CANADIAN ENVIRONMENTAL ASSESSMENT ACT FIVE YEAR REVIEW

PROVINCIAL AND TERRITORIAL INPUT

BACKGROUND REPORT

PROVINCIAL JURISDICTION AND THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT

APRIL 2000

C E A A F I V E Y E A R R E V I E W

P R O V I N C I A L A N D T E R R I T O R I A L I N P U T

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I n t r o d u c t i o n

> *"Federal responsibility for fisheries has been used as a pretext to extend federal jurisdiction over water quality and land use, leading to needless duplication and conflict with existing provincial pollution control legislation, particularly in relation to resource-based industries."*[1]

The quotation cited above is contained in a report prepared for the Western Premiers in 1978. The specific context for the concerns expressed were amendments to the federal *Fisheries Act.* The western provinces regarded these amendments as "an intrusion into provincial jurisdiction"[2]. Among other things, the western provinces argued that the amendments were a repudiation of provincial environmental policies and harmonization efforts with federal policies. In addition, they believed that their representations on the amendments to both the Minister of Fisheries and to the House of Commons' Standing Committee on Fisheries and Forestry were totally ignored.

While these criticisms were expressed a number of years ago, they serve as a reminder that provincial apprehensions with respect to federal environmental policies is not a recent phenomenon. The provincial concern over federal intrusions into their jurisdiction continues to this day. The issues are complex because they range from questions of legislative jurisdiction over the environment, to ownership and management of natural resources, duplication of effort and processes, standards and how they are determined, and costs of environmental assessment (EA) and federal-provincial co-operation or conflict. As will be seen, some of these issues are raised in the various case studies prepared by the provinces for the review of the *Canadian Environment Assessment Act* (CEAA).

[1] *Western Premiers' Task Force on Constitutional Trends,* Second Report, April 1978, p. 32.
[2] *Ibid.*

Background

The Hon. David Anderson, Canada's Minister of the Environment, announced the CEAA Five Year Review in December 1999. At that time, he released *Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation*[3]. Comments were invited from stakeholders, which can be interpreted as meaning those with an interest in the question of EA. The stakeholders identified included "the interested public, industry associations, environmental organizations, provinces, aboriginal organizations and other federal departments."[4]

The provinces and territories, other than Quebec, considered how best to respond to the CEAA Five Year Review. It was decided to develop a series of theme papers examining:

- Provincial Jurisdiction and CEAA;
- Interjurisdictional Cooperation in Environmental Assessment;
- Trends in Environmental Assessment; and
- Options For Change.

The focus of this paper is provincial jurisdiction. The attached appendix gives a brief overview of the origins of CEAA and the presentations by the provinces to the House of Commons' Committees examining its provisions.[5]

To assist in the development of the theme papers, the provinces and territories produced a number of case studies on the application of CEAA to specific projects within their boundaries. The case studies are intended to illustrate provincial concerns. The case studies, and the observations and conclusions drawn from them, document a number of issues of common concern to the provinces and territories with respect to CEAA. Given the fact that the bilateral agreements under the Accord are relatively recent, for the most part the papers focus on the application and administration of CEAA. In provinces which have bilateral

[3] Canada, Canadian Environmental Assessment Agency, *Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation,* December 1999. Cited hereafter as the "federal discussion paper."

[4] Paper, p. 5.

[5] The lead author of this paper was Dr. Peter Meekison

agreements in place or which are in the midst of negotiating one, the agreement, where applicable, is taken into consideration in the case studies.

The role of the provinces and territories in EA is also reflected in the Canada-Wide Accord on Environmental Harmonization (Accord), signed by the provinces (other than Quebec), the territories and the federal government in January 1998. The Accord provides for a number of sub-agreements including a sub-agreement on environmental assessment. This EA sub-agreement is to be implemented through bilateral federal-provincial agreements on EA. To date, bilateral agreements have been signed with British Columbia, Alberta and Saskatchewan. Bilateral agreements with other provinces are in various stages of negotiation. The Accord was scheduled to be reviewed after two years, a review which happens to overlap with the timeline for the CEAA Five Year Review. The Canadian Council of Ministers of the Environment is currently reviewing the Accord.

Whether by chance or by design the convergence of these two reviews provides an excellent opportunity for furthering federal-provincial harmonization of EA policies. The Accord is premised on and recognizes shared jurisdiction. The paradox is that the federal discussion paper does not build on this foundation. Indeed, the federal-provincial dimension in the federal discussion paper is somewhat muted.[6] The Accord stands as a reminder of what is possible in the area of intergovernmental cooperation. The next step is to see these same principles included as part of the legislative changes to CEAA.

While not questioning the scope of the consultation, identifying the provinces and territories as simply one of a number of stakeholders completely understates the provincial and territorial role in EA. As part of their exclusive legislative jurisdiction under sections 92 and 92 A. of the *Constitution Act*, provinces have wide-ranging responsibility for the environment. This responsibility is clearly demonstrated in many provincial statutes and regulations. In addition to legislative jurisdiction, an additional factor to take into consideration is provincial ownership of natural resources. The case studies make it abundantly clear that EA is a matter of shared responsibility under the Constitution. The partnership principles found in the Accord are a clear recognition of this fact.

[6] See Paper, pp. 42-44 for a discussion of federal-provincial harmonization.

Observations from the Case Studies

An overview of the case studies suggests that the CEAA process is not problem free, a fact acknowledged in the federal discussion paper. There is recognition that, for some projects, CEAA has added value to the EA process. The more dominant theme, however, is that CEAA has frequently been seen by the provinces as an intrusion into the development of provincial resources, causing costly delays, and a duplication of effort without any offsetting benefit. The value added by CEAA has been mixed. In a few instances there have been clearly identified benefits from the CEAA review. However, in a large number of projects, the positive features of the CEAA review have been offset by the delays, uncertainty, legal battles and unmeasured "value added" to the provincial review.

As noted from the outset, the case studies represent a provincial perspective. That said, some of the concerns identified in the case studies, e.g. scoping, were flagged as potential problems by the provinces at the time CEAA was drafted. Some of the concerns are also included in the comprehensive list entitled "Concerns of Canadians" in the federal discussion paper.[7] Some of them are reflected in the various options for change in the federal discussion paper. While those involved with a particular assessment may dispute some of the specifics, the general themes from the case studies warrant serious consideration. In a few instances, comments from the case studies appear under more than one heading.

The case studies reveal a number of concerns clustered around a few central themes.

- Jurisdiction
- Procedures
- Application of CEAA

[7] Paper, p. 37.

Jurisdictional Concerns

Jurisdictional concerns arise in situations where the application of CEAA curtails, circumscribes, prevents or ignores the exercise of provincial jurisdiction. In particular, the federal application of EA interferes at times with the objectives of the resource owners and managers regarding those resources. Such situations often arise with respect to the development of natural resources. They may also emerge in other contexts such as highway construction or the proximity of the project to a national park.

a) **BRITISH COLUMBIA PROSPERITY MINE PROJECT.** "In this project, it may not be possible to exercise provincial sovereignty and jurisdiction if the project is stopped as a result of federal policy interpretation" (BC Case Studies: p. 116).

b) **BRITISH COLUMBIA MELVIN CREEK/CAYOOSH MOUNTAIN RESORT.** "There may be some challenges in concluding the cumulative effects analysis, given that the main issues, impacts to goats and grizzly bears, fall under provincial jurisdiction" (BC Case Studies: p. 37). A similar concern over grizzly bears emerged in the CEAA review of the **GREENVILLE-KINCOLITH ROAD PROJECT** in the British Columbia Nass Valley.

c) **ALBERTA CHEVIOT COAL MINE PROJECT.** "The narrow Fisheries responsibility provided an opportunity for federal agencies to become involved in provincial management of coal development and renewable resources in the Eastern Slopes. This is beyond the direct scope of the federal approval (fisheries authorization). Federal interest is based largely on proximity to Jasper National Park, concerns with movement of wildlife across park boundaries and wildlife habitat changes in a buffer area around parks" (Alberta Case Studies: p. 13). Note that a similar situation exists in another CEAA review currently underway in Alberta; **GENESIS LAND DEVELOPERS LTD PROJECT** in Kananaskis Country is one kilometre from the Banff National Park boundary.

d) **ALBERTA SUNPINE PROJECT.** "No added environmental protection was created as a result of the CEAA review. The [Sunpine] case demonstrates how narrow CEAA triggers can be used to attempt to give the federal government and stakeholders a role in provincial resource management. The Sunpine case has had significant implications for economic development and employment" (Alberta Case Studies: p. 57).

e) **ALBERTA SUNCOR MILLENIUM EXPANSION PROJECT.** "The federal government has minor responsibilities; the project affected a relatively small amount of fish habitat. Most ongoing management of fish habitat and watercourse protection is delivered under provincial land, water and fish management programs. A narrow federal *Fisheries Act* responsibility led to an EA under CEAA that was used by federal agencies to involve themselves in provincial resource management (oil sands) and matters within provincial responsibility" (Alberta Case Studies: p. 43).

f) **ONTARIO RED HILL CREEK EXPRESSWAY.** "The Region [of Hamilton-Wentworth] filed a second Judicial Review Application on November 15, 1999 challenging the Environmental Impact Statement Guidelines issued by the Panel on October 15, 1999, claiming that they encroach on provincial and municipal responsibilities and that the Panel's Terms of Reference are outside Federal jurisdiction" (Ontario Case Studies: p. 25).

"Ontario believes that if a federal assessment is necessary for the Red Hill Creek Expressway, it should be limited to those areas of federal interest which trigger CEAA. Since this is already a provincially approved project, this duplication sets a dangerous precedent for future projects that trigger both the provincial and federal Environmental Assessment Acts. It can be argued that this type of involvement is an intrusion into matters of provincial jurisdiction" (Ontario Case Studies: p. 31).

g) **NEW BRUNSWICK MARITIMES AND NORTHEAST PIPELINE PROJECT.** "The structure of the joint review created confusion and misunderstanding of the provincial regulatory function" (New Brunswick Case Studies: p. 6).

h) **NEW BRUNSWICK PETITCODIAC RIVER MONCTON-RIVERVIEW CAUSEWAY GATES TRIAL OPENING.** "CEAA officials became concerned over liability issues and through an equivocal interpretation of the legislation decided that a CEAA review would have to be conducted. While the document and the analysis contained within was very thorough, it is difficult to appreciate the value of having the work done pursuant to CEAA, particularly where there was no clear regulatory trigger" (New Brunswick Case Studies: p. 16).

i) **NEW BRUNSWICK AUBERGE AU LILE DE L'EAU BED AND BREAKFAST.** "The CEAA screening review was done independently (without comment/feedback from other agencies)–the result, an approval was given by the Atlantic Canada Opportunities Agency for a non-compliant wastewater treatment system" (New Brunswick Case Studies: p. 12).

j) **NEW BRUNSWICK EEL GROUND FIRST NATION WASTEWATER TREATMENT LAGOON.** "No coordination between CEAA review and Province as Indian and Northern Affairs did its CEAA review and issued an approval without contacting the New Brunswick Department of Environment as they did not feel that the province had jurisdiction over the project. Construction was initiated without all approvals in place" (New Brunswick Case Studies: p. 1).

k) **NOVA SCOTIA MARITIMES AND NORTHEAST PIPELINE PROJECT.** " There were no clear benefits of the *Canadian Environmental Assessment Act* in this case. The entire Maritimes and Northeast Pipeline Project was subject to provincial jurisdiction and all environmental aspects of the project were able to be assessed through the Nova Scotia Department of Environment (NSDOE) environmental assessment process.

During the joint assessment process, conflicts occurred as a result of the National Energy Board's (NEB) reluctance to support NSDOE authority with respect to the interprovincial pipeline and the failure of the NEB to consult directly with the NSDOE. The NEB's support of NSDOE authority has progressed over the past couple of years, but significant improvements are still desired." (Nova Scotia Case Study: p.6).

l) **NEWFOUNDLAND NORTHWEST RIVER HYDROELECTRIC PROJECT.** "New federal issues raised at end of the review related to the proximity of the proposed project to Terra Nova National Park" (Newfoundland Case Studies: p. 8).

Procedural Concerns

Procedural concerns relate to the administration of CEAA. There are a number of procedural concerns: timelines and delays, duplication of effort and lack of coordination at the federal level.

The most frequently expressed procedural concerns are timelines and timeliness. Some provincial legislation on EA contains provisions for setting timelines. The federal legislation does not. This difference frequently leads to delays in final approval. It also leads to situations where a province has completed its review and issued its order, only to discover that federal approval is still pending. This undermines the one window or "one project-one assessment" approach, which underlies the various federal-provincial agreements. While timelines are one method of achieving timeliness, other solutions are simplification or streamlining of process requirements. The following comments taken from the case studies reflect this concern.

(i) Timelines/Delays

a) **BRITISH COLUMBIA SOUTHERN CROSSING PIPELINE PROJECT.** "Federal approval of the CEAA screening report was not completed until after the British Columbia *Environmental Assessment Act* review, and after the provincial ministers had made a decision on the project" (BC Case Studies: p. 139). " If post-BCEAA certification consultation becomes standard policy for federal agencies, the intent of the *Canada/British Columbia Agreement on Environmental Assessment Cooperation* will not be met." (BC Case Studies: p. 143).

b) **BRITISH COLUMBIA KEENLEYSIDE HYDROELECTIC PROJECT.** " The decision by the lead RA to hold a public meeting after the BCEAA certification had been issued meant that the intent of the *Canada/British Columbia Agreement on Environmental Assessment Cooperation* was not met. The result was that provincial ministers had approved the project before DFO invited local interest groups and the public to a meeting in Castlegar. The lead RA's decision, two months after the province had approved the project, was of considerable concern to the proponent and delayed the completion of the CEAA review. " (BC Case Studies: p. 70).

c) **ALBERTA SUNCOR EXPANSION PROJECT.** "The scope of the project and assessment for the CEAA review were also issued after the Alberta Environmental Impact Assessment report was submitted by the proponent and under review by both federal and provincial agencies" (Alberta Case Studies: p. 44).

d) **SASKATCHEWAN PIKE LAKE PUMPING AND INLET WORKS PROJECT.** "Conflicts were mainly focused on the time differential between the processes" (Saskatchewan Case Studies: p. 48).

e) **ONTARIO PORT UNION WATERFRONT.** "Due to a delay in receiving comments from the federal Department of Fisheries and Oceans, the EA Review and Notice of Completion was not published as per the schedule outlined in the Deadlines Regulations" (Ontario Case Studies: p. 10).

f) **ONTARIO HIGHWAY 407.** "Delays to the proponent were experienced in obtaining federal permits on the West extension, which subsequently caused delays in the start of construction. Furthermore, the East Partial section, which was granted approval in 1998, is only now undergoing a CEAA review" (Ontario Case Studies: p. 3).

g) **NEW BRUNSWICK TRANS CANADA HIGHWAY UPGRADE – FREDRICTON TO MONCTON.** "In the first year of construction, the federal agencies were stating that a CEAA screening had to be done on a number of stream crossings... (DFO requiring HADD). This announcement came as a complete surprise to the proponent and to the New Brunswick Department of Environment" (New Brunswick Case Studies: p. 10).

h) **NEWFOUNDLAND TRANSHIPMENT PROJECT.** "Newfoundland *Environmental Assessment Act* timelines not met by federal departments. CEAA guidelines on timelines would be helpful for harmonizing with the Newfoundland Environmental Assessment Act" (Newfoundland Case Studies: p.12).

i) **NEWFOUNDLAND NORTHWEST RIVER HYDROELECTRIC PROJECT.** " Newfoundland *Environmental Assessment Act* timelines not met by federal government, otherwise good coordination through one EA committee" (Newfoundland Case Studies: p. 8).

j) **NEWFOUNDLAND GISBORNE LAKE WATER BOTTLING AND EXPORT PROJECT.** "No simultaneous provincial and federal decisions meant provincial timelines were not met and coordination of public communications could not be achieved" (Newfoundland Case Studies: p. 6).

(ii) Duplication

In many instances, the end result of two separate reviews has been similar, which should not come as a surprise since the same data and material are used by the two orders of government. To proponents, this appears to be a duplication of effort and an inefficient use of scarce resources. Given pressures on budgets better use of resources is essential.

a) **BRITISH COLUMBIA VANCOUVER ISLAND HIGHWAY PROJECT.** "The CEAA review did not improve or require extra mitigation or compensation for highway or fisheries compensation designs" (BC Case Studies: p. 10).

b) **BRITISH COLUMBIA SOUTHERN CROSSING PIPELINE.** "In the context of harmonization, the Department of Fisheries and Ocean's post-certification consultation was an administrative process that provided no value added to the review" (BC Case Studies: p. 144).

c) **SASKATCHEWAN ATHABASCA SEASONAL ROAD.** "Environmental protection for the road was not enhanced as a result of the CEAA process i.e. the results of the Environmental Impact Assessment, the issues raised and the mitigation identified, would have been similar with or without a review under CEAA" (Saskatchewan Case Studies: p. 10).

d) **ONTARIO RED HILL CREEK EXPRESSWAY.** "In our review of the Agency's draft Terms of Reference for the Panel Review, it appears the potential issues to be considered by the Panel are the same issues that the Province has considered in previous reviews" (Ontario Case Studies: p. 30).

(iii) Lack of Coordination

Lack of coordination among various federal departments involved in an assessment has contributed to uncertainty and delay in a number of assessments.

a) **BRITISH COLUMBIA SKYTRAIN EXTENSION PROJECT.** "The Rapid Transit Project 2000 was also not always sure which federal department would review information provided to the Department of Fisheries and Ocean's " (BC Case Studies: p. 130).

b) **BRITISH COLUMBIA MAXHAMISH PIPELINE PROJECT.** "Future pipeline proposals that cross jurisdictions may experience uncertainty and possible delays while federal agencies sort out jurisdictional responsibilities" (BC Case Studies: p. 89).

Application of CEAA

The scoping and cumulative effects provisions of CEAA are two issues related to the application of CEAA which continues to present difficulties. The lack of clarity of the provisions has resulted in court challenges. Federal cumulative effects requirements are sometimes counterproductive in terms of reasonable and effective environmental management. In addition, as noted in the federal discussion paper, both the scoping and cumulative effects provisions may lead to instances where provinces have reason to argue that the federal government is intruding into provincial jurisdiction.[8]

(i) Scoping and Cumulative Effects

a) **ALBERTA SUNPINE PROJECT.** The scope of the project as determined by the responsible authority was the subject of a court challenge and appeal. This prolonged court action took 23 months to go from the application for judicial review to an initial decision at the Federal Court Trial Division. The appeal took 13 months. There is a further appeal to the Supreme Court of Canada. "The Federal Court of Appeal decision states that the Responsible Authority has the discretion to determine the scope of the project, and can determine whether or nor two separate proposals are to be considered as one project. The Responsible Authority does not have to consider elements that are outside the definition of scope of the project. With respect to cumulative effects, the Federal Court of Appeal found that the Responsible Authority must exercise its discretion and decide what to include in the consideration of cumulative effects" (Alberta Case Studies: p. 53).

b) **ONTARIO RED HILL CREEK EXPRESSWAY.** "[T]he potential issues to be considered by the Panel are the same issues that the Province has considered in previous reviews. In particular, under the Scope of the Review, the Panel proposes to include: the need for the project; the purpose of the undertaking; and alternative means of carrying out the undertaking. These are all issues that the Province of Ontario examined in 1985 as part of the formal government review under the EAA, and by the Joint Board in its decision. Most

[8] See Paper p. 49 for scoping and p. 57 for cumulative effects.

recently, in 1997, with the concurrence of Cabinet, the provincial Minister of the Environment granted approval to the Region to proceed with design changes, noting that the need for, and alternatives to, this project had already been adequately addressed." (Ontario Case Studies: p.30).

Ontario believes that if a federal assessment after provincial approval is necessary for the Red Hill Creek Expressway, it should be limited to those areas of federal interest which trigger CEAA (Ontario Case Studies: p. 31).

c) **SASKATCHEWAN SOURIS VALLEY CO_2 PIPELINE.** "Despite having indicated they had no CEAA trigger and that they did not wish to participate in the provincial review, Environment Canada provided comments on scope of assessment to the National Energy Board " (Saskatchewan Case Studies: p. 54). This intervention came after the parties had agreed to the scope of the project.

d) **NEWFOUNDLAND VOISEY'S BAY MINE.** "Many important issues raised by the Department of Fisheries and Ocean's, but no linkage with federal permits/authorizations" (Newfoundland Case Studies: p. 14).

e) **NEWFOUNDLAND TRANS LABRADOR HIGHWAY.** "There was uncertainty about the scope of the project, whether it was a series of bridges or the entire road. Clearer CEAA guidelines on this could have avoided the constant threat of Court challenge" (Newfoundland Case Studies: p. 10).

f) **BRITISH COLUMBIA PINGSTON HYDROELECTRIC PROJECT.** " Department of Fisheries and Ocean's did not apply reasonable approaches to cumulative effects assessment and determination of fish habitat impacts, therefore costs to the proponent were extremely high, with no additional benefit from the work" (BC Case Studies: p. 102).

(ii) Law List Trigger

Also related to the application of CEAA is the length of time to identify the federal trigger or to determine the information required for the CEAA review. Two governments involved in an assessment adds to the assessment's complexity. The earlier the application of federal triggers is determined, the greater the likelihood of fewer delays to a project.

a) **BRITISH COLUMBIA VANCOUVER ISLAND HIGHWAY PROJECT.** "The late notification to the Ministry of Transportation and Highways that CEAA would apply to the project, and change in process, caused uncertainty, confusion, extra effort and expenses. It also indicated the inconsistent interpretation and application of CEAA within the Department of Fisheries and Ocean's " (BC Case Studies: p. 11).

b) **SASKATCHEWAN MEE-TOOS FOREST PRODUCTS.** "The federal process is not in step with the planning nature of the provincial review process due to the fact that the potential CEAA triggers are, in this case, attached to regulatory details that will follow from an assessment of project impacts and a constraining of the project through the provincial Ministerial decision" (Saskatchewan Case Studies: p. 40).

c) **SASKATCHEWAN CLUFF LAND URANIUM MINE DECOMMISSIONING; DISPOSAL OF CIGAR LAKE URANIUM MINE WASTE ROCK; PROCESSING OF CIGAR LAKE MINE PHASE I URANIUM ORE AT RABBIT LAKE DEVELOPMENT.** "Time taken by federal agencies to determine who is a responsible authority , federal authority etc., under CEAA and time taken by federal agencies to determine CEAA requirements–screening, comprehensive study–and what does this entail." The consequences to the project are "delay, which means cost, not only to the proponent but to the progress of national and provincial economic activity"

d) **MANITOBA ROCK LAKE REGULATION.** "The implementation of CEAA resulted in a lengthy delay in advising the proponent of information requirements for the purpose of the federal review of the project" (Manitoba Case Studies: p. 5).

e) **ONTARIO YORK DURHAM WATER SUPPLY.** "This case deals with a situation that may involve a Department of Fisheries and Ocean's trigger. However, this is still unconfirmed. This is also an important project to highlight since it is a positive example of cooperation between the levels of government in the interest of maintaining the project's integrity. Although in the absence of an official harmonization process, both the federal and provincial governments are working together to deal with the conceptual designs of the project and to meet the requirements of the Department of Fisheries and Ocean's early in the process" (Ontario Case Studies: p. 47).

The case studies provide an important and timely insight into the operation and administration of CEAA. One would expect jurisdictional concerns to surface, given the shared nature of environmental responsibilities. One would also expect to discover problems associated with the administration of CEAA and the different approaches to EA by the federal and provincial governments. A matter that is referred to more than once in the case studies is the legal uncertainty surrounding CEAA. Legal challenges were mounted in Sunpine, Suncor and Cheviot.

The threat of legal challenges surfaced in New Brunswick and Newfoundland. A proponent in Ontario is challenging the application of CEAA. While one could argue these legal challenges are a direct result of ambiguities of CEAA, one can also question if the courts are the appropriate forum for clarifying ambiguities. There are a number of outstanding challenges currently before the courts which suggests that the legislation needs to be clarified. The CEAA Five Year Review provides an opportunity for that to occur.

That the federal and provincial governments view the implementation and application of CEAA differently is also understandable. That said, such differences are more than simply disputes over whose procedures are better or standards are higher. The underlying theme is the consequences for environmental

management resulting from overlapping jurisdiction. Perhaps the best example is the issue of delays because of a lack of timelines in the federal regulations. In effect, the federal process has difficulty accommodating the provincial time guidelines. Other examples are instances where federal departments, in the case of cooperative reviews, expand the scope of the provincial review beyond what is needed to assess the project adequately or introduce issues beyond the scope of their trigger.

Each time there is a dispute over the application of CEAA, the provinces are left to wonder if the responsible authority is simply being unreasonable. As a result of the wearing down of the provinces, the end result is an expansion of federal responsibility. Three excellent examples are: the New Brunswick Petitcodiac River Project where a review was held despite the fact there was no clearly defined "Law List" trigger; the Souris CO_2 Pipeline where Environment Canada provided comments on the scope of the review, while acknowledging there was no "Law List" trigger; and the Greenville-Kincolith Road Project where differences over the protection of grizzly bears was a point of contention.

The "Law List" trigger also has jurisdictional overtones, particularly in situations where the province does not know what to expect or when to expect a trigger being identified. A climate of uncertainty and the high probability of delay undermine the provincial process and bring all EA processes into disrepute with the public and proponents. The harmonization of processes is one way of overcoming these difficulties, but for harmonization to be effective provincial processes have to be recognized as equivalent to federal processes.

There is an element of paternalism underlying CEAA which is reflected in the deliberations of the Committees reviewing CEAA and in the presumption that the provinces are in a conflict of interest situation when it comes to protecting the environment. It is presumed that the provinces cannot be both developers of their natural resources and guardians of the environment at the same time. Some federal departments appear to see their role as bridging that gap. This perspective may help to explain the federal position on the application of CEAA.

Some comments by Mr. Lee Clark, Parliamentary Secretary to the Minister of the Environment, during the Commons' Committee review of the bill in October 1991, reflect these sentiments. In an exchange with Hans Konow, Vice-President of the Canadian Electrical Association, Mr. Clark said:

> *"[I]n recent testimony provided to the Standing Committee on the Environment, as a result of fairly extensive polling, the conclusion in both cases was that there is less public confidence in the environmental review process conducted by the provinces than there is in the one conducted by the federal government.*
>
> *Now that may not be saying an awful lot for either jurisdiction, but I think it is important to understand that if there is cynicism, suspicion of the process, there is even more directed at the provincial level. There is a fairly widespread belief that you could not expect an objective assessment at the provincial level because of the obvious economic vested interest in many cases... .*
>
> *Do you see evidence in Bill C-13 of an attempt on the part of the federal government to expand its jurisdictional responsibilities? I do not."*

In his response, Mr. Konow stated in part "[the perception] leads to a very arrogant notion that only the federal government is a repository, because it is one step removed, of the moral authority to conduct unbiased assessments."[9] Mr. Clark's comment also ignores the fact that provincial EA legislation has been drafted to ensure accountability and the ability to administer the law in an unbiased way.

At the time of its enactment, almost a decade ago, CEAA was considered by its proponents to be one of the most significant pieces of environmental legislation in place in Canada. However, it should be remembered that many provinces already had EA legislation in place, such as Saskatchewan whose legislation dates back to 1980. Provinces have continued to develop and strengthen their EA legislation. One example is the 1995 *British Columbia Environmental Assessment Act.* This legislation provides for federal representation on all project review committees. Ontario amended its *Environmental Assessment Act* in 1997 and a number of other provinces are currently in various stages of reviewing their EA requirements.[10]

[9] For the exchange see, Canada, House of Commons, Minutes of Proceedings and Evidence of Legislative Committee C on Bill-C13, October 31, 1991, Issue No. 6, pp. 25-6.

One of the acknowledged strengths of federalism is that it allows for different and new approaches to public policy at the provincial level or, as some describe it, experimentation. If different or new approaches prove to be successful in one jurisdiction other jurisdictions can adopt and adapt them to meet their own needs.. EA is no exception. Processes are constantly evolving and provinces and territories are in the vanguard of change.

Given the constantly changing nature of EA one needs to consider the value added by the CEAA process. The case studies would suggest that for many projects the CEAA review is essentially a confirmation of the recommendations arising from the provincial review process. While one could argue that the advantage of having a dual review is to ensure the maintenance of rigorous provincial standards, a counter argument is that, in many instances, the further review is in fact superfluous. Thus, what is needed in the future is avoidance of duplication but some assurance federal interests are protected. The path to a solution appears to point in the direction of more harmonization, the principal theme of the Accord. Improvements based on this approach would reduce conflict and promote greater efficiencies.

[10] More detail is provided on this subject in the theme paper *Trends in Environmental Assessment*.

Appendix

To put the CEAA review in context, some minimal understanding of CEAA and its evolution is necessary. CEAA first appeared in 1990 as Bill C-78, receiving first reading June 18, 1990, a few days before the demise of the Meech Lake Accord. The Bill was presented by the Hon. Robert de Cotret, who, at that time was President of the Treasury Board. He became Minister of the Environment replacing the Hon. Lucien Bouchard who had resigned from cabinet a few weeks earlier over the government's handling of Meech Lake. It should be noted that the bill was drafted during the period Mr. Bouchard was minister. The Bill died on the order paper in 1991 and was reintroduced as Bill C-13 in the new session of Parliament. By this time, the Minister of the Environment was the Hon. Jean Charest. The Bill received Royal Assent in June 1992, two years after it made its appearance. At that time the constitutional discussions leading to the Charlottetown Accord were underway and this background appears periodically in the parliamentary debates of the bill. In 1994 CEAA was revised slightly.[11] It was proclaimed in 1995 by a Liberal government.

In the fall of 1990, the provinces, other than Quebec, shared their views with the House of Commons' Committee examining Bill C-78. Provincial intervention came late in the Committee's hearings. Indeed, one Committee member indicated that he was worried that there would be no provincial input. The provincial position was presented by the Hon. John Reynolds, British Columbia's Minister of the Environment, who was also Chair of Canadian Council of Ministers of the Environment (CCME). He made it clear in his presentation that he was speaking for only the provincial and territorial ministers who had attended the CCME meeting a week earlier.[12] He indicated that CCME had discussed Bill 78 at several of its meetings. The position set out below was "in response to federal environment minister Robert de Cotret's open invitation to consider any amendments to strengthen the proposed legislation"[13]. At the end of his opening remarks he offered "to arrange [during clause-by-clause review] for provincial officials to work with your staff to explain in detail the rationale for each proposed amendment"[14].

[11] Statutes of Canada, 1994, Chapter 46.

[12] Canada, House of Commons, Minutes of Proceedings and Evidence of Special Committee to Examine Bill C-78, December 4, 1990, Issue No. 13, p. 4. Quebec did not attend so they were not a party to the position.

[13] Ibid.

[14] Ibid., p. 7.

Mr. Reynolds, on behalf of the provinces, proposed a series of amendments to the bill. The amendments would:

- provide for consultation with the provincial minister prior to referring a project to mediation or a review panel;
- allow for the establishment of joint federal and provincial procedures for joint panels;
- provide for consultation with the provincial minister on transboundary assessments;
- establish an intergovernmental co-operative scoping process through federal-provincial agreement;
- provide an opportunity for the federal minister to transfer responsibility to a province for all or part of an environmental impact assessment for a project or class of projects; and
- allow for the establishment of criteria for deciding whether a project or class of projects should be excluded from federal EA where there appears to be minimal or limited federal contribution.[15]

To the provinces, these measures would:

- maximize federal-provincial co-operation;
- minimize duplication of effort;
- give a clear message as to which order of government is responsible; and
- encourage federal-provincial co-operation to ensure the environment is protected.

[15] Ibid., pp. 6-7.

Shortly after this presentation there was a new session of Parliament. The government recommended that the House of Commons give its approval to restore Bill C-78, renumbered as Bill C-13. With restoration, the House gave consent to resume debate at the Committee stage. In June 1991, at the first meeting of the Committee assigned the responsibility of reviewing Bill C-13, the Hon. Jean Charest responded to the provincial suggestions advanced by Mr. Reynolds.

While he was "partial to the several amendment proposals put forward by the provinces, which would facilitate more effective federal-provincial consultation prior to key process and project decisions", he either reserved judgement on or rejected the other amendments.[16] He reserved judgement on a federal-provincial scoping process until the Supreme Court of Canada rendered its decision on the Oldman dam. (The Supreme Court delivered its opinion in January 1992). He rejected both the minimal federal involvement and equivalency recommendations.

In October 1991, Mr. Charest presented the Committee a redrafted bill which, among other changes, incorporated the provincial amendments he supported. He also confirmed his earlier concerns with panel substitution and a detailed scoping process.[17] In the same presentation he linked the principle of sustainable development found in Bill C-13 to a similar principle contained in the recently released federal government position on constitutional reform[18]. During a discussion of the legislative requirement that reviews would have to take into consideration the need for or alternatives to a project, Mr. Charest stated, "[w]e have to recognize there are areas of responsibility and jurisdictions for each level of government… [W]e cannot replace another government in its areas of jurisdiction"[19]. This statement, and the earlier one by Mr. Clark, give a very clear indication that the federal government recognized that inclusion of these factors in reviews had the potential of leading to federal-provincial conflict over jurisdiction.

In the fall of 1991, the provinces, other than Quebec, once again made their views known to the Committee reviewing the bill. On this occasion the presentation was made by the Hon. Ralph Klein, then Alberta's

[16] Canada, House of Commons, Minutes of Proceedings and Evidence of Legislative Committee C on Bill C-13, June 19,1991, Issue No. 1, p. 28.

[17] Legislative Committee C, October 10, 1991, Issue No. 2, p. 6.

[18] See Canada, *Shaping Canada's Future Together*, p. 12. The principle is found in the Canada clause. The clause also refers to the environment, the first time the word would appear in the constitution.

[19] Legislative Committee C, Issue No. 2, p. 21.

Minister of the Environment. In his remarks, Mr. Klein emphasized that he was speaking on behalf of CCME, although, in some of his specific comments on scoping and equivalency, he indicated the position was that of provincial ministers[20]. He acknowledged that Mr. Charest had agreed to certain amendments that the provinces had proposed. He went on to stress that "the federal government continues to reject the two key provincial amendments dealing with the issues of co-operative scoping and equivalency"[21].

Mr. Klein also expressed concern over the "need for and alternatives to" provision. He stressed that:

> *"... the members of CCME are concerned that without a co-operative scoping process and provision for equivalency, the wording under section 11 of the proposed bill [section 16 of the Act] would allow for the federal government to assume a decision-making role in the provincial management of natural resources. That wording would allow a federal or a joint panel to determine the need for a project, the alternatives to a project, as well as the capacity of the renewable resource to accommodate the project.*
>
> *While all credible environmental assessment processes must obviously include consideration of these factors, significant jurisdictional problems are created when these factors are considered by a federal or joint assessment of a project, primarily within provincial jurisdiction.*
>
> *Canada's environment ministers are concerned that these jurisdictional issues, which are essentially unrelated to the environment but more related perhaps to the economy, may impair our ability to implement effective environmental assessments."*[22]

Mr. Charest returned to the Committee a week after Mr. Klein's presentation. He first referred to a newspaper account of Mr. Klein's concerns about the draft bill's "need for and alternatives to" provision as a way for the federal government to intervene into provincial jurisdiction. He attempted to play down this clause by noting that there was an element of ministerial discretion in its application.[23] The fact remains that, with or without the exercise of ministerial discretion, the government was giving itself a mechanism to intrude directly into provincial jurisdiction. As already noted, Mr. Charest was not prepared to consider the

[20] See his comments, Legislative Committee C, November 19, 1991, Issue No. 10, pp. 6-7. It is also worth noting that Mr. Klein was accompanied by the Director General of CCME, Dr Eva Rosinger, and an Alberta official.

[21] Ibid., p. 6.

[22] Issue No. 10, p. 8.

[23] Legislative Committee C, November 26, 1991, Issue No. 12, p. 9.

question of co-operative scoping until the Supreme Court of Canada decision on the Oldman dam. That decision came after the Committee had tabled its report in the House of Commons.

As far as equivalency is concerned, two reasons were advanced for its rejection. The first is the more plausible and was made by Michel Dorais, Executive Chairman, of Federal Environmental Assessment Review Office. He said:

> *"The equivalency provisions would eliminate federal involvement in the assessment of those [major] projects most likely to be of national concern and to require significant decisions from the federal government. Accepting an equivalency provision in those few major cases would effectively mean that the federal government would remove itself from the environmental assessment process."*

In his opinion, "delegation of the screening and comprehensive study phases and a joint review at the panel ... are preferable"[24]. The reason for federal preference for delegation under CEAA, as opposed to equivalency, was given in later testimony by Karen Brown, Vice-President, Policy and Regulation, of the Federal Environmental Assessment Review Office. Delegation "wouldn't constitute a substitution [equivalency] in the sense that the provinces have been discussing because you'd be naming them to administer this bill, which is not what the provinces want. They want equivalency to administer their own process and have our bill recognize their process"[25].

The second and less compelling reason for federal opposition to equivalency was advanced by Mr. Lee Clark, Parliamentary Secretary to the Minister of the Environment. He said, "we foresaw the difficulty of the federal government sitting in judgement of provincial jurisdictions in determining who was and was not equivalent"[26]. While one can appreciate the political difficulties associated with such a decision, having the provinces apply the federal act avoids the question.

[24] See his comments before Legislative Committee C, November 7, 1991, Issue No. 9, p. 8.

[25] Issue No. 12, p. 9.

[26] Legislative Committee C, December 12, 1991, Issue No. 15, p. 25.

As a result of the failure of the Meech Lake Accord in June 1990, the Government of Quebec, under Premier Robert Bourassa, adopted a policy of boycotting federal-provincial meetings. Thus Quebec had little input into the legislation and development of the provincial position, a situation not that dissimilar to what one finds today. On March 18 1992, the same day that the House of Commons gave third reading to Bill C-13, the Quebec National Assembly voted to express its disapproval of the Bill. A Bloc Quebecois member, Louis Plamendon, perhaps expressed most clearly Quebec's jurisdictional fears. He said:

> *"What worries me is that this bill asserts total federal control over jurisdictions that occasionally or usually were Quebec's, especially over energy, for example.... If energy is an exclusively provincial domain but the federal government controls all discussions of environmental issues and all requirements, what use is that power?*
> ...
>
> *The very discretionary powers of the Minister of the Environment are unacceptable for Quebec and I presume for the other provinces that sometimes have their own provincial projects. The bill would give discretionary power over the justification for a project and over alternatives to it, that means total jurisdiction and total interference in any assessment that a Canadian province might do."*[27]

The parallels between the provincial position on CEAA and that of the Western Premiers' Task Force are striking. In addition to concerns about the environment, the provinces are also concerned about jurisdiction, ownership of natural resources and economic development. There remains a lingering suspicion that the federal environmental review process may be used for purposes other than EA, particularly when one is required by legislation to take into consideration need for, or alternatives to, a project. These same jurisdictional concerns remain to this day and are reflected in a number of the case studies.

[27] Canada, House of Commons, *Debates,* March 16, 1992, pp. 8295 and 96.