Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

July 19, 2016 **BY EMAIL**

Review of Environmental Assessment Processes
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, Ontario
K1A 0H3

RE: PROPOSED TERMS OF REFERENCE OF EXPERT PANEL – REVIEW OF *CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012*

The Canadian Environmental Law Association (CELA) commends the federal government for proceeding with the long-promised and highly anticipated review of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and related regulatory processes.

Over the past two decades, CELA has represented clients, or participated on its own behalf, in numerous administrative and legal proceedings under CEAA 2012 and its predecessor, CEAA 1992. In addition, CELA lawyers have made submissions to, and appeared as witnesses before, various parliamentary committees in relation to federal environmental assessment legislation, including the original enactment of CEAA 1992. More recently, CELA vigorously 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).

From a public interest perspective, CELA concludes that CEAA 2012 is clearly unworkable, fundamentally unacceptable, and effectively beyond repair. Thus, the federal government must not confine itself to merely tweaking the status quo, or pursuing minor revisions of CEAA 2012. Instead, this ill-conceived statute must be repealed by Parliament as expeditiously as possible.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, the 1992 law 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 environmental assessment (EA) regime.

Accordingly, CELA submits that the federal government needs to 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 environmental sustainability and delivering net societal benefits. This new federal regime must be effective, equitable and enforceable, and it must be developed with timely input from stakeholders, indigenous communities and the public at large.

For the foregoing reasons, CELA welcomes this historic opportunity to renew, revitalize and refocus the process for information-gathering and decision-making about environmental matters at the federal level.

CELA also commends the federal government on its decision to establish an independent Expert Panel to conduct the CEAA review, solicit public input, and provide recommendations for reform. It goes without saying that CELA looks forward to participating extensively in the forthcoming review process.

However, CELA has serious concerns about the excessively narrow and wholly inadequate scope of the draft Terms of Reference (TOR) that is intended to guide the Expert Panel's work. Moreover, it appears to CELA that the draft TOR is inconsistent with, or not fully responsive to, Prime Minister Trudeau's 2015 mandate letter to the Minister of the Environment and Climate Change. Among other things, this mandate letter envisioned the creation of a robust, participatory, and evidence-based EA process that is free from political interference. If the federal government intends these objectives to serve as the benchmark for the outcome of the CEAA review, then the draft TOR will necessarily have to be clarified, amended and expanded.

CELA's ten specific concerns about the draft TOR – and our recommendations for addressing them – are outlined below.

1. The Need to Broaden the Parameters of the CEAA Review

The proposed TOR defines environmental assessment (EA) in an unacceptably limited manner by suggesting that EA is only intended to "identify opportunities" to avoid, eliminate or reduce a project's adverse impacts on the environment.

In our view, this sparse definition may accord with current practice under CEAA 2012, but it does not appropriately define the overall intent and public interest purpose of EA planning and decision-making. In our view, the goal of EA is not to make questionable projects somehow less risky or impactful. Instead, a rigorous EA regime ensures that an informed decision can be made on whether a proposal should be permitted to proceed at all.

In short, EA is not simply an exercise in impact mitigation. This particularly true since there are other regulatory approvals regimes that, at least in theory, could be used to address certain project-specific effects at the detailed design stage. Instead, EA is intended to be a rational, replicable and traceable process that precedes the issuance of regulatory approvals, and that systematically identifies and evaluates key threshold questions (with meaningful public participation), including:

- what is the purpose of the proposal under consideration?

- is there a demonstrable need, rationale or justification for the proposal?

- what are the reasonable "alternatives to" the proposal, and what are the potential ecological and socio-economic advantages/disadvantages of these alternatives in comparison to the proposal?

- what are the "alternative methods" (or "means", including alternative sites) of carrying out the proposal, and what are the ecological and socio-economic advantages/disadvantages of these alternatives in comparison to the proposal?

The above-noted factors are generally absent from regulatory approvals regimes at the federal level (e.g. *Nuclear Safety and Control Act*). Therefore, the draft TOR for the Expert Panel must be amended to ensure that the Panel's report addresses how (not whether) the fundamental EA planning issues of purpose, need, alternatives to, and alternative methods should be entrenched in new EA legislation.

2. The Need for Strategic- and Regional-Level EA

The draft TOR's misrepresentation of EA as project-level decision-making also overlooks the overwhelming need for the new federal regime to incorporate appropriate – and mandatory – provisions for strategic- and regional-level EA planning that can guide subsequent decisions on individual undertakings.

On this point, there is widespread consensus among EA practitioners, lawyers, academics, environmental groups and indigenous communities across Canada that one of the most serious shortcomings in CEAA 1992 and CEAA 2012 is the ongoing failure to include a legally enforceable duty to undertake strategic- and/or regional-level assessments. For example, upfront strategic/regional EA planning (in cooperation with other levels of government as appropriate) should help determine resource management priorities and appropriate land uses in areas where there has been little or no resource development, extraction activities or related infrastructure.

Thus, CELA submits that the draft TOR for the Expert Panel should be amended to specify that the Panel is empowered to review and report upon how (not whether) strategic- and regional-level EA planning should be implemented via the new federal regime.

3. The Need for Cumulative Effects Assessment

The draft TOR's focus on the environmental effects of individual projects ignores the need to significantly enhance the assessment of cumulative effects under federal EA law.

While CEAA 2012 notionally requires cumulative effects analysis in EA's of designated projects, it is CELA's experience that there is room for considerable improvement in the interpretation and application of this critically important requirement.

Thus, CELA submits that the draft TOR should expressly require the Panel members to review and report upon the legislative, regulatory, policy and administrative reforms (including education/outreach to EA consultants) which are needed to ensure that best practices are employed to identify and assess cumulative effects in a meaningful manner.

4. The Need to Reconsider the Application of the New EA Regime

CEAA 2012 routinely applies to the projects (physical works or activities) that have been designated by regulation. Depending on the type of project, the responsibility for conducting the EA of designated projects generally falls to the Canadian Nuclear Safety Commission (CNSC), the National Energy Board (NEB), or the Canadian Environmental Assessment Agency (CEA Agency). In some cases, referral to a review panel (or joint review panel) may occur.

In CELA's view, this current arrangement raises three fundamental questions. The first is whether the current list of designated projects is adequate in terms of capturing all environmentally significant facilities, activities or undertakings which involve or engage federal jurisdiction. On this point, CELA notes that there was widespread public criticism of the limited scope of the designated projects regulation when it was first proposed, but no substantive improvements have occurred to date. Accordingly, CELA recommends that the Expert Panel should be expressly directed by the TOR to review and report upon the adequacy of the designated projects list, and the pros/cons of using other approaches for delineating the matters subject to EA coverage (e.g. using prescribed "triggers" for EA obligations, as occurred under CEAA 1992).

Second, confining EA obligations to designated projects ignores the compelling need to ensure that EA obligations are extended to strategic- and regional-level plans, policies and programs which tend to drive or facilitate individual projects at the local level. As noted above, CELA recommends that the draft TOR for the Expert Panel must be amended to ensure that options for implementing strategic- and regional-level EA are reviewed and reported upon by the Panel members.

Third, the draft TOR merely directs the Expert Panel to consider "how" EA processes are conducted by the CNSC, NEB and CEA Agency. This begs the fundamental question of whether these entities should be conducting EA's at all, and whether there are other (or more preferable) institutional options for ensuring EA quality, credibility and accountability. In our view, there should be no presumption by the Expert Panel that these existing institutions are best positioned or well-equipped to conduct EA processes. Instead, all options should be on the table for the Expert Panel's consideration, including stripping away these entities' current EA responsibilities and vesting them in another administrative body.

In this regard, CELA submits that specific consideration should be given by the Expert Panel to the pros/cons of establishing an independent, quasi-judicial administrative tribunal (e.g. the Environmental Review Tribunal under Ontario's EA Act) that can hold public hearings and render legally binding decisions on matters under the new federal EA legislation.

As regulators, the CNSC or NEB could participate as parties in such hearings (as can the CEA Agency if it wishes), but the new tribunal (if established) should be empowered to grant party status to any other person, group, stakeholder or indigenous community that is interested in, or potentially affected by, the proposal under consideration. These public hearings should occur with the full set of procedural rights (e.g. evidence under oath, cross-examination, expert qualifications, etc.) that are typically lacking in EA's (or review panel proceedings) conducted under the auspices of the CNSC under CEAA 2012.

5. The Need for Proper Analysis of Severe Accidents and Effects

The recent CEAA litigation in the Federal Court of Appeal[1] regarding the Darlington nuclear power plant has highlighted the pressing need to reconsider how "worst case scenario" accidents and malfunctions (and their potential impacts to the environment) should be identified and assessed under the new federal EA regime.

Read together, the Darlington judgments suggest that when proponents, federal authorities, or joint review panels are assessing a project's environmental effects, they are free to exclude from the EA process any severe or major accidents that are alleged to be low-probability, even if the off-site impacts may be catastrophic.

Some leading commentators have argued that this narrow interpretation is fundamentally at odds with the purposes and provisions of CEAA, especially the precautionary principle expressly entrenched within the legislation.[2] In light of the Darlington litigation, it is reasonable and necessary for the Expert Panel to reconsider this important matter and to determine whether law reform is needed to address the Darlington judgments on this point.

Accordingly, CELA recommends that the draft TOR should direct the Expert Panel to review and report upon how (not whether) alleged low-probability, high-consequence accident/malfunction scenarios (and their effects) should be assessed under the new federal EA regime. The bottom line is that without credible information on the potential effects of these so-called low-probability, high-consequence accidents, EA decision-makers are left with an incomplete basis for determining whether the proposed undertaking should be permitted to proceed despite the societal risks.

6. The Need to Properly "Consider" Environmental Factors

The Darlington judgments also raise the issue of how federal authorities should fulfill the CEAA duty to "consider" the environmental factors prescribed in section 19 of CEAA 2012.

According to this line of CEAA jurisprudence, all that the legislation requires is for federal authorities to at least "turn their minds" to the statutory factors. Thus, if the federal authority briefly mentions the factors (even in just a single paragraph or sentence), then the courts may be unwilling to interfere with such superficial "consideration," or to review the adequacy of the underlying evidence (if any).

In CELA's view, this highly debatable approach sets the EA bar too low, and should not be carried forward into the new federal EA regime. If Parliament wants proposed undertakings to be assessed in a careful and precautionary manner, then the new legislation must specify precisely how substantive EA obligations should be implemented by federal authorities. Put another way, any approach that confers virtually unreviewable discretion upon federal authorities (or review panels)

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[1] *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.

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

to give short shrift to prescribed factors, or to simply treat them as an afterthought, should not be countenanced under the new federal EA regime.

Thus, CELA recommends that the draft TOR should direct the Expert Panel to review and report upon how substantive EA requirements can be complied with by federal authorities. This could include establishing an appropriate standard of proof for EA decision-making (e.g. on a balance of probabilities, preponderance of evidence, clear and compelling evidence, etc.). This evidentiary requirement should be accompanied by clear direction and appropriate mechanisms for testing and weighing evidence, particularly where there are conflicting opinions by qualified professionals who are participating in the EA process.

7. The Need for Enhanced Judicial Accountability

The Darlington judgments and the Northern Gateway judgment also raise the question of enforceability of statutory EA obligations in the courts.

As described above, the Darlington judgments took a highly deferential approach in deciding not to overturn the contentious EA decision-making that occurred in those cases. Similarly, the Northern Gateway judgment suggests that it is up to Cabinet – not the courts – to ensure the evidentiary adequacy of EA documentation under CEAA 2012.[3]

If this is the current state of the law, then CELA submits that it is time to revisit whether alleged non-compliance with statutory EA powers and duties should be enforced in the courts, and if so, how this can be best achieved (e.g. appeal, judicial review, citizen suit, etc.). However, we hasten to add that our above-noted recommendation for the establishment of an independent quasi-judicial tribunal is intended to create an appropriate forum to adjudicate disputes about EA adequacy. If adopted, this recommendation may help to dispense with the need to go immediately to Federal Court if there are public concerns about non-compliance. On the other hand, if this recommendation is not adopted, then it will be necessary to consider appropriate judicial mechanisms to ensure compliance with substantive EA requirements.

Thus, CELA recommends that the draft TOR should be amended to instruct the Expert Panel to review and report upon the pros/cons of alternative approaches for judicial accountability for non-compliance with legal requirements imposed under the new EA regime.

8. The Need for Sustainability Assessment

CELA is concerned that the draft TOR may be interpreted in a manner that constrains the Expert Panel's ability or willingness to go beyond the limited methodology of CEAA 2012, or to consider newer, broader and bolder approaches to EA planning and decision-making.

In this regard, CELA strongly supports the visionary thinking reflected in the "next-generation EA" model currently being espoused by Professors Gibson, Doelle and Sinclair.[4] In essence, these

[3] *Gitxaalo Nation v. Canada,* 2016 FCA 187, paras 124-26.

[4] R.B. Gibson, M. Doelle and J. Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016), 29 JELP 251.

authors recommend a 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, there is considerable merit in replacing CEAA 2012 with an appropriate "sustainability assessment" regime at the federal level.

Accordingly, CELA recommends that the draft TOR should be amended to specify that the Expert Panel should not only review CEAA 2012, but should also consider and report upon alternatives to the EA approach reflected by CEAA 2012.

9. The Need to Expand the Expert Panel's Consultation Duties

According to the draft TOR, the Expert Panel is required to report back to the federal government with its recommendations in January 2017. Given the public importance and sweeping nature of the fundamental EA issues to be considered, this appears to be a very compressed timeframe, especially since the Panel has not even been appointed yet. In addition, CELA notes that the initial tasks of the Panel include development of a public consultation plan, development of indigenous engagement plan, establishment of a website, liaising with the Multi-Interest Advisory Committee, potentially retaining experts, and other ancillary activities.

Given the time-consuming nature of these various tasks, it appears to CELA that the January 2017 deadline for delivery of the Panel's report may be unduly optimistic (if not unrealistic). Accordingly, CELA submits that the draft TOR should be amended to specify that January 2017 is the deadline for the delivery of an interim report from the Expert Panel. This interim report should be made available for public review/comment, including by participants in related regulatory review processes (see below). The Expert Panel's final report can then be prepared, filed and released in due course (e.g. a deadline set later in 2017), and this report should concisely explain how public input on the draft report has been considered by Panel members and reflected in its final recommendations.

CELA further notes that while the Expert Panel has the option of retaining independent non-governmental experts, it is unclear to CELA whether the Panel will be given sufficient resources to do so. Accordingly, CELA submits that it may be advisable for the Minister and/or Agency to provide complementary support by commissioning external experts to prepare discussion papers, options analyses, multi-jurisdictional scans and other research work that will assist and expedite the Panel's deliberations. All such work should be readily available to all participants in the CEAA review process.

10. The Need to Clarify Next Steps in the Review Process

The draft TOR acknowledges that related regulatory reviews are being conducted by other Ministers under other statutes. However, the draft TOR is unclear about when (or whether) the Expert Panel is going to interact with these other review processes to ensure that the overall reform package is coherent and consistent. Thus, CELA recommends that the draft TOR should be amended to outline when and how this coordination between review processes will be carried out.

CELA further notes that while the NEB and its regulatory processes form the subject-matter of a separate review process, a similar stand-alone review of the CNSC and the *Nuclear Safety and Control Act* (NSCA) has not been established within the current review framework. To our knowledge, no rationale has been provided by the federal government to explain why the need to "modernize" the NEB and its legislation warrants special consideration in a separate review process, but the equally compelling (if not greater) need to modernize the CNSC and its legislation does not. In our experience, the CNSC warrants close scrutiny in a separate review process for the same reasons as the NEB (e.g. regain public trust, enhance accountability, ensure procedural fairness, etc.). This is particularly true in light of the environmental and public health significance of the various nuclear facilities and activities which fall within the regulatory jurisdiction of the CNSC. Thus, CELA recommends that the federal government should either commit to conducting a concurrent review of the CNSC and NSCA, or expand the draft TOR for the Expert Panel to specifically include this long overdue public review.

The draft TOR also fails to specify what actions that the Minister will undertake upon receipt of the Expert Panel report. In CELA's view, it is important to ensure that the report does not languish on the Minister's desk for a prolonged period of time. Thus, CELA recommends that the Minister should commit to preparing and releasing the federal government's response to the Expert Panel's final report within a specified timeframe after receipt. This governmental response, in turn, should be subject to public review and comment (perhaps via public hearings by the Standing Committee on Environment and Sustainable Development) before the federal government proceeds to develop and implement measures to reform the federal EA regime.

In closing, CELA notes that if properly carried out, the CEAA review process offers the federal government an important opportunity to develop ground-breaking legislation that effectively addresses a number of key challenges and political commitments, including:

- meeting Canada's climate change targets, timeframes and other obligations;

- safeguarding and advancing indigenous rights/interests, as per the U.N. Declaration on the Rights of Indigenous Peoples;

- ensuring sustainable resource development; and

- restoring public trust in EA processes and protecting the public interest.

In our view, next-generation EA can be utilized as a potent planning and decision-making tool to address all of the above-noted matters. Therefore, CELA calls upon the federal government to jettison CEAA 2012 in favour of broader sustainability-based legislation that is capable of addressing the environmental issues and opportunities of the 21st century.

We trust that the foregoing comments will be taken into account as the Expert Panel's TOR is finalized in the coming weeks. Please contact the undersigned if there are any further questions arising from these comments.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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The Hon. Jim Carr, Minister of Natural Resources
The Hon. Carolyn Bennett, Minister of Indigenous and Northern Affairs
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