CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

July 9, 2010 **BY EMAIL**

Senator Joseph A. Day, Chair
Senate Committee on National Finance
Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Day:

RE: BILL C-9: PROPOSED CHANGES TO THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

On behalf of the Canadian Environmental Law Association ("CELA"), I am writing to commend and thank the Senate Committee on National Finance for voting yesterday against Bill C-9's objectionable proposals to amend the *Canadian Environmental Assessment Act* ("CEAA").

You will recall that during my July 6th presentation to the Committee, I undertook to review and respond to the Minister's presentation to Committee that occurred earlier on the same day.

I have now obtained the transcript of the Minister's presentation, and would like to offer the following observations for the consideration of Committee members and all other Senators when Bill C-9 returns to the Senate for a vote next week.

Please be advised that rather than responding to all of the Minister's claims about the proposed CEAA amendments, we have attempted to focus upon the priority matters which were addressed in the Minister's presentation. In particular, there are eight specific matters which warrant a response from CELA, as follows:

1. In his introductory remarks, the Minister referred to some specific projects (i.e., Ruby Creek mine, Wasquatim Dam, and Celtic petrochemical and LNG facility) to illustrate his general assertion that the CEAA process "has not benefited the environment" and "has harmed the economy." It appears to us, however, that the Minister did not actually point to any actual environmental or economic harm arising from the application of CEAA to these projects. Instead, the Minister's presentation centred more on concerns that the federal EAs in question were "delayed" and finished well after applicable provincial EA processes had been completed for these projects. In our view, these situations point out the need for appropriate administrative reforms – not sweeping legislative amendments – to ensure the timely and efficient implementation of CEAA requirements. In addition, these case studies raise the more important question of why federal and provincial officials failed or refused to use existing CEAA provisions to ensure that a single, coordinated (or harmonized) EA process took place in relation to these projects.

Accordingly, it is our respectful opinion that the case studies cited by the Minister do not support the proposition that CEAA needs to be "fixed" by the amendments set out in Bill C-9, nor do these amendments actually target the "sources" of delay for these and other projects.

2. During his presentation to the Committee, the Minister further suggested that these case studies illustrate costly "duplication" between governments. As noted above, however, it is our view that these case studies merely illustrate what can happen if CEAA's existing provisions are not used to avoid uncoordinated federal and provincial EA processes. More generally, we remain perplexed by the Minister's unmeritorious suggestion that the Bill C-9 changes are necessary to address "duplication" between federal and provincial EA processes. In our view, such claims have been thoroughly discredited by the Standing Committee on Environment and Sustainable Development,[1] independent commentators,[2] and the Supreme Court of Canada in its recent decisions in *MiningWatch Canada v. Canada*[3] and *Quebec v. Moses.*[4] Accordingly, we are unclear why the "duplication" argument is still being invoked by the Minister as the apparent rationale for the CEAA changes being proposed within Bill C-9.

3. When discussing Bill C-9's proposal to create new and unprecedented Ministerial project-scoping powers (section 15.1), the Minister made the astonishing claim that the scoping landscape "changed in January of this year" with the release of the Supreme Court's judgment in the *MiningWatch* case. As the lawyer who acted on behalf of the environmental interveners in this case, I can strongly assure you that that the Court's decision did not "change" the scoping provisions that currently exist within CEAA. To the contrary, the Court's unanimous judgment interpreted and affirmed the scoping provisions which had been duly passed by Parliament, and the Court confirmed that federal officials in the *MiningWatch* case had not complied with these CEAA requirements. Accordingly, it is abundantly clear that new section 15.1 is not an appropriate or necessary response to "changes" in CEAA scoping allegedly caused by the Court's judgment.

4. The Minister further opined that section 15.1 is intended to allow the Minister – not federal authorities – to define the "proper" scope of the project, and the Minister assured the Committee that it was not his intention to use section 15.1 to "weaken" the federal EA process. More specifically, the Minister emphasized that for accountability reasons, it was necessary for the Minister – not federal authorities – to hold and use project-scoping powers under CEAA. In response, we would point out that the apparent rationale for centralizing the scoping power within the Minister's hands is completely undermined by the subsequent provisions of section 15.1, which purport to allow the Minister to delegate this power right back to federal authorities (see section 15.1(3)), with or without conditions. In addition, the delegation of scoping power from the Minister to federal authorities may be in relation to either a single project, or, more alarmingly, an entire "class of projects" (see section 15.1(4)). More fundamentally, the Minister's personal intentions about his future use of this scoping power are completely immaterial and unpersuasive for two main reasons: (i) there are no specific criteria in section 15.1 to govern or structure the exercise of Ministerial discretion (i.e., to limit such scoping

powers to situations where there are equivalent provincial EA requirement which apply to the same project); and (ii) when construing section 15.1, Courts will be examining the actual wording of section 15.1 and the overall scheme and legislative purposes of CEAA, as reflected in section 4 of CEAA rather than the Minister's personal intentions as stated to the Committee.

5. The Minister further assured the Committee that section 15.1 does not alter the assessment track under CEAA, in that projects found in the Comprehensive Study List Regulations will still undergo a comprehensive study. We agree that Bill C-9 does not alter the initial track, and we are unaware of anyone who has argued that Bill C-9 does so. However, our fundamental objection is that after a project starts on the comprehensive study track, section 15.1 purports to empower the Minister to subsequently redefine, restrict or limit the portions of the project that will be subject to the comprehensive study. For example, even if a proposed mine or tarsands project is initially caught by the Comprehensive Study List Regulations, there is nothing in section 15.1 that would prevent the Minister (or his/her delegatee) from scoping down the project to be assessed in a very narrow, piecemeal or fragmented fashion (i.e., a comprehensive study that just examines access roads or stream crossings, rather than the core elements of the whole project as proposed by the proponent). While the Minister may suggest that he personally would not undertake or authorize such scoping down of projects, we note that there is nothing in section 15.1 that would prevent the Minister (or his successor) from doing so in his/her discretion.

6. In making his comments about section 15.1, we note that the Minister read a quote from the factum filed by the appellant MiningWatch in the above-noted Supreme Court case, and the Minister implied that his proposed section 15.1 was "supported" by this excerpt. We will leave it to our colleagues from MiningWatch and Ecojustice to respond to this apparent misuse of their argument out of context. At this time, we would simply observe that the position advanced by MiningWatch, supported by our clients, and ultimately accepted by the Supreme Court was that the minimum scope of the project to be assessed is generally the project as proposed by the proponent, subject to the Minister's discretion to specify other additional matters or issues that should also be considered within the EA process. Accordingly, we must strongly but respectfully disagree with the Minister's contention that section 15.1 does not overturn the Court's ruling in the *MiningWatch* case.

7. The Minister stated that the public participation opportunities under CEAA will remain unchanged by the Bill C-9 amendments. We must respectfully disagree with the Minister, as it is our opinion that the Bill C-9 amendments directly and indirectly diminish or erode public participation under CEAA. For example, there will be no public participation under CEAA for the thousands of infrastructure projects which are now being permanently exempted *holus bolus* from federal EA requirements. We are aware that such projects were previously exempted on a temporary basis via recent CEAA regulations, but this, of course, begs the question of whether these exemptions should have been granted in the first place, and whether these regulatory exemptions were even lawful (which is the subject matter of recent litigation in the Federal Court). Similarly,

where a Minister uses section 15.1 to scope down the comprehensive study for a major project to just a subset of minor components or otherwise excludes the key environmental issues, we seriously question whether interested persons will bother wasting their time, energy and resources in participating in such an unduly constrained EA exercise. Thus, even if there is a governmental commitment to make participant funding available, we do not believe that this commitment "saves" Bill C-9's amendments or makes them more palatable to our client communities.

8. The Minister repeatedly advised the Committee that the Bill C-9 changes are being advanced at this time because "there is no time to wait". In response, we would simply note that the Minister has failed to demonstrate that there is any particular urgency to enact these changes, nor has the Minister provided any compelling reasons why these changes could not have been proposed and debated within the mandatory Parliamentary review of CEAA that will commencing shortly. In addition, there is not a scintilla of evidence to suggest weakening or gutting CEAA via Bill C-9 is necessary in order to create jobs or facilitate economic growth across Canada. In our view, it is a false dichotomy to suggest that we must choose between economic recovery or a robust EA process. Instead, we can have both, and we would submit that a strong CEAA program is necessary to ensure that economic recovery is achieved through environmentally sound projects which provide sustainable societal benefits. Thus, as compared to burying CEAA changes in a 900 page budget bill, we firmly believe the pending CEAA Review offers a far more open and transparent opportunity to develop the legislative and administrative reforms that are necessary to achieve these public interest objectives.

For the foregoing reasons, we would again urge the Senate to delete, defer or defeat Bill C-9's ill-conceived and unjustifiable amendments to CEAA.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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Counsel

cc. The Hon. Jim Prentice, PC, MP

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[1] Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment* (December 1997), wherein the Committee rejected "unsubstantiated claims of overlap and duplication" within Canada's environmental management regime.

[2] Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2009), JELP 20:2, pp.1-35.

[3] 2010 SCC 2, para.24-25, 41.

[4] 2010 SCC 17, para.13, 29, 37, 46, 48.