Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

ENSURING SUSTAINABILITY THROUGH STATUTORY REFORM: ESSENTIAL ELEMENTS OF IMPACT ASSESSMENT LAW IN CANADA

Submissions of the Canadian Environmental Law Association
To the Government of Canada regarding
***Environmental and Regulatory Reviews: Discussion Paper* (June 2017)**

Prepared by:

Richard D. Lindgren
Counsel

August 28, 2017

Canadian Environmental Law Association
T 416 960-2284 • 1-844-755-1420 • F 416 960-9392 • 55 University Avenue, Suite 1500 Toronto, Ontario M5J 2H7 • cela.ca

ENSURING SUSTAINABILITY THROUGH STATUTORY REFORM: ESSENTIAL ELEMENTS OF IMPACT ASSESSMENT LAW IN CANADA

By
Richard D. Lindgren
Counsel, Canadian Environmental Law Association

Abstract: *Released in April 2017 after extensive public consultation, the Expert Panel's report on federal environmental assessment ("EA") articulates a bold new vision for establishing robust, credible, participatory and evidence-based processes focused on sustainability. In response, the Government of Canada issued a short Discussion Paper (June 2017) that outlines potential EA reforms that are under consideration at the present time. Unfortunately, many of these proposed reforms are very general in nature, and the Discussion Paper omits specific details on precisely how the proposals would be implemented. Similarly, the Discussion Paper fails to adopt or even mention a number of critically important recommendations made by the Expert Panel, particularly in relation to sustainability considerations. In addition, the Discussion Paper contains several proposals which are clearly inconsistent, or directly conflict, with the Panel's well-founded recommendations. In this paper, the author reviews the various gaps in the high-level EA reforms described in the Discussion Paper, and identifies the essential elements which should be reflected in new federal legislation that repeals and replaces the Canadian Environmental Assessment Act, 2012.*

PART I - INTRODUCTION

The Canadian Environmental Law Association ("CELA") welcomes this opportunity to provide submissions to the Government of Canada in relation to the *Environmental and Regulatory Reviews: Discussion Paper* ("*Discussion Paper*") released in June 2017.

The *Discussion Paper* addresses various broad topics arising from the recent public reviews on reforming the *Canadian Environmental Assessment Act, 2012* ("*CEAA*"), modernizing the National Energy Board ("NEB"), and restoring lost protections and building modern safeguards into the *Fisheries Act* and *Navigation Protection Act*. However, CELA's analysis of the *Discussion Paper* primarily focuses on the proposed "path"[1] for reforming federal environmental assessment ("EA") legislation, which constitutes the bulk of the *Discussion Paper*.

(a) Background

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues.

[1] *Discussion Paper*, page 4.

Since our inception, CELA's casework, law reform and public outreach activities have involved EA matters at the federal and provincial levels. In particular, CELA has represented clients, or participated on its own behalf, in numerous administrative and legal proceedings under *CEAA 2012* and its predecessors, *CEAA 1992* and the *Environmental Assessment and Review Process* ("*EARP*") *Guidelines Order*. For example, CELA has intervened in Canada's leading federal EA cases, such as the *Oldman River*[2] and *MiningWatch*[3] judgments of the Supreme Court of Canada.

In addition, CELA lawyers have made submissions to, and appeared as witnesses before, various Parliamentary committees in relation to federal EA legislation, including the original enactment of *CEAA 1992* and its implementing regulations. Similarly, CELA opposed the previous government's repeal of *CEAA 1992*, the passage of *CEAA 2012*, and the implementation of other unjustifiable rollbacks of Canada's environmental safety net (e.g. Bill C-9, Bill C-38 and Bill C-45).[4]

More recently, CELA participated in the hearings held by the independent Expert Panel that was established by the Government of Canada in mid-2016 to undertake a public review of existing EA processes at the federal level. For example, CELA appeared before the Expert Panel in November 2016 to present[5] our preliminary submissions on EA reform.[6] Similarly, in December 2016, CELA filed its final submissions[7] with the Expert Panel.

After the release of the final report[8] of the Expert Panel in April 2017, CELA has continued to review and discuss the essential elements of EA reform with representatives from non-governmental organizations and indigenous communities across Canada. In early June 2017, for example, CELA and other environmental groups, practitioners, academics and other persons participated in the second "EA Summit" in Ottawa to evaluate the Expert Panel report, and to share ideas about how to design and implement long-overdue EA reform at the federal level.

Similarly, after the *Discussion Paper* was released for public comment, CELA and other environmental groups met in July 2017 with the federal Minister of the Environment and Climate Change, political staff, and senior officials with the Canadian Environmental Assessment Agency to exchange views about the various proposals set out in the *Discussion Paper*.

(b) Overview of CELA's Conclusions about the Discussion Paper

On the basis of our decades-long experience in EA matters, CELA has carefully considered the *Discussion Paper* from the public interest perspective of our client communities.

---

[2] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.
[3] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6.
[4] These submissions are available at the CELA website: http://www.cela.ca/collections/justice/canadian-environmental-assessment-act . Many of the comments in this paper reiterate and expand upon CELA's previous submissions to the Expert Panel and to the Government of Canada regarding federal EA reform.
[5] http://www.cela.ca/slides-preliminary-submissions-federal-ea-act
[6] http://eareview-examenee.ca/wp-content/uploads/uploaded_files/nov.8-14h00-cela-preliminary-submissions-to-the-expert...-2016.pdf
[7] http://www.cela.ca/publications/legal-path-sustainability-top-five-reforms-needed-next-generation-assessments
[8] Expert Panel, *Building Common Ground: A New Vision for Impact Assessment in Canada* (2017) ["Expert Panel Report"].

For the reasons outlined below, CELA's overall conclusion is that the *Discussion Paper*'s proposals are inadequate, unacceptable and unlikely to achieve the federal government's objective of delivering EA and regulatory processes that "regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous persons, ensure good projects go ahead, and resources get to market."[9]

Accordingly, CELA recommends that the *Discussion Paper*'s sparse proposals for EA reform[10] should not be used as the primary basis for framing the drafting instructions to be provided by Cabinet to legislative counsel in the coming months. Instead, CELA submits that the drafting instructions for statutory reform should more closely reflect and incorporate the findings, conclusions and recommendations of the Expert Panel, subject to our additional comments set out below.

CELA RECOMMENDATION #1: The Discussion Paper's proposals for EA reform should not be used as the primary basis for framing Cabinet's drafting instructions to legislative counsel. Instead, Cabinet's drafting instructions should more closely reflect and incorporate the findings, conclusions and recommendations of the final report of the Expert Panel on federal EA processes.

At the same time, CELA remains highly concerned that the *Discussion Paper* appears to contemplate merely amending *CEAA 2012*, rather than starting afresh with a comprehensive new statute. For example, despite the well-documented problems within Canada's current EA regime,[11] the *Discussion Paper* states that "changes" to *CEAA 2012* "are being considered to strengthen environmental protection."[12] Thus, there appears to be no federal interest or commitment in the *Discussion Paper* to develop new legislation as a result of the current review of EA and regulatory processes.

In our view, *CEAA 2012* is fundamentally flawed and cannot be salvaged by amendments which leave intact the same inadequate information-gathering and politicized decision-making structure that currently exists under this widely discredited law. Accordingly, CELA strongly recommends that *CEAA 2012* must be repealed and replaced by new legislation that is fully responsive to the Expert Panel's recommendations (particularly in relation to sustainability assessments), and that delivers on recent commitments made by the current government in relation to national EA reform (see below).

---

[9] *Discussion Paper*, page 3.
[10] *Ibid*, pages 18 to 19. The *Discussion Paper*'s legislative proposals are simply set out in two-page summary of overgeneralized bullet points, rather than a textual description of specific proposed reforms, at a sufficient level of detail, with accompanying implementation approaches or options.
[11] For example, the Expert Panel found that "current assessment processes under CEAA 2012 are incapable of resolving disparate points of view" about the purpose, scope and content of federal EA requirements: see Expert Panel Report, page 10.
[12] *Discussion Paper*, page 18.

CELA RECOMMENDATION #2: *CEAA 2012* must be wholly repealed and replaced by new comprehensive "next generation" legislation that fully entrenches the principles, processes and policies required to implement sustainability assessments at the federal level.

In summary, CELA submits that the federal government should start with a clean slate, return to first principles, and develop an integrated package of forward-looking statutory, regulatory, policy and administrative reforms aimed at ensuring sustainability. This new federal regime must be effective, enforceable, and equitable, and it must be developed with meaningful opportunities for input from stakeholders, indigenous communities and the public at large.

(c) Benchmarks for Assessing the Discussion Paper

In assessing the acceptability and efficacy of the *Discussion Paper*'s proposals, CELA has considered the relevant portions of the Expert Panel report, as well as the key commitments made by the current federal government, including:

- the current government's election platform commitment to "immediately review Canada's environmental assessment processes and introduce new, fair processes" which will:

  - "restore robust oversight and thorough environmental assessments;"

  - "ensure that decisions are based on science, facts and evidence, and serve the public's interest;"

  - "provide ways for Canadians to express their views and opportunities for experts to meaningfully participate;"

  - "end the practice of having federal Ministers interfere in the environmental assessment process;"

  - "ensure that environmental assessments include an analysis of upstream impacts and greenhouse gas emissions resulting from projects under review;" and

  - "ensure that on project reviews and assessments, the Crown is fully executing its consultation, accommodation, and consent obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights and the United Nations Declaration on the Rights of Indigenous Peoples;"[13] and

- Prime Minister Trudeau's 2015 mandate letter to Minister McKenna which, among other things, directs the Minister to review EA processes in order "to regain public trust", and to "introduce new processes that will:

[13] https://www.liberal.ca/realchange/environmental-assessments/

> - restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while also working with provinces and territories to avoid duplication;
>
> - ensure that decisions are based on science, facts, and evidence, and serve the public's interest;
>
> - provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and
>
> - require project advocates to choose the best technologies available to reduce environmental impacts" (emphasis added).[14]

Viewed against this backdrop, CELA concludes that the *Discussion Paper* falls considerably short of the mark, and that it is clearly insufficient for the purposes of keeping the above-noted commitments. In our view, if the Government of Canada truly intends to create a robust process, restore public trust, and facilitate meaningful participation, then Parliament must enact new legislation that goes well beyond the vague and incomplete suggestions contained within the *Discussion Paper*.

In addition to the above-noted governmental commitments, CELA's analysis of the *Discussion Paper* has considered the widely held consensus on the essential components of an "advanced" impact assessment regime. These components have been summarized in a leading textbook as follows:

- **APPLICATION RULES**: Ensure assessment of all undertakings – including strategic-level policies, programs, plans and projects – that might have significant environmental effects, individually and collectively;

- **LEVELS OF ASSESSMENT**: Provide authoritative links [between assessment streams] so that broader strategic assessments can guide and be guided by individual project assessments;

- **CONCEPTION OF ENVIRONMENTAL CONSIDERATIONS**: Adopt a broad conception of the environment as linked complex systems with intertwined social, economic, cultural and biophysical/ecological factors at multiple scales; include positive and negative effects; emphasize attention to cumulative effects;

- **BREADTH OF ANALYSIS – UNDERTAKINGS**: Ensure critical review of public interest purpose of each undertaking; require identification and comparative evaluation of the reasonable alternatives – including different general approaches and different designs – with justification for selection of the preferred alternative as the proposed undertaking;

[14] http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter

- **BREADTH OF ANALYSIS - EFFECTS**: Require integrated consideration of related undertakings as well as interactive and cumulative effects of existing, proposed and reasonably anticipated future activities;

- **KNOWLEDGE**: Incorporate different kinds of knowledge and analysis, including informal, traditional and Aboriginal knowledge as well as conventional science;

- **EVALUATION OF PREDICTED EFFECTS**: Require identification and evaluation of the significance of predictable effects, uncertainties (about impact predictions, mitigation and enhancement effectiveness) and associated risks; apply explicit sustainability-based criteria for evaluation, recognizing differences in cases and contexts;

- **PUBLIC PARTICIPATION**: Include provisions, including funding support, to ensure effective public as well as technical notification and consultation at significant points throughout the proposal development and assessment process and in post-approval monitoring;

- **COMPLIANCE AND FOLLOW-UP**: Establish enforceable decision-making powers requiring compliance with conditions, monitoring of actual effects, and timely response to emerging problems and opportunities;

- **ROLE IN OVERALL APPROVAL DECISION-MAKING**: Treat environmental assessment as the main venue for comprehensive evaluation and public review of purposes of and rationale for proposed undertakings, based on a comparative evaluation of options, considering positive as well as adverse effects;

- **CORE DECISION CRITERIA**: Require that the proposed undertaking represent the most beneficial option, with the greatest contribution to lasting gains while avoiding significant adverse environmental effects; favour precaution and adaptability; aim to avoid trade-offs and reject all trade-offs that displace significant adverse effects to future generations;

- **BROADER LINKS**: Provide for integration of assessment work, including monitoring, into a broader regime for setting, pursuing and re-evaluating public objectives and guiding future undertakings; and

- **ADDITIONAL PROCESS EFFICIENCY MEASURES**: Use strategic-level assessments to guide and streamline individual project assessments; clarify relations with specific permitting and licencing processes; harmonize the central components of Canadian environmental assessment regimes to facilitate multi-jurisdictional assessments.[15]

Aside from these general components, CELA's analysis of the *Discussion Paper* also evaluates whether – or to what extent – the proposed reforms will make any tangible progress in ensuring

[15] Paul Muldoon *et al.*, *An Introduction to Environmental Law and Policy in Canada (2nd ed.)* (Toronto: Emond Montgomery Publications Limited, 2015) at pages 232 to 233.

ecological, socio-cultural and economic sustainability as Canada faces the disparate challenges of the 21st century, including climate change.

In this regard, CELA strongly recommends the replacement of *CEAA 2012* by "next generation" legislation which has been endorsed by the Expert Panel, and which enjoys considerable support among EA practitioners, academics,[16] non-governmental organizations and other stakeholders across Canada.

In particular, CELA adopts and commends the "next generation" model articulated by Professors Gibson, Doelle and Sinclair.[17] This sustainability model was advocated by numerous participants across Canada who presented to the Expert Panel, including the Environmental Planning and Assessment Caucus ("EPA Caucus") of the Canadian Environmental Network, whose submission described several key objectives for legislative reform:

- achieve cooperative multi-jurisdictional assessment in Canada's complex federal system;
- design an appropriate structure to deliver effective and robust assessment processes and decisions;
- guarantee early triggering and effective scoping of assessments;
- ensure effective post-decision tracking, reporting, and compliance;
- embrace a learning orientation throughout the assessment, decision-making, and follow-up processes;
- make sustainability a core principle of assessment;
- incorporate the principles of meaningful public participation; and
- address climate change effects in EA.[18]

CELA submits that it is now time for the Government of Canada to shift from its constrained "first generation" EA regime (as exemplified by *CEAA 2012*) to a comprehensive "sustainability assessment" approach which includes strategic- and regional-level assessment, and emphasizes outcomes that deliver long-term, multiple, mutually reinforcing and fairly distributed societal benefits from approved undertakings.

CELA further notes that developing new federal legislation also provides a timely and important opportunity to implement reconciliation obligations in relation to Canada's indigenous communities:

> The need – and opportunity – for better recognition of Indigenous jurisdiction and authority and Aboriginal rights, including Canada's commitments to implement both the Calls to

---

[16] See, for example, Martin Olszynski *et al*., *Strengthening Canada's Environmental Assessment and Regulatory Processes: Recommendations and Model Legislation for Sustainability* (August 18, 2017).

[17] R.B. Gibson *et al*. "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016), 29 JELP 25; R.B. Gibson, *Key Components for Reform of Federal EA Processes* (November 9, 2016).

[18] EPA Caucus, *Achieving Next Generation Environmental Assessment* (December 14, 2016) at http://eareview-examenee.ca/wp-content/uploads/uploaded_files/epa-caucus-submission-to-expert-panel-2016-12-14.docx, page 1.

> Action of Canada's Truth and Reconciliation Commission and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is an overarching theme of our work. Reconstructing the federal EA regime represents an important opportunity to create the possibility of reconciliation with respect to Indigenous peoples and territories by building in a respectful place for Indigenous participation in EA, but more importantly by respecting Indigenous authorities and jurisdiction in their own territories.[19]

Therefore, when developing the new impact assessment law, the Government of Canada must provide meaningful opportunities for indigenous involvement in the drafting exercise, and should ensure that the new statute fully entrenches the principle of full, prior and informed consent ("FPIC") when undertakings affecting indigenous persons, communities, lands or interests are being proposed. This position was advanced by numerous indigenous communities which made presentations to the Expert Panel,[20] and we commend this position to the Government of Canada as a vitally important component of any drafting instructions for development of the new impact assessment framework.

In summary, it is clear to CELA that there is strong public support across Canada for the "next generation" impact assessment model. Therefore, in our view, the primary question for the Government of Canada at this time is not <u>if</u> the "next generation" model should be embraced, but <u>how</u> it can be duly codified in new federal legislation and properly implemented across the country.

PART II – CELA'S ANALYSIS OF THE DISCUSSION PAPER

CELA's analysis follows the same basic chronology of the *Discussion Paper*, and focuses upon three main aspects of the *Discussion Paper*:

- the general principles being used by the Government of Canada to "guide" changes to federal EA and regulatory processes;

- the various reforms that are intended to "rebuild" trust in the project assessment system; and

- summary of the proposed program and legislative changes.

---

[19] *Ibid*, page 2.

[20] See, for example, Stswecem'c Xgat'tem First Nation, Submissions to the Expert Panel (December 18, 2016), pages 1, 7; BC Assembly of First Nations, Submissions to the Expert Panel (December 15, 2016), pages 3 to 5, 14 to 15; Cowichan Tribes, Submission to the Expert Panel (December 12, 2016), pages 3 to 4; Carrier Sekani Tribal Council, Verbal Submission to the Expert Panel (December 11, 2016), pages 2 to 3, 8 to 9; Gitanyow Hereditary Chiefs, *An Indigenous Approach to Sustainability Assessment* (December 9, 2016), Slide 17; Citxw Nlaka'pamax Assembly, Presentation to Expert Panel (December 2016), Slides 6 to 9, 13, 15, 17; Coastal First Nations – Great Bear Initiative Society, *Environmental Assessment in the Context of Reconciliation* (December 2016), Slide 2; Okanagan Nation Alliance, Presentation to the Expert Panel (November 29, 2016), Slides 15 to 16; Mikisew Cree First Nation, Presentation to the Expert Panel (November 24, 2016), Slides 9 to 15; Gwich'in Tribal Council, Submissions to the Expert Panel (September 29, 2016), page 2.

(a) Guiding Principles

The *Discussion Paper* sets out five general principles that are intended to guide the development of "system-wide" changes to Canada's EA and regulatory processes:

1. Fair, predictable and transparent environmental assessment and regulatory processes that build on what works.

2. Participation of Indigenous peoples in all phases that advances the Government's commitment to the United Nations Declaration on Rights of Indigenous Peoples and reconciliation.

3. Inclusive and meaningful public engagement.

4. Timely, evidence-based decisions reflecting the best available science and Indigenous knowledge.

5. One project – one assessment, with the scale of assessment aligned with the scale and potential impacts of the project.[21]

While these broad principles may seem unexceptional or well-intentioned at first glance, CELA has identified a number of concerns about the nature, wording and application of certain principles.

First, it appears to CELA that the stated principles are largely procedural in nature, and they do not specify or address the substantive outcome (e.g. sustainability) that should be achieved by the proposed changes to the EA regime. While procedural reforms are undoubtedly necessary as part of the overall reform package, CELA notes that EA is not done simply for the sake of doing EA. Instead, EA is a planning and decision-making tool that can be used to achieve desirable outcomes that are in the public interest. In our view, the apparent disconnect in the *Discussion Paper* between procedural improvements and substantive outcomes is both puzzling and alarming. On this point, we note that the word "sustainability" does not appear even once in the *Discussion Paper*, although it is found repeatedly throughout the Expert Panel's report and forms the central basis of the Expert Panel's key recommendations.[22]

Second, CELA seriously questions the veracity of the claim in the first principle that the proposed changes "build on what works." In our experience, there is very little that "works" in the current *CEAA 2012* regime, and we note that the Expert Panel reached similar conclusions after receiving submissions from stakeholders and indigenous communities across Canada. Even the *Discussion Paper* acknowledges the numerous problems that plague the existing EA process.[23]

---

[21] *Discussion Paper*, page 7.
[22] For example, the Expert Panel recommends that sustainability should be "central" to impact assessment, and that federal impact assessment should "decide whether a project should proceed based on that project's contribution to sustainability": see Expert Panel Report, pages 3, 19 to 22, 31, 45, 47, 65 to 67, and 69.
[23] *Discussion Paper*, page 6.

However, the *Discussion Paper* goes on to assert, without explanation or elaboration, that "some elements of the current system," such as "a strong role for expert regulators in energy transmission, nuclear and offshore oil and gas," should continue to "form part of improved environmental assessment and regulatory processes."[24] This is precisely the proposition that was correctly rejected by the Expert Panel[25] on the evidence, and should not be used as the starting point for legislative reform. In short, CELA submits that the NEB and Canadian Nuclear Safety Commission ("CNSC") should not lead (or co-lead) future assessment processes for the very persuasive reasons offered by the Expert Panel. For example, the litany of current EA problems outlined in the *Discussion Paper*[26] are exactly the ones that CELA continues to encounter while engaging in EA processes conducted by the CNSC under *CEAA 2012*, as discussed in Appendix A below.

Third, the second principle (indigenous participation in "all phases" of EA processes) indicates that this is intended to "advance" Canada's commitment to reconciliation and the UNDRIP. CELA respectfully defers to the views of indigenous peoples, communities and organizations on whether this is an accurate claim or an acceptable approach. However, as a matter of interpretation, CELA notes that this principle does not appear to commit the federal government to actually incorporate UNDRIP or FPIC requirements directly into the new legislation that emerges from the current EA review exercise. In short, "advancing" international obligations is not the same as directly entrenching them into federal law in an effective and enforceable manner.

Fourth, as a practical matter, it appears to CELA that the *Discussion Paper*'s proposals may do little or nothing to actually implement or fulfill the above-noted principles. For example, the modest changes currently being recommended in relation to public participation and decision-making will likely not make "public engagement" more "inclusive and meaningful," nor will they result in "timely" or "evidence-based" decisions, as stated in the *Discussion Paper*'s third and fourth principles. These and related concerns are explored below in more detail.

Accordingly, CELA submits that the five principles outlined in the *Discussion Paper* do not really provide any meaningful guidance, and they should not be used by the Government of Canada as the pretext or rationale for proposing (or rejecting) specific reforms to the federal EA regime. Instead, CELA advises the federal government to use the above-noted commitments (e.g. the mandate letter to Minister McKenna), EA benchmarks, and sustainability requirements as the principled basis for identifying and prioritizing the substantial legislative changes that are urgently required in Canada.

(b) Rebuilding Trust

In order to "rebuild" public trust in federal assessment processes, the *Discussion Paper* identifies seven "cross-cutting" areas of change.[27] CELA's comments and recommendations on each of these topics are set out below.

---

[24] *Ibid.*
[25] Expert Panel Report, pages 49 to 52.
[26] *Discussion Paper*, page 6.
[27] *Ibid*, page 8.

1. Addressing Cumulative Effects

The *Discussion Paper* briefly suggests that cumulative effects should be addressed through strategic assessments of activities subject to federal oversight and regulation (e.g. climate change), and through regional assessments undertaken in collaboration with provinces, territories, indigenous communities and stakeholders.[28] The results of such regional assessments would, in turn, "inform project assessments."[29] It is unclear what "inform" means in this context, but CELA recommends that the new legislation should continue to require cumulative effects analysis in project level assessments, which has been legally mandated for many years under *CEAA 1992* and *CEAA 2012*.

CELA RECOMMENDATION #3: The new legislation should require cumulative effects analysis within strategic, regional and project assessments.

In general terms, CELA agrees with the need to identify and evaluate cumulative effects in a much more rigorous manner than has occurred to date across Canada. We further submit that strategic and regional assessments are important tools for not only evaluating cumulative effects, but also for addressing broader policy issues, comparatively evaluating alternative approaches, and understanding the overall environmental, socio-cultural and economic context for individual projects. In our view, appropriately framed strategic or regional assessments have considerable potential to help determine resource management priorities and appropriate land uses, particularly in areas where there has been little or no resource development, extraction activities or related infrastructure expansion.

The Expert Panel report acknowledges the need for strategic and regional assessments, and offers a number of detailed findings and recommendations on this topic.[30] In particular, the Expert Panel correctly recommends that:

- impact assessment (IA) legislation should require regional IAs where cumulative impacts may occur or already exist on federal lands or marine areas, or where there are potential consequential cumulative impacts to matters of federal interest;

- IA legislation should require the IA authority to develop and maintain a schedule of regions that would require a regional IA and to conduct those regional IAs;

- regional IAs should establish thresholds and objectives to be used in project IA and federal decisions;

- IA legislation should require that the IA Authority conduct a strategic IA when a new or existing federal policy, plan or program would have consequential implication for federal project or regional IA; and

[28] *Ibid*, page 9.
[29] *Ibid*.
[30] Expert Panel Report, pages 76 to 85.

- strategic IA should define how to implement a policy, plan or program in project and regional IA.[31]

In this regard, we note that the Multi-Interest Advisory Committee ("MIAC") also provided the Expert Panel with similar advice that strongly affirms the need for strategic- and regional-level assessments in Canada.[32]

In contrast, however, the *Discussion Paper* fails to provide any operational details on how strategic and regional assessments are to be triggered, structured and implemented under the new regime. In this regard, CELA notes that the *Discussion Paper*'s summary of proposed legislative reforms[33] does not even mention strategic or regional assessments, and instead focuses on project-level assessments. If this significant omission means that the federal government does not intend to create a legally binding duty to conduct strategic or regional EAs of federal plans, policies and programs, then CELA is strongly opposed to this woefully inadequate approach.

As recommended by the Expert Panel, CELA submits that the requirement to conduct strategic- or regional-level sustainability assessments must be codified in legislation, rather than continuing to leave such matters to Cabinet discretion. On this point, we also note that the Commissioner of the Environment and Sustainable Development has reported[34] that leaving strategic EA to a Cabinet directive has meant that few federal ministries or agencies have fully considered the environmental implications of governmental plans, programs or policies. CELA reasonably anticipates that a similarly disappointing track record will occur under "next generation" legislation unless it expressly imposes a mandatory legal duty upon the federal Cabinet (and ministries, departments or agencies) to conduct strategic- or regional-level sustainability assessments.

More specifically, CELA adopts the above-noted recommendations of the Expert Panel, and submits that the triggers, content requirements and procedural steps for strategic- or regional-level assessments should be clearly established by the "next generation" legislation. The new statute should also include opportunities for members of the public and indigenous communities to file petitions requesting these kinds of upper-tier assessments. The Government of Canada should be compelled to provide a responsive and timely answer to such petitions (e.g. within 90 days of receipt).

CELA RECOMMENDATION #4: The new legislation should entrench strategic and regional assessments on a firm statutory basis, and, at a minimum, should specify triggers, content requirements, procedural steps, and opportunities for public and indigenous participation in such assessments.

Moreover, CELA submits that properly designed strategic- or regional-level sustainability assessments should not be confined to certain discrete matters within the Government of Canada's

---

[31] *Ibid*.
[32] MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), page 34.
[33] *Discussion Paper*, pages 18 to 19.
[34] Commissioner of the Environment and Sustainable Development, *2016 Fall Report 3: Departmental Progress in Implementing Sustainable Development Strategies*, paragraphs 3.13 to 3.22.

exclusive constitutional jurisdiction (e.g. fisheries, migratory birds, aboriginal interests, etc.). To the contrary, CELA envisions that the information-gathering phase of strategic- and regional-level assessments will inevitably involve other matters and other jurisdictions across Canada. In this regard, CELA endorses the "cooperative assessment" approach recommended by the Expert Panel,[35] as discussed below.

2. Early Engagement and Planning

The Expert Panel correctly found that "early engagement is critical to fully inclusive and informed IA processes," and that "assessments do not currently start early enough" under *CEAA 2012*.[36] For example, by the time that the existing EA process is initiated, many of the most important decisions (e.g. the preferred means of carrying out the undertaking) have already been made by proponents long before indigenous peoples, local stakeholders and members of the public are notified or consulted.[37]

Accordingly, the Expert Panel recommends that "federal IA should begin with a legislated Planning Phase that, for projects, occurs early in project development before design elements are finalized (emphasis added)."[38] To implement this new Planning Phase, the Expert Panel proposes that multi-party committees (overseen by an independent IA Commission) should be established to support early engagement/planning activities.[39] The Expert Panel report also outlines the recommended process and anticipated outcomes for this Planning Phase, and adds that "legislation should be used to ensure that the proponent has the onus and legal duty to provide the notice early in project development."[40] CELA supports these findings and recommendations, and we commend them to the Government of Canada when drafting the new statute that replaces *CEAA 2012*.

Like the Expert Panel report, the *Discussion Paper* recognizes that indigenous peoples, stakeholders and the public at large "want to be aware of, and want to have the opportunity to be involved earlier, in project planning activities."[41] Therefore, the *Discussion Paper* properly proposes that "assessments should begin with a planning phase that occurs before project design elements are finalized in order to develop effective engagement strategies and foster greater collaboration" between proponents, parties and governmental officials.[42]

However, unlike the Expert Panel (which recommends that the Planning Phase should be led by an independent IA Commission), the *Discussion Paper* suggests that early engagement/planning should be led by proponents "with clear direction from government."[43] However, the *Discussion Paper* provides no reasons why the federal government has apparently rejected the sound advice of the Expert Panel on this matter. Given that transparency is supposed to be a hallmark of the

[35] Expert Panel Report, pages 22 to 24.
[36] *Ibid*, pages 18 to 19.
[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid*, pages 58 to 61.
[40] *Ibid*, page 59.
[41] *Discussion Paper*, page 10.
[42] *Ibid*.
[43] *Ibid*.

new assessment regime, it is somewhat ironic that this major departure from the Expert Panel's recommendation has not been explained adequately (or at all) in the *Discussion Paper*.

Moreover, aside from merely indicating that the federal government is "considering" this new approach, the *Discussion Paper* provides no illustrative examples or implementation details on how this early engagement/planning phase would work in practice. For example, no definition of "early" is offered in the *Discussion Paper*, which makes it virtually impossible to understand precisely when this new step would actually get triggered or what the "clear direction" from government would entail. Similarly, no information is provided in the *Discussion Paper* in relation to timelines, notification requirements, consultation options, participant funding, public access to documentation, issue identification, and conflict resolution (or adjudication) in the event that consensus cannot be reached on critical upfront matters (e.g. scope of assessment, consideration of "need"/alternatives, sufficiency of project description, adequacy of intended consultation, etc.).

On this latter point, if early engagement/planning is led by proponents (who have an obvious self-interest in obtaining successful outcomes of the assessment process), then CELA submits that "consensus" among all parties may not be readily obtainable in many controversial cases, which, in our view, underscores the need for effective oversight by a specialized institution or entity (e.g. independent IA authority, appeals tribunal, etc.), even at this early stage. However, the *Discussion Paper* does not identify any legal mechanisms for resolving impasses where consensus cannot be achieved between proponents and parties on assessment-related issues in dispute. In short, rebuilding public trust in federal assessment processes will not be achieved if proponents are given the lead responsibility for the early engagement/planning stage.

Similarly, it is not clear from the *Discussion Paper* whether this new early engagement/planning requirement would be entrenched in legislation (and supplemented by regulation), or whether the federal government is simply proposing to provide "clear direction" to proponents via non-binding guidelines, policy statements, or guidance materials. It further appears to CELA that the *Discussion Paper*'s discussion of this topic is limited to project assessments, rather than strategic or regional assessments (where early engagement/planning is also desirable and necessary).

CELA RECOMMENDATION #5: The new legislation should mandate an early engagement and planning phase in the assessment process, which must be led by the independent assessment authority established by the legislation, rather than proponents.

In summary, CELA submits that the *Discussion Paper*'s vague proposals about early engagement/planning needs to be seriously reconsidered and revised by the Government of Canada. In our view, "rebuilding public trust" in federal assessment processes will be exceptionally difficult (if not impossible) if the proponent (not an independent IA authority) is given the responsibility for leading early engagement/planning. Thus, CELA concludes that the various components of the Expert Panel's recommended Planning Phase offer a much more credible and workable solution that helps address the current shortcomings of *CEAA 2012*, and should therefore be duly incorporated within new assessment legislation.

3. Transparency and Public Participation

It is well-established that early and meaningful opportunities for public involvement in impact assessments result in fairer and more credible processes, and improve the overall quality, acceptability and soundness of assessment decisions.[44] In CELA's view, timely and effective public participation is the *sine qua non* for informed decision-making under impact assessment legislation.

Although public participation is entrenched as a statutory purpose[45] of *CEAA 2012*, the Expert Panel heard considerable evidence from citizens, environmental groups and other stakeholders who encountered serious obstacles when attempting to participate in federal EA processes.[46] These obstacles include: deficient or delayed public notices; short public comment periods; lack of timely access to all relevant documentation; inadequate awards of participant funding; and lack of basic procedural rights (e.g. no evidence under oath, no cross-examination of witnesses, etc.) in some recent cases. CELA hastens to add that these participatory problems are continuing to date in EAs conducted by the CNSC, as documented below in Appendix A.

In light of these ongoing problems under *CEAA 2012*, the Expert Panel specifically rejected *CEAA 2012*'s restrictive "interested person" standing test[47] (defined as only those persons "directly affected" by the proposal), and endorsed a more inclusive approach in assessment processes.[48] In addition, the Expert Panel recommends various reforms that are intended to go beyond mere information dissemination by proponents, and that will help ensure meaningful public involvement in project design, assessment scoping, and decision-making.[49] In particular, the Expert Panel recommends that:

- IA legislation should require that IA provide early and ongoing public participation opportunities that are open to all;

- results of public participation should have the potential to impact decisions;

- the participant funding program for IA should be commensurate with the costs associated with meaningful participation in all phases of IA, including monitoring and follow-up; and

- IA legislation should require that IA information be easily accessible, and permanently and publicly available.[50]

The *Discussion Paper* appears to broadly embrace some – but not all – of these recommendations, and proposes to "design a system where Canadians can influence decision-making through open

[44] See, for example, MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 41 to 42.
[45] *CEAA 2012*, subsection 4(1)(e).
[46] Expert Panel Report, pages 36 to 42.
[47] *CEAA 2012*, subsection 2(2).
[48] Expert Panel Report, page 38.
[49] *Ibid*.
[50] *Ibid*, pages 39 to 43.

access to information, meaningful public participation, and transparent decision-making."[51] For example, the *Discussion Paper* commits to eliminating the above-noted "interested person" test used by the NEB to screen out persons wishing to participate in assessment processes. In CELA's view, this is a welcome commitment that will require legislative amendments, not just a change in practice by the NEB.

CELA RECOMMENDATION #6: The new legislation should not contain the "interested person" standing rule, nor any other standing rule that limits Canadians from participating in the federal assessment process.

Unfortunately, several of the other proposals in the *Discussion Paper* regarding public engagement are best characterized as statements of good intentions, rather than a prescriptive list of operational details or specific legislative requirements. For example, the *Discussion Paper* indicates that there will be "open opportunities for meaningful public participation," but fails to describe how and when such opportunities will be provided in the new regime, or whether they will be applicable to strategic and regional assessments as well as project assessments.

Similarly, the *Discussion Paper* promises that participant funding programs will be "improved," but neglects to explain the nature, extent or quantum of the anticipated improvements. It is also unclear whether participant funding opportunities will be available in the new early engagement/planning phase, or in the post-approval phase as recommended by the Expert Panel.

In addition, the *Discussion Paper* claims that "greater transparency" will occur in the reasons for EA and regulatory decisions, and that "clearer transparency requirements" will be issued for certain projects (e.g. assessments of projects on federal lands). In CELA's view, it is difficult to accept this vague claim at face value, particularly since the *Discussion Paper* fails to articulate a "contribution to sustainability" test or criteria to be used by decision-makers when determining if undertakings should be approved at all.

CELA further notes that the *Discussion Paper* proposes "inclusive monitoring and compliance activities" so that "lifecycle regulators" (e.g. NEB and CNSC) and permitting agencies can "work closely" with indigenous peoples, communities and landowners. Again, no specific details are offered to explain how this will be accomplished in practice. CELA supports the direct involvement of local persons, organizations and communities in monitoring and compliance programs. However, we strongly object to having the NEB and CNSC continuing to lead (or co-lead) assessment processes that eventually result in monitoring and reporting conditions, as discussed below.

In summary, CELA submits that the new legislation must ensure meaningful public participation in all levels, and at all stages, of sustainability assessments. This includes the post-approval stage, when socio-cultural, economic and environmental effects of approved undertakings are being monitored, reported, and addressed through appropriate adaptive management techniques. In our view, the *Discussion Paper* correctly emphasizes meaningful public engagement and greater transparency, but Cabinet's drafting instructions for new legislation will have to go considerably

[51] *Discussion Paper*, page 11.

beyond the general platitudes in the *Discussion Paper* in order to transform this rhetoric into reality.

CELA RECOMMENDATION #7: The new legislation should include prescriptive details on when and how opportunities for meaningful public participation will be guaranteed in law for all stages of strategic, regional and project assessments, including:

(a) provisions for expanded and effective participant funding programs that are commensurate with the costs of engaging in federal assessment processes;

(b) provisions for public involvement in post-approval monitoring, compliance and adaptive management activities.

4. Science, Evidence and Indigenous Knowledge

The *Discussion Paper* notes that "science, evidence and Indigenous knowledge should inform project planning, assessment and decision making, and be open, accessible and transparent."[52] CELA agrees with this general proposition, but concludes that the *Discussion Paper*'s broad suggestions (e.g. moving towards an open science/data platform, incorporating indigenous knowledge, ensuring peer reviews of science and evidence, and making science accessible) are insufficient, in and of themselves, to rebuild public trust, facilitate rigorous assessments or ensure credible decision-making. Moreover, as noted by the Expert Panel, "new legislative requirements are needed to ensure that IA is evidence-based and contains the best science."[53]

For example, while CELA supports the *Discussion Paper*'s commitment to developing an open science/data platform, many critical implementation details are absent, particularly in relation to public accessibility, content searchability, and updating protocols. In addition, it appears to CELA that substantial legislative changes will be required in order to transform the current Registry[54] under *CEAA 2012* into the fully functional "open platform" contemplated by the *Discussion Paper*.

Similarly, the *Discussion Paper*'s general endorsement of "peer review" raises more questions than it answers. For example, it is unclear whether this commitment refers to peer reviews conducted internally by federal scientists and subject matter experts, or to peer reviews conducted externally by scientists and subject matter experts retained by non-proponent parties (in which case sufficient participant funding will be required). Similarly, the *Discussion Paper* does not clarify whether peer reviews will be also be undertaken during the post-approval stage, when monitoring, reporting and follow-up activities are being undertaken.

More generally, CELA submits that the value and utility of peer reviews is highly dependent upon the degree of expertise and independence possessed by the peer reviewers. In this regard, we note that all experts who appear as witnesses in public hearings before Ontario's Environmental Review Tribunal (which is empowered to hold hearings and render decisions under the *Environmental Assessment Act*) must sign forms which acknowledge that:

---

[52] *Discussion Paper*, page 12.
[53] Expert Panel Report, page 43.
[54] *CEAA 2012*, sections 78 to 82.

- the expert will provide opinion evidence that is fair, objective and non-partisan;

- the expert will provide opinion only on matters within his/her area of expertise;

- the above-noted duties prevail over any obligations between the expert and the party that retained him/her.[55]

In CELA's view, the new federal statute should specifically include these duties, and should impose them not only on peer reviewers but also upon all persons offering technical, scientific or opinion evidence within the sustainability assessment process, including those retained by proponents or acting on behalf of federal departments, agencies and regulators. In our experience, imposing these kinds of statutory duties should help curtail the disturbing tendency of some scientific experts to become partisan advocates for their respective clients (or regulated sectors) during federal assessment processes.

CELA RECOMMENDATION #8: The new legislation should establish statutory duties which require all experts offering technical, scientific or opinion evidence in federal assessment processes to provide evidence that is fair, objective, non-partisan, and focused only on matters within their area of expertise.

CELA further notes that facilitating peer reviews, and ensuring the independence of experts, are not the only ways to promote credible, evidence-based decision-making. In our view, it is equally important to ensure that there is rigorous testing of the technical, scientific or opinion evidence tendered by proponents, governments, and other parties.

For example, where public hearings are to be held under the new legislation (see below), CELA submits that the hearings should be adjudicative in nature, and must include the usual procedural safeguards utilized in quasi-judicial administrative proceedings (e.g. evidence under oath, cross-examination of witnesses, etc.). These procedural safeguards are not currently contained within *CEAA 2012*, but should be entrenched in the new assessment law. As a legislative precedent for entrenching procedural rights, CELA would point to Ontario's *Statutory Powers Procedure Act*,[56] which codifies a number of important procedural rights in order to ensure fairness and natural justice when provincial tribunals are holding hearings and rendering decisions.

RECOMMENDATION #9: The new legislation should include meaningful opportunities for parties to test technical, scientific or opinion evidence tendered during assessment processes, and should codify basic procedural safeguards (e.g. evidence under oath, cross-examination of witnesses, etc.) where public hearings are held under the new legislation.

In addition, CELA notes that the *Discussion Paper* fails to adequately address scientific uncertainty and the role of the precautionary principle, which is currently mentioned (but not defined) in *CEAA 2012*.[57] In our view, this is an unfortunate and significant omission in the

[55] ERT Rules of Practice and Procedure (September 2016), Expert's Duty Form.
[56] RSO 1990, c.S.22.
[57] *CEAA 2012*, subsections 4(1)(b), 4(1)(g) and 4(2).

Discussion Paper, particularly since predictions about environmental impacts (or the alleged efficacy of proposed mitigation measures) often involve some degree of uncertainty.

However, in our experience, it is not uncommon under the current EA regime for such uncertainties to be addressed through promises of future (and often unspecified) corrective measures under the guise of "adaptive management." In CELA's view, this cavalier approach is not consistent with the precautionary principle, and should not be countenanced under the new sustainability assessment regime. Accordingly, CELA agrees with the Expert Panel that "the new approach to federal IA should continue to rely on the precautionary principle and approach to address issues of scientific uncertainty."[58]

RECOMMENDATION #10: The new legislation should entrench and define the precautionary principle in accordance with international law, and should specify how this principle applies where scientific uncertainty exists in relation to predicted impacts, proposed mitigation, or related matters.

In summary, CELA looks forward to robust, participatory and science-based assessments and decision-making under the new regime. While the *Discussion Paper* appears to share this vision at a high level, CELA submits that considerably more detail is required before it can be reasonably concluded that the federal proposals will actually achieve this important and long overdue outcome.

5. Impact Assessment

Arguably, the *Discussion Paper*'s superficial discussion of "impact assessment"[59] is the most contentious and objectionable aspect of the proposed reform package. CELA submits that not only do some of the main proposals conflict with the Expert Panel's well-conceived recommendations, but they also retain some of the very elements of the *CEAA 2012* regime that resulted in the significant loss of public trust and credibility in the first place. In short, we fail to understand how essentially perpetuating the status quo structure (e.g. maintaining the Project List regulation, having regulators conduct assessments, decision-making by the Minister or Cabinet, etc.) will rebuild trust, keep the governmental promises made, and ensure robust assessment processes.

For example, the *Discussion Paper* proposes that the new regime will consider environmental, economic, social and health impacts of proposed undertakings.[60] In our view, this broader assessment scope is a modest step in the right direction, although we are unclear why cultural impacts are conspicuously absent from the list of mandatory considerations.

More fundamentally, CELA is astounded by the *Discussion Paper*'s lack of even a single reference to sustainability assessments, although this "next generation" model has been widely endorsed across Canada, and forms the centerpiece of the Expert Panel's recommendations.[61] No

[58] Expert Panel Report, page 43.
[59] *Discussion Paper*, page 13 to 14
[60] *Ibid*.
[61] Expert Panel Report, pages 3, 19 to 22, 31, 45, 47, 65 to 67, and 69.

explanation or elaboration is offered in the *Discussion Paper* on why the Government of Canada has apparently rejected the Expert Panel's advice on this critically important matter.

As noted above, CELA submits that the new legislation must clearly adopt "contribution to sustainability" as its overall substantive purpose. In turn, sustainability considerations should be used to delineate the scope of assessment processes, and to establish the approval/rejection test under the statute. To assist proponents, parties and decision-makers, the new statute should also prescribe explicit sustainability criteria and rules for making trade-offs (if necessary) in order to achieve the five "pillars" of sustainability identified by the Expert Panel.[62] These criteria and trade-off rules can be further particularized in regulations and guidance materials issued under the new assessment regime.

CELA RECOMMENDATION #11: The new legislation should contain a purpose section that establishes "contribution to sustainability" as the paramount goal of the federal assessment regime. In addition, the new legislation should incorporate sustainability considerations to delineate the scope of assessments and the overall test for approval/rejection of proposed undertakings. Similarly, the new legislation should prescribe explicit decision-making criteria and trade-off rules in order to achieve environmental, social, economic, health and cultural sustainability.

In our view, developing a clear and transparent framework for assessing impacts on sustainability is both workable[63] and preferable to the highly subjective and excessively discretionary concepts embedded in *CEAA 2012*, such as "significant" adverse environmental effects or "justified in the circumstances." In our view, these widely criticized concepts should be immediately jettisoned from the federal assessment regime. CELA submits that for accountability and public trust purposes, these and other outdated relics from Canada's "first generation" EA laws should not play any role in the new sustainability assessment legislation.

CELA RECOMMENDATION #12: The new legislation should not include any references to "significant adverse environmental effects", "justified in the circumstances", or other vague terminology or inappropriate approval tests currently used in *CEAA 2012*.

In relation to which proposed undertakings will be subject to the new assessment law, CELA notes that the *Discussion Paper* merely commits to "reviewing" the current Project List regulations[64] to ensure that "major projects with the greatest potential impacts in federal jurisdiction are assessed."[65] In our view, this is an excessively narrow and fundamentally flawed approach for determining assessment triggers. It also seems premised on the faulty assumption that only "major" projects can adversely affect areas of federal interest.

---

[62] These sustainability pillars are environmental, social, economic, health and cultural: see Expert Panel Report, pages 20 to 21.

[63] See, for example, the federal EAs conducted in relation to the McKenzie Gas Project, Voisey's Bay Mine/Mill Project, and other projects where a sustainability framework was developed and applied.

[64] SOR/2012-147.

[65] *Discussion Paper*, page 13.

After *CEAA 2012* was enacted, CELA and other stakeholders strongly criticized the inadequacy of the current project list, which was largely derived from the former Comprehensive Study regulations[66] under *CEAA 1992*. On this point, it should be recalled that the Comprehensive Study regulations were not intended to be an exhaustive list of undertakings that should be subject to EA. Instead, it was simply intended to list certain types of projects which should trigger a Comprehensive Study rather than a screening under *CEAA 1992*. Additional triggers were used under section 5 of *CEAA 1992* to capture other types of projects that engaged federal jurisdiction (e.g. federal lands, approvals, funding and proponency), and which warranted application of the information-gathering and decision-making provisions of the federal EA process.

Unfortunately, after *CEAA 2012* was enacted, the former government proposed a Projects List regulation that was narrower than the former Comprehensive Study list, and which continued to omit a number of environmentally significant undertakings. In our submissions on the Projects List regulation, CELA identified a number of additional undertakings which should be designated as projects to which *CEAA 2012* applies.[67] However, most if not all of these suggested undertakings have not been added to the Projects List regulation to date.

Instead of solely relying upon the deficient Projects List under *CEAA 2012*, CELA recommends that an appropriate mix of specific, general and discretionary triggers should be developed for use under the new legislation, particularly in relation to project-level assessments. For example, these project-level triggers should include the following mechanisms:

- specific list(s) of undertakings (e.g. projects, physical works or activities) that warrant assessment by the IA authority;

- general description(s) of federal decision-making powers that warrant assessment (similar to former section 5 of *CEAA 1992*); and

- residual Ministerial or Cabinet discretion to designate additional undertakings that warrant assessment (e.g. proposals that may affect Canada's national targets and international commitments regarding climate change).

CELA RECOMMENDATION #13: The new legislation should clearly specify the triggers for strategic, regional and project assessments. In relation to project assessments, the new legislation should entrench three types of triggers:

(a) listing of prescribed undertakings, as amended from time to time;

(b) decision-based triggers involving federal powers under other statutes or regulations; and

(c) discretionary trigger to compel assessments of non-prescribed undertakings.

---

[66] SOR/94-638.

[67] CELA letter to CEA Agency dated May 13, 2013 http://www.cela.ca/sites/cela.ca/files/900DraftCEAARegs.pdf See also Nature Canada, *Comments on the Environmental and Regulatory Reviews: Discussion Paper* (August 2017), page 3.

These triggers should, in turn, determine the type or "track" of assessment to be used for such undertakings, and should be accompanied by appropriate inclusion/exclusion lists to finetune the application of "next generation" legislation. The operative rule should be that all undertakings that appear to trigger the application of the "next generation" legislation must undergo sustainability assessments unless they are expressly exempted from coverage.

CELA further recommends that the scope of the sustainability assessment, once triggered, should address the entire life cycle of the whole undertaking as proposed by the proponent, and should go well beyond federal matters such as fisheries, aquatic species at risk or migratory birds. Among other things, the scope of the assessment should be legally required to address the full suite of sustainability considerations (including an overarching "contribution to sustainability" test), rather than merely canvass whether the proposal may cause "significant adverse environmental effects" (or whether such effects are "justified" in the circumstances) as occurs under *CEAA 2012*.

On this latter point, CELA concurs with the position advanced by the EPA Caucus that in light of recent EA jurisprudence, there is no constitutional reason to restrict or constrain "next generation" information-gathering to specific areas of federal jurisdiction:

> With respect to the scope of assessments, it seems unlikely in light of Supreme Court of Canada decisions in *Oldman*, *Hydro Quebec*, and *MiningWatch*, and the more recent *Syncrude* decision at the Federal Court (involving ethanol in fuel regulations under CEPA), that courts would impose limits on the scope of a federal assessment.[68]

Accordingly, it remains our opinion that there is no constitutional impediment to enacting "next generation" legislation that sets out a comprehensive set of sustainability factors to be addressed during the information-gathering stage of sustainability assessments.

CELA RECOMMENDATION #14: The new legislation should not limit the information-gathering components of the assessment process to specific heads of exclusive federal jurisdiction (e.g. fisheries, migratory birds, etc.).

In CELA's view, the completion of the information-gathering stage must lead to an appropriate, credible and enforceable decision (with proper reasons) on the adequacy of the sustainability assessment and the overall approvability of the proposed undertaking. For accountability purposes, this decision should be based on sustainability criteria that are expressly entrenched within "next generation" legislation, and that are further particularized in undertaking-specific terms of reference or guidelines that are developed for the conduct of sustainability assessments of individual proposals.

CELA further submits that at all material times, the burden of proof should be on the proponent to demonstrate, on a balance of probabilities, that the undertaking meets the prescribed sustainability criteria and all other substantive requirements which are imposed upon the proponent by the new law (e.g. establishing the need for, and purpose of, the undertaking; consideration of "alternatives

[68] EPA Caucus, *supra*, note 18, page 4 (footnotes omitted).

to" the undertaking; consideration of "alternative methods" of carrying out the undertaking, etc.). Where there is uncertainty about impacts, risks or trade-offs, then the precautionary principle should be applied by decision-makers, as discussed above.

CELA RECOMMENDATION #15: The new legislation should impose a clear statutory duty on decision-makers in the federal assessment process to consider and apply the "contribution to sustainability" test and all applicable sustainability criteria and trade-off rules, based on the facts and evidence adduced during the assessment process. The legislation must also specify that the decision, and the reasons for decision, must adequately explain why the proposed undertaking was approved or rejected. Similarly, the new legislation should place an onus upon the proponent to demonstrate, on a balance of probabilities, that the proposed undertaking satisfies the "contribution to sustainability" test and the applicable sustainability criteria and trade-off rules.

CELA notes that while the outer limits of federal decision-making authority may be difficult to pin down in the abstract, the nature and extent of federal jurisdiction to make decisions (or to attach terms and conditions to such decisions) under "next generation" legislation will greatly depend on the findings and conclusions reached during the information-gathering stage:

> With respect to post-assessment decision-making, there is some uncertainty about the precise limits of federal jurisdiction, but it is clear that the results of the assessment need to lay a proper foundation for federal decision-making. If the assessment identifies clear impacts on areas of federal jurisdiction (whether they be biophysical or socio-economic), there is a solid basis for federal jurisdiction to take an integrated and comprehensive approach to addressing the impacts identified. Where an assessment clarifies that a proposed activity does not affect any areas of federal jurisdiction, there will be no basis for a federal decision. In short, the results of the assessment will necessarily shape the decision-making authority of the federal government.[69]

However, it goes without saying that if the "cooperative assessment" model is adopted (see below), then federal decision-making should not be occurring in isolation, but instead should be taking place in a coordinated manner in conjunction with other levels of government exercising decision-making authority within their respective jurisdictions.

However, this begs the critically important question of who should be empowered to make the ultimate federal decision under "next generation" legislation to accept/reject proposed undertakings, or to craft effective terms and conditions that should be attached to such decisions. In CELA's preliminary and submissions to the Expert Panel, we examined various historical precedents and identified the need to establish a new independent, quasi-judicial tribunal that will hold public hearings and make legally binding decisions under "next generation" legislation.[70]

---

[69] *Ibid*, page 4.
[70] CELA, *supra*, note 6, pages 14 to 18.

Similar support for specialized administrative decision-making by an independent IA authority was provided to the Expert Panel by various other participants.[71]

On the basis of this evidence, the Expert Panel correctly found that:

> First and foremost to the goal of restoring trust and confidence in the process is a belief that the authority conducting the assessment must be free from bias and conflicts of interest.
>
> Public trust and confidence is crucial to all parties… While some would likely favour the NEB and CNSC for the assessment of projects in their particular industries, the erosion of public trust in the current assessment process has created a belief among many interests that the outcomes are illegitimate… or pre-ordained…
>
> Second, regulation and assessment are two quite distinct functions that require different processes and expertise…
>
> Third, any federal IA authority must be instilled with a governing philosophy that encourages a culture of consensus and cooperation and must be able to understand and account for diverse views across a wide spectrum of interests…
>
> Fourth, a new governance model must provide for transparent, evidence-based decisions. IA decisions must reflect the facts and evidence collected throughout the IA process, and decision-making criteria must be explicitly described and the trade-offs explained and justified…
>
> For all of these reasons, the Panel believes that the best way to achieve efficient, consistent and accountable governance is to incorporate the IA function into a single authority, with strong regional presence across the country and with the mandate to make IA decisions. A structure such as a quasi-judicial tribunal would empower the single authority to fulfill this mandate…[72]

Accordingly, rather than retaining or tweaking the current governance arrangements under *CEAA 2012*, the Expert Panel concluded that the new assessment regime should establish and empower a new independent "IA Commission." In particular, the Panel recommends that:

- a single authority should have the mandate to conduct and decide upon IAs on behalf of the federal government; and

- the IA authority should be established as a quasi-judicial tribunal empowered to undertake a full range of facilitation and dispute resolution processes.[73]

---

[71] See, for example, BC Nature, *Science, the Law and the Environmental Assessment Process* (December 11, 2016), pages 2 to 3; Peace Valley Environment Association, Presentation to the Expert Panel (November 2016), Slide 2; Nature Canada, *Next Generation Impact Assessment: Toward Sustainability* (October 31, 2016), pages 13 to 14.
[72] Expert Panel Report, pages 50 to 51.
[73] *Ibid*, page 52.

The Expert Panel report goes on to provide additional suggestions in relation to staffing, equipping and implementing the IA Commission, including the possibility of an appeal to Cabinet from the decisions of the IA Commission.[74]

However, these key recommendations have been summarily rejected, without reasons, by the *Discussion Paper*. Instead, the Government of Canada proposes to create a "single government agency responsible for impact assessment and coordinating consultations with indigenous peoples," but lifecycle regulators (e.g. NEB and CNSC) would continue to be involved in the assessments in conjunction with this new agency.

Moreover, the *Discussion Paper* proposes that decision-making authority would remain vested in the Minister or Cabinet, and would be based on whether projects are "in the public interest."[75] Significantly, the nebulous term "public interest" is not defined, but presumably it does not mean "sustainability" since that concept is wholly absent from the *Discussion Paper*. In addition, the *Discussion Paper* does not propose any appeal mechanism (e.g. to Federal Court, new appeals tribunal, etc.) in order for parties to hold federal decision-makers legally accountable for inappropriate decisions (or inadequate conditions of approval) in relation to proposed undertakings.

While the *Discussion Paper* states that the Government of Canada is simply "considering" these ideas, it is our understanding that the above-noted proposals are more or less cast in stone and are highly unlikely to change. In our view, the government's intransigence on this point is both unfortunate and unsupportable, and the rationale relied upon by the government in support of its position is not particularly persuasive.

For example, the *Discussion Paper* asserts that Ministerial or Cabinet decision-making is necessary to ensure "accountable government." Similarly, CELA understands that the Government of Canada maintains that having elected federal officials make assessment decisions is effectively required by the Westminster parliamentary system used in this country. In our view, such arguments are misplaced and unsubstantiated, especially since both the federal[76] and provincial[77] governments have seen fit in recent decades to vest important decision-making authority in specialized administrative agencies, boards, and commissions. Therefore, in our opinion, there is no legal, jurisdictional or political impediment that prevents Parliament passing new assessment legislation that delegates or assigns decision-making powers to an independent IA authority, as recommended by the Expert Panel.

In our recent discussions with the federal government, CELA was advised that a further argument against creating a new IA authority with decision-making powers is that the authority would not

---

[74] *Ibid*, pages 52 to 55.
[75] *Discussion Paper*, page 13.
[76] Aside from the NEB and CNSC, there are several other examples where Parliament has delegated decision-making authority to administrative bodies or tribunals (e.g. CRTC, Canadian Transportation Agency, etc.).
[77] For example, under Ontario's EA regime, the Environmental Review Tribunal is empowered to hold public hearings and to make final and binding decisions, subject only to Cabinet's time-limited ability to vary the decision: see *Environmental Assessment Act*, RSO 1990, c.E.18, subsections 11.2 and 11.3. In addition, the Ontario Legislature has created and delegated statutory powers of decision to other specialized administrative bodies that adjudicate matters of public interest (e.g. Ontario Energy Board, Ontario Municipal Board, etc.).

be able to undertake nation-to-nation consultations with indigenous peoples. According to this line of argument, only the Crown can carry out the duty to consult and accommodate. However, this line of argument was clearly rejected in two recent judgments of the Supreme Court of Canada, which held that the independent NEB could discharge the Crown's duty to consult and accommodate.[78] Thus, as a matter of law, CELA submits that it would be jurisdictionally permissible for the new IA authority to perform this duty.[79] In making this submission, however, we are aware that the Supreme Court judgments have been criticized by some indigenous commentators, and we express no opinion on whether tribunal-led consultation is better or worse than direct nation-to-nation dialogue.

Aside from the highly dubious claim that only the Minister or Cabinet should make assessment decisions, the *Discussion Paper* also states that "lifecycle regulators" should continue to be involved in conducting assessments in light of their "expert capacity." In response, CELA notes that while the NEB and CNSC may possess some experience in regulating their respective industrial sectors, they have little or no institutional expertise in conducting sustainability assessments.

For example, an EA practitioner advised the Expert Panel as follows:

> [T]he assignment in 2012 of panel review functions to the National Energy Board and the Canadian Nuclear Safety Commission was entirely inappropriate. The NEB and CNSC are regulatory bodies with very focused mandates and expertise. Their reviews are directed to attaching conditions to proponent construction and operating permits, which these agencies then regulate by means of inspection and enforcement… Issues of regional scale social, economic, and environmental project effects were never the central focus of either the NEB or the CNSC. Further, neither agency makes explicit recommendations to itself, nor does it consider transparently the broader question of adverse impacts that might arise from the limits of its own regulatory capacity.
>
> The effect of turning CEAA panel reviews over to the NEB and the CNSC was to transfer the responsibility for assessing cumulative impacts and project contribution to sustainability to agencies with little experience or demonstrated competence of considering those issues, let alone holding hearings on matters of broad public concern rather than the highly technical and legal matters they normally deal with. Since then, there has been no evidence that either the NEB or the CNSC have actually considered cumulative effects, or applied sustainability criteria, in the systematic manner that review panels had come to do prior to 2012.[80]

---

[78] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41.

[79] The Expert Panel recognized that "indigenous relations would play an integral role in each IA", and that the IA Commission "would fulfill consultation and accommodation requirements, build capacity and establish long-term relationships": Expert Panel Report, pages 53 to 54.

[80] Peter Usher, *Making Major Project Assessment Work* (October 3, 2016), page 3.

CELA and many other stakeholders agreed with these views in their submissions to the Expert Panel. For example, the EPA Caucus advised the Expert Panel that allowing the NEB and CNSC to conduct federal EAs has created various problems:

> Moreover, the vesting of authority for some EA reviews in the National Energy Board (NEB) and Canadian Nuclear Safety Commission (CNSC) has proven problematic in fundamental ways that in our view cannot be fixed by improving those institutions. For one, there are great inconsistencies in the processes used by the three responsible authorities. Perhaps more importantly, the NEB and CNSC are regulators without the relevant mandate or impartiality to undertake the sort of fair, public, planning-based process that good EA requires.[81]

Similarly, Greenpeace's submission to the Expert Panel raised a number of red flags about having the CNSC conduct federal EAs of nuclear projects, particularly since it is an "industry-specific regulatory agency" that is more focused on technical issues rather than the "big picture" planning issues that are central to EAs.[82] In addition, Northwatch identified various unresolved concerns about the lack of transparency and independence of the CNSC, and concludes that the CNSC is not a suitable entity for carrying out federal EA processes (particularly since the option of having panel reviews for nuclear facilities is no longer available under *CEAA 2012*, and the CNSC may conduct written hearings instead of public hearings under *CEAA 2012*).[83] Moreover, MiningWatch Canada raised the issue of "regulatory capture" in the context of EAs conducted by the CNSC.[84] The Concerned Citizens of Renfrew County also recommended that the responsibility for conducting nuclear EAs should be transferred from the CNSC to an independent federal body.[85] A similar recommendation was offered by the Aroland First Nation on the grounds that the CNSC (and the NEB) "are too friendly" with the regulated industry.[86]

In light of this evidentiary record, CELA submits that the Expert Panel's above-noted recommendations are sound in law and unassailable on the facts. Even if lifecycle regulators no longer lead (or co-lead) assessments under the new regime, CELA anticipates that they may still be able to contribute useful information, data and perspectives during sustainability assessments carried out by the independent IA authority. However, CELA submits that the CNSC should not be given the legal responsibility for conducting, or rendering decisions on, sustainability assessments. As noted in CELA's preliminary submissions, CNSC itself has conceded that it lacks sustainability criteria and the institutional capacity to assess sustainability considerations.[87]

CELA RECOMMENDATION #16: The new legislation should establish and empower an independent assessment authority (or commission), with quasi-judicial functions and powers, to lead federal assessment processes, to conduct public hearings, and to render a

---

[81] EPA Caucus, *supra*, note 18, page 17 (footnotes omitted).
[82] Greenpeace, Submission to the Expert Panel (November 10, 2016), page 2.
[83] Brennain Lloyd, Transcript of Sudbury Public Presentations to the Expert Panel (November 3, 2016), pages 7 to 8, 10 to 11, 14.
[84] MiningWatch Canada, Presentation to the Expert Panel (November 8, 2016), page 3.
[85] Concerned Citizens of Renfrew County, *Strengthening Federal Environmental Assessments: A Case Study of Nuclear Projects at the Chalk River Laboratories* (November 2016), Slide 8.
[86] Aroland First Nation, *Initial Input to Federal EA Review Panel Hearings* (November 15, 2016), Slide 8.
[87] CELA, *supra*, note 6, page 15.

final binding decision, subject to an appropriate judicial or administrative appeal mechanism. The new legislation should not require or permit the NEB or CNSC to lead, or co-lead, federal assessment processes, but should instead direct these regulatory bodies to participate in assessments led by the independent authority.

The *Discussion Paper* goes on to propose that legislated timelines will be "maintained," subject to Ministerial discretion to approve exceptions to the timelines when necessary to facilitate cooperative assessments with other jurisdictions.[88] CELA does not agree with this general proposal for several reasons. First, there is no evidence to support the conclusion that current timelines under *CEAA 2012* are appropriate and should be continued under the new regime. While CELA has no objection to the promulgation of non-binding guidelines setting out the anticipated timeframes for various stages of the assessment process, we seriously question the need for, and utility of, establishing fixed "one-size-fits-all" deadlines for the completion of the assessment process, or for the rendering of assessment decisions, under the new legislation.

Second, as noted by the Environmental Commissioner of Ontario, it is highly debatable whether "faster" assessment decisions are necessarily "better" decisions,[89] and numerous legal and policy concerns (e.g. fairness and natural justice, tribunal independence, purpose of public hearings, transparency of decision-making, etc.) have been raised about the imposition of time limits upon the ERT under Ontario's environmental assessment regime.[90] In our view, these concerns are equally applicable to the new federal assessment regime, particularly where review hearings are held.

CELA RECOMMENDATION #17: The new legislation should not establish generic, fixed or arbitrary timelines for each stage of federal assessment processes, and should instead enable the independent authority, upon consultation with the parties during the early engagement/planning phase, to develop appropriate case-specific guidelines for the timing of the assessment process.

In summary, CELA submits that the *Discussion Paper*'s proposals in relation to "impact assessment" reforms are unjustified and unacceptable. CELA recognizes that the *Discussion Paper* proposes to create a single government agency to oversee many aspects of the assessment process. However, the value or utility of this proposal is undermined by the *Discussion Paper*'s failure to endorse the "contribution to sustainability" test.

In addition, contrary to the Expert Panel report, the *Discussion Paper* illogically insists that in order to rebuild public trust, the NEB and CNSC must still play a lead role in assessment processes, and that final decision-making authority must still be retained by the Minister or Cabinet rather than the new agency. Moreover, the *Discussion Paper* proposes to "maintain" legislative timelines, and to retain (but "review") the narrow and much-maligned Projects List regulation under *CEAA 2012*. In our view, this kind of "reform" is a recipe for the inevitable continuation (if not expansion)

---

[88] *Discussion Paper*, page 14.

[89] Environmental Commissioner of Ontario, *Annual Report 2008-09*, at pages 78 to 81 in relation to public transit EA's.

[90] Alan D. Levy, "Scoping Issues and Imposing Time Limits by Ontario's Environment Minister at Environmental Assessment Hearings – A History and Case Study" (2001), 10 JELP 147.

of public mistrust in the federal assessment process, and it cannot be reconciled with the above-noted governmental commitments to create a credible, robust and participatory regime.

6. Partnering with Indigenous Peoples

The *Discussion Paper* states that "reconciliation requires sustained government-wide action and needs to be at the centre of our consultation and accommodation activities," and outlines various reforms that are currently under consideration in order to ensure "cooperation and partnership based on recognition of Indigenous rights" throughout assessment processes.[91] CELA respectfully defers to the views of indigenous peoples on whether the *Discussion Paper*'s proposals are adequate, consistent with the UNDRIP, or fully reflective of FPIC principles.

7. Cooperation with Jurisdictions.

While recognizing the desirability of multi-jurisdictional assessments that are "cooperative and flexible," the *Discussion Paper* states that "we need to be efficient and seek out every reasonable opportunity to collaborate on project assessments."[92] CELA generally agrees with this sentiment, but we submit that it also applies, with necessary modifications, to strategic and regional assessments,[93] as noted above.

CELA RECOMMENDATION #18: The new legislation should entrench appropriate mechanisms for comprehensive and cooperative strategic, regional and project assessments when multiple jurisdictions (e.g. provincial, territorial and/or indigenous governments) may be engaged in reviewing the same proposed undertaking.

In addition, CELA agrees with the Expert Panel's observation that "for sustainability to be advanced, all jurisdictions need to find a way to work together."[94] To achieve this outcome, the Expert Panel recommends that cooperation should be the "primary mechanism" for coordination where multiple IA process (e.g. provincial and/or indigenous assessment regimes) are applicable.[95] Significantly, the Expert Panel correctly rejects "equivalency" as an appropriate mechanism since it effectively exempts proposed undertakings from the federal process.[96] Accordingly, CELA submits that equivalency (or delegation) should not form any part of the new federal assessment law.

CELA RECOMMENDATION #19: The new legislation should not include, authorize or facilitate the use of "equivalency" or "delegation" mechanisms.

The *Discussion Paper* endorses the cooperative model, but does not identify this approach as the preferred (or only) mechanism under the new assessment statute. Instead, the *Discussion Paper* goes to vaguely propose the enactment of "legislative provisions" that would allow provincial

[91] *Discussion Paper*, page 15.
[92] *Ibid*, page 17.
[93] Expert Panel Report, page 26.
[94] *Ibid*, page 23.
[95] *Ibid*, page 24.
[96] *Ibid*, page 26.

processes to substitute for the federal process where there is an undefined "alignment" with federal standards.[97] CELA is alarmed by the paucity of detail in the *Discussion Paper* regarding substitution, and urges the Government of Canada to reconsider its apparent adoption of the substitution mechanism. Otherwise, CELA is concerned that poorly drafted substitution provisions may inadvertently create a back-door way of circumventing (or undermining) the far more desirable cooperative multi-jurisdictional assessment model.

On this point, we note that the Expert Panel concluded that substitution should "remain an option in an enhanced federal IA process," and the Panel articulated eight restrictive criteria as to when substitution should – or should not – be permitted.[98] It appears to CELA that if these suggested federal criteria were actually satisfied by a provincial process, then the resulting arrangement would amount to *de facto* upward harmonization, not a wholesale substitution of one regime for another regime.[99] In any event, the Expert Panel recommends that substitution should only be available "on the condition that the highest standard of IA would apply," which the Panel describes as "a higher bar" than the current substitution provisions under *CEAA 2012*. More importantly, the Expert Panel recommends that instead of the Minister or Cabinet, the independent IA authority responsible for conducting federal assessments should be the entity determining whether substitution should be allowed.[100]

In contrast, none of the Expert Panel's suggested criteria are discussed or even mentioned in the *Discussion Paper*. This omission leads CELA to surmise that what is being contemplated by the Government of Canada is the passage of open-ended and highly discretionary enabling provisions which allow the Minister and/or Cabinet to authorize substitutions. This approach is clearly contrary to the well-founded advice, qualifications and caveats from the Expert Panel regarding substitution, and should not be entrenched in the new assessment statute.

In making this recommendation, CELA is mindful of the dubious substitution track record under *CEAA 2012*, which provides little or no evidence that substituted processes are more effective than cooperative (or joint) assessments in terms of ensuring robust reviews or environmentally sound decisions.[101] We further note that substitution may be difficult to implement in practice since provincial assessment regimes are diverse, variable, and non-duplicative of federal requirements or constitutional interests.

CELA RECOMMENDATION #20: The new legislation should not permit substitution by other jurisdictions' regimes for the federal assessment process. In the alternative, if substitution is to become available as an option, then the new legislation must specify that substitution may only be used where the independent assessment authority decides, with

---

[97] *Discussion Paper*, page 17.
[98] Expert Panel Report, page 26.
[99] Arlene Kwasniak, "Environmental Assessment: Overlap, Duplication, Harmonization, Equivalency and Substitution" (2009), 20 JELP 1, page 20. See also Martin Olszynski *et al*., *Strengthening Canada's Environmental Assessment and Regulatory Processes: Recommendations and Model Legislation for Sustainability* (August 18, 2017), pages 27 to 28.
[100] Expert Panel Report, page 26.
[101] *Ibid*, page 25. See also West Coast Environmental Law, *Submissions to the Expert Panel* (December 23, 2016), pages 6 to 7.

written reasons, that the substituted regime meets or exceeds all legal requirements imposed under the new legislation.

In summary, CELA submits that when a proposed undertaking is subject to multi-jurisdictional assessment by various levels of government, then, to the maximum extent possible, governmental officials should work together in a coordinated and cooperative manner to design and implement an efficient and rigorous "one project – one assessment" approach that satisfies all applicable requirements for all stages of the federal sustainability assessment process (e.g. from early engagement/planning to post-approval monitoring and follow-up).[102]

Since the ambiguous proposals in the *Discussion Paper* seem to enable (or even favour) outright substitution rather than integration and coordination, then it behooves the Government of Canada to move beyond the *Discussion Paper*, and to ensure that the new statute mandates comprehensive, integrated and cooperative multi-jurisdiction assessments where applicable. If so, then there is no compelling public policy reason to include substitution provisions in the new law as an alternative mechanism.

(c) Summary of Changes

The *Discussion Paper* collects all of its proposed legislative and program changes into a single compendium,[103] but offers no new or additional proposals (or implementation details) that would significantly strengthen and improve upon current EA practice at the federal level.

Moreover, it appears that the Government of Canada proposes to cram all of its suggested changes into amendments to *CEAA 2012*, rather than repealing and replacing this statute. While the *Discussion Paper* boldly proclaims that its reform package represents a "new approach to environmental assessment for designated projects,"[104] CELA submits that the "new" approach, when stripped down to its key essential components, is simply a minor variation of the same old approach that Canadians have encountered – and objected to – under *CEAA 1992* and *CEAA 2012*. In our view, it is time for the Government of Canada to honour its commitment to pursue real change in the federal assessment process, rather than piecemeal tweaks that keep intact the most objectionable and controversial aspects of *CEAA 2012*.

PART III – CONCLUSION AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA concludes that because *CEAA 2012* is fundamentally flawed, the existing legislative framework cannot be amended to properly implement the principles, processes and policies which are needed to ensure robust sustainability assessments at the federal level. Instead, a fresh start – and a fresh statute – is required as soon as possible. As succinctly noted by

[102] See also MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 49 to 52.
[103] *Discussion Paper*, pages 18 to 19.
[104] *Ibid*, page 18.

one commentator, "*CEAA 2012* was a backwards and mistaken step, and there is nothing in it worth retaining."[105]

Accordingly, CELA urges the Government of Canada to go beyond the vague and unacceptable proposals outlined in the *Discussion Paper*, and to instead develop effective, enforceable and equitable "next generation" impact assessment legislation.

CELA's specific recommendations for legislative drafting instructions to accomplish this outcome may be summarized as follows:

CELA RECOMMENDATION #1: The Discussion Paper's proposals for EA reform should not be used as the primary basis for framing Cabinet's drafting instructions to legislative counsel. Instead, Cabinet's drafting instructions should more closely reflect and incorporate the findings, conclusions and recommendations of the final report of the Expert Panel on federal EA processes.

CELA RECOMMENDATION #2: *CEAA 2012* must be wholly repealed and replaced by new comprehensive "next generation" legislation that fully entrenches the principles, processes and policies required to implement sustainability assessments at the federal level.

CELA RECOMMENDATION #3: The new legislation should require cumulative effects analysis within strategic, regional and project assessments.

CELA RECOMMENDATION #4: The new legislation should entrench strategic and regional assessments on a firm statutory basis, and, at a minimum, should specify triggers, content requirements, procedural steps, and opportunities for public and indigenous participation in such assessments.

CELA RECOMMENDATION #5: The new legislation should mandate an early engagement and planning phase in the assessment process, which must be led by the independent assessment authority established by the legislation, rather than proponents.

CELA RECOMMENDATION #6: The new legislation should not contain the "interested person" standing rule, nor any other standing rule that limits Canadians from participating in the federal assessment process.

CELA RECOMMENDATION #7: The new legislation should include prescriptive details on when and how opportunities for meaningful public participation will be guaranteed in law for all stages of strategic, regional and project assessments, including:

(a) provisions for expanded and effective participant funding programs that are commensurate with the costs of engaging in federal assessment processes;

---

[105] Peter Usher, *Response to the Government Discussion Paper on EA Reform, with particular Reference to Independent Panel Reviews for Major Projects* (August 24, 2017), page 1.

(b) provisions for public involvement in post-approval monitoring, compliance and adaptive management activities.

CELA RECOMMENDATION #8: The new legislation should establish statutory duties which require all experts offering technical, scientific or opinion evidence in federal assessment processes to provide evidence that is fair, objective, non-partisan, and focused only on matters within their area of expertise.

RECOMMENDATION #9: The new legislation should include meaningful opportunities for parties to test technical, scientific or opinion evidence tendered during assessment processes, and should codify basic procedural safeguards (e.g. evidence under oath, cross-examination of witnesses, etc.) where public hearings are held under the new legislation.

RECOMMENDATION #10: The new legislation should entrench and define the precautionary principle in accordance with international law, and should specify how this principle applies where scientific uncertainty exists in relation to predicted impacts, proposed mitigation, or related matters.

CELA RECOMMENDATION #11: The new legislation should contain a purpose section that establishes "contribution to sustainability" as the paramount goal of the federal assessment regime. In addition, the new legislation should incorporate sustainability considerations to delineate the scope of assessments and the overall test for approval/rejection of proposed undertakings. Similarly, the new legislation should prescribe explicit decision-making criteria and trade-off rules in order to achieve environmental, social, economic, health and cultural sustainability.

CELA RECOMMENDATION #12: The new legislation should not include any references to "significant adverse environmental effects", "justified in the circumstances", or other vague terminology or inappropriate approval tests currently used in *CEAA 2012*.

CELA RECOMMENDATION #13: The new legislation should clearly specify the triggers for strategic, regional and project assessments. In relation to project assessments, the new legislation should entrench three types of triggers:

(a) listing of prescribed undertakings, as amended from time to time;

(b) decision-based triggers involving federal powers under other statutes or regulations; and

(c) discretionary trigger to compel assessments of non-prescribed undertakings.

CELA RECOMMENDATION #14: The new legislation should not limit the information-gathering components of the assessment process to specific heads of exclusive federal jurisdiction (e.g. fisheries, migratory birds, etc.).

CELA RECOMMENDATION #15: The new legislation should impose a clear statutory duty on decision-makers in the federal assessment process to consider and apply the "contribution to sustainability" test and all applicable sustainability criteria and trade-off rules, based on the facts and evidence adduced during the assessment process. The legislation must also specify that the decision, and the reasons for decision, must adequately explain why the proposed undertaking was approved or rejected. Similarly, the new legislation should place an onus upon the proponent to demonstrate, on a balance of probabilities, that the proposed undertaking satisfies the "contribution to sustainability" test and the applicable sustainability criteria and trade-off rules.

CELA RECOMMENDATION #16: The new legislation should establish and empower an independent assessment authority (or commission), with quasi-judicial functions and powers, to lead federal assessment processes, to conduct public hearings, and to render a final binding decision, subject to an appropriate judicial or administrative appeal mechanism. The new legislation should not require or permit the NEB or CNSC to lead, or co-lead, federal assessment processes, but should instead direct these regulatory bodies to participate in assessments led by the independent authority.

CELA RECOMMENDATION #17: The new legislation should not establish generic, fixed or arbitrary timelines for each stage of federal assessment processes, and should instead enable the independent authority, upon consultation with the parties during the early engagement/planning phase, to develop appropriate case-specific guidelines for the timing of the assessment process.

CELA RECOMMENDATION #18: The new legislation should entrench appropriate mechanisms for comprehensive and cooperative strategic, regional and project assessments when multiple jurisdictions (e.g. provincial, territorial and/or indigenous governments) may be engaged in reviewing the same proposed undertaking.

CELA RECOMMENDATION #19: The new legislation should not include, authorize or facilitate the use of "equivalency" or "delegation" mechanisms.

CELA RECOMMENDATION #20: The new legislation should not permit substitution by other jurisdictions' regimes for the federal assessment process. In the alternative, if substitution is to become available as an option, then the new legislation must specify that substitution may only be used where the independent assessment authority decides, with written reasons, that the substituted regime meets or exceeds all legal requirements imposed under the new legislation.

In closing, CELA looks forward to our continued involvement in Parliament's timely development of a new "sustainability assessment" law that properly reflects the above-noted recommendations.

August 28, 2017

APPENDIX A

CELA'S REVIEW OF RECENT EA's CONDUCTED BY THE CANADIAN NUCLEAR SAFETY COMMISSION

Prepared by
Theresa A. McClenaghan
Executive Director and Counsel, Canadian Environmental Law Association

CELA is involved in a number of current EA's under *CEAA 2012* for various nuclear projects where the CNSC is serving as the lead or co-lead for the EA process. In our experience, these EA's are illustrative of the types of issues and concerns that arise when federal energy regulators conduct EA's instead of independent authorities, as described below.

1. Deep Geological Repository

The Deep Geological Repository ("DGR") for low and intermediate radioactive waste proposed by Ontario Power Generation ("OPG") at Kincardine is the subject of an ongoing EA process that commenced under *CEAA 1992*, but was continued under *CEAA 2012*. All members of the Joint Review Panel ("JRP") appointed in that process are currently also part-time members of the CNSC, presumably pending the completion of that EA process and potential exercise of responsibilities for licensing under the *Nuclear Safety and Control Act*. The Minister has advised them that she does not require their further assistance in the current stage where the Minister must make a decision based on a report from the JRP.

The JRP was responsible for conducting and completing an EA under *CEAA 2012*. In CELA's view, the JRP's final report did not adequately address several significant issues which arose prior to and during the public hearing on the DGR, and which continue to present unresolved issues of public credibility as to the findings of the JRP in its final report. In our view, a more credible *CEAA* process would have avoided many of these problems in the first place, or would have not allowed the project to proceed as far as it has (or at all), or without remedying these fundamental issues.

- **Bait and switch issues**
  These are problems arising when the proponent, in early consultation with the affected community and the public, states that the project is intended to address one set of problems, and then later in the process, the intended purpose of the project, in this case, radioactive waste, is broadened to include other problems that are more serious with greater environmental threats. In the case of the DGR, the original public communication was to the effect that it would handle only low-level waste, and some intermediate-level waste whose properties were trivialized. Over the course of the proceedings, it became evident that the proponent intends to construct a larger facility, which is intended to take much more intermediate-level (more dangerous) waste than originally proposed.

- **Closed door decision-making**
  These are problems arising when proposals are developed behind closed doors, and then the public is told that the project will be good for the community. In the case of the DGR, the impetus appeared to be the perceived need or desire of a former mayor to have another major energy infrastructure project in the community, according to evidence at the hearing. The proposal was developed at meetings between municipal officials and the proponent to which the public was not admitted.

- **Limited vision of community future ("need" for a large nuclear facility)**
  "Visioning" exercises are commonly undertaken by consultants for proponents of large facilities with members of the community. By definition, the entire frame of the consultation is in the context of the major project that the proponent wants to site or build. Inadequate representation by the public, and a poverty of vision, is the predictable result. But the result of the limited "vision" may become a major driver behind the proposal – "a willing host" as has been argued by OPG in the case of Kincardine. In the case of the DGR, the "need" for the project has never been demonstrated in the view of many stakeholders including CELA, and this should be a *sine qua non*, regardless of such "visions" of the alleged economic benefit of such projects.

- **Insufficient proof of "need"**
  As indicated above, the threshold issue of "need" should be an essential and mandatory requirement to facilitate robust reviews of major energy projects, especially nuclear projects. While "need" was mentioned in *CEAA 1992*,[106] the current *CEAA 2012* omits any express reference to "need" in the list of mandatory considerations.[107] In any event, even where "need" has been notionally required in federal EA's, the process has traditionally places a great deal of weight on the view of the proponent in this respect, rather than taking a more objective step back to determine whether the project is essential or desirable from the larger public interest perspective, as opposed to other reasonable options or alternatives.

- **Insufficient consultation with whole community**
  Many major projects suffer from wholly inadequate early consultation, and in the case of the DGR, there was a great deal of evidence led regarding the deficiencies in early consultation, its limited geographic scope, its failure to properly consult surrounding municipalities and residents, and its failure to consult seasonal residents (as Kincardine is at the centre of a major seasonal population on Lake Huron).

[106] *CEAA 1992*, subsection 16(1)(e).
[107] *CEAA 2012*, section 19.

- **Extremely limited geographic scope**
  The Great Lakes and even Lake Huron were not defined into the EA study area, and transportation impacts were excluded (except for a very recent and superficial information request). As a result, hundreds of communities all around the Great Lakes have been expressing their major opposition to the project, and are of the view that it should not proceed.

- **Failure to consider real alternatives**
  Due to the apparent availability of a "willing host," the proponent did not conduct a proper alternatives analysis. There were attempts by both the JRP itself and the Minister to have the proponent provide such an analysis, and in CELA's view, this requirement has never been addressed or remedied to date. Part of the original problem was the *CEAA* guidance that gave undue weight to proponents' own business considerations, in this case the utilization of a site that OPG already owns.

2. Near Surface Disposal Facility

There is currently a proposed project undergoing an EA under *CEAA 2012* for a "Near Surface Disposal Facility" for low and intermediate radioactive waste. The size of the proposal is four times the size of the DGR proposed for Kincardine. This is one of the first projects in which the CNSC is solely responsible for the conduct of the EA. This project is at a relatively early stage, but there are already indications of severe issues which *CEAA 2012* may or may not be able to address or remedy. In addition, considerable concern is being expressed by the public as to whether the CNSC as sole authority for the EA has the institutional wherewithal to decide on the merits of this proposal in the long-term public interest. These public concerns include, but are necessarily limited to, the following issues.

- **Confusion of business opportunities with actual waste management needs**
  This will be a test of the "need" for the project. Legacy radioactive waste owned by the federal government is the subject of a "government owned – contractor managed" process which is proposing a low and intermediate level waste facility in a "Near Surface Disposal Facility" – essentially an engineered mound at the surface. However there are concerns that the real purposes of the project which may be dealing with the waste with the maximum speed and least cost, as opposed to the most appropriate alternative, will not be scrutinized properly against appropriate long term sustainability criteria, which are lacking under the current *CEAA 2012* process.

- **Lack of national policy or strategic EA**
  The lack of a comprehensive national radioactive waste policy, contrary to IAEA guidance, is also a major issue in this project. By utilizing project-by-project review, rather than strategic level review, it is difficult for the public to see that a rational, comprehensive approach is being taken. This is true for a number of current radioactive waste projects underway or contemplated in Canada, including the DGR, the fuel waste process under the *Nuclear Fuel Waste Management Act*, and additional proposals at Rolphton, Ontario and Whiteshell, Manitoba.

- **Public participation undermined by lack of full disclosure**
  Under *CEAA 2012*, there are also issues with these projects in terms of disclosure of necessary information to the public, lack of transparency, and downplaying of the potential significance of the projects. There is public concern about whether the CNSC has the willingness or ability to adequately deal with these concerns in its processes. The role of the CNSC to date has been to simply encourage proponents to provide all necessary information to the public, but not necessarily to require it. The public will be looking to the CNSC to do a much better job in this aspect and other EA responsibilities than it has done in licensing hearings, where often critically important information is often provided late or not at all to public intervenors.

***