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Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

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UPDATE:

SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION REGARDING BILL C-13 (THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT)

Prepared by:

Richard D. Lindgren
Canadian Environmental
Law Association

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INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest law group dedicated to the enforcement and improvement of environmental law. Funded as a legal aid clinic, CELA also provides a free legal advisory service to the public on matters involving environmental law. In addition, CELA lawyers represent citizens and citizens' groups in the courts and before statutory tribunals on a wide variety of environmental matters, including environmental assessment.

Since its inception, CELA has strongly advocated the need for effective environmental assessment legislation in all jurisdictions to ensure that environmentally significant undertakings are thoroughly assessed as early as possible in the planning and approval process. At the federal level, for example, CELA made submissions in response to the "Green Paper on Reforming Federal Environmental Assessment". CELA has also commented on matters involving the Environmental Assessment and Review Process Guidelines Order (hereinafter "the EARP Guidelines"), and CELA intervened in the recent appeal to the Supreme Court of Canada respecting the Oldman Dam (SCC File # 21890). CELA is also a member of the Environmental Assessment Caucus coordinated by the Canadian Environmental Network, which has frequently advocated reform of the federal environmental assessment process.

More recently, CELA has been reviewing and commenting upon the proposed Canadian Environmental Assessment Act as it has evolved over the past two years. For example, after Bill C-78 was introduced in June, 1990, CELA made a submission which concluded, inter alia, that the Bill was fundamentally flawed and that the Bill should be withdrawn unless substantial amendments were enacted. This view was widely shared among a number of other public interest groups which made submissions on Bill C-78.

In May, 1991, Bill C-78 was reintroduced as Bill C-13 by the Minister of the Environment, who released amendments to the Bill in October, 1991 in response to the criticism of the Bill. After reviewing these amendments, CELA then made a further submission on Bill C-13 which again concluded that the Bill remained fundamentally deficient despite the amendments. CELA subsequently commented critically on the two draft regulations under Bill C-13 that the federal government had circulated for public review.

In December 1991, Bill C-13 was subject to further amendments, which CELA has now reviewed in consultation with other public interest groups. Although CELA welcomes the government's attempt to place environmental assessment on a legislative basis, it remains our view that the amendments do not transform Bill C-13 into effective or enforceable environmental assessment legislation. Accordingly, CELA does not support Bill C-13, and

we submit that the Bill should be substantially revised to address the serious deficiencies outlined in this brief.

CRITIQUE OF BILL C-13 AS AMENDED

While some improvements to Bill C-13 have occurred, the most recent amendments to Bill C-13 generally fail to address the fundamental deficiencies within the Bill. Accordingly, this brief will outline CELA's major concerns with Bill C-13 as amended:

1. As we have discussed in our previous submissions, the Preamble should recite the government's constitutional authority for Bill C-13, particularly the "peace, order and good government" (POGG) power. In the Oldman decision, the Supreme Court of Canada has clearly confirmed the constitutional basis for federal environmental assessment, and the government should not be reticent about invoking this power in the Preamble to help fend off the inevitable constitutional challenges to Bill C-13. In addition, since the Court has upheld the EARP Guidelines, we submit that there is no compelling reason for Bill C-13 to limit the scope or universality of the environmental assessment process presently required under the EARP Guidelines.

2. The definition of "environment" fails to include reference to social, economic, cultural or built environments; thus, CELA submits that the definition must be broadened to include these aspects of the environment (i.e. see Ontario's Environmental Assessment Act).

3. The definition of "environmental effect" should be amended to expressly include any direct, indirect or cumulative environmental impacts. It is well-recognized that cumulative impact assessment is becoming increasingly important, and our suggested amendment will avoid any uncertainty as to whether cumulative effects are caught by the definition.

4. The definition of "federal authority" continues to exclude federal agencies and authorities presently subject to the EARP Guidelines. In our view, this regressive approach is inconsistent with the widely held view that environmental assessment should be mandatory and universal in application. In addition, we submit that there are no compelling environmental reasons to exclude bodies such as harbour commissions from the full application of the Act. CELA recognizes that such bodies may be subject to some form of environmental assessment pursuant to regulations under s.55(j) to (j.2); however, we have no confidence that such regulations will be passed in a timely manner, nor are we assured that such regulations will incorporate the essential elements of sound environmental assessment.

5. The definition of "project" focuses entirely on physical works, rather than the governmental plans, programs or policies driving individual projects. Accordingly, many forms of environmentally significant decision-making by government (i.e. economic policy decisions) are not caught by the Bill, which represents one of the most important shortcomings of Bill C-13. In our view, this also represents a step backward from the

definition of "proposal" under the EARP Guidelines. Thus, we submit that a broad definition of "proposal" or "undertaking" must be included in the Bill to ensure that the above-noted decision-making is caught by Bill C-13. CELA maintains that environmental assessment of government policy is long overdue and that such review must be placed on a firm legislative basis rather than on internal guidelines in order to maximize effectiveness and accountability. In addition, we remain unpersuaded by arguments that environmentally significant policy-making cannot be opened up to public participation due to reasons of "Cabinet confidentiality". In fact, Ontario's Environmental Bill of Rights Task Force is currently designing a public participation regime for environmental permit-issuing, regulation-making, and policy-making.

6. Section 4(b) should be reworded to impose a positive duty on all federal authorities to act in accordance with the principles of sustainability. Currently, this section "encourages" only "responsible authorities" (as defined in the Act) to "promote" sustainable development.

7. Section 4(d) should be reworded to ensure meaningful public participation early and often throughout the environmental assessment process. As we discussed in our previous brief, what constitutes "public participation" should be defined in the Act.

8. Section 5 (particularly subsection (d)) restricts the application of environmental assessment now available under the EARP Guidelines. Currently, the EARP Guidelines apply, inter alia, whenever a "proposal may have an environmental effect on an area of federal jurisdiction". This has been replaced in Bill C-13 by an attempt to prescribe by regulation a list of statutory approvals which would be subject to environmental assessment. CELA has previously submitted comments on the deficiencies of the draft "law list", and would only add at this time that the application of environmental assessment should be universal (i.e. "all in unless expressly exempted").

9. CELA remains concerned about the potential misuse (or overuse) of the exclusion powers under s.6. For example, to our knowledge no draft exclusion list has been circulated for public comment, thereby making it difficult to comment with any certainty on the Bill's potential application. Similarly, the scope and intent of s.6(2) remains unclear, although the provision appears to provide a loophole through which federal authorities can evade environmental assessment of funding arrangements where "essential details are not specified before or at the time the power is exercised."

10. Section 11(1) still fails to make a description of "purpose", "need", or "alternatives to" the project a mandatory component of every "screening" under the Act. Similarly, "need" and "alternatives to" are not required under s.11(2) for comprehensive studies, mediations, or assessments by review panels. In our view, these are essential elements of environmental assessment, and are particularly important at the earliest planning stages where critical decisions are to be made. We submit that these matters should never be optional or left to the discretion of the Minister or responsible authority under s.11(1)(e), especially where the "scope" of such factors can be restricted by these parties under s.11(3). Taken together,

these provisions will undoubtedly ensure the preparation of inadequate and self-serving self-assessments under the Bill. Accordingly, CELA submits that s.11 must be completely overhauled to ensure that every environmental assessment under the Bill includes consideration of:

- the purpose of and need for the undertaking;
- the "alternatives to" the undertaking;
- the alternative means of carrying out the undertaking;
- the environmental effects, advantages, and disadvantages of the undertaking and the alternatives;
- the mitigation measures necessary to address adverse environmental effects;
- the monitoring and other follow-up programs necessary to address adverse environmental effects; and
- the public comments concerning each of the above-noted factors.

11. Section 13(3) should be reworded to ensure that there are adequate public participation opportunities in all screenings, not just those where the responsible authority believes public participation is "appropriate".

12. While s.16 has been improved over earlier versions, CELA submits that this section should be amended to include opportunities for public comment regarding a responsible authority's decision to proceed under s.16(1)(a) without a review panel or mediation. This decision should be made in writing with reasons and should be appealable to the Minister by any person.

13. Section 25 has been properly amended to exclude the requirement that parties in a mediation must have a "direct interest" in order to participate. However, by using the phrase "interested party", the section leaves open the possibility that the traditional standing test (i.e. personal, pecuniary or proprietary interest) may still be used to exclude public interest participants. Thus, CELA submits that this section should be amended to expressly provide that any person can participate in the mediation, regardless of whether or not that person can demonstrate a personal, pecuniary, or proprietary interest. In addition, the Bill must provide for access to information and participant funding in order to ensure fair and effective mediation.

14. With respect to panel reviews, s.31 still fails to refer to the rules of natural justice or the principles of fairness regarding the conduct of panel proceedings. In particular, s.31

does not contain any provisions related to standing; notice; participant funding; the right be represented by counsel; the right to present and cross-examine evidence; and other important procedural matters. CELA does not wish to transform review panels into full-blown adversarial trials; however, the lack of formality or due process in panel proceedings can undermine public participatory rights. We therefore submit that this section must be amended to guarantee the essential elements of fairness in panel proceedings.

15. Section 34 does not require the responsible authority to accept or act upon the recommendations of the review panel or mediator. Moreover, the responsible authority is not required to advise the public in writing why such recommendations have not been accepted. In our view, this represents a fundamental deficiency in the Bill, particularly since responsible authorities are proponents with a self-interest in seeing that projects proceed. If the intent of the government is to establish a credible and independent process, then final approval cannot be left with proponents. Instead, the review panel should be empowered to make a binding and enforceable decision, with or without terms and conditions, and with the possibility of an appeal to the Minister or Cabinet. Where undertakings have not gone to mediation or a review panel, then final decision-making authority should be exercised by the Minister, with or without terms and conditions, with a possible appeal to Cabinet.

16. Section 37 should be amended to ensure that where joint review panels are established, the more stringent environmental assessment process of the respective jurisdictions shall be applied.

17. CELA maintains that s.43(2) should be deleted since it provides an inappropriate loophole for the Minister and the provinces to opt out of a joint environmental assessment. CELA further submits that ss.43-45 should be amended to allow any person, regardless of whether he or she has an interest in land, to petition the Minister with respect to transboundary or international environmental effects, or with respect to effects on federal lands.

18. CELA submits that s.48 should be amended to allow any person, not just the Attorney General of Canada, to apply for an injunction to enforce a s.47 Ministerial order. Moreover, injunction relief should be expressly available for any contravention of the Act or regulations, and the Act must be expanded to include offence and penalty provisions to ensure compliance. We note that Ontario's Environmental Assessment Act includes offence provisions, and we submit that similar provisions are required in Bill C-13. In short, we are astounded that environmental legislation such as Bill C-13 could be enacted without including any offence provisions.

19. Section 54(1)(h) provides that the Minister may establish a participant funding program. In our view, participant funding should not be optional or ad hoc; instead, such funding must be statutorily based and provided to all eligible participants in review panels and mediations.

CONCLUSIONS

The federal government has frequently espoused the need for fair, effective and efficient environmental assessment in order to integrate environmental and economic decision-making. However, despite the most recent amendments, Bill C-13 remains a seriously flawed statute.

Accordingly, CELA cannot support Bill C-13 as amended, and we recommend that even at this late stage, the Bill should be substantially amended to address the major deficiencies identified herein.

All of which is respectfully submitted.

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Richard D. Lindgren

Counsel
Canadian Environmental Law Association