to *CEAA* 1995 were to be introduced as part of the 2012 Budget Implementation Bill (Bill C-38).⁷ The Bill was introduced in April 2012, and was passed by the House of Commons in June 2012. The government did not accept any of the hundreds of amendments to the Bill put forward by opposition parties. While the 2010 amendments may have been included in the budget bill to ensure their passage, this was clearly not the motivation of the 2012 majority government. Instead, the motivation appears to have been to reduce debate and to deflect public attention away from this major shift in the role of the federal government in environmental assessments.

In comparison to the two months it took for *CEAA* 2012 to pass as part of the Budget Implementation Bill, it took years to consult on the concept and draft *CEAA* 1995, and well over two years to guide it through Parliament in the early 1990s. During the clause-by-clause review of the early 1990s Bill before the same Standing Committee, the Conservative government of the day accepted over 100 amendments to the Bill it had introduced.⁸

The 2012 federal budget bill introduced a completely new *Canadian Environmental Assessment Act 2012 (CEAA 2012)*.⁹ The following is an overview of the fundamental differences between *CEAA* 1995¹⁰ and *CEAA* 2012. Some of the implications of these changes will not be clear until projects that have been assessed under *CEAA* 2012 — or have been excluded from assessment — are in operation.

A fundamental change to the *CEAA* is that the way the Act applies has changed from a legal test involving the definition of project and its potential impacts, the law list and various exclusions, to a project list process with a great deal of discretion built into the process. The effect of the old triggering process was legal certainty and a reasonably precautionary approach. Projects that involved federal decisions or approvals generally were included unless they were specifically exempt from an EA, mainly through regulations. Under *CEAA* 2012, the application of the federal EA process to particular projects is subject to the discretion of the Minister and the Canadian Environmental Assessment Agency (CEA Agency).

Under *CEAA* 2012, the process starts with the registration of designated projects listed in a project list regulation. Whether an environmental assessment of

CEAA (2012), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5300807&Language=E&Mode=1&Parl=41&Ses=1&File=105>>; Dissenting Opinion by the Liberal Party of Canada on the Report of the Statutory Review of the *Environmental Assessment Act (CEAA) (2012)*, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5300807&Language=E&Mode=1&Parl=41&Ses=1&File=108>>.

⁷ West Coast Environmental Law, “*Budget Implementation Act 2012: West Coast goes to Ottawa to talk about how the Omnibus Bill will harm Canada*” (14 June 2012), online: <<http://wcel.org/category/keywords/budget-implementation-act-2012>>.

⁸ M Doelle, *CEAA, New Uncertainties, but a Step in the Right Direction* (1994) 4 JELP 59.

⁹ *Canadian Environmental Assessment Act (CEAA) 2012*, proposed under Bill C-38, *Jobs, Growth and Long-term Prosperity Act, 2012*, 1st Sess, 41st Parl, 2012.

¹⁰ *Canadian Environmental Assessment Act*, SC 1992, c. 37.

a registered project is required will then be decided by government officials based on information filed by the proponent. In other words, the federal process will become very similar to many provincial EA processes, essentially a combination of a project list for registration *and* broad discretion to decide whether an environmental assessment is to be carried out for a given a project (even if it is already on the project list).

Among other key changes in *CEAA* 2012 is the elimination of two EA process options. Screenings and comprehensive studies are combined into a one-size-fits-all EA process that is much narrower in scope than either the screening or comprehensive study process under *CEAA* 1995. Another process option, mediation, is completely eliminated, perhaps because it was rarely used. Panel reviews have been retained, but will operate under very different rules.

Another key change in *CEAA* 2012 is that the scope of a federal assessment has been significantly narrowed, from a generally inclusive approach that tried to look at a broad range of adverse environmental effects of proposed projects to one that is focused on a few issues within the direct regulatory authority of the federal government.

In short, there will be many fewer federal EAs with a much narrower scope of assessment. A thorough assessment of projects will not take place under *CEAA* 2012, unless there is agreement to carry out a joint federal/provincial EA. In other cases, the federal process will look at certain specific issues, such as the impact of the project on fisheries, aquatic endangered species and migratory birds — leaving other issues to the provinces to review and consider, if their legislation requires such assessment.

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

2. WHO IS RESPONSIBLE FOR FEDERAL EAs?

CEAA 1995 was designed around the basic idea that all federal decision makers, in principle, should consider the environmental implications of decisions they were being asked to make about proposed projects. To encourage federal decision makers to seriously consider the environmental implications of those decisions, *CEAA* 1995 utilized a flexible screening process that was imposed directly on federal decision makers. This screening process in *CEAA* 1995 applied to over 99 per cent of the assessments carried out and could involve any one or more of hundreds of federal decision makers for a given project.

Under *CEAA* 2012, the number of federal decision makers involved in the EA process is drastically reduced. It is now generally limited to three agencies, the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC) and the Canadian Environmental Assessment Agency (CEA Agency).¹¹ Under s.

¹¹ *CEAA* 2012, s. 15.

15, in addition to these three agencies with primary responsibility for federal EAs, there is an option for other federal regulatory authorities (if a number of circumstantial criteria are met), to carry out the EA process.¹² It seems that the intention is for the NEB and the CNSC to carry out assessments of projects within their regulatory authority, to allow other regulators who hold regulatory hearings to do the same and to have all other EAs carried out centrally by the CEA Agency.¹³

This shift in responsibility raises two related issues. The first is that it spells the end of the self-assessment experiment that was inherent in *CEAA* 1995. Self-assessment, in this context, refers to the idea that the federal decision maker itself is asked to oversee the gathering of information about the broader environmental implications of its decision, and the evaluation of the information gathered, rather than a more independent agency. To be fair, this experiment was controversial from the start, and it has been questioned throughout the life of *CEAA* 1995, including in the previous parliamentary review in 2000.¹⁴

Many federal decision makers, such as Fisheries and Oceans Canada, clearly never fully accepted the idea that they should go beyond their core mandate and consider the broader environmental implications of the project decisions they were asked to make. What is not clear is whether the failure of the self-assessment process is a result of internal power struggles within the federal bureaucracies, inadequate resources made available to responsible departments, or a more fundamental problem with the concept that decision makers should be encouraged to look beyond their core mandate to consider the broader implications of decisions they are required to make.¹⁵

It is interesting, in this regard, that while the CEA Agency will take over the EA process for most federal authorities, there are two that have been shielded from this shift — the NEB and the CNSC. These two agencies will continue to operate on a self-assessment basis. This raises the second related issue: whether agencies responsible for regulatory processes, such as the NEB and the CNSC, are well positioned to carry out environmental assessment processes.

Experience over the years has often shown that regulatory agencies are more focused on technical issues, and less interested in the big picture planning issues so fundamental to effective EAs. There are also legitimate concerns that some regulators may be captured by their industry, making it difficult for them to consider whether the industry sector they regulate offers the most sustainable long-term solution to the need or purpose being pursued with the proposed project. Furthermore, the perception of capture tends to undermine the credibility of the EA process to

¹² Such additional agencies would also have to be identified in a regulation under s. 83(b).

¹³ To more fully appreciate what is intended, one would have to look at s. 15(c) and not yet released regulations under ss. 83 and 84 to determine exactly whom this applies.

¹⁴ Canadian Environmental Assessment Agency, *Year 2000 review of the Canadian Environmental Assessment Act*, (2000); Minister of the Environment, *Strengthening Environmental Assessment for Canadians* (Canadian Environmental Assessment Agency, 2001); see also Meinhard Doelle, *The Federal EA process, A Guide and Critique* (Markham: LexisNexis Canada, 2008) on self-assessment, at 33.

¹⁵ For a more detailed discussion of the issue of self assessment under *CEAA*, see Doelle, *ibid.* at 199–237.

the general public. It is curious, then, that while *CEAA* 2012 generally signals an abandonment of the self-assessment experiment, which clearly had been unsuccessful under *CEAA* 1995, it allows the NEB and the CNSC to continue to play a self-assessment role.

3. APPLICATION OF THE PROCESS

Federal ministers speaking about the new Act before its introduction were quoted in the media as stating that only projects of national significance would be assessed under *CEAA* 2012.¹⁶ The legal tools to ensure this objective can be met have clearly been put in place through the listing approach and the discretion introduced into the application of the process in *CEAA* 2012.

Under *CEAA* 2012 there is no longer a legal test for whether a project requires an assessment under the Act, but a definition of “designated project”, which refers to a list of all projects that require registration.¹⁷ Once registered, however, designated projects, other than those under the control of the NEB or the CNSC, are not automatically assessed. Instead, the CEA Agency is given broad discretion to determine whether a federal EA is required for that particular project. The Act offers no clear direction on how this discretion is to be exercised. The preamble, the purpose section and some general factors to be considered by the Agency offer the primary guidance in this regard.¹⁸ The main limitation imposed on the CEA Agency is that it must consider the information provided by the proponent and the comments received by members of the public.

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

Projects on federal lands and outside Canada are addressed in ss. 67 and 68 of *CEAA* 2012. These provisions are fundamentally different from the transboundary provisions of *CEAA* 1995.¹⁹ First, ss. 67 and 68 do not apply to projects with inter-provincial effects, whereas the transboundary provisions in *CEAA* 1995 did. More fundamentally, ss. 67 and 68 do not require federal authorities to carry out an EA at all. They only require a decision as to whether the project is likely to cause significant adverse environmental effects — and, if so, whether those effects are justified in the circumstances. There is no requirement to follow the EA process set out in *CEAA* 2012 or any EA process before making these determinations.

In short, whether a federal environmental assessment is required of a designated project listed in regulations is left to the discretion of the CEA Agency. Whether a federal environmental assessment is required of a project not listed as a designated project in regulations is left to the discretion of the Minister. The result

¹⁶ Shawn McCarthy and John Ibbitson, “Harper Government to shrink environmental-assessment process” (2012) April 16, *Globe & Mail*.

¹⁷ See definition of “designated project”, *CEAA* 2012, ss 2(1) and 84(a).

¹⁸ *CEAA* 2012, s. 10(a).

¹⁹ *CEAA* 1995, S.C. 1992, c. 37, ss. 46–48.

is a triggering process with considerable uncertainty and a federal EA process that will likely apply to only a small percentage of the number of projects triggered under *CEAA* 1995.

4. PROCESS OPTIONS AND FEATURES

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

(a) The “Standard” EA Process

The resulting “standard process” under *CEAA* 2012 is expected to proceed as follows. The process is initiated when the proponent of a designated project registers its project with the CEA Agency. The information required to be included with the registration of the project is set out in regulations.²¹ The proponent of a designated project is not permitted to take measures to implement the project that would have an impact on the environmental effects listed in s. 5 of the Act until the CEA Agency has decided that no EA under *CEAA* is required or the proponent complies with the conditions imposed at the conclusion of the EA process.²²

The timelines from registration to the decision to proceed with an EA are tight. The CEA Agency, on receiving the registration documents from the proponent, has ten days to decide if it requires more information from the proponent.²³ The CEA Agency has to post notices to the public on an electronic registry, allow 20 days for public comments and make its decision within 45 days.²⁴ Within the 45 days, the CEA Agency is also empowered to seek input from expert federal departments to inform its decision.²⁵ A notice of the CEA Agency’s decision at the end of this 45-day period is required to be posted on the electronic registry.²⁶

If a decision is made to require an EA of the project under the Act, a notice of

²⁰ It is unfortunate that mediation has been eliminated without ever giving this process option a real chance to work. For a discussion of how mediation might be used in EA, see M Doelle & AJ Sinclair, “Mediation in Environmental Assessments in Canada: Unfulfilled Promise?” (2010) 33 *Dalhousie Law Journal* 117.

²¹ *CEAA* 2012, s. 84(b).

²² *CEAA* 2012, s. 6. Similarly, under s. 7, responsible authorities are not permitted to perform any power, duty or function unless one of these two conditions has been met.

²³ *CEAA* 2012, s. 8.

²⁴ The proponent’s registration documents are not required to be posted on the electronic registry, only a notice as to where these documents will be available.

²⁵ *CEAA* 2012, s. 11.

²⁶ *CEAA* 2012, s. 12.

commencement has to be posted on the electronic registry.²⁷ The responsible authority takes over at this stage. For projects that the NEB, the CNSC, or some other regulatory agency is designated as the responsible authority, the respective designated agency is responsible for the EA process.²⁸ For projects without an agency designated as the responsible authority for the EA process, the CEA Agency acts as the responsible authority for purposes of the EA process.

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

Under s. 27, the responsible authority is given 365 days to complete the standard EA. Time spent by the proponent to fulfill its obligations in the process does not count toward the 365 days nor are timelines imposed on the proponent. The Minister may grant an extension of up to three months.²⁹ Process requirements for EAs carried out by the NEB are tailored to the specific NEB regulatory processes.³⁰

(b) Panel Reviews

As indicated, the only alternative to the standard EA process under *CEAA* 2012 is a panel review. There is limited guidance in the Act on the process steps for a panel review, so only practice will tell whether and how much the panel review process may change. The key legislative provisions for panel reviews are now briefly reviewed.

The Minister has 60 days from the notice of commencement of the EA process under *CEAA* 2012 to decide whether to refer an environmental assessment to a panel review.³¹ This is a significant departure, as the Minister previously had the discretion to refer any project to a panel review anytime during the EA process. Those 60 days are a short time frame both for the public to gain sufficient understanding of the proposed project and voice their concerns, and for the Minister to make a final process decision.

No panel reviews are permitted for projects that the NEB or the CNSC are

²⁷ *CEAA* 2012, s. 17.

²⁸ This could also include another regulatory agency designated by regulations under s. 83(b). For projects that involve the NEB and the CNSC, all designated projects are required to go through the process used by the NEB or CNSC in place of the EA process under *CEAA*, so there is no discretion regarding the application of the standard EA process.

²⁹ *CEAA*, s. 27(3).

³⁰ *CEAA*, ss. 28–31.

³¹ *CEAA* 2012, s. 38. Factors to be considered in determining whether to refer an environmental assessment to a review panel include the significance of adverse effects, public concerns, and opportunities to coordinate with other jurisdictions.

identified as responsible authorities in the designated project regulations.³² This is consistent with the general approach in *CEAA* 2012 that deems that the regulatory processes of the NEB and the CNSC, which include public hearings, are sufficient to meet the objectives of *CEAA* 2012.

Given the narrow scope and expected limited application of *CEAA* 2012, it is likely a fair conclusion that not much would be gained by allowing a CEA Agency panel review instead of an NEB or CNSC regulatory process. This is because the new panel review process under *CEAA* 2012 is so restricted in scope that it is little more than an information gathering process for key federal regulatory decisions. However, this does not mean that the NEB and CNSC are well suited as regulators to engage the public in a true planning process that considers whether the proposed project is the most appropriate way to meet societal needs and how its contribution to sustainability can be maximized.

Another change to the panel review process is that one-person panels are now permitted, whereas, previously, a minimum of three panel members were required.³³ There is potential for this to be a positive change, but only if one-person panels are to be used where comprehensive studies were used under *CEAA* 1995. If, however, one-person panels are used for larger projects that previously were subject to three-person panels, the ability to appoint one-person panels could signify a further step backward for the panel review process.³⁴ In other words, whether the options to appoint one-person panels is a positive steps depends on whether it results in more panel reviews being carried out.

The Minister is specifically authorized under the new Act to seek further information from the proponent after reviewing the panel report and before making a final project decision.³⁵ While this could allow the Minister to fill information gaps left at the conclusion of a panel review, this new Ministerial power takes the intervenors and the panel out of the critical final stage of the EA process. The Minister will not have the benefit of those perspectives in evaluating the information provided by the proponent at this crucial stage. In the end, it is therefore the wrong solution to a problem created by the timelines set in the new Act. A more appropriate approach would have been to give the panel the power and time to ensure there are no information gaps in its final report, rather than to require panels, as is common practice today, to meet strict timelines for the hearings, closure of the record, and the preparation of the final report.

CEAA 2012 imposes an overall timeline of two years for panel reviews.³⁶ As with the timeline for the standard EA process, time spent by the proponent to pro-

³² *CEAA* 2012, s. 38(6).

³³ *CEAA* 2012, s. 42(1).

³⁴ A one-person panel is preferable to an assessment under the control of a responsible authority because it adds a level of independence and credibility at little cost in terms of time or resources. It is a step backward from a three-person panel, because the complexity of the issues faced by a panel makes it very challenging for a one-person panel to adequately consider the range of issues.

³⁵ *CEAA* 2012, s. 47(2).

³⁶ *CEAA* 2012, s. 38(3).

vide information requested by the panel does not count toward the two-year limit.³⁷ The time limit can be extended for up to three months by the federal project decision-maker or by the Governor in Council (GIC, or Cabinet) on recommendation from the Minister.³⁸ The Minister is required to specify time limits for individual steps in the panel review process that collectively does not exceed the two-year timeline. In cases where the panel does not conclude its work within the required timeline, the process is to be terminated by the Minister.³⁹ In this case, the EA will be completed by the CEA Agency, which is then required to file a final report with the Minister in place of the panel report.⁴⁰

Many of the other features of panel reviews, such as the requirement for public hearings, access to relevant documents, notice and publication of the panel report and final project decision, are retained in *CEAA 2012*. At the same time, federal review panels will be unrecognizable to anyone familiar with panel reviews under *CEAA 1995*, mainly due to the narrow scope of EA under *CEAA 2012*.⁴¹

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

(c) Decision-making

There are important changes in *CEAA 2012* to the way project decisions will be made. The basic approach is that responsible authorities determine whether a project is likely to cause significant adverse environmental effects as defined in s. 5(1) and (2). Where the responsible authority is the CEA Agency, that decision is made by the Minister. In case of a panel review, the “significance” determination is also made by the Minister. If the project is found to result in significant adverse effects under s. 5, the GIC then determines whether those effects are justified in the circumstances.

If it is determined that the effects are justified, the responsible authority or Minister in charge of the EA process determines the conditions for approval of the project, not the GIC. Conditions are to be limited to those that are “directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority”.⁴² This means that the ability to impose conditions has been considerably narrowed under *CEAA 2012*. The decision statement, which has to include conditions regarding mitigation measures and follow-up programs, is

³⁷ *CEAA 2012*, ss. 48 and 54.

³⁸ *CEAA 2012*, ss. 54(3) and 54(4).

³⁹ *CEAA 2012*, s. 49.

⁴⁰ *CEAA 2012*, s. 50.

⁴¹ *CEAA 2012*, ss. 5 and 19.

⁴² *CEAA 2012*, s. 53(2).

required under s. 54 to be made public. The statement is to include the decision regarding significance, the decision on whether significant effects are justified and conditions for approval.⁴³

In case of an equivalency finding under s. 37 with respect to a provincial EA process, it appears that there will be no federal project decision under *CEAA* 2012, and no requirement to consider the results of the equivalent provincial EA process, though there may still be federal regulatory decisions. What is not clear is whether federal decision-makers responsible for regulatory decisions, in the case of a project subject to a provincial EA process declared to be equivalent, have to consider the results of the provincial EA process in making their regulatory decisions.

5. SCOPE OF EA

Along with the reduction of quantity of EAs to be carried out and the discretion introduced into the application of the process, the changes to the scope of federal EAs constitutes perhaps the most significant change to the federal process. The Act narrows the scope of the project, the definition of environmental effect, and the factors to be considered. The combined effect of these changes risks turning the federal EA process into a narrow information gathering process that is largely already required for existing federal decision-making responsibilities for the project.

The scope of the project to be assessed, which had recently been determined by the Supreme Court of Canada in the *Red Chris* decision to be quite broad under *CEAA* 1995, has been significantly narrowed in *CEAA* 2012.⁴⁴ The definition of “designated project” includes “any physical activities incidental” to the physical activity that triggered the EA.⁴⁵ A key difference between *CEAA* 1995 and *CEAA* 2012 in this regard is that *CEAA* 1995, as interpreted by the SCC in *Red Chris*, required that the scope of the project be at least the full project as proposed by the proponent. *CEAA* 2012 allows projects to be scoped much more narrowly.

Under *CEAA* 2012, depending on the interpretation of “incidental”, the scope of the project could be limited to the specific component of the project listed on the designated project list. In other words, *CEAA* 2012 is potentially a step back to the situation demonstrated in the *True North* decision, where an oil sands development was scoped as a river destruction project, because it was the destruction of the river that triggered the federal EA.⁴⁶ The only specific provision regarding the scope of a project in *CEAA* 2012 other than the definition of designated project is s. 16, which is limited to the coordination in case of two related designated projects.

The definition of environmental effect has been severely narrowed, making it the most significant of the various changes to the scope of assessment under the

⁴³ The clarity this provides is a rare case of an improvement in *CEAA* 2012.

⁴⁴ *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, 2010 CarswellNat 55, 2010 CarswellNat 56.

⁴⁵ *CEAA* 2012, s. 2(1), definition of “designated project”.

⁴⁶ *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries & Oceans)*, 2006 FCA 31, 2006 CarswellNat 170, 2006 CarswellNat 1217; leave to appeal refused 2006 CarswellNat 1981, 2006 CarswellNat 1982 (S.C.C.) [*True North*]; see also Doelle, *The Federal EA Process: A Guide and Critique*, (Markham: Lexis-Nexis Canada, 2008) at 121–35.

new Act. Under *CEAA* 1995, environmental effects included any effect a project had on the biophysical environment. And it included the social, economic, and cultural effects of those biophysical changes. Under *CEAA* 2012, the definition of environmental effect is limited to changes to a small number of environmental components specifically listed in s. 5. Given the critical importance of the definition of environmental effect for the scope of EAs, a summary of the components included in s. 5(1) is included here:

- a change to the following components within the legislative control of Parliament:
 - fish and fish habitat as defined in the *Fisheries Act*,⁴⁷
 - aquatic species as defined in the *Species at Risk Act*,
 - migratory birds as defined in the *Migratory Birds Convention Act*,
 - any other component in Schedule 2 (which can be amended by the GIC);
- a change that may be caused to the environment that would occur
 - on federal lands,
 - across a provincial boundary,
 - outside Canada,
- with respect to aboriginal peoples, an effect of any change that may be caused to the environment on
 - health and socio-economic conditions,
 - physical and cultural heritage,
 - the current use of lands and resources for traditional purposes, or
 - any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.⁴⁸

In case of an existing federal regulatory decision for the project assessed, s. 5(2) provides for some requirement to consider other effects directly linked to the regulatory responsibility to be exercised, and to consider social, economic and cultural effects of the environmental effects included in 5(1).

The factors to be assessed are set out in s. 19, replacing s. 16 of *CEAA* 1995. The changes to the factors are more subtle than the change to the definition of environmental effect, but they signal a further erosion of the federal EA process. Most notably, the references to alternatives to the project and to the need for the project have been omitted. To be fair, these references in *CEAA* 1995 were not mandatory, but they had become standard for comprehensive studies and for panel

⁴⁷ Of course, Bill C-38 also made significant changes to the *Fisheries Act*, which affect the regulatory reach of that Act and in turn the scope of EA under *CEAA*.

⁴⁸ It is difficult to see how the narrow focus in terms of biophysical effects will allow the EA process to identify the broad range of potential aboriginal impacts of proposed projects listed in s. 5. This will be a critical issue in the implementation of *CEAA* 2012, and one that deserves careful study both from a legal and a practical perspective.

reviews. An assessment of the effect of the project on the capacity of renewable resources is also no longer required. On a positive note, the result of regional studies carried out under ss. 73 and 74 are included in the list of factors to be taken into account. Unfortunately, there is no requirement to carry out such studies.⁴⁹

The end result of these fundamental changes to the scope of project and scope of assessment is to turn the federal EA process into a regulatory information gathering process with a focus on components of projects that are under direct regulatory control of the federal government; and with a scope of assessment that is based only on selected functional jurisdiction over issues such as fisheries, aquatic species, migratory birds and aboriginal peoples.⁵⁰ Broader federal powers and responsibilities, as articulated by the SCC in cases such as *Oldman*⁵¹ and *Red Chris*,⁵² are not being exercised in the application of *CEAA* 2012.

6. HARMONIZATION WITH PROVINCIAL EAs

CEAA 2012 rejects the concept that harmonization is best achieved through inter-jurisdictional co-operation leading to one comprehensive EA process that provides the basis for decisions at all levels of government. Indeed, *CEAA* 2012 makes extraordinary efforts to ensure that the federal process will not apply whenever there is a concern about overlap with a provincial or other process. The approach in *CEAA* 2012 involves picking one jurisdiction to carry out an EA process, with no direct involvement by the other level of government and few other safeguards to ensure that the EA will provide a solid basis for decision-making at all relevant levels of government.

The discretion to decide on a case by case basis whether a designated project should undergo a federal EA under *CEAA* 2012, and whether the EA should take the form of a standard EA process or a panel review already is a powerful tool to limit the application of the federal EA process and to avoid any actual or perceived duplication with provincial EA processes. The narrow scope of the federal EA process and the harmonization of the EA process with federal regulatory processes further reduces any risk of duplication with provincial EAs, as the nature of the federal process has shifted from an environmental assessment process to a process of gathering limited information already required for regulatory decision making. If there is duplication, it is duplication with federal regulatory processes, not with EA processes carried out by other jurisdictions. In short, when applied, the federal process will already look very different from any EA process carried out at a provincial level.

⁴⁹ Unfortunately, regional and strategic environmental assessments are not otherwise incorporated into *CEAA* 2012. For a detailed discussion on how these could have been incorporated, see R. Gibson et al, “Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options” (2010) 20 JELP 175.

⁵⁰ The role of the federal government in some of these areas is being further reduced through changes to other federal legislation, such as the *Fisheries Act*.

⁵¹ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 1992 CarswellNat 649, 1992 CarswellNat 1313.

⁵² *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, 2010 CarswellNat 55, 2010 CarswellNat 56.

To add further opportunities for harmonization, *CEAA* 2012 includes provisions for substitution and equivalency. Substitution to provincial EA processes is framed in mandatory language and linked to a request by a province, while substitution to federal and aboriginal processes is framed in more permissive language. In both cases, however, the substitution is dependent on the Minister forming an opinion that the process in question “would be an appropriate substitute”. In the absence of an exclusive list of substantive criteria, this language, in the end, still leaves any substitution in the discretion of the Minister.⁵³ Substitution can be approved for an individual designated project or a class of designated projects. Substitution is not an option for panel reviews or for EAs carried out by the NEB or the CNSC. Once a substitution is approved, the approved process is deemed to meet the EA requirements under *CEAA*. The responsible authority or the Minister, as appropriate, must then make a project decision based on the final report prepared at the conclusion of the substitute process.⁵⁴

Equivalency takes the substitution process one step further by permitting the Governor in Council to fully exempt a designated project or class of designated projects from the application of *CEAA*. The power for this complete exemption is limited to approved provincial substitute processes. The only two additional requirements currently identified in s. 37 are that the provincial process must identify significant adverse effects and that it must ensure the implementation of mitigation measures. The section makes provision for the Minister to add additional conditions. It is unclear in the Act whether, in the case of an equivalency finding, federal decision makers have to take the results of the provincial EA into account in making federal project decisions.⁵⁵

In summary, when it comes to harmonization, *CEAA* 2012 has shifted from a cooperative approach designed to encourage one comprehensive environmental assessment process, involving all jurisdictions with decision making responsibilities, to one that sees delegation to the provinces and narrowing of federal EAs as the primary tools for avoiding duplication among jurisdictions involved in project EAs. The result is a federal process that can no longer be considered an EA; but, rather, is at risk of becoming a process of gathering information already required for ex-

⁵³ *CEAA* 2012, s. 34 does set out some minimal requirements a substitute process has to meet, including a scope that includes the factors set out in s. 19, an opportunity for the public to participate and have access to relevant documents, and a final report that will be made public. It is clear, however, that the Minister can add other criteria in determining whether a given process is a suitable substitute, as long as those criteria are made public.

⁵⁴ *CEAA* 2012, s. 36.

⁵⁵ A s. 52 (*CEAA* 2012) decision would seem to be only required in case of a substitution, not in case of equivalency, given the wording in s. 37 that equivalency would “exempt the designated project from the application of this Act”. However, the requirement for the equivalent process to identify significant adverse effects suggest that the results of the equivalent EA process are intended to be taken into account by federal project decision makers in deciding whether to exercise their power, duty or function with respect to the designated project. The requirement that the provincial process will ensure the implementation of mitigation measures, on the other hand, suggests that no federal action may be anticipated.

isting federal regulatory decisions, such as decisions under the *Fisheries Act*, the *Species at Risk Act*, and the *Migratory Birds Convention Act*. This will place significant new burdens on provincial and other EA processes in Canada, such as those carried out under Aboriginal self government agreements, to ensure a comprehensive consideration of the environmental, social and economic implications of proposed new developments.

7. PUBLIC ENGAGEMENT IN THE PROCESS

In general terms, the approach in *CEAA 2012* is a further step backward in the effort to actively engage members of the public in the planning stage of project development, and to provide meaningful opportunities for mutual learning.⁵⁶ As a starting point, the standard EA process in *CEAA* has few legislative requirements regarding public participation when compared to the comprehensive study process under *CEAA 1995*. Strict timelines tend to put members of the public at a disadvantage relative to proponents. Furthermore, fewer federal EAs mean fewer opportunities for members of the public to have input into project planning or decision-making.

Public engagement is also reduced through the new process to determine whether an EA is required. By starting the *CEAA 2012* process with the registration document filed by the proponent that will seek to convince federal decision makers that the project does not warrant an EA, the proponent is encouraged to complete and defend the project design before the EA process starts. The public is thereby essentially excluded from the project planning process. This in turn further minimizes the value of the process by pushing it further to the technical regulatory stage, and further away from an EA planning process.⁵⁷

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

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

⁵⁶ For a discussion of the value of EA as a mutual learning opportunity, see, for example, JA Sinclair & AP Diduck, “Public Involvement in EA in Canada: A Transformative Learning Perspective” (2000) *Environ Impact Assess Rev* 113.

⁵⁷ As a final note on public engagement, the requirement that *CEAA 1995* imposed on federal decision makers to justify decisions not to follow recommendations contained in a panel report has also been taken out, eliminating an important transparency tool.

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

8. CONCLUSION

There are, of course, numerous other changes to the federal EA process under *CEAA* 2012. The implications of many of these changes will only become apparent through the application of the new process over time. This is particularly relevant given the lack of scrutiny *CEAA* 2012 was subjected to, which ordinarily would have brought concerns about undesired consequences of the changes to the surface. In short, the true implications of the Act for federal EAs cannot be fully assessed until the Act has been applied for some time. Nevertheless, the key changes reviewed in this article do allow for an assessment of the direction of federal EAs under *CEAA* 2012. The shift in responsibility for the EA process, the discretion introduced to the application, the changes to the process, the narrow scope, new powers of delegation, substitution and equivalency, the more restricted role of the public, all go counter to the improvements to *CEAA* 1995 suggested in the academic literature. Key amongst those improvements would be early triggering, more effective public engagement, broader focus on sustainability, and the incorporation of strategic and regional EAs into the legal framework.⁵⁸

The shift in responsibility to the NEB and the CNSC aligns the federal process more closely with regulatory processes. This will make it more difficult for the

⁵⁸ See, for example, Robert Gibson et al, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005); Peter Duinker and Lorne Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006) 37:2 *Environmental Management* 153; Jennifer MP Steward and A John Sinclair, "Meaningful public participation in environmental assessment: Perspectives from Canadian participants, proponents, and government" (2007) 9:2 *JEAPM* 161; Bram Nobel and J Harriman Gunn, "Strategic Impact Assessment" in K Hanna (ed), *Environmental Impact Assessment — Practice and Participation*, 2nd edition (Toronto: Oxford University Press, 2009); David Lawrence, *Environmental Impact Assessment: Practical solutions to recurrent problems* (Mississauga: Wiley-Interscience, 2003); Meinhard Doelle, *The Federal EA Process: A Guide and Critique*, (Markham: Lexis-Nexis Canada, 2008). See also John Sinclair, Stephen Hazell, Jamie Kneen, Josh Paterson & Rachel Forbes. "Environmental Assessment Law for a Healthy, Secure and Sustainable Canada: A Checklist for Strong Environmental Laws." (Vancouver, 2012), available at: <https://d3n8a8pro7vhnmx.cloudfront.net/envirolawsmatter/pages/38/attachments/original/1332998614/A_Checklist_for_Strong_Environmental_Laws_FINAL_pdf.pdf?1332998614> s.

process to become a true planning process that engages governments and the public in the early stages of project planning and design, and consideration of alternative means of meeting the need and purpose of the proposed project.

The discretionary triggering process will create uncertainty about the application of the Act and politicise the process. It will also result in the process starting late in the project design stage, and will drastically reduce the number of federal EAs carried out. Delegation, substitution, and equivalency provisions will serve to further reduce the federal role in EA.

Narrow scope will reduce the EA to a regulatory information gathering process that is no longer in a position to inform project decisions on whether the project is capable of making a net contribution to sustainable development, or whether it is the best way of meeting societal needs and purposes. The new approach to harmonization with provinces, one of delegation rather than cooperation, will further exacerbate this problem by discouraging comprehensive cooperative EA processes carried out jointly to consider the full range of issues raised by a proposed project.

In short, *CEAA 2012* is a major step backward; it makes the EA less effective and less fair. It even makes the EA less efficient in the sense that it now completely duplicates the already existing regulatory process, and therefore is an additional regulatory burden without offering the value of good EA.

Instead, as clearly set out in the academic literature, the EA should be encouraged to start earlier in the project planning process, it should support and encourage public engagement rather than make it more difficult, it should move forward in integrating Regional EAs and Strategic EAs into the project based EA process, and it should broaden its scope toward sustainability assessments rather than narrow the scope.⁵⁹ In short, *CEAA 2012* marks the end of federal EAs as the concept of EA is envisaged in the literature. The process under *CEAA 2012* is an EA process in name only.

This means the burden of ensuring a proper EA process to avoid the mistakes of the past will now rest on provincial, territorial, aboriginal and municipal planning and EA processes. It will be critical for all jurisdictions in Canada to carefully consider the enhancement of their EA and planning processes to fill the huge gap left by *CEAA 2012*. Otherwise, we will undoubtedly have new environmental disasters such as the Sydney Tar Ponds to deal with in the future, and our efforts to finally turn the corner toward sustainable development will continue to be frustrated by short-term thinking.

⁵⁹ *Ibid.*