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GOING BACK TO THE FUTURE:
HOW TO RESET FEDERAL ENVIRONMENTAL ASSESSMENT LAW

Preliminary Submissions from the Canadian Environmental Law Association
To the Expert Panel regarding the *Canadian Environmental Assessment Act, 2012*

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Abstract: *The Expert Panel's forthcoming report on federal environmental assessment ("EA") offers an important opportunity to develop new legislation that establishes robust, credible, participatory and evidence-based EA processes focused on sustainability. In this paper, the author draws upon previous EA reform efforts at the federal and provincial levels, and provides recommendations on three key issues: (i) the appropriate triggers for applying federal EA processes; (ii) the scope of federal EA requirements once triggered; and (iii) the need for independent EA decision-making upon satisfactory completion of the information-gathering stage of federal EA processes.*

PART I - INTRODUCTION

The Canadian Environmental Law Association ("CELA") welcomes this opportunity to provide submissions to the Expert Panel in relation to federal environmental assessment ("EA") processes under the *Canadian Environmental Assessment Act* ("*CEAA*") *2012*.

(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.

Since our inception, CELA's casework, law reform and public outreach activities have focused on EA 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*[1] and *MiningWatch*[2] 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. More recently, 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).[3]

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[1] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.
[2] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6.
[3] These submissions are available at the CELA website: http://www.cela.ca/collections/justice/canadian-environmental-assessment-act

(b) Overview

In CELA's view, the Government of Canada's establishment of the Expert Panel (and its approved Terms of Reference) offers an important opportunity to renew, revitalize and refocus information-gathering and decision-making within the federal EA regime.

From our public interest perspective, CELA concludes that *CEAA 2012* is clearly unworkable, fundamentally unacceptable, and effectively beyond repair, as discussed below. Thus, the Expert Panel should not recommend that the Government of Canada merely needs to tweak the status quo or pursue minor revisions of *CEAA 2012*. Instead, CELA submits that this ill-conceived statute must be repealed by Parliament as expeditiously as possible.

At the same time, CELA is not calling for the immediate restoration of *CEAA 1992* in its entirety. In our experience, *CEAA 1992* was also plagued by procedural problems and substantive flaws which were well-known but never adequately rectified over its 20 year-long existence. Unfortunately, the enactment of *CEAA 2012* not only compounded these deficiencies, but it also created a proliferation of new problems which have undermined the efficacy, utility and credibility of the federal EA regime.

Accordingly, CELA submits that the Expert Panel should not automatically presume that the current legislation is the preferable approach or ideal starting point for establishing rigorous federal EA requirements in Canada. To the contrary, CELA recommends that the Expert Panel should start with a clean slate, return to first principles, and recommend an integrated package of forward-looking EA reforms aimed at ensuring environmental sustainability and delivering net societal benefits.

In this regard, CELA fully supports the replacement of *CEAA 2012* by the "next generation" EA regime being advocated by EA practitioners, academics, non-governmental organizations and other stakeholders across Canada. In particular, CELA adopts the visionary thinking reflected in the "next generation" model being advanced by Professors Gibson, Doelle and Sinclair.[4] This sustainability model has been endorsed by numerous participants who have presented to the Expert Panel to date. In addition, the need for a new sustainability focus in federal EA has been supported in various articles, monographs and commentaries:

> This paper argues for a rigorous approach to alternatives within federal environmental assessment. It has presented a detailed review of early federal EAs in the 1970s to 1990s that demonstrated a rigorous approach to this topic… Today, under CEAA/12, the focus on significance [of adverse environmental effects] has increased, leaving alternatives as a fading aspect of federal EA.

[4] R.B. Gibson, M. Doelle and J. Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016), 29 JELP 25.1

> This paper advocates for reform of the federal EA process to embrace sustainability in all aspects, including review of alternatives (emphasis added).[5]

In essence, CELA submits that is now time to shift from traditional "first generation" EA regimes (which tend to focus on adverse effects, mitigation measures and trade-offs among competing interests) 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 benefits from approved undertakings). In our view, *CEAA 2012* should be replaced by an appropriate "sustainability assessment" regime at the federal level, and CELA highly commends this new approach to the Expert Panel for its consideration.

In supporting the "next generation" EA model, CELA relies upon Prime Minister Trudeau's 2015 mandate letter to the Minister of the Environment and Climate Change. Among other things, this mandate letter envisions the creation of a robust, participatory, and evidence-based EA process that is free from political interference. If the federal government is serious about achieving these public policy objectives, then CELA submits that an appropriately designed "next generation" EA law is best positioned to meet these governmental – and public – expectations for a fresh new approach to federal EA.

In CELA's view, the bottom line is that unlike *CEAA 2012*, the new federal EA regime must be effective, efficient, equitable and enforceable. If the Government of Canada agrees, then a whole new EA law must be drafted with meaningful input from stakeholders, indigenous communities and the public at large.

(c) Purpose of CELA's Preliminary Submissions

The purpose of these preliminary submissions is to provide the Expert Panel with CELA's initial analysis and recommendations in relation to three key threshold issues:

- what "triggers" should be used to determine when the federal EA process is applicable?

- which environmental planning factors should be addressed once the federal EA process has been triggered?

- who should be exercising EA decision-making authority upon completion of the EA process?

Prior to the Expert Panel's December 2016 deadline for written public comments, CELA will be filing comprehensive final submissions in order to: (i) provide additional details on the foregoing issues; (ii) respond to comments or recommendations made by other participants in the Expert Panel proceedings; and (iii) describe how the "next generation" EA model should be implemented at the federal level in Canada.

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[5] Rodney Northey, "Fading Role of Alternatives in Federal Environmental Assessment" (2016), 29 JELP 41, at p. 64. See also . See also Mark Winfield, *A New Era in Environmental Governance in Canada* (Metcalf Foundation, May 2016), pp.23-31.

PART II – FEDERAL EA TRIGGERS, SCOPE OF ASSESSMENT, AND EA DECISION-MAKING

When designing and implementing a new federal EA regime, there are several fundamental issues for Parliament to carefully consider, including (but not limited to) implementing the precautionary principle; ensuring meaningful public and indigenous participation; integrating traditional ecological knowledge; providing adequate participant funding; enhancing access to information; facilitating timely and efficient processes; requiring effective follow-up programs; and otherwise ensuring that federal EA processes are robust, fair, transparent and accountable.

However, for the purposes of these preliminary submissions, CELA submits that it is necessary to focus upon three critical components of the new federal EA regime, *viz.*, EA triggers, assessment scope, and decision-making. In CELA's view, these upfront considerations are of central importance to federal EA processes, and therefore deserve close scrutiny by the Expert Panel and, in due course, the Government of Canada.

(a) Triggers for Federal EA Requirements

The first crucial step in crafting the new EA regime is to determine which proposals[6] should trigger the application of federal EA processes. Arguably, this determination is the most important consideration in the new EA regime since it dictates when the EA process is – or is not – applicable.[7]

Over the past four decades, a variety of trigger options have been used in EA programs across Canada. In the early 1970s, for example, the Ontario government originally intended to restrict the application of its proposed EA law to only those individual projects which were designated by Cabinet on a case-by-case basis.[8] However, due to well-founded public concern that this discretionary approach would lead to few (if any) projects being made subject to EA requirements, Ontario's EA law was amended (prior to its enactment in 1975) to impose an "all-in-unless-exempted" rule in relation to public sector undertakings.[9] This general rule remains in effect to date, although a number of undertakings (and classes of undertakings) have been exempted over the years.[10]

At the federal level, *EARP* contained several open-ended triggers that applied the EA process to "proposals"[11] which would be undertaken by an initiating federal department, be located on federal

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[6] This preliminary submission focuses upon the types of individual activities or facilities which should trigger federal EA processes. However, there is also a need to apply federal EA requirements to higher-order governmental plans, programs and policies. Strategic- and regional-level EA is an important component of the "next generation" model, and will be discussed in more detail in CELA's final submissions to the Expert Panel.
[7] Rodney Northey, *Guide to the Canadian Environmental Assessment Act* (Toronto: LexisNexis, 2015), p.69.
[8] D. Estrin and J. Swaigen, *Environment on Trial (3rd ed.)* (Toronto: Emond Montgomery, 1993), pp. 193-95.
[9] Private sector undertakings are generally not subject to Ontario EA requirements unless they are specifically designated by regulation or order as undertakings to which the provincial EA law applies.
[10] See Ontario Regulation 334.
[11] "Proposal" was defined as "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility": *EARP*, section 2.

lands, require a federal financial commitment, or may have an impact on an area of federal responsibility.[12]

These four *EARP* triggers were modified and carried forward into *CEAA 1992*, which generally applied to "projects"[13] where a federal authority is the proponent, provides financial assistance to enable the project to proceed, disposes of interests in federal lands to enable the project to proceed, or issues a prescribed statutory instrument.[14] Detailed regulations (e.g. the Inclusion List, Exclusion List, Comprehensive Study List, and Law List) were developed to clarify and implement this broad triggering approach under *CEAA 1992*.

However, *CEAA 2012* jettisons these four triggers, and instead restricts the application of EA requirements to "designated projects"[15] which are prescribed by a regulatory list.[16] With some exceptions, this regulatory list[17] generally resembles the previous Comprehensive Study List in that it designates "physical activities" associated with certain major projects, such as oil/gas facilities, large mines, nuclear power plants, and pipelines.

The net result is that the number of EAs now triggered under *CEAA 2012* has significantly decreased from the *CEAA 1992* era. CELA acknowledges that it is important for federal EA processes to continue to apply to the various mega-projects currently found on the regulatory list under *CEAA 2012*. However, in light of the quantitative thresholds used in the regulatory list (e.g. rate of industrial production, tonnage capacity, length of linear projects, etc.), the current listing approach does not necessarily capture medium or small projects which may still nevertheless cause direct, indirect and cumulative environmental effects.

On this point, CELA submits that the size, scale or capacity of a particular facility may have little or no bearing on its environmental significance or the risks posed to nearby ecosystems or communities. For example, depending upon its location (e.g. in or near sensitive lands, riparian zones, wetlands or wildlife habitat), a relatively small project may still cause adverse effects upon natural heritage features, functions and values.

In addition, the current list under *CEAA 2012* begs the question of whether it even captures all large-scale activities or facilities that may cause significant adverse effects upon the environment

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[12] *EARP*, section 6.
[13] "Projects" were defined as physical works or prescribed physical activities: see *CEAA 1992*, section 2.
[14] *CEAA 1992*, subsection 5(1).
[15] "Designated project" is defined as one or more "physical activities" which are: (i) carried out in Canada or on federal lands; (ii) have been designated by regulation or order; and (iii) and are "linked" to the federal authority specified by regulation or order. This definition goes on to state that it includes any physical activity that is "incidental" to the prescribed physical activity: *CEAA 2012*, section 2.
[16] Generally, see Rodney Northey, *Guide to the Canadian Environmental Assessment Act* (Toronto: LexisNexis, 2015), pp.69-73. It should be noted that for certain projects, being caught on the regulatory list does not necessarily guarantee that a federal EA will be carried. For example, *CEAA 2012* empowers the Canadian Environmental Assessment Agency to conduct a "screening" to decide whether a federal EA should even be required: *CEAA 2012*, section 10. Other provisions allow for the substitution of provincial EA processes for the federal process where the Minister opines that the provincial process is "appropriate" or "equivalent" to the federal process: *CEAA 2012*, sections 32-37.
[17] SOR/2012-147, as amended.

or public health. For example, in CELA's submission on proposed revisions to the list,[18] we identified several significant projects which did not appear to be adequately caught by the list at that time, including:

- any proposed refurbishment or life extension of an existing nuclear generating station;[19]
- importing, exporting or transporting low-, intermediate- or high-level radioactive wastes from a Class IA or IB nuclear facility to any other public or private facility for storage, processing, recycling or disposal purposes;
- constructing, operating, modifying, or decommissioning an ethanol fuel production facility;
- constructing, operating, modifying, or decommissioning oil or gas development projects involving the following technologies:
    - hydraulic fracturing (fracking);
    - exploratory drilling or seismic surveys for off-shore oil or gas deposits; and
    - steam-assisted gravity drainage oil sands projects.
- constructing, operating, modifying or decommissioning marine or freshwater aquaculture facilities;
- constructing, operating, modifying, or decommissioning facilities for generating electricity from geothermal power or off-shore wind farms;
- all physical activities prescribed by the previous *Inclusion List Regulations* (SOR/94-637);
- constructing, operating, modifying or decommissioning buildings or infrastructure within protected federal lands[20] (i.e. National Parks, National Park Reserves, National Marine Conservation Areas, National Wildlife Areas, Marine National Wildlife Areas, Marine Protected Areas, Migratory Bird Sanctuaries, etc.), such as:
    - building new roads or rail lines, or widening/extending existing roads or rail lines; or

[18] Letter from CELA to John McCauley dated August 23, 2012.
[19] By order, the Minister designated the proposed Darlington NGS refurbishment as an activity to which *CEAA 2012* applies, but CELA submits that all such nuclear refurbishment projects should be caught by the regulatory list.
[20] CELA notes that the general duty imposed by section 67 of *CEAA 2012* upon "authorities" to self-review environmental impacts of projects on federal lands does not constitute an environmental assessment under the Act. Accordingly, CELA submits that these physical activities, if proposed upon nationally protected lands, should be caught by the PLR and potentially trigger an environmental assessment.

- building or expanding golf courses, ski resorts, ski trails, visitor centres or ancillary facilities; and

- constructing, operating, modifying or decommissioning of a diamond mine or chromite mine.

Whether or not the Expert Panel agrees with these particular examples, CELA submits that they highlight the practical downside of solely relying upon a regulatory list for the purposes of triggering federal EA processes. In our experience, such lists tend to remain static for prolonged periods of time, and it is difficult for regulatory lists to address new or emerging technologies in a timely manner. In short, it is challenging (if not impossible) for Cabinet to proactively anticipate and specifically list every conceivable activity that may cause adverse environmental effects. This is why CELA recommends the use of general triggers to implement an "all-in-unless-exempted" approach for triggering federal EA processes, as described below.

For environmentally significant projects not currently on the regulatory list, there is considerable uncertainty as to when – or if – the federal Minister will exercise his/her authority to designate additional projects for the purpose of triggering EA requirements.[21] It therefore appears to CELA that in order to convince the Minister to designate a non-listed project, considerable lobbying efforts would have to be undertaken by persons concerned about, or potentially impacted by, the particular project. At the same time, it is reasonable to anticipate that the proponent of a non-listed project would vigorously lobby against designation by Ministerial order.

However, as noted in the Prime Minister's mandate letter, it is highly desirable to de-politicize the federal EA process. In our view, this means that there should be greater clarity and predictability as to when the new EA regime will be applied to activities or facilities other than mega-projects. CELA submits that this outcome is best accomplished by returning to the use of general EA triggers, rather than awaiting the exercise of Ministerial discretion on a case-by-case basis.

Based on the past 40 years' worth of EA experience in Canada, it appears that the basic triggering options may be viewed on a continuum that ranges from absolute Cabinet discretion at one end, to using a narrow regulatory list of proposals, and to applying more general EA triggers at the other end. CELA observes that these options are not mutually exclusive *per se*; instead, the optimum triggering approach could be a hybrid model that involves general triggers (accompanied by appropriate Inclusion/Exclusion Lists) combined with a specific list of projects that warrant the application of federal EA requirements.

Accordingly, CELA recommends that the Expert Panel should give careful consideration to combining general and specific triggers for the purposes of applying EA requirements under the new federal regime. In particular, the traditional triggers (e.g. federal proponency, lands, funds, instruments) should be used to capture a broader range of activities and activities that merit some degree of scrutiny under the new EA regime before federal decisions are made to enable proposals to proceed. In this regard, we strongly recommend that former section 35(1) of the *Fisheries Act*

[21] *CEAA 2012*, subsection 14(2). See also Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012), 24 JELP 1, at p.7.

(e.g. harmful alteration, disruption or destruction of fish habitat) should be restored and reframed as a permit-issuing provision, and then re-used as an instrument trigger for the new federal EA process.

At the same time, CELA supports the renewed use of an updated (and possibly expanded) Exclusion List to help screen out environmentally insignificant projects (or classes of projects) which may involve areas of federal responsibility, but which do not necessarily require the application of federal EA processes. This would reflect that "all-in-unless-exempted" approach recommended by CELA, currently used in Ontario, and previously utilized under *CEAA 1992*.

Similarly, CELA recommends that the new EA legislation should make use of a specific regulatory list to identify the types or categories of nationally (or internationally) significant projects which warrant detailed EA scrutiny at the federal level.

CELA notes that the issue of EA triggers is inextricably linked to the related issue of which EA "track" or "stream" should be applicable to a particular project. In our view, the level or intensity of EA work required under the new regime should be commensurate with the potential environmental impacts or risks posed by the proposals under consideration.

This is not to say that proponents of smaller projects should be almost wholly relieved of key EA obligations under the new federal regime. To the contrary, for this category of projects, there should be minimum EA content requirements (e.g. contribution to sustainability, broad definition of environmental effects, consideration of alternatives, cumulative effects analysis, etc.) that must be addressed by proponents and considered by decision-makers.

In this regard, we note that *CEAA 1992* established a hierarchy of different types of federal EA, such as screenings (including class screenings), mediations, comprehensive studies, and panel reviews. In contrast, *CEAA 2012* generally features a single type of federal EA,[22] which only applies to the mega-projects found on the regulatory list. In our view, the cumbersome "one-size-fits-all" EA track under *CEAA 2012* (and its limited applicability to mega-projects) should be replaced by a more flexible or tiered series of EA tracks (or levels of assessment) similar to what previously existed under *CEAA 1992*.

For example, CELA would support renewed (and expanded) use of class screenings in appropriate cases for small-scale projects that recur frequently, have some potential to cause environmental impacts that are well understood, and that are amenable to standard mitigation and monitoring measures. These class screenings should require public notification at the earliest possible stage, and should include timely and meaningful opportunities for public and indigenous participation throughout the planning process. Class screenings should also include a safety valve mechanism that allows for particularly significant projects to be "elevated" (or "bumped up") to a higher level of EA planning and decision-making under the new EA regime.[23]

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[22] However, the option of referring an EA to panel review is still available (but highly discretionary) under *CEAA 2012*.

[23] This mechanism is found in Class EAs and environmental screening processes approved under Ontario's EA legislation. However, bump-ups (or "Part II orders") are rarely granted in Ontario.

CELA remains puzzled and concerned by *CEAA 2012*'s definition of "designated projects", which vaguely states that it includes physical activities "incidental" to the physical activities prescribed by the regulatory list. For the purposes of greater certainty, CELA submits that the new EA regime should include a provision that is similar to subsection 15(3) of *CEAA 1992* in order to ensure all actual (or likely) activities associated with the project will be addressed within the EA process. In accordance with the *MiningWatch* judgment,[24] CELA further adds that the word "project" should be interpreted as meaning the project as proposed by the proponent, and there should be no authority in the new regime to allow federal authorities to limit the scope of the assessment to only certain sub-components of the overall project.

Similarly, based upon our review of *CEAA 2012*, there currently appears to be no equivalent to section 24 of *CEAA 1992*, which previously ensured that an EA would be triggered, *inter alia*, if there was a modification of a previously assessed project. Accordingly, CELA submits that if a proponent proposes to vary, change or otherwise modify the manner in which a previously assessed (and approved) project is to be carried out, then an EA should be triggered in relation to the proposed modification. In our view, if a project is duly assessed and approved under the new EA regime, then it should be mandatory for the proponent to carry out further EA work and undertake public and indigenous consultation if it proposes to materially change the project (or adjust EA approval terms/conditions) prior to or during the implementation phase.

(b) Factors to be Addressed in Federal EA Processes

Once the Expert Panel determines how the new EA regime should be triggered, the next step is to consider the nature and scope of the environmental planning factors which should be addressed within federal EA processes. In essence, this issue focuses upon the information-gathering aspect of federal EA processes, which has attracted considerable public, political and judicial attention since the 1970s.

For example, *EARP* contained no definitions of "environment" or "environmental effect", but required federal authorities to consider a proposal's "environmental implications", and the "significance" of any adverse effects that may result from the proposal.[25] As a matter of constitutional law and statutory interpretation, the Supreme Court of Canada in *Oldman River* upheld EARP's broad requirement for federal authorities to gather information on a proposal's potential impacts on the physical, economic and social environment, not just on specific matters falling within federal jurisdiction.[26]

In *CEAA 1992*, the term "environment" was broadly defined, as was the phrase "environmental effect," which included several wide-ranging and important elements:[27]

> "environmental effect" means, in respect of a project,

[24] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6.
[25] *EARP*, sections 3 and 12.
[26] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.
[27] *CEAA 1992*, section 2.

> (a) any change that the project may cause in the environment, including any effect of any such change on health or socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal purposes, or on any structure, site or thing that is of historical, archeological, paleontological or architectural significance; and
>
> (b) any change to the project that may be caused by the environment,
>
> whether any such change occurs within or outside Canada (emphasis added).

Subsection 16(1) of *CEAA 1992* then went on to list the mandatory factors to be considered in every federal EA, such as:

- the environmental effects of the project, including the effects of accidents/malfunctions that may occur in connection with the project;
- any cumulative environmental effects that are "likely" to result from the project in combination with other projects or activities;
- the significance of the above-noted environmental effects;
- public comments;
- mitigation measures to address any significant adverse environmental effects; and
- other relevant matters, such as the need for the project and the alternatives to the project, as may be required to be considered.

Subsection 16(2) of *CEAA 1992* then listed additional factors which were to be considered in certain federal EAs, such as: (i) purpose of the project; (ii) alternative means of carrying out the project; (iii) need for, and requirements of, follow-up programs; and (iv) the project's effects upon the capacity of renewable resources to meet the needs of present and future generations.

In *CEAA 2012*, the same broad definition of "environment" was utilized, but the definition of "environmental effect" was considerably narrowed from that contained in *CEAA 1992*. In particular, *CEAA 2012* restricts "environmental effect" to certain matters "that are within the legislative authority of Parliament," such as: fish; aquatic species at risk; migratory birds; transboundary impacts; and aboriginal peoples.[28]

Similarly, while *CEAA 2012* lists many of the same factors found in *CEAA 1992* in terms of what a federal EA "must take into account",[29] the limited definition of "environmental effect" effectively reduces the nature and scope of the EA documentation, and limits the information that

[28] *CEAA 2012*, section 5.
[29] *CEAA 2012*, section 19. It is noteworthy that the "renewable resources" factor listed in subsection 16(2)(d) of *CEAA 1992* was not reproduced in section 19 of *CEAA 2012*, even though this factor is clearly related to sustainability.

is gathered and placed before the EA decision-maker. CELA further notes that *CEAA 2012* also deleted the *CEAA 1992*'s express references to the "need for the project" and "alternatives to the project" as matters to be considered.

CELA agrees with other commentators that *CEAA 2012*'s reduction in the scope of federal EA constitutes "the most significant change in the federal process" because it "narrows the scope of the project, the definition of environmental effects, and the factors to be considered."[30] Moreover, in light of the *Oldman River* judgment, CELA submits that there is no compelling constitutional reason for *CEAA 2012* to limit information-gathering to a small number of discrete issues within Parliament's legislative competence.[31]

Accordingly, CELA recommends that, at a minimum, the new federal EA legislation should return to the *CEAA 1992* definition of "environmental effect." At the same time, the list of mandatory EA factors originally found in section 16(1) and (2) of CEAA 1992 should be incorporated and merged within the new EA regime, but with renewed emphasis upon the importance of demonstrating "need for the project" and examining "alternatives to the project" in federal EAs.[32] In addition, some of these environmental planning factors require some necessary modifications or elaboration in the new EA regime.

For example, further and better direction is required in relation to the critically important obligation for EAs to consider the environmental effects of project accidents/malfunctions that "may" occur.[33] In accordance with the precautionary principle, CELA submits that this obligation should extend to accidents/malfunctions which may have a low probability of occurrence, but if they do occur, then potentially catastrophic off-site impacts upon the environment or human health may result. One CEAA text describes this issue as follows:

> Given limited time and resources, the responsible authority may be wise to concentrate its efforts on important malfunctions and accidents, based on the significance of the potential environmental effects, rather than on the likelihood of their occurrence.
>
> For example, while the risk of a nuclear accident may be low, the severe consequences of such an accident require careful consideration of its effects.[34]

However, it has been our experience that the environmental effects (or mitigability) of high-consequence accidents have been typically excluded from consideration in federal EAs on the grounds that such accidents are statistically unlikely to occur, at least from the subjective perspective of proponents and/or federal authorities.

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[30] See, for example, Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012), 24 JELP 1, at p.11.

[31] See also Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2009), 20 JELP 1.

[32] Rodney Northey, "Fading Role of Alternatives in Federal Environmental Assessment" (2016), 29 JELP 41.

[33] Similar legislative direction is also required in relation to cumulative effects analysis under the new EA regime.

[34] Beverley Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (Aurora: Canada Law Book, 2011), at p.II-97.

As discussed below, for example, the Federal Court of Appeal has recently declined to second-guess or criticize the exclusion of severe, multi-reactor accidents (or their effects or the adequacy of emergency planning for such events) from EAs conducted in relation to the Darlington nuclear power plant. In CELA's view, this highlights the need for further law reform on this point.

In short, the new federal EA legislation should make it abundantly clear that EAs must identify and evaluate the environmental effects of "worst-case scenario" accidents in a careful, precautionary and evidence-based manner, despite protestations from proponents (or regulators) that such accidents may be unlikely. In our view, real-world experience (e.g. Fukushima, Chernobyl, BP oil spill, etc.) demonstrates that severe accidents can and do occur, with devastating biophysical, ecological and socio-economic consequences. Therefore, CELA submits that sufficiently detailed accident/malfunction analysis is required in order to provide decision-makers with an adequate evidentiary basis for making objective decisions about whether it is in the public interest to assume such risks.

A second necessary modification relates to <u>how</u> environmental effects, significance, or mitigation measures are to be "considered" or "taken into account" during the information-gathering and decision-making stages of the new federal EA regime. Recent jurisprudence under *CEAA 1992* and *CEAA 2012* suggests all that is required of federal authorities is that they must at least "turn their minds" to the prescribed factors, and where this has occurred on the record, then the courts will not intervene unless there has been non-compliance with procedural requirements.[35] In CELA's view, the courts' general reluctance to judicially review the substantive adequacy of EA information-making and decision-making militates in favour of creating a new federal EA tribunal to deal with such issues, as described below.

A third set of modifications will be necessary in order to properly implement the "next generation" model supported by CELA and other stakeholders. As currently drafted, the factors in section 19 of *CEAA 2012* (formerly subsections 16(1) and (2) of *CEAA 1992*) tend to focus primarily on the mitigation of significant adverse environmental effects (e.g. making a bad project a little less bad), as opposed to an explicit "contribution to sustainability" test. If, as CELA recommends, the new EA regime requires sustainability assessments rather than mere impact mitigation, then the list of prescribed environmental planning factors will have to be considerably broadened and expanded in order to usher in this new and fundamentally different approach.

<u>(c) Federal EA Decision-Making</u>

One of the most important issues to be determined when designing a new federal EA regime is deceptively simple: who should be given the ultimate decision-making authority to approve or reject proposals upon satisfactory completion of the information-gathering stage of the EA process?

Over the past four decades, the ongoing (and highly contentious) debate on this issue typically focuses on two general options: (i) allowing the final EA decision to be made by a political entity

[35] *Ontario Power Generation et al. v. Greenpeace et al.*, 2015 FCA 186; *Greenpeace et al. v. Attorney General of Canada et al*., 2016 FCA 114; *Gitxaalo Nation v. Canada,* 2016 FCA 187.

(e.g. Minister or Cabinet); or (ii) allowing the final EA decision to be made by an independent expert tribunal.

The *EARP* regime was clearly predicated upon the political option, even where particularly significant proposals were referred to public review by a panel. The political option was continued under *CEAA 1992*, and has been carried forward into *CEAA 2012*.[36]

The lack of truly independent EA decision-making under *CEAA 1992* was criticized by one commentator as follows:

> A second significant limitation of the CEAA is its failure to ensure independent decision-making. The process of environmental assessment under the Guidelines Order began with self-assessment by government decision-makers. Where a proposal was referred for public review, the Guidelines Order required the establishment of an independent panel, but the panel was not empowered to make decisions on the proposal; it could only provide recommendations back to government Ministers. In recent years, this produced many controversies, particularly when government made decisions on public reviews that were contrary to the fundamental recommendations of panels.[37]

In CELA's view, such controversies have not been avoided or abated under *CEAA 2012*, even though EAs are now conducted by the Canadian Environmental Assessment Agency and by two regulatory tribunals, *viz*., the National Energy Board ("NEB") and the Canadian Nuclear Safety Commission ("CNSC"). As noted by Professor Doelle, it cannot be concluded "that the NEB and CNSC as regulators are well-suited to engage the public in a true planning process that considers whether the proposed project is the most appropriate way to meet societal needs and how its contribution to sustainability can be maximized."[38]

Indeed, continuing public concern about the NEB and its handling of certain energy projects has prompted Prime Minister Trudeau to create a separate expert panel to examine the need to "modernize" the NEB's enabling legislation and to ensure public confidence in the NEB. Given the existence of the separate review exercise in relation to NEB, it is beyond the scope of these preliminary submissions to provide the Expert Panel with CELA's views about NEB reform.

However, it is unclear to CELA why a similar public review is not being concurrently undertaken in relation to the CNSC or its enabling legislation. For example, many of the same concerns and complaints levelled at the NEB (e.g. loss of public confidence, regulatory capture, unfair hearing procedures, etc.) have been raised by a number of stakeholders in relation to the CNSC.[39] In the absence of a separate CNSC review, CELA submits that it falls by default to the Expert Panel to

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[36] *CEAA 2012*, sections 27, 31, 36, 47, 51, 52.

[37] Rodney Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Toronto: Carswell, 1994), pp.612-13.

[38] Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012), 24 JELP 1, at p.9.

[39] See, for example, Shawn-Patrick Stensil, "Greenpeace Blogpost: How Harper turned a nuclear watchdog into a lapdog" (August 19, 2015); Mark Mattson and Pippa Feinstein, "Waterkeeper Blog: NEB v. CNSC – Comparing ethical standards behind closed doors" (September 26, 2016); Tristan Willis, "Waterkeeper Blog: Inside #DarlingtonNuclear, Part 2: Who to Trust?" (November 4, 2015). See also Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012), 24 JELP 1, at pp.5-6.

evaluate how the CNSC has conducted EA processes and, more importantly, to determine whether the CNSC should be conducting EAs at all.

On this point, it has been CELA's experience that the EA processes conducted by the CNSC (or joint review panels co-established by the CNSC) have been marred by an absence of basic procedural safeguards (e.g. evidence under oath or affirmation; cross-examination of witnesses; review of witnesses' professional expertise before being qualified to give opinion evidence, etc.). Given the nature, extent, and significance of environmental impacts associated with new or expanded nuclear facilities, it is CELA's position that a far more rigorous and credible public hearing process is required in federal EAs involving such facilities.

More fundamentally, it is our respectful submission that the CNSC has not exhibited any particular institutional expertise in conducting federal EA processes. Indeed, in the recent proceeding involving the proposed Deep Geological Repository for low- and intermediate-level radioactive waste, a senior CNSC representative conceded on the record that the CNSC has no sustainable development criteria for use during EAs, and no capacity to assess sustainability considerations.[40] For this reason alone, CELA submits that the CNSC should not be assigned the legal duty to conduct (or decide) sustainability assessments under the "next generation" model.

In response to such criticism, the CNSC may argue that its EA processes (and the subsequent EA decisions) were upheld by the Federal Court of Appeal in recent litigation involving the Darlington nuclear power plant.[41] However, CELA notes that in these cases, the Court did not conclude that the CNSC's EA processes (or its interpretations of *CEAA 1992*) were legally correct as a matter of law; instead, the Court ruled that the impugned EA processes were not so unreasonable as to warrant intervention by the Court. In short, the Court essentially upheld the CNSC's right to be wrong, as long as the CNSC does not stray beyond its jurisdictional boundaries. CELA further observes that a legally permissible approach is not necessarily an environmentally sound approach.[42]

In these circumstances, CELA submits that it was neither appropriate nor in the public interest for *CEAA 2012* to assign EA responsibilities to the CNSC, which also licences and regulates the nuclear sector. In principle, CELA has no objection to the continuation of the CNSC's regulatory role under the *Nuclear Safety and Control Act*, although, in our view, the Act is ripe for public review and Parliamentary revision. Moreover, CELA submits that there appears to be considerable room for improvement in the CNSC's day-to-day regulatory activities (e.g. on-site inspections), as confirmed by the most recent report from the federal Environmental Commissioner.[43]

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[40] Testimony of Patsy Thompson, Joint Review Panel Transcript (October 3, 2013), Vol. 15, pp.182-85. Similarly, the Joint Review Panel that conducted the Darlington "new build" EA declined to conduct a sustainability assessment: EA Report (August 25, 2011), pp. 31, 140.

[41] *Ontario Power Generation et al. v. Greenpeace et al*., 2015 FCA 186; *Greenpeace et al. v. Attorney General of Canada et al*., 2016 FCA 114.

[42] Mark Haddock, *Environmental Tribunals in British Columbia* (Victoria: Environmental Law Centre, 2011), p.13.

[43] Commissioner of the Environment and Sustainable Development, *Fall 2016 Report 1: Inspection of Nuclear Power Plants – CNSC*, section 1.13.

While it should be open to the CNSC (and other federal agencies or ministries) to participate in an EA hearing in relation to nuclear facilities, it does not necessarily follow that the CNSC should be the entity that is legally responsible for holding the EA hearing or making the final EA decision. Therefore, instead of using existing regulatory bodies at the federal level to conduct EA hearings, CELA strongly recommends that the Expert Panel should consider other potential institutional arrangements for implementing the new EA regime, particularly at the decision-making stage.

The option that CELA strongly commends to the Expert Panel is the establishment of a new, independent, and quasi-judicial expert tribunal that is empowered by federal EA legislation to hold public hearings and make final and binding decisions upon completion of the EA process. The procedural safeguards for the tribunal's hearings could be prescribed by regulation, or, alternatively, by statute.[44] These safeguards should be supplemented by rules of practice which, *inter alia*, confer broad discretion upon the tribunal to allow individuals, groups, corporations, municipalities, indigenous communities and others to intervene in the hearing as a party, participant or presenter.

In our view, this new federal tribunal should be a permanent institution staffed with full-time members who have relevant EA expertise, and who are unbiased and free of conflict of interest. In our view, a stand-alone permanent tribunal would be a vast improvement over the temporary review panels that get established (and then disbanded) on a case-by-case under *CEAA 2012*.

Moreover, a robust EA hearing process can provide a variety of benefits. As noted in a provincial report on EA reform, public hearings "are important mechanisms for gathering information, testing evidence, weighing competing interests and making informed decisions about particularly significant or controversial undertakings."[45] In CELA's view, the intense scrutiny provided by a public hearing before an expert federal tribunal is tailor-made for critically evaluating the soundness and credibility of proponents' claims about the environmental effects (or impacts upon sustainability) caused by their proposals.

Further consideration should be given to the appropriate structure, function and jurisdiction of the new EA tribunal at the federal level. Options include: (i) setting up the tribunal as an appellate body to hear appeals against EA decision-making by federal authorities; (ii) giving the tribunal original jurisdiction to hold *de novo* hearings on EAs prepared by proponents; (iii) conferring power upon the tribunal to award advance or final costs to facilitate public and indigenous participation in the hearing process; (iv) empowering the tribunal to adjudicate whether a particular project should be "bumped up" from a class screening to a higher level of EA; (v) enabling the tribunal to hold joint hearings with other federal, provincial or territorial tribunals; and (vi) establishing a time-limited opportunity for tribunal decisions to be appealed to Cabinet or judicially reviewed by the Federal Court. CELA's final submissions to the Expert Panel will examine these implementation options in more detail.

While this proposed EA tribunal may be perceived by some as a radical reform, there is, in fact, legislative precedent in Canada for CELA's recommended approach. For example, Ontario's

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[44] Rodney Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Toronto: Carswell, 1994), p.607.
[45] Minister's EA Advisory Panel, *Improving Environmental Assessment in Ontario: A Framework for Reform* (2005), Vol. I, p. 81.

Environmental Assessment Act[46] ("EAA"), which is generally administered by the provincial Minister of the Environment and Climate Change, specifically provides for public hearings[47] to be held by the independent Environmental Review Tribunal ("ERT"), previously known as the EA Board. Where an EA hearing is held, it is the ERT – not the Minister or Cabinet – that decides the proponent's EA application upon completion of the public hearing.

While the *Intervenor Funding Project Act*[48] no longer exists in Ontario, the ERT has broad cost powers that can facilitate the participation by persons who are interested in, or potentially affected by, the proposed undertaking. Where a proposal triggers public hearing requirements under other provincial statutes (e.g. *Planning Act*), then the *Consolidated Hearings Act* enables the creation of a joint board (e.g. ERT and Ontario Municipal Board) to conduct a single integrated hearing and to render the required statutory decisions.

In short, Ontario's ERT makes a legally binding EA decision, although the EAA allows the Minister to "review" the ERT decision, and the Cabinet to "vary" the decision, within 28 days of its release.[49] Otherwise, the decision becomes final and effective upon the expiry of the 28 day period,[50] and the EAA contains a strong privative clause that prohibits the courts from altering or setting aside the ERT decision unless it is "patently unreasonable."[51]

CELA notes that over the decades, Ontario's EA process generally evolved from having Cabinet make final EA decisions to having an independent administrative tribunal to make final EA decisions.[52] In our view, it is time for the federal EA process to follow a similar progression. In assessing the implications of the Ontario regime in the context of federal EA reform, one commentator has concluded that the Ontario experience suggests "that the way forward involves independent expert decision-making, but [needs] further consideration of the most effective process for providing such decision-making."[53] CELA agrees with this observation, and calls upon the Expert Panel to identify the most effective manner for implementing independent decision-making under the new federal EA regime.

In addition, CELA notes that creating an independent EA tribunal at the federal level is not a new idea or novel proposition. To the contrary, this concept has important roots in the evolution of the federal EA regime, and, in fact, has been debated since the very earliest days in the pre-*EARP* era.

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[46] EAA, sections 9.1, 9.2, 9.3 and Part III. It should be noted, however, that it is the Minister who decides whether an EA application is referred, in whole or in part, to the ERT for hearing and decision. While EAs were commonly referred to the ERT from the 1970s to the late 1990s, it appears that, as a matter of practice, no EA hearings have been required by the Minister in recent years.

[47] These EA hearings must be conducted in accordance with the procedural safeguards set out in Ontario's *Statutory Powers Procedure Act* and the ERT Rules of Practice.

[48] This statute created a mandatory intervenor funding program for EA hearings and was based on the "proponent pays" model. However, this statute expired in 1996, and was not renewed or replaced.

[49] EAA, section 11.2.

[50] EAA, section 11.3.

[51] EAA, section 23.1.

[52] However, if the "no hearing" trend continues in Ontario, it appears as if this evolution has stalled or even regressed.

[53] Rodney Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Toronto: Carswell, 1994), pp.2-3.

In the early 1970s, for example, the federal government established a Task Force that reviewed and reported upon how an EA regime should be implemented at the federal level.[54] Among its various recommendations, the Task Force favoured the creation of an independent "Environmental Review Board" that would, *inter alia*, examine the adequacy of EA documentation, pronounce on environmental implications of proposals, and ensure necessary arrangements for monitoring.[55]

Significantly, the Task Force concluded that the independence of the Environmental Review Board must be "assured" and "obvious" in order to fulfill its national role, and further recommended that the Board should "have none of the regulatory, administrative or other routine responsibilities of a department of government" (emphasis added).[56] Such recommendations were praised by an EA commentator on the grounds that "an independent Board equipped with appropriate procedural safeguards is preferable" to *ad hoc* advisory panels established on a case-by-case basis.[57]

However, the Task Force's recommendations were not acted upon when *EARP* was put into place, nor have they been implemented in subsequent decades when *EARP* was replaced by *CEAA 1992* and *CEAA 2012* thereafter.

Similarly, during the 1993 federal election campaign, the Liberal government committed to various EA reforms, including the establishment of an independent CRTC-like entity. The intended purpose of this reform was to "shift decision-making power" to this new entity, subject to an appeal to Cabinet.[58]

However, this reform was not acted upon by the time that *CEAA 1992* was proclaimed in force in 1995. This unfortunate omission prompted the author of an EA textbook to observe:

> At present, these reforms do not ensure independent decision-making. However, in the hope that we will see an independent federal institution capable of bringing together the legal and planning conversations on environmental assessment, I have sought to provide a book that references significant contributions from both conversations.[59]

In CELA's view, these conversations have been going on for far too long at the federal level. Thus, it is now time to embark on a bold new direction by establishing an independent, quasi-judicial expert tribunal that is empowered to hold public hearings and render legally binding EA decisions, subject only to a time-limited Cabinet appeal and judicial review supervision by the Federal Court.

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[54] *Final Report of the Federal Task Force on Environmental Impact Policy and Procedure* (August 30, 1972).
[55] Generally, see D.P. Emond, *Environmental Assessment Law* (Toronto: Emond Montgomery, 1978), pp. 225-27.
[56] *Final Report of the Federal Task Force on Environmental Impact Policy and Procedure* (August 30, 1972), pp.7-8, 11.
[57] D.P. Emond, *Environmental Assessment Law* (Toronto: Emond Montgomery, 1978), p. 227.
[58] *Creating Opportunity: The Liberal Plan for Canada* (1993), p.64.
[59] Rodney Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Toronto: Carswell, 1994), p. vii.

PART III - CONCLUSIONS

From the earliest days under *EARP* to the last days of *CEAA 1992*, there has been a slow but steady evolution in EA practice and procedure at the federal level. *CEAA 2012*, however, represents the devolution of federal EA:

> In short, CEAA 2012 is a major step backward; it makes EA less effective and less fair. It even makes the EA process less efficient… and therefore is a regulatory burden without offering the value of good EA.[60]

Accordingly, CELA concludes that the Expert Panel must not recommend that *CEAA 2012* should remain in force, even if amended. In this regard, CELA agrees that CEAA 2012 deserves a "tear-down, not a reno."[61]

Among other things, *CEAA 2012* (i) unreasonably reduces the number, nature and scope of federal EAs; (ii) improperly allows federal EA planning and decision-making responsibilities to be delegated to provincial EA regimes; (iii) inappropriately relies upon narrowly focused regulatory agencies in the energy sector (NEB and CNSC) despite their traditional lack of EA expertise or experience; and (iv) significantly overpoliticizes federal EA processes at key decision-making stages.

As the Expert Panel considers the parameters of a new EA regime that should replace *CEAA 2012*, CELA submits that Panel members should have regard for past and present EA experience when addressing the key issues of EA triggers, assessment scope and decision-making for the future.

In relation to these three issues, CELA makes the following recommendations to the Expert Panel:

1. **The new federal EA legislation should include a combination of general triggers (e.g. federal proponency, funds, lands and instruments), specific triggers (e.g. regulatory list(s) of nationally significant projects), and inclusion/exclusion lists to determine when federal EA requirements apply, and which EA "track" should be used.**

2. **The new federal EA legislation should contain broad definitions of "environment" and "environmental effect," and should expand the list of prescribed environmental planning factors which must be addressed in every EA in order to ensure sustainability.**

3. **The new federal EA legislation should establish an independent, quasi-judicial expert tribunal that is empowered to hold public hearings and render legally binding EA decisions, subject only to a time-limited Cabinet appeal and judicial review supervision by the Federal Court.**

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[60] Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012), 24 JELP 1, at p.17.
[61] Chris Tollefson, "Blog: Canada's environmental assessment law: a tear-down, not a reno" (*Policy Options*, July 13, 2016). See also J. Maclean, M. Doelle and C. Tollefson, "Polyjural and Polycentric Sustainability Assessment: A Once-in-a-generation Law Reform Opportunity" (2016), 30 JELP 1 (forthcoming).

In closing, CELA looks forward to our continued participation in the Expert Panel proceedings, and to Parliament's timely development of a new "sustainability assessment" law that fully reflects the above-noted recommendations.

November 7, 2016