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THE LEGAL PATH TO SUSTAINABILITY:
THE TOP FIVE REFORMS NEEDED FOR NEXT-GENERATION ASSESSMENTS

Final Submissions of the Canadian Environmental Law Association
To the Expert Panel regarding the *Canadian Environmental Assessment Act, 2012*

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THE LEGAL PATH TO SUSTAINABILITY: THE TOP FIVE REFORMS NEEDED FOR NEXT-GENERATION ASSESSMENTS

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Abstract: *The Expert Panel's forthcoming report on federal environmental assessment ("EA") offers an important opportunity to develop new legislation that establishes robust, credible, participatory and evidence-based EA processes focused on sustainability. To date, many participants in the Expert Panel hearings have supported the development of "next generation" federal legislation which requires sustainability assessments of environmentally significant projects, plans, policies and programs. In this paper, the author addresses five essential legal reforms which should be reflected in the new federal law: meaningful public participation; strategic and regional assessments; cumulative effects analysis; broad information-gathering; and independent decision-making.*

PART I - INTRODUCTION

The Canadian Environmental Law Association ("CELA") welcomes this opportunity to provide its final submissions to the Expert Panel in relation to federal environmental assessment ("EA") processes under the *Canadian Environmental Assessment Act* ("*CEAA*") *2012*.

These submissions should be read in conjunction with CELA's preliminary submissions, which were presented to the Expert Panel on November 8, 2016,[1] and are now posted on the Expert Panel website.[2]

(a) Background

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues.

Since our inception, CELA's casework, law reform and public outreach activities have focused on EA at the federal and provincial levels. In particular, CELA has represented clients, or participated on its own behalf, in numerous administrative and legal proceedings under *CEAA 2012* and its predecessors, *CEAA 1992* and the *Environmental Assessment and Review Process* ("*EARP*") Guidelines Order. For example, CELA has intervened in Canada's leading federal EA cases, such as the *Oldman River*[3] and *MiningWatch*[4] judgments of the Supreme Court of Canada.

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[1] http://www.cela.ca/slides-preliminary-submissions-federal-ea-act
[2] http://eareview-examenee.ca/wp-content/uploads/uploaded_files/nov.8-14h00-cela-preliminary-submissions-to-the-expert...-2016.pdf
[3] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.
[4] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6.

In addition, CELA lawyers have made submissions to, and appeared as witnesses before, various Parliamentary committees in relation to federal EA legislation, including the original enactment of *CEAA 1992* and its implementing regulations. Similarly, CELA 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).[5]

(b) Basic Principles of Sustainability Assessments

For the reasons outlined in our preliminary submissions, CELA fully supports the replacement of *CEAA 2012* by the "next generation" legislation which is being advocated by EA practitioners, academics, non-governmental organizations and other stakeholders across Canada.

In particular, CELA adopts and commends the "next generation" model articulated by Professors Gibson, Doelle and Sinclair.[6] This sustainability model has been endorsed by numerous participants across Canada who have presented to the Expert Panel to date.[7] Accordingly, CELA strongly supports the detailed submission[8] of the Environmental Planning and Assessment Caucus ("EPA Caucus") of the Canadian Environmental Network which sets out several key objectives for legislative reform:

- achieve cooperative multi-jurisdictional assessment in Canada's complex federal system;
- design an appropriate structure to deliver effective and robust assessment processes and decisions;
- guarantee early triggering and effective scoping of assessments;
- ensure effective post-decision tracking, reporting, and compliance;
- embrace a learning orientation throughout the assessment, decision-making, and follow-up processes;
- make sustainability a core principle of assessment;

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[5] These submissions are available at the CELA website: http://www.cela.ca/collections/justice/canadian-environmental-assessment-act

[6] R.B. Gibson et al. "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016), 29 JELP 25; R.B. Gibson, *Key Components for Reform of Federal EA Processes* (November 9, 2016).

[7] See, for example, MiningWatch Canada, *Making Federal Environmental Assessment Work for the Public and the Planet* (December 21, 2016), pages 1-3; Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), page 2; Greenpeace, Submission to the Expert Panel (November 10, 2016), pages 3-4; David R. Boyd, *From Environmental Assessment to Sustainability Assessment: A Way Forward for Canada* (December 15, 2016), pages 3-4 and Appendix A; West Coast Environmental Law, *Preliminary Submissions on Next Generation Environmental Assessment* (December 11, 2016); BC Nature, *Science, the Law and the Environmental Assessment Process* (December 11, 2016), pages 6-7; MiningWatch Canada, Presentation to the Expert Panel (November 8, 2016), page 2; Nature Canada, *Next Generation Impact Assessment: Toward Sustainability* (October 31, 2016), pages 4-5; Environmental Coalition of Prince Edward Island, Presentation to the Expert Panel (October 11, 2016), page 4; Grand Riverkeeper Labrador Inc., Presentation to the Expert Panel (October 6, 2016), pages 2-4; East Coast Environmental Law, Presentation to the Expert Panel (October 3, 2016), pages 1-3.

[8] EPA Caucus, *Achieving Next Generation Environmental Assessment* (December 14, 2016) at http://eareview-examenee.ca/wp-content/uploads/uploaded_files/epa-caucus-submission-to-expert-panel-2016-12-14.docx

- incorporate the principles of meaningful public participation; and
- address climate change effects in EA.[9]

CELA agrees with the EPA Caucus that it is now time for the Government of Canada to shift from its traditional "first generation" EA regime (which focuses 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, *CEAA 2012* should be repealed and replaced by a rigorous "sustainability assessment" regime at the federal level. Thus, CELA strongly urges the Expert Panel to recommend the development of "next generation" legislation.

CELA further agrees with the EPA Caucus that developing new federal legislation also provides a timely and important opportunity to implement reconciliation obligations in relation to Canada's indigenous communities:

> The need – and opportunity – for better recognition of Indigenous jurisdiction and authority and Aboriginal rights, including Canada's commitments to implement both the Calls to Action of Canada's Truth and Reconciliation Commission and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is an overarching theme of our work. Reconstructing the federal EA regime represents an important opportunity to create the possibility of reconciliation with respect to Indigenous peoples and territories by building in a respectful place for Indigenous participation in EA, but more importantly by respecting Indigenous authorities and jurisdiction in their own territories.[10]

CELA therefore calls upon the Government of Canada to provide meaningful opportunities for indigenous involvement in the drafting of "next generation" legislation, and to ensure that the new statute fully entrenches the principle of "full, prior and informed consent" when undertakings affecting indigenous persons, communities, lands or interests are being proposed.[11]

(c) Scope and Purpose of CELA's Final Submissions

In our preliminary submissions to the Expert Panel, CELA addressed three threshold issues:

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[9] *Ibid*, page 1.
[10] *Ibid*, page 2. See also Canadian Bar Association, *Environmental Assessment Process Review* (December 2016), pages 14-15.
[11] See, for example, Stswecem'c Xgat'tem First Nation, Submissions to the Expert Panel (December 18, 2016), pages 1, 7; BC Assembly of First Nations, Submissions to the Expert Panel (December 15, 2016), pages 3-5, 14-15; Cowichan Tribes, Submission to the Expert Panel (December 12, 2016), pages 3-4; Carrier Sekani Tribal Council, Verbal Submission to the Expert Panel (December 11, 2016), pages 2-3, 8-9; Gitanyow Hereditary Chiefs, *An Indigenous Approach to Sustainability Assessment* (December 9, 2016), Slide 17; Citxw Nlaka'pamax Assembly, Presentation to Expert Panel (December 2016), Slides 6-9, 13, 15, 17; Coastal First Nations – Great Bear Initiative Society, *Environmental Assessment in the Context of Reconciliation* (December 2016), Slide 2; Okanagan Nation Alliance, Presentation to the Expert Panel (November 29, 2016), Slides 15-16; Mikisew Cree First Nation, Presentation to the Expert Panel (November 24, 2016), Slides 9-15; Gwich'in Tribal Council, Submissions to the Expert Panel (September 29, 2016), page 2.

- what "triggers" should be used to determine when the federal EA process is applicable?

- which environmental planning factors should be addressed once the federal EA process has been triggered?

- who should be exercising EA decision-making authority upon completion of the EA process?

On these three issues, CELA's preliminary submissions recommended that:

- the new federal EA legislation should include a combination of general triggers (e.g. federal proponency, funds, lands and instruments), specific triggers (e.g. regulatory list(s) of nationally significant projects), and inclusion/exclusion lists to determine when federal EA requirements apply, and which EA "track" should be used;

- the new federal EA legislation should contain broad definitions of "environment" and "environmental effect," and should expand the list of prescribed environmental planning factors which must be addressed in every EA in order to ensure sustainability; and

- the new federal EA legislation should establish an independent, quasi-judicial expert tribunal that is empowered to hold public hearings and render legally binding EA decisions, subject only to a time-limited Cabinet appeal and judicial review supervision by the Federal Court.

Accordingly, the purpose of CELA's final submissions to the Expert Panel is to build upon these initial recommendations by identifying and discussing the top five legal reforms that are necessary to implement "next generation" sustainability assessments at the federal level.

In advocating these reforms, CELA has considered the voluminous submissions made to the Expert Panel by other stakeholders, practitioners, academics, governmental officials, representatives of indigenous communities, and members of the public at large. Where appropriate, CELA's final submissions adopt, cross-reference or, in some cases, refute the positions taken by other participants in the Expert Panel proceedings.

In summary, having reviewed other participants' submissions, it is clear to CELA that there is strong public support across Canada for the "next generation" model. Therefore, in our respectful submission, the primary question for the Expert Panel is not if the "next generation" model should be embraced, but how it can be codified in federal legislation and implemented across the country.

PART II – TOP FIVE LEGAL REFORMS FOR SUSTAINABILITY ASSESSMENTS

For the purposes of these final submissions, CELA focuses on five key priorities which should be incorporated within "next generation" legislation. If endorsed by the Expert Panel and adopted by Parliament, these priorities can be reflected in the drafting instructions given to legislative counsel who will be writing the new statute.

In particular, CELA's top five legal reforms may be summarized as follows:

- ensuring meaningful public participation in sustainability assessments;
- requiring strategic- and regional-level sustainability assessments as a matter of law;
- improving the identification and evaluation of cumulative effects;
- triggering broad information-gathering requirements in sustainability assessments; and
- ensuring informed, accountable and independent decision-making.

However, CELA hastens to add that these five matters do not represent the entire suite of statutory changes that are required, and we acknowledge that there are many other implementation details which will have to be addressed via the new legislation and the accompanying regulations. It should be further noted that our five topics are not presented in these submissions in descending order of importance. To the contrary, CELA views all five matters as equally important components which should form the centerpiece of an integrated and comprehensive reform package.

Issue 1: Meaningful Public Participation

The need for, and the societal benefits of, public participation in EA processes has long been recognized, and need not be reviewed in detail in these final submissions.[12] Suffice it to say that early and meaningful opportunities for public involvement result in fairer and more credible processes, and improve the overall quality, acceptability and soundness of EA decisions. In short, CELA submits that effective public participation is the *sine qua non* for informed decision-making under EA legislation.

Although public participation is entrenched as a statutory purpose[13] of *CEAA 2012*, the Expert Panel has received considerable evidence from citizens, environmental groups and other stakeholders who encountered serious obstacles when attempting to participate in federal EA processes. These obstacles include: deficient or delayed public notices; short public comment periods; lack of timely access to all relevant documentation; inadequate awards of participant funding; and lack of basic procedural rights (e.g. cross-examination) in some recent cases.

In light of these ongoing problems, CELA endorses the public participation principles identified in the EPA Caucus submission to the Expert Panel:

1. Participation begins early in the planning and decision-making processes, is meaningful

[12] See, for example, MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 41-42; Canadian Bar Association, *Environmental Assessment Process Review* (December 2016), page 7.
[13] *CEAA 2012*, subsection 4(1)(e).

and builds public confidence;

2. Public input can influence or change the outcome/project being considered;
3. Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;
4. Formal processes of engagement, such as hearings and various forums of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;
5. Adequate and appropriate notice is provided;
6. Ready access to the information and the decisions at hand is available and in local languages spoken, read, and understood in places potentially affected by proposed undertakings;
7. Participant assistance and capacity building is available for informed dialogue and discussion;
8. Participation programs are learning oriented to ensure outcomes for all participants, governments, proponents and participants;
9. Programs recognize the knowledge and acumen of the public; and,
10. Processes are fair and open in order for the public to be able to understand and accept decisions.[14]

In CELA's view, these principles are vitally important and must be fully incorporated within the new federal EA regime to ensure that there is meaningful public participation in all levels, and at all stages, of sustainability assessments. This includes the post-approval stage, when socio-economic and environmental effects of approved undertakings are being monitored, reported, and addressed through adaptive management techniques.

Among other things, this means that *CEAA 2012*'s restrictive "interested person" concept[15] (defined as only those persons "directly affected" by the proposal) must be immediately jettisoned in order to ensure that decision-makers solicit and receive a broader range of evidence, perspectives and opinions from the Canadian public (including civil society groups) on sustainability considerations.[16]

In addition, the availability and size of participant funding under the new legislation should be commensurate with the type of EA (strategic-, regional- or project-level assessment), and the nature and extent of the environmental, social and economic factors at issue in the EA. Similarly, participant funding should not be restricted to only proposals which are subject to public hearings, and should instead be made available at the earliest (and critical) stages of EA processes when the specific problems or opportunities are being identified, alternatives are being formulated and considered, and potential project descriptions are taking shape.

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[14] EPA Caucus, *supra*, note 8, page 35.
[15] *CEAA 2012*, subsection 2(2).
[16] Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), pages 4-5.

Moreover, to ensure that eligible persons, groups and indigenous communities receive sufficient funding to retain the necessary legal, technical, and scientific assistance, CELA submits that the quantum of participant funding in the new EA regime must be dramatically increased over the small awards typically issued under *CEAA 2012*.[17] In this regard, consideration should be given to restructuring the federal participant funding program, in whole or in part, on a "proponent pays" basis, which was the approach used in Ontario's former (and highly regarded) intervenor funding law.[18]

Issue 2: Strategic- and Regional-Level Sustainability Assessments

CELA submits that the superstructure of the new federal legislation should be constructed of three inter-related, or "nested", tiers: strategic assessment; regional assessment, and project assessment. In short, requiring strategic- and regional-level assessments will help ensure that relevant macro-issues or larger policy considerations (e.g. climate change, cumulative effects, etc.) are assessed at the right scale with the right set of parties. In addition, the results of these higher-order assessments can trickle down to, and inform the design of, project-level assessments (and *vice versa*).

However, as noted in our preliminary submissions, *CEAA 2012* currently applies EA requirements to just a small handful of designated mega-projects, and these requirements have been cast in an excessively narrow manner, as compared to *CEAA 1992*.[19] While this rollback alone is cause for considerable concern and warrants fundamental legislative reform, CELA also objects to *CEAA 2012*'s ongoing failure to create a legally binding duty to conduct strategic or regional EAs of governmental plans, policies and programs. In this regard, we note that the Multi-Interest Advisory Committee ("MIAC") has provided the Expert Panel with cogent advice that strongly affirms the need for strategic- and regional-level assessments in Canada.[20]

In CELA's view, the requirement to conduct strategic- or regional-level sustainability assessments must be codified in law, rather than be left to Cabinet discretion. On this point, we note that the Commissioner of the Environment and Sustainable Development recently reported[21] that leaving strategic EA to a Cabinet directive has meant that few federal ministries or agencies have fully considered the environmental implications of governmental plans, programs or policies. CELA reasonably anticipates that a similarly disappointing track record will occur under "next

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[17] See also Gitanyow Hereditary Chiefs, *An Indigenous Approach to Sustainability Assessment* (December 9, 2016), Slide 12; BC Assembly of First Nations, Submissions to the Expert Panel (December 15, 2016), pages 7-8; Tsawwassen First Nation, Presentation to the Expert Panel (December 13, 2016), Slide 6; Canadian Bar Association, *Environmental Assessment Process Review* (December 2016), pages 8-9, 11-12; Peace Valley Environment Association, Presentation to the Expert Panel (November 2016), Recommendation 16; Environment North, *Federal Environmental Assessment Review: Key Considerations* (November 14, 2016), Slides 9-11; Pembina Institute, Presentation to the Expert Panel (October 2016), Slide 9; Westaway Law Group, Speaking Notes: EA Review Panel Hearing (September 20, 2016), pages 7-8, 14.

[18] *Intervenor Funding Project Act*, R.S.O. 1990, c.I.13. Unfortunately, this law expired without renewal in 1996.

[19] CELA, *supra*, note 2, pages 6-8, 11-12.

[20] MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), page 34. See also Nature Canada, *Next Generation Impact Assessment: Toward Sustainability* (October 31, 2016), pages 10-13.

[21] Commissioner of the Environment and Sustainable Development, *2016 Fall Report 3: Departmental Progress in Implementing Sustainable Development Strategies*, paragraphs 3.13 to 3.22.

generation" legislation unless it expressly imposes a mandatory legal duty upon the federal Cabinet (and ministries, departments or agencies) to conduct strategic- or regional-level sustainability assessments.

We agree with the EPA Caucus that the triggers for strategic- or regional-level assessments should be established by the "next generation" legislation, which should also include opportunities for members of the public and indigenous communities to file petitions requesting these kinds of upper-tier assessments.[22] The Government of Canada should be compelled to provide a responsive and timely answer to such petitions (e.g. within 90 days of receipt).

Moreover, CELA submits that properly designed strategic- or regional-level sustainability assessments should not be confined to certain discrete matters within the Government of Canada's exclusive constitutional jurisdiction (e.g. fisheries, migratory birds, aboriginal interests, etc.). To the contrary, CELA envisions that the information-gathering phase of strategic- and regional-level assessments will inevitably involve other matters and other jurisdictions across Canada. In this regard, CELA endorses the "cooperative EA" approach recommended to the Expert Panel by the EPA Caucus, and we strongly agree that problematic "equivalency", "delegation" and "substitution" arrangements should play no role under the "next generation" legislation.[23]

In our view, when a proposal is subject to multi-jurisdictional assessment by various levels of government (e.g. federal, provincial, territorial, indigenous and municipal), then, to the maximum extent possible, governmental officials should work together in a coordinated and cooperative manner to design and implement an efficient "one project – one assessment" approach that satisfies all applicable requirements for all stages of the EA process (e.g. from proposal description to post-approval monitoring).[24]

Any disputes about the adequacy or outcome of strategic-, regional-, or project-level assessments can be resolved through appropriate mechanisms (e.g. mediation, adjudication by an independent tribunal, etc.) established in the new legislation.[25]

Issue 3: Cumulative Effects Analysis

Although cumulative effects analysis is both "encouraged"[26] and required[27] by *CEAA 2012*, there appears to be widespread consensus in submissions to the Expert Panel that there is room for

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[22] EPA Caucus, *supra*, note 8, pages 9, 11. See also Nature Canada and Environmental Law Centre, *Starting Off on the Right Foot* (December 2016); West Coast Environmental Law, *Preliminary Submissions on Next Generation Environmental Assessment* (December 11, 2016), pages 6-7*;* Martin Olszynski, *Avoiding the "Tyranny of Small Decisions": A Canadian Environmental Assessment Regime for the 21st Century* (November 21, 2016), pages 8-9; MiningWatch Canada, Presentation to the Expert Panel (November 8, 2016), pages 2-3.

[23] EPA Caucus, *supra*, note 8, pages 6-8. See also Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), pages 14, 17-18; West Coast Environmental Law, *Preliminary Submissions on Next Generation Environmental Assessment* (December 11, 2016), pages 3-4.

[24] See also MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 49-52.

[25] EPA Caucus, *supra*, note 8, page 15.

[26] *CEAA 2012*, subsection 4(1)(i).

[27] *Ibid*, subsection 19(1)(a).

considerable improvement in how cumulative effects are identified and assessed at the federal level.[28]

However, CELA anticipates that requiring comprehensive strategic- and regional-level assessments will greatly enhance the evaluation and mitigation of cumulative effects, which is often difficult to accomplish in a credible manner in project-level assessments of individual proposals.[29]

Accordingly, CELA agrees with the EPA Caucus that one of the triggers that can be used for strategic- or regional-level assessment is whether the proposed plan, policy or program may initiate, continue or compound significant cumulative effects.[30] This trigger would be particularly useful for implementing a climate change test in relation to federal plans, policies or programs that may directly or indirectly result in cumulative increases in greenhouse gas emissions (upstream or downstream), or cumulative decreases or impairment of carbon storage.

This is not to say that cumulative effects analysis should play no role in project-level sustainability assessments. To the contrary, the assessment of cumulative effects should continue to be required at the project level, but much of the foundational work and overall context should have already occurred in upper-tier strategic- or regional-level assessments. In addition, the findings, conclusions and impact predictions of project-level assessments can feed into the larger-scale or regional frameworks that are developed and updated in relation to cumulative effects.[31]

Issue 4: Triggering Broadly Framed Sustainability Assessments

CELA's preliminary submissions identified the need for "next generation" legislation to utilize various triggers for the commencement of sustainability assessments, and to establish broad parameters for the information-gathering stage of such assessments.[32]

In particular, CELA recommends that an appropriate mix of specific, general and discretionary triggers should be developed for use under the new legislation, particularly in relation to project-level assessments.[33] For example, these triggers should include the following mechanisms: (a) specific list(s) of undertakings that warrant assessment (similar to the former Comprehensive Study List under *CEAA 1992*); (b) general description(s) of federal decision-making powers that

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[28] Mississaugas of the New Credit First Nation, Submission to the Expert Panel (December 16, 2016), page 4; Pacheedaht First Nation, *Federal Environmental Assessment Processes* (n.d.), pages 5-7; Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), pages 19-20; MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), page 63; Wildlife Conservation Society Canada, *Improving Environmental Impact Assessment: A Case Study from Ontario's North* (November 14, 2016), pages 2-4; Alberta Wilderness Association, *CEAA and Cumulative Effects* (November 23, 2016), Slides 4-5.

[29] EPA Caucus, *supra*, note 8, page 42; BC Nature, *Science, the Law and the Environmental Assessment Process* (December 11, 2016), page 7.

[30] EPA Caucus, *supra*, note 8, page 20.

[31] *Ibid*, pages 21, 42.

[32] CELA, *supra*, note 2, pages 8-9, 11-13.

[33] See also West Coast Environmental Law, *Preliminary Submissions on Next Generation Environmental Assessment* (December 11, 2016), page 5; Alberta Wilderness Association, *CEAA and Cumulative Effects* (November 23, 2016), Slide 6; Nature Canada, *Next Generation Impact Assessment: Toward Sustainability* (October 31, 2016), pages 5-9.

warrant assessment (similar to former section 5 of *CEAA 1992*); and (c) residual Ministerial or Cabinet discretion to designate additional undertakings that warrant assessment (e.g. proposals that may affect Canada's national targets and international commitments regarding climate change).

These triggers should, in turn, determine the type or "track" of assessment to be used for such undertakings, and should be accompanied by appropriate inclusion/exclusion lists to finetune the application of "next generation" legislation. The operative rule should be that all undertakings that appear to trigger the application of the "next generation" legislation must undergo sustainability assessments unless they are expressly exempted from coverage.

CELA further recommends that the scope of the sustainability assessment, once triggered, should address the entire life cycle of the whole undertaking as proposed by the proponent, and should go well beyond federal matters such as fisheries, aquatic species at risk or migratory birds. Among other things, the scope of the assessment should be legally required to address the full suite of sustainability considerations (including an overarching "contribution to sustainability" test), rather than merely canvass whether the proposal may cause "significant adverse environmental effects" (or whether such effects are "justified" in the circumstances) as occurs under *CEAA 2012*.

Similar views have been expressed by a number of other participants in the Expert Panel proceedings[34], including the EPA Caucus, which advocates combining a mandatory listing approach and decision-based approach in order to trigger legal requirements for conducting the prescribed type of sustainability assessments.[35] The EPA Caucus submission also correctly outlines the types of sustainability factors which should be considered in assessments conducted under "next generation" legislation.[36]

On this latter point, CELA concurs with the position advanced by other participants,[37] and the EPA Caucus position, that in light of recent EA jurisprudence, there is no constitutional reason to restrict or constrain "next generation" information-gathering to specific areas of federal jurisdiction:

> With respect to the scope of assessments, it seems unlikely in light of Supreme Court of Canada decisions in *Oldman*, *Hydro Quebec*, and *MiningWatch*, and the more recent *Syncrude* decision at the Federal Court (involving ethanol in fuel regulations under CEPA), that courts would impose limits on the scope of a federal assessment.[38]

Accordingly, it remains our opinion that there is no constitutional impediment to enacting "next generation" legislation that sets out a comprehensive set of sustainability factors to be addressed during the information-gathering stage of sustainability assessments.

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[34] See, for example, Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), pages 6-10.
[35] EPA Caucus, *supra*, note 8, pages 18-21.
[36] *Ibid*, pages 31-34.
[37] Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), pages 11-12.
[38] EPA Caucus, *supra*, note 8, page 4 (footnotes omitted).

Issue 5: Informed, Accountable and Independent Decision-Making

In CELA's view, the completion of the information-gathering stage must lead to an appropriate, credible and enforceable decision on the adequacy of the sustainability assessment and the overall approvability of the proposed undertaking. For accountability purposes, this decision should be based on sustainability criteria that are expressly entrenched within "next generation" legislation, and that are further particularized in undertaking-specific terms of reference or guidelines that are developed for the conduct of sustainability assessments of individual proposals.[39]

CELA further submits that at all material times, the burden of proof should be on the proponent to demonstrate, on a balance of probabilities, that the undertaking meets the prescribed sustainability criteria and all other substantive requirements which are imposed upon the proponent by the new law (e.g. establishing the need for, and purpose of, the undertaking; consideration of "alternatives to" the undertaking; consideration of "alternative methods" of carrying out the undertaking, etc.).[40] Where there is uncertainty about impacts, risks or trade-offs, then the precautionary principle should be applied by decision-makers.

CELA agrees with the EPA Caucus that while the outer limits of federal decision-making authority may be difficult to pin down in the abstract, the nature and extent of federal jurisdiction to make decisions (or to attach terms and conditions to such decisions) under "next generation" legislation will greatly depend on the findings and conclusions reached during the information-gathering stage:

> With respect to post-assessment decision-making, there is some uncertainty about the precise limits of federal jurisdiction, but it is clear that the results of the assessment need to lay a proper foundation for federal decision-making. If the assessment identifies clear impacts on areas of federal jurisdiction (whether they be biophysical or socio-economic), there is a solid basis for federal jurisdiction to take an integrated and comprehensive approach to addressing the impacts identified. Where an assessment clarifies that a proposed activity does not affect any areas of federal jurisdiction, there will be no basis for a federal decision. In short, the results of the assessment will necessarily shape the decision-making authority of the federal government.[41]

However, it goes without saying that if the above-noted "cooperative EA" model is adopted, then federal decision-making should not be occurring in isolation, but instead should be taking place in a coordinated manner in conjunction with other levels of government exercising decision-making authority within their respective jurisdictions.

However, this begs the critically important question of who should be empowered to make the ultimate federal decision under "next generation" legislation to accept/reject proposed undertakings, or to craft effective terms and conditions that should be attached to such decisions.

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[39] EPA Caucus, *supra*, note 8, pages 31, 33. See also Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), pages 22-23; Gitanyow Hereditary Chiefs, *An Indigenous Approach to Sustainability Assessment* (December 9, 2016), Slides 5-10, 14-15.
[40] EPA Caucus, *supra*, note 8, page 33.
[41] *Ibid*, page 4.

In CELA's preliminary submissions, we examined various historical precedents and identified the need to establish a new independent, quasi-judicial tribunal that will hold public hearings and make legally binding decisions under "next generation" legislation.[42]

Similar support for specialized administrative decision-making by an independent authority has been provided to the Expert Panel by various other participants.[43] In addition, some participants have provided compelling reasons why current regulatory tribunals (e.g. National Energy Board ("NEB") and Canadian Nuclear Safety Commission ("CNSC")) should no longer be given the legal responsibility to conduct EAs at the federal level.[44] For example, one commentator succinctly (and correctly) notes that:

> [T]he assignment in 2012 of panel review functions to the National Energy Board and the Canadian Nuclear Safety Commission was entirely inappropriate. The NEB and CNSC are regulatory bodies with very focused mandates and expertise. Their reviews are directed to attaching conditions to proponent construction and operating permits, which these agencies then regulate by means of inspection and enforcement… Issues of regional scale social, economic, and environmental project effects were never the central focus of either the NEB or the CNSC. Further, neither agency makes explicit recommendations to itself, nor does it consider transparently the broader question of adverse impacts that might arise from the limits of its own regulatory capacity.
>
> The effect of turning CEAA panel reviews over to the NEB and the CNSC was to transfer the responsibility for assessing cumulative impacts and project contribution to sustainability to agencies with little experience or demonstrated competence of considering those issues, let alone holding hearings on matters of broad public concern rather than the highly technical and legal matters they normally deal with. Since then, there has been no evidence that either the NEB or the CNSC have actually considered cumulative effects, or applied sustainability criteria, in the systematic manner that review panels had come to do prior to 2012.[45]

The EPA Caucus also concludes that allowing the NEB and CNSC to conduct federal EAs has created various problems:

> Moreover, the vesting of authority for some EA reviews in the National Energy Board (NEB) and Canadian Nuclear Safety Commission (CNSC) has proven problematic in fundamental ways that in our view cannot be fixed by improving those institutions. For one, there are great inconsistencies in the processes used by the three responsible authorities. Perhaps more importantly, the NEB and CNSC are regulators without the

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[42] CELA, *supra*, note 2, pages 14-18.
[43] See, for example, BC Nature, *Science, the Law and the Environmental Assessment Process* (December 11, 2016), pages 2-3; Peace Valley Environment Association, Presentation to the Expert Panel (November 2016), Slide 2; Nature Canada, *Next Generation Impact Assessment: Toward Sustainability* (October 31, 2016), pages 13-14.
[44] Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), pages 26-27; BC Nature, *Science, the Law and the Environmental Assessment Process* (December 11, 2016), page 2.
[45] Peter Usher, *Making Major Project Assessment Work* (October 3, 2016), page 3.

> relevant mandate or impartiality to undertake the sort of fair, public, planning-based process that good EA requires.[46]

Similarly, Greenpeace's submission to the Expert Panel raises a number of red flags about having the CNSC conduct federal EAs of nuclear projects, particularly since it is an "industry-specific regulatory agency" that is more focused on technical issues rather than the "big picture" planning issues that are central to EAs.[47] In addition, Northwatch identifies various unresolved concerns about the lack of transparency and independence of the CNSC, and concludes that the CNSC is not a suitable entity for carrying out federal EA processes (particularly since the option of having panel reviews for nuclear facilities is no longer available under *CEAA 2012*, and the CNSC may conduct written hearings instead of public hearings under *CEAA 2012*).[48] Moreover, MiningWatch Canada raises the issue of "regulatory capture" in the context of EAs conducted by the CNSC.[49] The Concerned Citizens of Renfrew County also recommend that the responsibility for conducting nuclear EAs should be transferred from the CNSC to an independent federal body.[50] A similar recommendation has been offered by the Aroland First Nation on the grounds that the CNSC (and the NEB) "are too friendly" with the regulated industry.[51]

In light of this extensive stakeholder criticism and public concern, the CNSC provided the Expert Panel with submissions that allegedly demonstrate the CNSC's expertise in EA matters.[52] For example, the CNSC contends that it conducts "clear, efficient and fulsome lifecycle EA" processes that "respect jurisdictional mandates."[53] Similarly, the CNSC argues that EA is "central" to its responsibilities, that its EA decisions are "independent, transparent and evidence-based", and that its "lifecycle approach" provides public and aboriginal participation "from beginning to end."[54]

However, in our submission, the Expert Panel should give little or no weight to the CNSC's self-proclaimed prowess in conducting EAs under *CEAA 2012*. In essence, CELA submits that the CNSC's claims simply amount to an admission that the CNSC likes its own handiwork when conducting federal EAs. While the CNSC's view may be shared by proponents (such as Ontario Power Generation ("OPG")) who appear before the CNSC and successfully obtain the requisite approvals under federal law, suffice it to say that this view is not widely shared among public interest intervenors which are regularly involved in such proceedings. Moreover, since Ontario does not apply its EA legislation to OPG's nuclear proposals,[55] it is of paramount importance to

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[46] EPA Caucus, *supra*, note 8, page 17 (footnotes omitted).
[47] Greenpeace, Submission to the Expert Panel (November 10, 2016), page 2.
[48] Brennain Lloyd, Transcript of Sudbury Public Presentations to the Expert Panel (November 3, 2016), pages 7-8, 10-11, 14.
[49] MiningWatch Canada, Presentation to the Expert Panel (November 8, 2016), page 3.
[50] Concerned Citizens of Renfrew County, *Strengthening Federal Environmental Assessments: A Case Study of Nuclear Projects at the Chalk River Laboratories* (November 2016), Slide 8.
[51] Aroland First Nation, *Initial Input to Federal EA Review Panel Hearings* (November 15, 2016), Slide 8.
[52] CNSC, Presentation to the Expert Panel (September 19, 2016).
[53] *Ibid*, Slides 2, 5.
[54] CNSC, *Nuclear Regulation in Canada* (September 9, 2016), Slides 2, 9, 17.
[55] For example, OPG proposals to build new reactors, and to refurbish existing reactors, at the Darlington nuclear power plant were not subjected to provincial EA requirements. Similarly, the OPG proposal to construct a Deep Geological Repository for low- and intermediate-level radioactive waste was not subject to Ontario's EA process.

ensure that rigorous sustainability assessment requirements are imposed under federal "next generation" legislation in relation to such facilities.

Interestingly, OPG's presentation to the Expert Panel outlines "what is working for OPG" under *CEAA 2012*, and claims that the CNSC is "the most appropriate federal agency to provide comprehensive regulatory oversight on the nuclear industry."[56] Similarly, the Canadian Nuclear Association asserts that the "CNSC has a strong regulatory framework for environmental protection."[57]

However, even if such statements are assumed to be true for nuclear licencing purposes, it does not necessarily follow that the CNSC is the most appropriate entity to conduct federal EAs of new, expanded or decommissioned nuclear facilities. CELA anticipates that under "next generation" legislation, the CNSC (like other federal ministries, departments or agencies) will play an important role in sustainability assessments, but the CNSC should not be given the legal responsibility for conducting, or rendering decisions on, these assessments. As noted in CELA's preliminary submissions, CNSC itself has conceded that it lacks sustainability criteria and the institutional capacity to assess sustainability considerations.[58]

More generally, CELA notes that submissions to the Expert Panel from private companies, commercial interests or industrial associations tend to support the status quo and recommend the retention of *CEAA 2012*, subject to some minor amendments, clarifications or "improvements."[59] In our opinion, this position is both understandable and unsurprising since *CEAA 2012* is clearly more proponent-friendly than *CEAA 1992* (e.g. by dramatically reducing the number and nature of federal EAs), and since there appear to very few instances under the current regime where the proposed project has been rejected (although there are some notable exceptions such as the Northern Gateway pipeline). In CELA's view, it is time to address this imbalance by developing robust and participatory "next generation" provisions which ensure that "no" is a likely (if not inevitable) outcome of the assessment process if the proposed undertaking does not satisfy sustainability criteria.

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[56] OPG, Presentation to the Expert Panel (November 9, 2016), Slide 5.
[57] Canadian Nuclear Association, *Review of CEAA Process* (November 1, 2016), Slide 3.
[58] CELA, *supra*, note 2, page 15.
[59] See, for example, Cenovus Energy Inc., Submission to the Expert Panel (December 21, 2016), page 4; Canadian Construction Association, Submission to the Expert Panel (n.d.), pages 3-6; Business Council of British Columbia, Presentation to the Expert Panel (December 12, 2016), Slides 4-5, 7; Teck, Presentation to the Expert Panel (December 12, 2016), Slide 4; Stantec, Presentation to the Expert Panel (December 12, 2016), Slide 7; Mining Association of British Columbia, Presentation to the Expert Panel (December 11, 2016), Slides 5-6; CN, Presentation to the Expert Panel (December 8, 2016), Slides 4-5; Nova Scotia Power, Submissions to the Expert Panel (December 2016), page 2; Canadian Hydropower Association, Presentation to the Expert Panel (November 8, 2016), Slides 8-10; Railway Association of Canada, Presentation to the Expert Panel (November 8, 2016), Slides 7-8; Canadian Electricity Association, Presentation to the Expert Panel (November 8, 2016), Slides 7-8; NB Power, Presentation to the Expert Panel (October 12, 2016), Slide 12; Newfoundland and Labrador Oil & Gas Industries Associations, Presentation to the Expert Panel (October 5, 2016), Slides 7-11; Canadian Association of Petroleum Producers, Presentation to the Expert Panel (October 5, 2016), Slides 10-11; ExxonMobil, Presentation to the Expert Panel (October 5, 2016), Slide 10; Saskatchewan Mining Association, Presentation to the Expert Panel (September 19, 2016), Slides 10-12; AREVA Resources Canada, Presentation to the Expert Panel (September 19, 2016), Slides 6-7; Cameco, Presentation to the Expert Panel (September 19, 2016), Slides 4-7.

On the other hand, if approval to proceed with an undertaking is given under "next generation" legislation, it is imperative that such decisions include stringent conditions for post-approval monitoring, reporting, and corrective measures if required. In short, sustainability assessments will necessarily include a number of predictions regarding environmental, social and economic impacts, and will invariably involve some degree of uncertainty regarding such impacts and/or their amenability to efforts intended to maximize or fairly distribute societal benefits and to avoid or minimize harm.

Accordingly, CELA submits that "next generation" decision-making authority must include mandatory requirements for effective post-approval monitoring to verify the accuracy of predictions made in relation to the positive/negative effects of the undertaking, and the effectiveness of mitigation measures which have been proposed by the proponent or imposed by the federal decision-maker.[60] In addition to effects/effectiveness monitoring, there is also a need to ensure compliance monitoring/reporting in order to confirm that the proponent is fully implementing all terms and conditions of the federal approval decision.

Where non-compliance has been detected, appropriate and timely enforcement action should be pursued by federal authorities under "next generation" legislation[61] (e.g. issuance of mandatory orders, commencement of legal proceedings, suspension/revocation of approval decision, etc.), or by members of the public (e.g. commencement of private prosecution). In addition, CELA recommends that consideration should be given to including "citizen suit" provisions in the "next generation" legislation in order to enable Canadian residents to commence a civil action in the Federal Court to enforce legal requirements against non-compliant proponents.[62]

PART III – CONCLUSION AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA concludes that *CEAA 2012* is fundamentally flawed, and submits that it cannot be tweaked or amended to properly implement the principles and processes which are needed to ensure robust sustainability assessments at the federal level. Accordingly, CELA requests the Expert Panel to recommend the expeditious development of "next generation" legislation.

CELA's specific recommendations to the Expert Panel in these submissions may be summarized as follows:

1. **The "next generation" legislation should require early and meaningful public participation in both the information-gathering and decision-making stages of sustainability assessments, as well as in post-approval activities.**

2. **The "next generation" legislation should require the preparation and updating of strategic- and regional-level sustainability assessments of governmental plans,**

[60] See also EPA Caucus, *supra*, note 8, pages 23-25; MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 61-63.
[61] Ecojustice, *Federal Environmental Assessment for the Future* (December 19, 2016), page 32.
[62] See, for example, the proposed *Canadian Environmental Bill of Rights* (Bill C-202), sections 18-19. See also *Canadian Environmental Protection Act, 1999*, section 22.

policies and programs, which, in turn, will guide or direct project-level assessments (and *vice versa*).

3. **The "next generation" legislation should impose effective requirements for identifying and evaluating cumulative effects within sustainability assessments at the strategic-, regional- and project-level.**

4. **The "next generation" legislation should include specific, general and discretionary triggers to determine the applicable assessment track that will be used to address a broad range of sustainability considerations.**

5. **The "next generation" legislation should include statutory sustainability criteria to facilitate informed, accountable and independent decision-making, and approval decisions should contain stringent and enforceable terms and conditions, particularly in relation to monitoring and reporting.**

In closing, CELA looks forward to our continued involvement in Parliament's timely development of a new "sustainability assessment" law that properly reflects the above-noted recommendations.

December 22, 2016