COUNTRY REPORT: CANADA
Canadian Environmental Asessment Reform:
A Glimpse at Regressive Reforms in Canadian Environmental Law

Pierre Cloutier de Repentigny*

Introduction

Often as jurists we seek through our work to propose legislative changes and reforms, to point out flaws in legislation or decisions, and to overall better the law. We thus often welcome legislative reforms as they offer an opportunity to improve the law and to bring relevance to our research. Thus the recent wave of Canadian environmental law reforms should have been an exciting occasion to improve a critical area of the law. Sadly not all reforms are progressive; in facts these legislative changes may be regarded as regressive from an environmental point of view.[1] Among the victims of this reform lies the now defunct *Canadian Environmental Assessment Act* (hereafter *CEAA 1995*),[2] once the centrepiece of federal environmental legislation.

This Country Report explores the modifications made to the federal environmental assessment regime by the adoption of the *Canadian Environmental Assessment Act, 2012* (hereafter *CEAA 2012*).[3] The report first briefly summarizes the previous regime of federal environmental assessments. It then points out key differences between the old and the new regime, while highlighting how these changes will affect comprehensive environmental assessments in Canada, a country who relies heavily on the exploitation of natural resources. It concludes with some words of caution and lessons to learn from such reforms.

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* University of British Columbia, contact: pa_cloutier@hotmail.com

[1] I use the terms “progressive” and “regressive” not in their political sense, but in their literal sense of making advancements or improvements to something.

[2] Canadian Environmental Assessment Act, SC 1992, c 37 [CEAA 1995].

[3] Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52 [CEAA 2012].

A Holistic Approach to Environmental Assessment: CEAA 1995 and its Predecessor

Environmental assessments have become a widely used tool to determine and mitigate environmental impacts of decisions and developments, and to integrate environmental and other social concerns into decision-making processes.[4] In the words of Justice La Forest of the Supreme Court of Canada:

> *"Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., Environmental Rights in Canada (1981), 245, at p. 247:*
> *The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation."*[5]

The first federal piece of legislation on the matter was the *Environmental Assessment and Review Process Guidelines Order* adopted pursuant to s 6 of the *Department of the Environment Act*.[6] The mandatory nature and constitutional validity of the Order was confirmed in *Friends of the Oldman River Society v Canada (Minister of Transport)*.[7] In 1992, the Parliament adopted *CEAA 1995*, which replaced the Order in 1995, to give formal statutory authority to the federal environmental assessment regime and eliminate any remaining uncertainties created by the *Environmental Assessment and Review Process Guidelines Order*.[8]

Under *CEAA 1995*, any project needing federal approval, benefiting from federal money, situated on federal land, initiated by the federal government, impacting aboriginal people, or

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[4] Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge (UK): Cambridge University Press, 2008), 5; and Jamie Benidickson, *Environmental Law*, 4th ed (Toronto: Irwin Law, 2013) 254 [Benidickson].

[5] Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3 at 71.

[6] Environmental Assessment and Review Process Guidelines Order, SOR/84-467; and Department of the Environment Act, RSC, 1985, c E-10.

[7] See also Canadian Wildlife Federation Inc v Canada (Minister of the Environment), [1989] 3 FC 309 (TD), aff'd (1989), 4 CELR (NS) 1 (FCA).

[8] Benidickson, supra note 4, 258.

having interprovincial or international effects is subject to an environmental assessment, unless explicitly excluded through regulations or is the result of an emergency situation.[9] Environmental assessments pursuant to *CEAA 1995* are conducted in one of four ways: self-assessment screenings or comprehensive study, panel reviews, or mediation.[10]

The scope of the assessment is determined by the responsible authority (a federal department or agency, a crown corporation, the Canadian Environmental Assessment Agency, or another body designated through regulations) who defines the project for the purpose of the assessment.[11] This scoping is however limited by s 15(3) of *CEAA 1995* which states that all works that are likely to be carried out in relation to the project as proposed by the proponent are subject to the assessment.[12] This provision created a floor for the scope of environmental assessment while allowing the responsible authority to expand it if necessary.

All assessments have to consider the environmental effects of the project, the significance of these effects, comments from the public, technically and economically feasible mitigation measures, and any other relevant matter such as the need for or alternatives to the project.[13] Assessments of a project subject to a comprehensive study, a mediation or a panel review must also consider the purpose of the project, technically and economically feasible alternative means to the project and their environmental effects, the need for and requirements of follow-up programs, and the capacity of renewable resources likely to be

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[9] *CEAA 1995*, supra note 3, ss 2, 5, 46 & 48. See also Natalie Nicole, "Le processus fédéral d'évaluation environnementale et les projets de développement hydroélectrique", in Barreau du Québec, *Développements récents en droit de l'environnement 2002*, (Cowansville (QC): Éditions Yvon Blais, 2002); and Benidickson, supra note 4, 259-260.

[10] Screening was the default process and applied unless the project was covered by the *Comprehensive Study List Regulations*, SOR/94-638 or is referred by the Minister of the Environment to a mediator or a review panel: *CEAA 1995*, supra note 3, ss 21 & 28. A referral is required when the Minister is of the opinion that the project may cause significant adverse environmental effects or that public concerns warrant a reference.

[11] *CEAA 1995*, supra note 2, ss 2 "federal authority" & 11 & 15(1).

[12] Mining Watch Canada v Canada (Fisheries and Oceans), 2010 SCC 2, para 39.

[13] *CEAA 1995*, supra note 2, s 16(1).

significantly affected to meet the needs of present and future generations.[14] Traditional Aboriginal knowledge may be considered, but it is not required.[15]

Following a screening, the responsible authority must reject the project if it is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; otherwise it may exercise its power.[16] When there is uncertainty, the project is likely to cause significant adverse environmental effects but could be justified, or when public concerns warrant it, the project is referred to a mediator or a review panel.[17] In the case of a comprehensive study, the Minister of the Environment may, after considering the report, issue an environmental assessment decision statement indicating whether in the Minister's opinion the project is likely to cause significant adverse environmental effects and the necessary mitigation measures and/or follow up programs.[18] The responsible authority then takes a decision as in a screening to approve or not the project.[19] However, if the Minister found that the project is likely to cause significant adverse environmental effects, the project must also receive the approval of the Governor in Council (the federal cabinet).[20] In the case of a project subject to mediation or a review panel, the report is submitted for a response to the Governor in Council who then approves or rejects the project following the same criteria as in other assessments.[21] Finally, decisions made pursuant to *CEAA 1995* are final and subject only to judicial review by the Federal Court.[22]

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[14] Ibid, s 16(2).

[15] Ibid, s 16.1. Nevertheless, *CEAA 1995* and arguably its successor must be applied in a manner consistent with the Crown constitutional duty to consult aboriginal people: *Quebec (Attorney General) v Moses*, 2010 SCC 17, para 45.

[16] *CEAA 1995*, supra note 2, s 20(1)(a)&(b).

[17] Ibid, s 20(1)(c).

[18] Ibid, s 23(1).

[19] Ibid, s 37(1).

[20] Ibid, s 37(1.3).

[21] Ibid, s 37(1)&(1.1).

[22] An application for judicial review cannot be grounded solely on a defect in form or a technical irregularity: Ibid, s 57. For more on grounds of review see *Dunsmuir v New Brunswick*, 2008 SCC 9 in general, and Andrew Green, "Discretion, Judicial Review and the Canadian Environmental Assessment Act", (2001-2002) 27 Queen's LJ 786 and *Inverhuron & District Ratepayers Ass v Canada (Minister of the Environment)*, 2001 FCA 203, specifically.

One Step Forward, Ten Steps Backward: CEAA 2012

While *CEAA 1995* was not perfect, the regime had the advantage of covering a large number of projects. For example, during the fiscal year of 2004-2005, the federal government conducted over 6000 screenings and 11 comprehensive studies.[23] The first key change brought by the 2012 reform is the drastic reduction in the number of projects subject to an environmental assessment. This was firstly done through modification of other statutes, mainly the *Fisheries Act* and the *Navigable Waters Protection Act* (now known as the *Navigation Protection Act*), which would have triggered federal environmental assessments through various approval processes under the old regime.[24] Secondly, *CEAA 2012* changes completely the scope of environmental assessment by moving away from a regime applicable to all federal decisions to one where only projects designated by the government are subject to an assessment.[25] Even when a project is designated, the Canadian Environmental Assessment Agency has considerable discretion to determine if an assessment is warranted.[26] Environmental assessments used to be the norm, now it seems they are the exception.[27]

The second change brought by the enactment of *CEAA 2012* is the limitation of environmental effects to be considered by the responsible authority. While under *CEAA 1995* all environmental effects had to be considered, now only effects within the legislative authority of Parliament are taken into account.[28] This is a considerable change to the regime which limits substantially the effectiveness of federal environmental assessment.[29]

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[23] Jamie Benidickson, *Environmental Law*, 3rd ed (Toronto: Irwin Law, 2009) 249-250.

[24] See Robert Daigneault, "C-38 et C-45: l'environnement, les pêches, la navigation et le mammouth" in Barreau du Québec, *Développements récents en droit de l'environnement 2013* (Cowansville (QC): Éditions Yvon Blais, 2013) [Daigneault] for these modifications.

[25] Regulations Designating Physical Activities, SOR/2012-147; and CEAA 2012, supra note 4, s 14.

[26] Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012) 24 JELP 1, 6-7 [Doelle]; and Benidickson, supra note 5, 262-263.

[27] Penny Becklumb & Tim Williams, *Canada's New Federal Environmental Assessment Process* (Ottawa: Library of Parliament, 2012) 3 [Becklumb & Williams].

[28] *CEAA 2012*, supra note 4, s 5. Such effects include effects on fish and fish habitat as defined by the *Fisheries Act*, aquatic species as defined by the *Species at Risk Act*, migratory birds as defined by the *Migratory Bird Convention Act*, *1994*, components listed in Schedule 2 of *CEAA 2012*, environmental changes occurring on federal lands or in more than on province or outside of Canada, and certain effects on aboriginal people.

[29] Doelle, supra note 26, 12-13.

Additionally, *CEAA 2012* allows for a much narrower scoping of projects and gives the Minister of the Environment the discretion to decide if a federal environmental assessment is warranted when a provincial one exists, thus further reducing the usefulness of the regime.[30] A more positive change was to move away from self-assessment and transfer the authority for environmental assessments mostly to the Canadian Environmental Assessment Agency.[31] Two bodies however retain control over environmental assessments of project under their regulatory authority: the Canadian Nuclear Safety Commission (hereafter the CNSC) and the National Energy Board (hereafter the NEB). Interestingly both agencies are responsible for important natural resources and energy projects such as the construction and refection of nuclear power plants for the CNSC, and oil and gas pipelines for the NEB. Both agencies do not have a primarily environmental nature/purpose and one wonders if they are well suited to conduct environmental assessments of controversial projects such as the Enbridge Northern Gateway pipeline, Kinder Morgan's Trans Mountain pipeline and TransCanada's Energy East pipeline, all connected to the tar sands.[32] In fact, recently, the NEB deemed that climate change was an irrelevant consideration in its analysis of Enbridge Line 9B Reversal and Line 9 Capacity Expansion Project, a decision upheld as reasonable by the Federal Court of Appeal.[33]

Decision-making has also been modified by *CEAA 2012*. Designated projects are now either subject to a "standard" environmental assessment or referred to a review panel.[34] Responsible authorities are required to determine if a designated project is likely to cause significant adverse environmental effects. If such a determination is made, the Governor in Council is responsible to determine if the significant effects are justified in the circumstances. If they are deemed justifiable, the responsible authorities must then determine the conditions for approval; conditions that must be "directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal

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[30] Ibid, 11 & 13-15; and *CEAA 2012*, ss 2(1) & 32-37 "designated project".

[31] Doelle, Ibid, 4-5.

[32] Ibid, 5-6.

[33] *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245. The decision also highlights the limits of public participation in the NEB, see also Becklumb & Williams, supra note 27, 4-5. Other challenges to the NEB decision are still pending before the Federal Court of Appeal. Of note, the situation of tar sand projects assessments was no better under the old Act: see Heather McLeod-Kilmurray & Gavin Smith, "Unsustainable Development in Canada: Environmental Assessment, Cost-Benefit Analysis, and Environmental Justice in the Tar Sands" (2010) 21 JELP 65.

[34] *CEAA 2012*, supra note 3, ss 22 & 38; and Benidickson, supra note 4, 263.

authority that would permit a designated project to be carried out, in whole or in part" further limiting the effectiveness of federal environmental assessments.[35]

Finally, one of the most troubling aspects of the 2012 environmental law reforms, including the adoption *CEAA 2012*, is the lack of transparency of the process used for their enactment.[36] One might expect that such reform, considering the numerous and important changes brought to the federal environmental assessment regime amongst others, would be subject to a rigorous analysis by Parliament. Sadly, the opposite happened in this case as these reforms were all adopted through two budget implementation bills, C-38 and C-45 (dubbed omnibus bills). It took only two months and minimal committee review to adopt *CEAA 2012* compared to the years it took to adopt its predecessor. It is clear that the federal government wanted to pass those legislative changes as fast as possible and with little scrutiny.

Conclusion

An overview of *CEAA 2012*, the process used for its enactment, and the move from a holistic and comprehensive approach where environmental assessments are the rule to a narrow one where they are the exception, indicate that the environment, thus the Canadian population and specifically the aboriginal population, is not the beneficiary of the reform. There is no doubt that the reform is regressive from an environmental point of view and will only benefit proponents, mainly the natural resource exploitations industry.[37] The fact that the federal government viewed environmental assessments as an impediment to economic development is telling.[38] *CEAA 2012* is far from the "planning tool […] generally regarded as an integral component of sound decision-making" described by the Supreme Court in *Friends of the Oldman River Society*. In the words of Doelle, "the process under *CEAA 2012* is an [environmental assessment] process in name only". [39] Moreover, even the implementation of *CEAA 2012* has attracted critics.[40]

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[35] Ibid, ss 52-53; and Doelle, supra note 26, 10-11.

[36] Doelle, ibid, 1-4; and Daigneault, supra note 24.

[37] Doelle, ibid, 16-17.

[38] Becklumb & Williams, supra note 27, 1.

[39] Doelle, supra note 26, 17.

[40] Office of the Auditor General of Canada, "Chapter 4: Implementation of the Canadian Environmental Assessment Act, 2012" of the *Report of the Commissioner of the Environment and*

I derive two main conclusions from this reform relevant for jurists, whether advocates or academics. The first is that due to the limited scope of *CEAA 2012*, both in terms of covered projects and of considered environmental effects, we will have to increasingly pay attention to provincial environmental assessments. The benefit of a federal state is that federal lacuna can be partially mitigated through provincial action. Moreover, some provincial governments might be more willing to lead on environmental matters than the current federal government. The recent decisions of the Superior Court of Québec concerning the protection of beluga whales and works conducted for the Energy East pipeline show how provincial regulations can potentially act as a safeguard for federal inaction.[41]

The second conclusion is broader. It is easy to think that established environmental legislation are secured (in French “les aquis”) and to focus our mind on what the next step forward can be. However, those aquis are, as demonstrated by this report, much more fragile than one might have thought. We must, as members of the public and as jurists, be mindful of how quickly decades of progress can be set aside. For the road ahead, it is worthwhile to start thinking about the best way to protect the environmental aquis from the changing whims of governments, such as constitutional protection or special parliamentary procedures, and ensure that environmental reforms, even in times of economic downturn, does not equate with regression.

Sustainable Development - Fall 2014 (Ottawa: Public Works and Government Services Canada, 2014).

[41] Centre Québécois du droit de l’environnement c Oléoduc Énergie Est ltée, 2014 QCCS 4147; and Centre Québécois du droit de l’environnement c Oléoduc Énergie Est ltée, 2014 QCCS 4398.