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# Canadian Environmental Assessment Act

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*An Annotated Guide*

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fundamental purposes and guiding principles of the Act are sound in that these support the goals of sustainable development, accountability and public participation in decision-making, there was general agreement among diverse stakeholders that the federal environmental assessment process could be improved. The amendments to the Act received Royal Assent on June 11, 2003 and were brought into force on October 30, 2003. The amendments include:

- departments and agencies working together and with other jurisdictions;
- eliminating the potential for referring a project to a review panel after it has undergone a comprehensive study;
- extending environmental assessment obligations to Crown corporations, beginning three years from the date of Royal Assent;
- providing the public with improved and up-to-date information on all federal environmental assessments through the creation of an Internet-based registry;
- strengthening the requirements for follow-up programs to ensure that sound mitigation measures are in place; and
- focusing resources on projects with adverse environmental effects and reducing the need to assess routine smaller ones.

## 1:20 CONSTITUTIONAL FRAMEWORK

To understand the legislation and its operation, the constitutional framework of Canada must constantly be borne in mind. It will largely dictate and, in some instances, restrict the scope of the environmental assessment that will be carried out. This is due to the shared nature of jurisdiction over the environment and its implications for federal action in environmental matters.

### 1:20.1 *Shared Jurisdiction Over Environmental Assessment*

The "environment" is not an enumerated head of power in the constitution. The Act must be read and interpreted in the context of the jurisdiction over environmental assessment shared by the provinces and the federal government.<sup>12</sup>

The federal Department of Fisheries and Oceans may, for example, conduct an environmental assessment of any project for purposes of determining the adverse environmental effects the project may have on fish habitat, where it considers issuing an authorization pursuant to the *Fisheries Act*.<sup>13</sup> This could be done on the grounds that the federal government has jurisdiction over fish habitat issues. At what point, however, will the department's environmental assessment exceed

<sup>11</sup> [Footnote omitted.]

<sup>12</sup> The Supreme Court of Canada has ruled that environmental assessment is *intra vires* both levels of government as the exercise of a power accessory to those provided by both ss. 91 and 92 of the *Constitution Act, 1867*: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1994] 1 S.C.R. 159.

<sup>13</sup> R.S.C. 1985, c. F-14.

federal jurisdiction and be said to be unduly intruding into an area of provincial jurisdiction? The response to this question stems to a large extent from the power, duty or function the federal authority proposes to exercise or perform with respect to a project.

### 1:20.2 *Acting Within Federal Jurisdiction*

Section 5 of the Act identifies the powers, duties and functions that a federal authority may exercise or perform with respect to a project. In brief, s. 5(1)(a) contemplates the situation where the federal authority is the proponent of a project. Section 5(1)(b) aims at instances where a federal authority provides financial assistance for the purposes of enabling a project to proceed in whole or in part. Section 5(1)(c) addresses those instances where the federal authority proposes to dispose of federal lands to allow the project to proceed. Finally, s. 5(1)(d) and (2)(a) deal with the issuance of a permit, licence or other authorization pursuant to another Act of Parliament or regulation that is specifically provided for on the *Law List Regulations*, and which is issued for the purposes of enabling a project to proceed in whole or in part.

On the basis of the decisions rendered to date by the Supreme Court of Canada with respect to similar provisions in the EARPGO, at least three conclusions may be drawn: where the federal authority proposes to carry out a project, provide financial assistance to a project, or dispose of federal lands for the purposes of enabling a project to be carried out in whole or in part, the federal authority can consider *all* adverse environmental effects likely to result from the project, *regardless* of the division of powers. In addition, the federal authority may impose *any* mitigation measures it considers necessary in the circumstances. For example, prior to issuing a cheque to a private-sector proponent for the purposes of enabling it to build an arena, the federal authority may require the proponent to undertake to mitigate any significant adverse environmental effects the project may cause on a nearby fish habitat (an area of federal jurisdiction), as well as any impact it may generate on wildlife (an area of provincial jurisdiction).

Where the federal authority proposes to exercise a power or perform a duty or function pursuant to a federal statute or regulation specifically provided for on the *Law List Regulations*, it is authorized to review *all* adverse environmental effects caused by the project. However, determining the level of significance of adverse environmental effects and the conditions a federal authority may attach to the issuance of a regulatory approval will be limited. The limits will include the head of federal jurisdiction the legislation relates to (which may vary depending on the type of action or approval the legislation authorizes) as well as other areas of federal jurisdiction and including areas of provincial jurisdiction that will likely affect the area of federal jurisdiction to be protected. For example, the Department of Fisheries and Oceans could issue an authorization pursuant to the *Fisheries Act* if it is of the opinion that all adverse environmental effects of the project on areas of federal jurisdiction (such as wildlife in a national park) are adequately dealt with. Effects on wildlife outside the national park, however,

would not normally be within its authority. The department could include conditions in the authorization to ensure that effects on wildlife were dealt with effectively and in a timely fashion — but only with respect to the national park and not adjacent territory. The department will only be able to consider those impacts in areas of provincial jurisdiction that in turn will affect an area of federal jurisdiction. It would be able to consider, for instance, the impact of the project on soil erosion in the adjacent territory (an area of provincial jurisdiction) if that erosion would have a negative impact on fish habitat. Again, the department could attach conditions in any *Fisheries Act* authorization to ensure that the erosion is eliminated or sufficiently reduced so as to effectively protect the fish habitat.

The responsible authority may also include, in considering the level of significance of the environmental effects of a project, factors that are relevant or connected to the exercise of the regulatory power, such as, any specific requirement provided

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for in the legislation that calls for the issuance of a permit, licence or authorization. These factors may also be considered in the terms and conditions of any permit, licence or authorization to be issued. An example is the *National Energy Board Act*<sup>14</sup> and related regulations that require that in considering an application for the export of hydro-electric power, the board review not only the adverse environmental effects of the proposed export, but also the likely adverse environmental effects of the related power plant.<sup>15</sup>

The net effect of the constitutional limits imposed on the exercise of a power or performance of a duty or function identified in the *Law List Regulations* is to reduce the scope of the legislation in a manner that is not apparent from the wording of the Act. For instance, the relatively broad definition of "environmental effect" in s. 2 of the Act may lead to incorrect assumptions. Before a responsible authority issues a permit, licence or authorization, it will be required to assess, mitigate and determine the level of significance on the basis of all adverse "environmental effects" the project is likely to cause — but *not* irrespective of whether such effects are in areas of federal or provincial jurisdictions. On the contrary, the choice of appropriate mitigation measures and corresponding level of significance of environmental effects may be a function of careful consideration of the division of powers, as well as the regulatory power that is to be applied.

### 1:30 BASIC PRINCIPLES

In order to apply the legislation correctly, it is also important to appreciate the principles of the legislation. There are four main principles to the Act.

#### 1:30.1 Self-assessment

The first is the self-assessment principle. Unlike other jurisdictions where one central agency is responsible for carrying out all required environmental assessments, a federal authority<sup>16</sup> that proposes to participate in a project is responsible to ensure an environmental assessment is done. As a result, any federal authority may at one time or another be required to ensure that an environmental assessment is carried out with respect to a project. This requires that there be common knowledge amongst federal authorities and some consistency in the manner in which federal authorities proceed. There may be circumstances where more than one department may be required to ensure that an

<sup>14</sup> R.S.C. 1985, c. N-7.

<sup>15</sup> *National Energy Board Electricity Regulations*, SOR/97-130.

<sup>16</sup> Section 2(1) of the Act limits "federal authorities" to the following:

- (a) a Minister of the Crown in right of Canada,
- (b) an agency of the Government of Canada, a parent Crown corporation, as defined in subsection 83(1) of the *Financial Administration Act*, or any other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs,
- (c) any department or departmental corporation set out in Schedule I or II to the *Financial Administration Act*, and
- (d) any other body that is prescribed pursuant to regulations made under paragraph 59(e) . . . ."