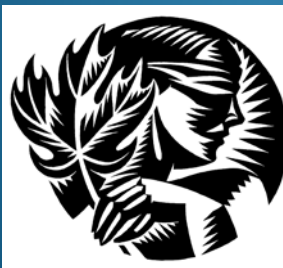


Bill C-38

Federal Budget Bill 2012 Implications for Federal Environmental Law

Theresa McClenaghan
Executive Director and Counsel, Canadian Environmental Law
Association
June 2012



Introduction: Division of Powers in Canada

- Federal government has some responsibilities pertaining to environment (e.g. fisheries, navigation, regulation of toxic chemicals)
- Provinces and territories have others (“ e.g. property and civil rights in the Province”)
- Many powers operate in related areas
- Aboriginal governments also have powers and responsibilities; some of the federal statutes explicitly recognize these powers
- Within provinces and territories, municipalities and local governments also have powers and responsibilities (delegated)
- Actions are appropriate and necessary at each scale

Budget Speech

- Finance Minister's Budget Speech March 29, 2012, set out a series of measures under the title "Responsible Resource Development"; a theme which continues through the budget process
- It included targeting "a maze of overlapping and complex regulatory requirements and red tape"
- He stated that "The Government is committed to reforming the regulatory system in the resource sector so that reviews are conducted in a timely and transparent manner, while safeguarding the environment"

Budget Speech

- Budget Speech said government would
 - bring forward legislation to achieve the goal of “one project, one review”
 - improve and make new investments in regulatory review, streamline the review process for major economic projects, strengthen pipeline and marine safety, support Aboriginal consultations
 - strengthen the Major Projects Management Office (\$54 million over two years)
 - “ensure the safety and security of Canadians and the environment as energy resources are developed”

Budget Speech – other issues

- Said government would be providing “\$330.8 million over two years to build and renovate on-reserve water infrastructure and support the development of a long-term strategy to improve water quality in First Nations communities”. The Budget Plan also referenced the recently re-introduced First Nations Safe Drinking Water Act (Bill S-8)
- Also announced \$50 million over two years to protect wildlife species at risk (implementation of the Species at Risk Act)

Budget Speech other issues cont'd

- The Budget also announced the creation of a national park in the Rouge Valley
- The government also announced “measures to ensure that charities devote their resources primarily to charitable, rather than political, activities, and to enhance public transparency and accountability in this area”.
- In addition, extensive program expenditure reductions across Departments is expected; a result of the program review the government conducted in 2011

Budget Speech other issues cont'd

- An overall initiative, on “Reducing red tape through the ‘One-for-One’ Rule and implementing the Canada-United States Action Plan on Regulatory Cooperation.”
- This consists of 29 initiatives that “align the regulatory approaches between Canada and the United States in areas of agriculture and food, transportation, health and personal care products, chemical management, the environment, and other cross-sectoral areas”
- Budget Plan states that it will not compromise health, safety or environmental protection standards.

Budget Plan

- The government's Budget Plan also tabled March 29 – 489 pages of text describing the measures to be taken
- Includes measures such as \$165 million over two years for responsible resource development; \$12.3 million for diamond exploration in the north; more access to seismic technology for offshore exploration
- On the other hand some tax preferences for resource industries are being phased out
- \$10.5 million for fisheries science
- Budget Plan includes a plan for much expanded pursuit of trade agreements

Budget Plan cont'd

- The pipeline and marine safety initiative (\$35.7 million over two years) includes issues around double hulls, piloting, tanker inspection, improved navigational products (charts)
- There is also a plan to revisit the legislative framework related to oil spills and emergency response (which we have been calling for)
- In addition, another \$13.5 million over two years to the NEB is meant to increase pipeline inspections (cost recovered)

Budget Plan – other issues

- Budget Plan also provided for \$51.2 million over two years on food safety
- There was a commitment “going forward” to pursue “water quality and ecosystem health improvements in lakes and other bodies of water”, such as Lake Winnipeg and Lake Simcoe, but no were dollars attached to this commitment at budget time
- Government also plans to establish a hunting and wildlife advisory panel

Budget Plan cont'd

- \$8 million was committed over 8 years to compensate property owners involved in the Port Hope area initiative dealing with clean up of legacy radioactively contaminated soils
- Accelerated depreciation of thermal and district energy equipment was also announced to encourage these clean energy investments
- The Budget Plan also announced that it would introduce legislation to eliminate the National Round Table on the Economy and the Environment, leaving its functions to Environment Canada

Budget Plan cont'd

- A plan to reduce travel by Environment Canada and Natural Resources Canada is intended to reduce vehicle fleets and save money (the Budget Plan did not address the implications if any from reduced travel in terms of oversight and enforcement)

Bill C-38, 2012 Federal Budget Implementation Bill

- The next level of detail is provided by the legislation introduced to implement the Budget
- A 431 page Bill introducing or amending many diverse pieces of legislation – thus styled an “omnibus” Bill
- Environmental community, including CELA objected to the use of the Budget bill to substantively amend environmental statutes
- Called on government to deal with those proposals by separate legislation with normal process of study and input

Bill C-38 - Contents

- Below I provide highlights of additional matters not outlined above and additional details on CEAA and Fisheries Act
- Specific provisions to implement the plans to have major energy projects approvals streamlined included matters such as giving the NEB authority over navigable waters in relation to pipeline crossing approvals

Bill C-38 contents cont'd

- It also gives the federal Cabinet the power to make final decisions on major pipelines and sets out the authority for the Minister and the NEB Chairperson to establish the timelines for regulatory reviews under the NEB Act
- The Fisheries Act was substantially amended (although not mentioned in the Budget Speech or the Budget Plan on March 29)
- It narrows the protection of the Fisheries Act to protection of fish that support “significant aboriginal, recreational or commercial fisheries”

Bill C-38 Contents cont'd

- Rather than amending the Canadian Environmental Assessment Act, the Budget surprisingly repealed the Act entirely and replaced it with a new version
- The new CEAA limits its purpose to protection of the components of the environment that are “within the legislative authority of parliament”
- It also adds as a purpose “to ensure the completion of EA in a timely manner”

Bill C-38 – Contents cont'd

(CEAA)

- The environmental effects to be taken into account include changes or significant effects on items “within the legislative authority of Parliament”:
 - “Fish” and “fish habitat” (new definitions)are imported from the revised *Fisheries Act*
 - Migratory birds,
 - Species at risk
 - Federal lands
 - Inter-provincial effects
 - International effects

Bill C-38 cont'd

- CEAA environmental effects also include,
“(c) *with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on*
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes, or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.”

Bill C-38

- Environmental effects beyond these, but directly linked to a federal authority's exercise of its power are also to be taken into account (for example, changes to the environment, health and socio-economic conditions, physical or cultural heritage, or sites of architectural and historical significance)
- Cabinet can exempt a component of the environment from the application of the Act by Order

Bill C38 – Contents cont'd

- Bill C-38 also repealed the Kyoto Protocol Implementation Act (also not mentioned in the Budget Speech nor Budget Plan)

Bill C-38 contents cont'd (CEAA)

- Authority was provided to recognize provincial EAs as “equivalent”, to be conducted under their provincial EA legislation on request of a province – this would supplant the federal EA in such a case
- There are limits in the Act to doing so – the Minister has to be satisfied as to the substantive and procedural procedures under the provincial process meeting section 19 CEAA factors and meeting certain public participation thresholds

Bill C-38 Contents (CEAA) cont'd

- Minister may refer an EA to a Review Panel (with a maximum combined 24 month time line)
- However Minister cannot make a referral if the responsible authority is the CNSC or the NEB

Bill C-38 – Fisheries Act

Contents

- Bill provides a new definition of “Serious harm to fish”
 - the death of fish or any permanent alteration to, or destruction of, fish habitat
- The revised Fisheries Act would limit the protection of fish habitat to this definition, rather than as per the previous provision which prohibited harmful alternation or disruption of fish habitat, regardless of whether long or short term in nature

Bill C-38 – Fisheries Act

- Other changes included in the bill will provide that activities to be listed in regulation will be exempted from the revised provisions; thus exempting them from permit requirements and federal oversight
- Cabinet is also empowered under the revised Bill to order or list provisions of the Act or regulations that do not apply in a province on the basis that that province has a provision “equivalent in effect” – this is puzzling since fisheries is a listed matter of federal jurisdiction

General Implications of Bill C-38

- Thousands of fewer Environmental Assessments (screening or otherwise) under federal Environmental Assessment
- Reduction of the number of federal agencies and departments conducting Federal EAs to three (the Canadian Environmental Assessment Agency (CEAA); the National Energy Board (NEB); and the Canadian Nuclear Safety Commission (CNSC) or in some cases another federal authority that holds hearings and is designated by Order or regulations

General Implications cont'd

- Set timelines for completion of EAs for projects (i.e. those remaining subject to Federal EA), regardless of complexity and availability or lack of critical information
 - Panel reviews 24 months
 - NEB hearings 18 months
 - “Standard” EAs 12 months (365 days from Notice of commencement; max 3 month extension; info requests not counted in the time)

General Implications cont'd

- Greatly increased reliance on narrowly focussed regulatory agencies in the energy sector, despite their traditional lack of EA expertise
- Potential to over-politicize the federal EA process at all key decision-making stages
 - Lack of criteria for many decisions such as those for approvals “justified in the circumstances”

General Implications

- Increased uncertainty (for example, questions as to which projects are to be “designated projects” under the Act)
- Increased discretion to the CEAA Agency as to whether to require EA of non-energy projects at all
- The provisions to allow a provincial EA as “equivalent to” or “an appropriate substitute to” the federal EA are inappropriate given the better, but vastly under-utilized current powers for joint provincial-federal EAs

General implications cont'd

- Undue narrowing of scope and content of federal EAs by way of the new narrower definition of environmental effects (see above)
- Narrowing of the environmental assessment considerations such as the omission of considering the “need” for the project or “alternatives to” the project

General Implications cont'd

- Failure to deal with issues that ENGOs and others had noted that did require legislative action such as:
 - Strengthening environmental sustainability considerations
 - Entrenching strategic EA of government policies, programs, plans
 - Improving public participation opportunities
 - Ensuring improved procedural fairness and rigour in review panel proceedings
 - Establishing mechanisms for assessing the cumulative effects of numerous “small” projects

Canadian Environmental Law Association

[Home](#) | [About CELA](#) | [e-Bulletin](#) | [Français](#) | [Library](#) | [Contact Us](#)

[News](#)
[Publications](#)
[Our Services](#)
[Frequently Asked Questions](#)

[CELA in the Courts](#)
[Access to Environmental Justice](#)
[Water Sustainability](#)
[Pollution and Health](#)
[Green Energy](#)
[Planning and Sustainability](#)

Subscribe

Subscribe to our **bulletin**, fill in your email below.



*CELA works to protect human health and our environment by seeking justice for those harmed by pollution and by working to change policies to prevent such problems in the first place. For 40 years, CELA has used legal tools to increase environmental protection and safeguard communities. As a **Legal Aid Clinic**, our top priority is to represent low income individuals and communities and to speak out for those with less influence and who receive less of a say in decision-making.*

*Through **landmark legal cases** CELA has helped shape government and industry approaches to pollution and other environmental threats and has forced polluters to clean up their act. CELA has also been part of shaping **innovative collaborations** to improve sustainability and human health including the Low Income Energy Network, the Renewable is Doable group, the Canadian Partnership for Children's Health and Environment, the Water Guardians Network, and many more.*

*Please see the **Our Services page** for more information about whether your case meets our Legal Aid criteria or alternative sources of assistance. Currently, our policy change work is focused on five areas:*

- **Access to Environmental Justice**
- **Water Sustainability**
- **Pollution and Health**
- **Green Energy**
- **Planning and Sustainability**

Contact information

32

Canadian Environmental Law Association

130 Spadina Ave., Ste. 301
Toronto, ON M5V 2L4
Tel.: 416-960-2284

Theresa McClenaghan,
Executive Director and Counsel
theresa@cela.ca



CELA web site: www.cela.ca
Low Income Energy Network: www.lowincomeenergy.ca
CPCHE website: www.healthyenvironmentforkids.ca
PollutionWatch Website: www.PollutionWatch.org
Water Guardians website: www.thewaterhole.ca
Environment & Law Resource Library: www.ecolawinfo.org

Twitter: @Theresa.McClenag
@CanEnvLawAssn