OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: May 7, 2012

TO: OKT Blog

FROM: Judith Rae

RE: Canada's new *Canadian Environmental Assessment Act, 2012*

FILE NO: ---

In the budget bill (Bill C-38), the government of Canada will repeal the *Canadian Environmental Assessment Act* and replace it with new legislation, the *Canadian Environmental Assessment Act, 2012*.[1] The new Act takes a much narrower approach to environmental assessment ("EA").

Many First Nation leaders have spoken out against the new Act, including the Assembly of First Nations, those affected by the proposed Taseko "New Prosperity" mine, and those affected by the proposed Northern Gateway project.

The new Act contains many changes from the old (current) version. There are too many changes to provide a complete analysis here but, in general, the new system: has fewer assessments, narrower environmental considerations, less room for participation, is more rushed, and it makes decision-making more political. Here are some highlights (or low-lights, I suppose):

- **Fewer assessments**

Far fewer projects will be subject to an EA under the new Act. Three major changes will dramatically narrow the number of projects that will now have a federal EA.

First, only "designated projects" will be subject to an EA.[2] These are projects that have specific activities listed in the regulations or that are designated by a Ministerial order. It used to be that once you had a "trigger" for a federal EA (such as a federal approval, federal funding or federal lands), an EA was automatic.[3] Now, only projects listed or specially ordered will get an EA.

Second, some designated projects will avoid EA through "screening".[4] Under the old Act, screening was the simplest type of EA. Under the new Act, screening has an entirely different meaning. It is not a type of EA, it is a filtering function in which the Canadian Environmental Assessment Agency can decide that some designated projects do not need an EA. The basis for this decision is unclear, but it looks like it may involve determining whether there is a "possibility" of adverse environmental effects.[5]

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[1] All section references in this memo are to the new proposed Act, unless otherwise indicated.
[2] "Designated project" is defined in s. 2(1). "Designated projects" may be subject to an EA under s. 10(b) (screening), s. 13 (automatic in certain cases), or s. 14(1) (Ministerial order).
[3] The old Act had a broad definition of "project", and then fairly broad application of EA requirement under s. 5(1) of the old Act.
[4] Screening is set out in ss. 8-12.
[5] The "possibility" consideration is in s. 10(a)(ii).

One of the implications of the two changes above is that only major projects will be subject to an EA. Rather than do a simplified version of an EA for small and medium sized projects (as occurred under the old Act), these projects will have no EA at all. Another implication is that much more discretion is introduced about which projects will get an EA, even for major projects.

Third, new substitution and exemption clauses allow the Minister and federal Cabinet to deem other EAs (mainly provincial EAs) sufficient, and no further federal EA will be conducted. In a substitution, a provincial EA or an EA under certain Aboriginal jurisdictions (e.g. under a land claim treaty) may be approved by the Minister. On the basis of that approval, the outside EA is delivered to the federal decision-makers as though it were a federal EA.[6] In an exemption, Cabinet can decide that a provincial EA suffices to exempt the project entirely. In that case, the federal Act will not even apply, and there will be no federal EA decisions.

Substitution and exemption may sound good in theory, but the fact is that federal and provincial EAs have a mandate to consider different issues, and have different jurisdiction to follow up on those issues.[7] There are other ways to reduce overlap, such as joint reviews.

- **Narrower environmental considerations**

EAs consider a project's environmental effects. What do they look at? Under the old (current) Act, an "environmental effect" included "any change that the project may cause in the environment", in addition to the impacts of those changes on matters such as health, socio-economic conditions, cultural heritage, and traditional land uses.[8]

The new Act has much narrower definition of environmental effects. An environmental effect must now fit into one of these five categories:

1. A change to a specific component of the environment under federal legislation, i.e. fish under the *Fisheries Act*, aquatic species under the *Species at Risk Act*, migratory birds under the *Migratory Birds Convention Act, 1994*, or another component set out by Cabinet in a Schedule [9]

2. Only with respect to Aboriginal peoples, the impact of changes to the environment on health, socio-economic conditions, cultural heritage, traditional land uses, etc. [10]

3. Changes to the environment outside the main province (on federal lands, outside Canada, or in another province from the project location) [11]

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[6] Substitution is in ss. 32-36. A substitution can be made even where the other process (provincial or Aboriginal) has already been completed: s. 34(2).

[7] See especially the Supreme Court of Canada's ruling in *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 SCR 3. It held that the environment comes under both federal and provincial jurisdiction, and overlapping jurisdiction may be inevitable depending on the case: "[T]he environment… is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. … [F]ederal participation will be required if the project impinges on an area of federal jurisdiction as is the case here."

[8] See s. 2(1) of the old Act under "environmental effect".

[9] Section 5(1)(a).

[10] Section 5(1)(c).

[11] Section 5(1)(b).

4. Changes "directly linked or necessarily incidental" to a federal approval [12]

5. If a certain change is "directly linked or necessarily incidental" to a federal approval, the EA can also consider impacts of that particular change on health, socio-economic conditions, cultural heritage, etc. beyond those on Aboriginal people [13]

Instead of trying to understand the environment as a whole – interconnected, linked through complex living ecosystems – Canada is cutting up the environment up into little tiny categories. "We'll consider this piece, but not that piece."

In an Orwellian twist, Cabinet is also giving itself the power to "add or remove a component of the environment".[14] In other words, for whatever reason it chooses, the government could decide that water, or fish, or geese, or some other part of the environment, is simply removed from consideration in the EA.

- **Less room for participation**

An EA is a process in which society tries to make a complex decision in the public interest. If a private company want to build a mine for its own profit, and that project will have complicated costs and benefits for people and the environment over the short- and long-term, how we do weigh the issues and come to a decision? Hearing the voices of the public is an important part of EA process. Local residents (including members of First Nations), those interested in jobs, those concerned about risks for the environment – all have views that deserve to be taken into account.

An EA that hears all these voices may be able to serve a conflict resolution role – coming to a community consensus, more or less, or at least a transparent decision. The decision in the end may be better too, because it considered important and relevant issues that would not have otherwise been addressed.

The new Act will limit public participation in EA processes, especially for EAs with hearings.

Participation in the standard form of EA under the new Act (like a "comprehensive study" under the old Act) will not really change. The "public" must be provided "an opportunity to participate".[15] However participation under this type of EA remains very limited, because it only considers written comments. There are no hearings.

A review panel has hearings, but who gets to go? Any member of the public can submit "comments", but only an "interested party" can participate at the hearing.[16] An interested party is someone who can prove that they are either "directly affected" by the project, or can contribute special information or expertise.[17] The "directly affected" test comes from Alberta where it has

[12] Section 5(2)(a).
[13] Section 5(2)(b).
[14] Section 5(3).
[15] Section 24, and see also 25(2).
[16] Section 43(1)(d) and 43(1)(d)(ii).
[17] Section 2(2).

been very narrowly applied, excluding many concerned citizens. Even local residents have had to go to court to prove their right to be heard.

If the project is a pipeline (i.e. needs a certificate under the *National Energy Board Act*), only an "interested party" can participate in the EA in any form.[18] This seems targeted at restricting participation in the the Northern Gateway hearings and in future EAs that would consider pipelines from the oil sands.

First Nations and their members appear to be subject to these restrictive tests. A First Nation who can show that they stand to be potentially affected by the project (e.g. if a duty to consult is triggered, or there is some other impact) would probably be allowed to participate, but the need to prove this up front can be a real barrier to entry. For the individual members of a First Nation, meeting these tests and proving it up front could be even more difficult.

- **More rushed**

The new Act introduces time limits for all federal EAs.

The standard EA under the new Act is similar to the "comprehensive study" under the old Act. It will have a 365 day time limit between the notice of commencement and the Minister's decision, not including time the proponent spends on studies or collecting information. This is similar to rules that Canada had already implemented through regulations last year.[19] The time limit can be extended for 3 months by the Minister or longer by Cabinet, but it is not clear what happens if the limit expires in a standard EA.[20]

A review panel will have a time limit of 24 months,[21] not including time the proponent spends on studies or collecting information.[22] It can be extended for 3 months by the Minister or longer by Cabinet.[23] After the time limit expires, the EA is "terminated", and then the Canadian Environmental Assessment Agency will be required to complete the assessment "in accordance with directives provided by the Minister".[24]

Pipeline projects will not be subject to these time limits,[25] but will have time limits set out in amendments to the *National Energy Board Act*. (The Chair of the National Energy Board will set the time limit, which cannot exceed 15 months.)

In bringing forward the new legislation, the federal government has emphasized the imposition time limits. It says that EAs need to be more efficient and streamlined.

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[18] Section 28.
[19] Section 27(2) and (6). Under the old (current) Act, the *Establishing Timelines for Comprehensive Studies Regulations*, SOR/2011-139 also provided a 365 day timeline. It gave proponents a bit more legroom, because it also excluded time spent by the proponent "to complete the requirements of the environmental impact statement guidelines", and "any period requested in writing by the proponent", plus a 30-day period for the Agency to determine if the environment impact statement submitted by the proponent is complete.
[20] Section 27(3)-(5).
[21] Section 38(3).
[22] Section 48.
[23] Section 54(3)-(5).
[24] Section 49-50.
[25] Section 27(7).

Some EAs are timely, but it is true that some have taken a long time. It would have been logical to look at the reasons for delay in those cases, and addressed those reasons. But the cut-off approach is not going to solve any underlying problems. In particular, the fact that Canada has cut the budget of the Canadian Environmental Assessment Agency (which conducts most federal EAs) by 43% does not bode well for the capacity of that Agency to conduct EAs that are just as good but faster. Normally, if you want to do something faster, you need more resources, not less.

The result of doing things faster with less resources, and subject to arbitrary cut-offs, inevitably points to decisions being rushed through without enough information, consideration and analysis.

- **Decision-making is more political**

A number of changes in the Act increase the power and discretion of higher-ups in political office. Here are some examples:

- Cabinet will now make final decisions on energy projects, not the National Energy Board. Regardless of what the NEB says, Cabinet will decide whether pipeline projects go ahead.

- The decision to refer an EA to a review panel was always a Ministerial decision with some discretion. But it used to be that the decision had to be made on the basis of defined criteria – the potential for significant adverse environmental affects and the level of public concern.[26] Now, the Minister will make this decision on the basis of his or her opinion of the "public interest".[27] This term invokes very wide discretion, giving even less accountability for this decision than there was before.

- The responsible authority for a particular EA used to make a decision about whether the project was likely to cause significant adverse environmental effects, and if so, whether those effects can be justified in the circumstances. The responsible authority was on a tight leash – it might be the Canadian Environmental Assessment Agency or another federal agency or department, and it would need Cabinet approval before issuing its statement.[28] The new Act takes this one level further: it is clear that Cabinet (not an agency or department) is the only one to decide if significant impacts are "justified in the circumstances".[29] In other words, it is more clear than ever that political higher-ups have overriding authority to green light projects despite findings of significant adverse environmental effects during the EA.

Other discretionary decisions at the political level were highlighted in the sections above. These kinds of changes mean that EA decision-making is going to be more political, less objective, less knowledgeable about the subject matter, and less based on what actually happened during the EA. These are significant risks when decisions are made about developments whose impacts may be felt for generations to come.

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[26] See section 28 of the old (current) Act.
[27] Section 38(1).
[28] See section 37 of the old Act.
[29] Section 52(2).

Controversial approach to ongoing EAs

It is worth adding a final comment about the controversial approach the new Act takes to ongoing EAs. Typically, new rules do not have retroactive effect. This makes sense because people will have already invested in the old system for a given project, and will be counting on it. Pulling the rug out from under their feet, by changing the rules mid-way, does not seem fair.

Contrary to usual practice, the new Act will apply to ongoing review panels that were started under the old (current) Act.[30] It seems fairly obvious from federal statements that this is targeted at the Northern Gateway pipeline review, but it would affect other panels too.

Other types of EA under the old Act are subject to less unusual transition rules. Ongoing comprehensive studies will be completed under the old Act (unless the Minister decides otherwise or if the Minister refers to a review panel),[31] and screenings will need to be completed within one year.[32]

This document contains information and commentary, not legal advice.

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[30] Section 126.
[31] Section 125.
[32] Section 124.