



200 – 2006 West 10<sup>th</sup> Avenue  
Vancouver, BC V6J 2B3  
www.wcel.org

tel: 604.684.7378  
fax: 604.684.1312  
toll free: 1.800.330.WCEL (in BC)  
email: admin@wcel.org

## Briefing Note

# **A Better Approach to Environmental Reviews: A Sustainability Assessment and Democratic Decision-Making Act**

## **Background**

The new *Canadian Environmental Assessment Act, 2012 (CEAA 2012)*<sup>1</sup> is not working for the environment, the public or industry. It restricts the quality and quantity of information necessary for making sound decisions, reviews too few activities and shuts citizens out of decision-making, forcing them to take to the courts and the streets for a fair consideration of their concerns.

It is time for a better approach to environmental decision-making. Replacing *CEAA 2012* with a Sustainability Assessment Act will help ensure a healthy, secure, more democratic and sustainable Canada.

Sustainability assessments have been successfully conducted in Canada already. At least five major panel reviews under the old *Canadian Environmental Assessment Act*<sup>2</sup> (CEAA) applied a positive contribution to sustainability test.<sup>3</sup> Under a new legal framework, sustainability assessments would ensure that undertakings do not compromise the resilience and sustainability of communities, helping them thrive into the future.

## **CEAA 2012 is not working**

Since 2012, Canadians have witnessed the federal government dramatically retreat from its role in environmental assessment. Under the new *CEAA 2012*, the federal government is assessing fewer projects, considering fewer of those projects' effects, shutting citizens out of reviews and imposing mandatory timelines that often make meaningful participation impossible.<sup>4</sup>

Such changes have contributed to a deep dissatisfaction among First Nations, local governments, stakeholders, civil society groups and the general public. The erosion of environmental protection and

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<sup>1</sup> SC 2012, c.19, s.52.

<sup>2</sup> SC 1992, c.37.

<sup>3</sup> Voisey's Bay Nickel Mine and Mill Environmental Assessment Panel Report (1999); the Whites Point Quarry and Marine Terminal Joint Review Panel Environmental Assessment Report (2007); the Kemess North Copper-Gold Mine Project Joint Review Panel Report (2007); Report of the Joint Review Panel for the Mackenzie Gas Project (2009); and Report of the Joint Review Panel of the Lower Churchill Hydroelectric Generation Project (2011).

<sup>4</sup> Meinhard Doelle, "CEAA 2012: the end of federal EA as we know it?" 2012: 24 *JELP* 1 at 1; Robert B. Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress," 2012: 30 *Impact Assessment and Project Appraisal* 3 at 179.

environmental assessment laws and processes in particular have only resulted in costly delays and greater uncertainty for all. In British Columbia in 2014 alone, at least 38 lawsuits were brought against 11 projects.<sup>5</sup>

Of course, federal EA was not without its problems under CEAA. Criticisms against that Act included the failure to achieve the goals of sustainable development, lack of effective integration of environmental factors into planning and decision making, inadequate public participation and failures in “anticipating and preventing the degradation of environmental quality while ensuring compatible and sustainable economic development.”<sup>6</sup>

Below are specific examples of issues faced with environmental assessments in Canada to date.

### ***Not achieving a sustainable Canada***

*CEAA 2012* has not succeeded in achieving consistent sustainability results. While it has promotion of sustainability as a purpose, it is not a requirement, resulting in inconsistency and risking approvals that do not have at their core the long-term best interests of Canadians and the environment.

### ***Failing on regional and strategic reviews***

While *CEAA 2012* provides for regional studies, none have yet been undertaken by the CEA Agency. Similarly, strategic environmental assessments in Canada have not consistently ensured the consideration of sustainability factors early in the development of such decisions.<sup>7</sup>

### ***Failing First Nations***

A British Columbia-based study showed significant failings in the BC and Canadian environmental assessment processes, including substantive procedural failures; relational failures between First Nation, provincial and federal governments; and fundamental philosophical differences between assessment processes and indigenous worldviews.<sup>8</sup> These failures are a significant source of legal conflict between Aboriginal peoples and provincial and federal governments.

### **A better approach**

Done correctly,<sup>9</sup> environmental assessments are an effective long term planning tool for maintaining a healthy, secure and sustainable Canada. As a long-term solution to the myriad concerns with federal EA, we recommend a new sustainability assessment law that assesses projects, policies, proposals and activities for their contributions to sustainability and ensures democratic decision-making.

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<sup>5</sup> Mark Hume, “Flurry of BC court battles threatens to drive away investment,” *The Globe and Mail* (22 November 2014); Mark Hume, “Eleven B.C. resource projects and the court actions they’ve inspired, in detail” (21 November 2014).

<sup>6</sup> West Coast Environmental Law Association, “Seven Year Statutory Review of the Canadian Environmental Assessment Act,” Submission to Standing Committee on Environment and Sustainable Development (28 November 2011).

<sup>7</sup> Stratos Inc., *Evaluation of the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, Final Report Submitted to Canadian Environmental Assessment Agency (2009) at v.

<sup>8</sup> Booth, Annie and Norm W. Skelton. 2011. “We Are Fighting for Ourselves” – First Nations’ Evaluation of British Columbia and Canadian Environmental Assessment Processes. *Journal of Environmental Assessment Policy and Management*, Vol. 13, No. 3, pp. 367-404.

<sup>9</sup> See, e.g., the Mackenzie Gas Project Joint Review Panel Environmental Assessment (2009), which has been called “[t]he most advanced application [of a sustainability assessment approach] by a Canadian environmental assessment panel” to date: Robert B. Gibson, “Preparing a sustainability-based argument for environmental assessment proceedings in Canada” (21 February 2011; rev 11 July 2013) at 5.

Such an Act should be developed in an open, collaborative manner, informed by the best available science and indigenous knowledge to safeguard our land, air, water and species, and should contain on the following principles.<sup>10</sup>

Below are some key elements of that law.

### ***Sustainability assessment of all undertakings***

Whereas an EA typically asks ‘how can this project be made less destructive,’ sustainability assessment asks ‘whether undertakings advance our economy and society toward an envisioned future’ by using a “positive contribution to sustainability” test as a main determiner for whether undertakings get approved.<sup>11</sup>

Sustainability assessment better addresses the longer-term needs of communities, regions and the country by providing a broader foundation for generating public and community support, helping make assessment processes and outcomes more effective and efficient. They have been successfully conducted in Canada already. At least five major environmental assessment panel reviews under the old *Canadian Environmental Assessment Act*<sup>12</sup> (CEAA) applied a positive contribution to sustainability test.<sup>13</sup>

To achieve sustainability results, a new legal framework should:

- Ensure that all policies, plans, laws and undertakings are assessed for their potential contributions to sustainability;
- Require the consideration of:
  - all potential environmental, social, cultural, health and economic impacts, including upstream and downstream (“life-cycle”) impacts, associated with an undertaking;
  - the significance of those impacts;
  - the interaction of those impacts; and
  - the cumulative impacts of past, present and future undertakings, including upstream and downstream (“life-cycle”) impacts (see below); and
- Require assessments to be conducted by an **independent Sustainability Authority**.

### ***Strong and integrated public participation***

Meaningful public participation means government decision-makers get much better information than by simple reliance their and proponents’ evidence, and leads to decisions that are both well-founded and more locally acceptable.

Public participation should be a fundamental component of all forms of environmental assessment, including regional strategic environmental assessments.

To be effective and inclusive, assessments should have early and ongoing processes to meaningfully engage the public from the initial identification of the proposal through to monitoring, and full transparency and sharing of information by governments and proponents.

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<sup>10</sup> From 10 principles for strong environmental assessment laws developed by the West Coast Environmental Law Association in conjunction with other environmental non-governmental organizations in early 2012, which can be found at [http://www.envirolawsmatter.ca/statement\\_of\\_principles](http://www.envirolawsmatter.ca/statement_of_principles). The list of the 58 endorsers at <http://www.envirolawsmatter.ca/endorsers>.

<sup>11</sup> Robert B. Gibson et al, *Sustainability Assessment: Criteria and Processes* (London, ON: Earthscan, 2005).

<sup>12</sup> SC 1992, c.37.

<sup>13</sup> Voisey’s Bay Nickel Mine and Mill Environmental Assessment Panel Report (1999); the Whites Point Quarry and Marine Terminal Joint Review Panel Environmental Assessment Report (2007); the Kemess North Copper-Gold Mine Project Joint Review Panel Report (2007); Report of the Joint Review Panel for the Mackenzie Gas Project (2009); and Report of the Joint Review Panel of the Lower Churchill Hydroelectric Generation Project (2011).

### ***Meaningful involvement of affected First Nations as decision-makers***

A 2011 British Columbia-based study showed significant failings in the BC and Canadian environmental assessment processes that are a significant source of legal conflict between Aboriginal peoples and provincial and federal governments.<sup>14</sup> First Nations have recommended a fundamental revision of environmental assessment processes to protect their treaty and Aboriginal rights and ensure their survival as distinct and viable cultures upon the land. To address the failings at the federal level, a new Sustainability Assessment law must:

- Require the timely and meaningful involvement of Aboriginal rights-holders;
- Provide Aboriginal rights-holders with the ability to exercise authority within the decision making process flowing from their inherent governance rights;
- Include mechanisms for negotiating the means by which Aboriginal groups exercise authority in relation to projects that impact their rights and interests; and
- Dynamically accommodate different Aboriginal groups, treaty and governance rights, and rights-holders in relation to varying scales of projects and types of environmental assessment being conducted.

### ***Comprehensive consideration of cumulative environmental effects***

Cumulative effects assessment (CEA) assists in long-term land use and environmental and economic planning and can help avoid undesirable and otherwise-unanticipated effects of multiple projects within the same area. As cumulative effects are the actual effects that are felt by communities, alter ecosystems and biophysical structures and demonstrate a project's net contribution to sustainability, CEA should be the central focus of all impact assessment work.

To ensure comprehensive CEAs, a Sustainability Assessment law should require the consideration of the cumulative effects of:

- All potential environmental, social, cultural, health and economic impacts, including upstream and downstream ("life-cycle") impacts, associated with an undertaking;
- The effects of past, present and potential future related or nearby undertakings;
- The significance of those cumulative impacts; and
- Their interactions.<sup>15</sup>

### ***A legal framework for strategic assessment***

Strategic environmental assessment (SEA) is the process of evaluating the potential environmental effects of proposed or existing policies, plans and programs and their alternatives. It is currently mandated under the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*.

SEA can strengthen accountability, provides confidence in government decision making and increases certainty that such decisions will contribute to sustainability.<sup>16</sup> A Canadian example is the 2013 SEA of the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring.

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<sup>14</sup> Booth, Annie and Norm W. Skelton. 2011. "We Are Fighting for Ourselves" – First Nations' Evaluation of British Columbia and Canadian Environmental Assessment Processes. *Journal of Environmental Assessment Policy and Management*, Vol. 13, No. 3, pp. 367-404.

<sup>15</sup> Bram Noble and Jill Harriman, *Regional Strategic Environmental Assessment (R-SEA): Methodological Guidance and Good Practice*, Report commissioned by the Government of Alberta (28 November 2008) at 41.

<sup>16</sup> Hugh Benevides *et al*, "Law and Policy Options for Strategic Environmental Assessment in Canada", paper submitted to the Canadian Environmental Assessment Agency in partial satisfaction of a Contribution Agreement dated July 2008

To improve SEA in Canada, a new Sustainability Assessment law should require all potential policies, plans and programs that could have significant direct or indirect impacts on or interactions with the environment or natural resources, or that may affect the number, location, type or characteristics of undertakings that require a project-specific assessment, to undergo an SEA.

### ***A legal framework for regional strategic assessment***

Regional strategic environmental assessments (RSEAs) examine the cumulative environmental effects of multiple developments within a region. Regional examples include the Mackenzie Valley, northeastern Alberta (tar sands) or the Bay of Fundy.

Done appropriately, RSEAs help manage cumulative effects while reducing the burdens of individual EAs. When undertaken ahead of major industrial development or expansions, they can help define the terms and requirements of subsequent project assessments, provide baseline data and analysis for project-specific assessments, and “provide decision makers with information that could contribute to an understanding of the wider implications of development and environmental change.”<sup>17</sup>

To ensure timely and effective RSEAs, a Sustainability Assessment Act should:

- **Require RSEAs** for regions that are subject to intense development pressures;<sup>18</sup>
- **Require periodic broad-scale regional assessments** of environmental conditions as compared to historic baselines and benchmarks;
- **Require the establishment of regional targets** for valued components of ecological and human well-being (for matters within federal jurisdiction) based on best available science and Indigenous and local knowledge;
- **Facilitate collaboration and agreement** among the various levels of government (including First Nations) on management targets and indicators for regional valued components, as well as objectives regarding the nature, pace and scale of desired development that will make the greatest net contribution to sustainability; and
- Establish mechanisms for **working with the provinces, Aboriginal governments, and northern co-management and assessment bodies** to establish regional frameworks to efficiently manage government responsibilities in a way that respects Aboriginal and treaty rights without duplicating efforts.

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between the Canadian Environmental Assessment Agency and the University of Waterloo (December 2008, amended October 2009) at 4; Mark Haddock, “Environmental Assessment in British Columbia” (Environmental Law Centre, University of Victoria Faculty of Law: November 2012) at 22; UNEP *et al.*, *Environmental Impact Assessment Course Module*, online: United Nations University; and Bram Noble and Jill Harriman, *Regional Strategic Environmental Assessment (R-SEA): Methodological Guidance and Good Practice*, Report commissioned by the Government of Alberta (28 November 2008).

<sup>17</sup> OAG, 2014 Fall Report of the Commissioner of the Environment and Sustainable Development, Ch 4.

<sup>18</sup> West Coast Environmental Law, “Toward a ‘More Planned Approach’ to Independent Power Projects in BC: Background on Strategic Environmental Assessment.” *Law Reform Papers, IPP Project Series* (2009), online: <http://wcel.org/resources/publication/toward-planned-approach-ipp-projects-bc-strategic-environmental-assessment>.

Celesa L. Hovart and Jeffrey Barnes, “Applying a Regional Strategic Environmental Assessment Approach to the Management of Offshore Oil and Gas Development” (2004).

### ***Employment of multijurisdictional environmental assessment***

Federal decision makers must uphold their duties to ensure that they have appropriate information about the social, economic and environmental implications of a proposed project before making decisions on whether to permit the project to proceed.<sup>19</sup>

To this end, a Sustainability Assessment law should include mechanisms for entering into bilateral agreements that set out frameworks for coordinated assessments, reflect the principle of harmonization upwards to the higher standard and require the federal government to play an equal role in the assessment process.

### ***Transparency, fairness, predictability and accessibility***

Predictability of process must not be conflated with predictability of outcome. In general, discretionary decisions should be constrained by legislative requirements, and affected persons and the interested public should have a right of appeal.

Moreover, a new Sustainability Assessment law should be accompanied by rules and guidance documents that clearly set out and describe the application of the legal framework to help ensure that proponents, other interested parties and the public know from the outset how assessment requirements apply.

For more information please contact the author:

Anna Johnston, West Coast Environmental Law Association  
ajohnston@wcel.org  
604-340-2304

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<sup>19</sup> Elaine Feldman, Submissions to the Standing Committee on Environment and Sustainable Development, 20 October 2011 at 11:50, online:

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5186909&Language=E&Mode=1>.