Submission

To: Expert Panel reviewing environmental assessment law

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Personal background and expertise in environmental assessment:

My first participation in an environmental assessment was in 1976 under the Environmental Assessment Review Process (EARP), pursuant to an Order in Council Guideline. The review was of the Wreck Cove Hydroelectric Project on Cape Breton Island.

Later, as part of a network of Canadian environmentalists, we urged the Canadian Environmental Advisory Council (CEAC) to replace the ambiguous guideline order with legislation, more approximating the stronger approach taken under the National Environmental Protection Act (NEPA) in the US. Terry Fenge was the key spokesperson in this effort and CEAC was convinced.

By 1986, I joined the staff of the office of the Minister of Environment, the Hon Tom McMillan. Having been in legal practice in Nova Scotia and in Ottawa with significant work in environmental law, I assumed the position of senior policy advisor. Work was already in process toward pursuing legislating environmental assessment. Ray Robinson was the key leader within the civil service. Together we took the proposal through Privy Council Machinery of Government approvals. I resigned on principle in 1988 over the issue of permits granted for the Rafferty and Alameda dams in Saskatchewan, without following the EARP guidelines process. That incident led to a leading case in which the Canadian Wildlife Federation successfully challenged the dam permits in federal court. It was established that the EARP guidelines order was, in fact, binding on the federal

government. That case only further propelled the argument for clearer legislated EA.

By the time the Canadian Environmental Assessment Act was presented for First Reading I was executive director of the Sierra Club of Canada. In that capacity, I participated in over a dozen critical environmental assessments (including Digby Quarry, Sydney Tar Ponds, Mackenzie Gas Pipeline, Shell Jackpine oil sands expansion, Canadian Resources oil sands, James Bay Great Whale project, NATO low-flights over Labrador, among others), as well as court actions to require compliance (including over the sale of nuclear reactors to the People's Republic of China without an EA, over aquaculture permits in St. Ann's Bay, Cape Breton, among others).

Between 1994 and 2006, I also worked on the EA caucus of the Canadian Environmental Network and on RAC panels in frequent public participation and review processes in the evolving development of the 1994 CEAA.

As a Member of Parliament, I was the first to identify the devastation of Canadian environmental laws in the 2012 spring omnibus budget bill C-38. Among the 400 amendments I proposed was a coherent environmental assessment act to repair at least some of the damage in C-38's repeal of CEAA. As an MP, I was also an intervenor in the National Energy Board Review of the Kinder Morgan Trans Mountain pipeline.

Having more than forty years' experience under different EA regimes in Canada, I feel qualified to offer "expert advice" to this expert panel. I deeply regret that my parliamentary commitments prevented me appearing in person to discuss these matters with you. My intention in providing this background is to set a context for forceful advice, without repeating much of what you have heard.

The starting point for your review:

Currently, Canada's environmental assessment process is entirely broken. It was never perfect, but C-38 in spring 2012 broke it in fundamental ways. To ignore that reality is to fail in providing honest advice to the current government.

Based on conversations with those in the current agency, as well as witnessing (at a distance) the agency's approach in specific cases, particularly approvals of

Woodfibre and Petronas, I am also afraid the agency itself is broken. The culture has changed from public service and dispassionate review of projects to a corporate concierge service speeding approvals, without adequate review.

Please resist agency advice "not to throw the baby out with the bathwater." The bathwater is toxic, and the agency that defends the new version of C-38 has become corrupted by the culture created over the last decade.

The Harper administration made changes to CEAA in advance of its repeal of the original act in 2012. The omnibus budget bill of 2010 rewrote the scoping sections of the act in response to the court decision in the Red Chris mine case. Those amendments removed any objective test of how a project was scoped for review. In its place the 2010 omnibus budget bill allowed the minister full discretion to scope the project.

While much has been claimed by pro-development forces as to the risk of duplicative EA processes, even the Canadian industry had concluded the newer versions of CEAA review had eliminated duplication as a concern. Prior to spring 2012, the act was working well in coordinating federal-provincial assessments.

C-38 did not modify or amend CEAA. It repealed it. Gone was the whole structure of the act and the spectrum from screenings, to comprehensive study assessments to Joint Panel Reviews. Gone was the substance of what an environmental review should cover. Section 5 or CEAA 2012 describes "environmental effects":

5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

- **(a)** a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:
  - **(i)** fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*,
  - **(ii)** aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,
  - **(iii)** migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and
  - **(iv)** any other component of the environment that is set out in Schedule 2;
- **(b)** a change that may be caused to the environment that would occur

- **(i)** on federal lands,
- **(ii)** in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or
- **(iii)** outside Canada; and

- **(c)** with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on
  - **(i)** health and socio-economic conditions,
  - **(ii)** physical and cultural heritage,
  - **(iii)** the current use of lands and resources for traditional purposes, or
  - **(iv)** any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

It is worth noting that Schedule 2 remains blank. Contrast that limited CEAA 2012 definition with what was repealed, from CEAA 1992:

environment means the components of the Earth, and includes

- **(a)** land, water and air, including all layers of the atmosphere,
- **(b)** all organic and inorganic matter and living organisms, and
- **(c)** the interacting natural systems that include components referred to in paragraphs (a) and (b); (*environnement*)

Also note that CEAA2012 makes no reference to socio-economic impacts or cultural heritage unless the impacts are limited to indigenous peoples. Whereas the original CEAA defined "environmental effects" more broadly, encompassing the concerns of communities for their natural environment as well as for socio-economic impacts:

environmental effect means, in respect of a project,

- **(a)** any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and
- **(b)** any change to the project that may be caused by the environment,

whether any such change occurs within or outside Canada.

As well as witnessing a dramatic reduction in the scope of reviews, the new CEAA 2012 slashed the "triggers" to prompt a required review. The following elements of Canadian environmental assessment were lost in the transition to CEAA 2012:

1) There is no longer a priority and fundamental principle encouraging public participation;
2) Tens of thousands of projects no longer receive even rudimentary screening;
3) Some industries receive EA (such as the mining industry) while others are able to duck any review;
4) Energy projects are given an entirely distinct and inconsistent review by different agencies that have never had EA responsibilities. There is no justification in public policy to treat energy projects differently than mining, forestry, highways, or any other development that triggers federal EA. The National Energy board, the Canadian Nuclear Safety commission, and the two Atlantic off-shore petroleum boards are wholly inappropriate review bodies;
5) The requirement under the original CEAA to ensure that alternatives were identified and that the need for the project be reviewed has been lost;
6) The described components of the environment remain an inadequate shell, such that the only review for environmental health relate through the one access point- indigenous peoples' need and use of such components. Schedule 2 of the CEAA 2012 remains blank and the definition excludes terrestrial ecosystems, mammals and birds, etc.
7) The potential for review of cumulative impacts has been eliminated;
8) The socio-economic impacts and impacts on community values is no longer included.

The time limits built into CEAA2012 also resulted in a significant breach in rights of intervenors to procedural fairness. These changes were not necessary in order to set time limits. The terms of reference for the review of the Sydney Tar Ponds clean up set out clear deadlines under the original CEAA.

Excluded from standing under CEAA2012 are members of the public and non-government organizations that cannot establish a direct impact.

As an intervenor in the National Energy Board review of the Kinder Morgan project, I can personally attest to the routine abuses of procedural fairness in the process. The fact that no cross-examination was permitted prevented the testing of evidence. Lacking oral cross-examination, intervenors were allowed to submit the written questions, but these questions were never answered by the experts or those who did studies and reviews, but by Trans Mountain's legal team. Nearly every intervenor complained that answers were non-responsive. But it is much worse than that. In essence, none of the witnesses were available to answer any question – whether orally or in writing.

Trans Mountain's claims that bitumen behaves just as ordinary crude in the marine environment is a critical, in fact, *the* critical, question for British Columbians. Trans Mountain based this claim on one study conducted in water tanks in Gainford Alberta. That one experiment ran for ten days. The Gainford study is contradicted by numerous and more rigorous studies. Unlike the Gainford ten day study, the evidence relied upon that bitumen forms oil balls that sink was tested through peer-review, as found in the study prepared by the Royal Society of Canada. However this study was not accepted by the NEB as it was published late in the process.

There are many other examples of weak to irrelevant "evidence" that was accepted by the National Energy Board. Under the previous process, intervenors would have been able to demonstrate the frailty of the proponents' claims through cross-examination.

The NEB also had no scope to examine socio-economic impacts. It refused to accept evidence from UNIFOR that the expansion of the pipeline would cause a reduction of employment, particularly threatening the Chevron refinery in Burnaby. The failure to examine alternatives and cost-benefit analyses by the NEB in the Trans Mountain review undermines the entire process.

As well, the agencies conducting reviews of energy projects have different levels of capacity and differing levels of finality in their reviews. Ironically, also due to C-38, the NEB Act was amended to give Cabinet decision-making authority and NEB "decisions" diminished to recommendations to Cabinet. However, decisions of the Canadian Nuclear Safety Commission and the Atlantic Canada off-shore petroleum boards are final.

The most inappropriate boards to conduct environmental reviews are the Canada-Nova Scotia Off-Shore Petroleum Board and the Canada-Newfoundland-Labrador Off-shore Petroleum Board. Both have a conflict of interest as they are mandated to expand oil and gas activity. The following is found in the federal-provincial accord with Nova Scotia:

"The parties shall …encourage interest holders to actively pursue the goal of early commercial oil and gas production …"

As well, both off-shore boards lack capacity. Decisions by both boards have been decried repeatedly in the Atlantic region by scientists, environmental groups and First Nations. If CEAA2012 is left in place, these boards have the ability to conduct EAs and approve projects in the sensitive Gulf of St. Lawrence and other critical marine eco-systems without any final approval from the federal minister.

As well, the reliance on delegating reviews to provincial processes has led to a serious weakening of reviews. The EA process in British Columbia is far weaker than the original CEAA. As proof of this I recommend the panel look at the proposed Taseko mine at Fish Lake. It easily cleared BC approval, but was rejected twice under the pre-2012 CEAA process.

The broken EA process is gaining ground as the *status quo*. Cuts in CEAA's budget were inevitable once screenings, cumulative reviews and most of the agency's core role were removed. It is critical that the process and budget be restored to its pre-2006 regime as quickly as possible. There was one improvement in CEAA2012 was to ensure review of commitments and conditions of approvals. Those can be transported to a revised act.

Looking forward from 2017

Once the damage wrought by C-38 is reversed, it is possible to improve the process. In the 1993 Red Book of the Liberal Party substantial improvements to CEAA were proposed. The Liberals under Jean Chretien pledged in the election campaign to get rid of industry self-assessment and to establish the Canadian Environmental Assessment Agency as a more independent CRTC-like agency. These promises were not fulfilled.

Ideally, now would be the time to address those historical weaknesses in CEAA. A more robust agency, with permanent commission members and the ability to develop an internal jurisprudence would better serve the public and proponents of projects. For example, the longest time lag under the old CEAA was in getting provincial appointments to federal-provincial joint review panels. With an established roster of commissioners, that time lag would be eliminated.

It is also worth using this opportunity to urge a comprehensive Environmental Bill of Rights for Canada.

Conclusion

I urge this panel to pull no punches. The destruction of the Canadian Environmental Assessment Act and the diminution of the agency over the last decade must be rectified. Our current system compares poorly against those of any other industrialized country and against those of many developing countries.

The unprecedented and indefensible system of energy projects being routed to a different regime must stop. The National Energy Board has no place in environmental reviews, and even less so should the CNSC or the off-shore petroleum boards be conducting reviews.

Even restoring the CEAA to its 1992 status would be a vast improvement. But in 2017, we should be able to modernize the process for better environmental protection in the context of enhanced socio-economic results.