

Failing Grade: New Federal Approach to Environmental Assessment Leaves Canadians at Risk and Without a Voice

Question: Does the federal omnibus Budget Bill make the grade on environmental assessment?

Answer: No, compared to a checklist of foundational criteria required for effective and principled environmental assessment of resource projects, the *Canadian Environmental Assessment Act 2012* (“CEAA 2012”) receives failing or incomplete grades in all areas.

Read the Report Card [here](#).

Our subject – Part 3 of the federal government’s omnibus Budget Bill C-38

Near midnight on June 18, 2012, Canada’s House of Commons gave third and final reading to Bill C-38, an omnibus “budget” bill that has been widely criticized as bad for nature, democracy, human rights and sustainable development.¹

Over 700 amendments were proposed to the 425-page Bill (grouped into 159 votes in the House in 23.5 straight hours). Despite this democratic marathon, the Bill passed as originally introduced.² It will bring significant changes to 70 Canadian laws. Part 3 of the Bill, titled “Responsible Resource Development” targets species at risk, fisheries, environmental protection, pipeline and energy projects, and environmental assessment, including the repeal of the previous environmental assessment act and replacing it with an entirely new, more politicized and less comprehensive law – CEAA 2012.

Our test – a principled approach

In February 2012, our co-authored paper, *Environmental Assessment Law for a Healthy, Secure and Sustainable Canada: A Checklist for Strong Environmental Laws*³ set out ten foundational criteria required for an effective and principled approach to environmental assessment of resource projects. Those principles are meant to ensure sound and democratic decisions, uphold the Canadian Constitution, and deliver lasting and sustainable benefits to all Canadians. To date, 58 diverse organizations⁴ across Canada have endorsed the Statement of Principles,⁵ representing scientists, physicians, lawyers, advocates for democracy and citizen groups.

¹ West Coast Environmental Law and Ecojustice Canada. May 2012. *What Bill C-38 means for the environment*. Available at: <http://wcel.org/resources/publication/what-bill-c-38-means-environment> and see envirolawsmatter.ca and blackoutspokeout.ca

² The vote was Division No. 445 on June 18, 2012. Yeas 158; Nays 135. See the following for a list of how each Member of Parliament voted: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=142&Parl=41&Ses=1&Language=E&Mode=1#T2250> and a list of the composition of MPs in the House here <http://www.parl.gc.ca/parlInfo/lists/PartyStandings.aspx?Menu=HOC-Representation&Section=03d93c58-f843-49b3-9653-84275c23f3fb>

³ West Coast Environmental Law, MiningWatch Canada, Ecovision Law, Green Action Centre. February 2012. *Environmental Assessment Law for a Healthy, Secure and Sustainable Canada: A Checklist for Strong Environmental Laws*. Available at: <http://wcel.org/resources/publication/checklist-for-strong-environmental-laws>

⁴ For a list of current endorsers, see: <http://www.envirolawsmatter.ca/endorsers>

⁵ The endorsed statement of principles is in English here: http://www.envirolawsmatter.ca/statement_of_principles and in French here: http://www.envirolawsmatter.ca/declaration_de_principes

Our grade – failing and incomplete

Now that Bill C-38 has been through the “parliamentary test” in the House of Commons, we have evaluated the changes to environmental assessment law and related environmental regulation in Part 3 against our *Checklist for Strong Environmental Laws* and asked: Does the federal omnibus Budget Bill make the grade on environmental assessment?

We give CEAA 2012, and related sections of Part 3 of the Bill, a failing grade on almost all accounts.

Where the new law does not get a failing grade we give it an incomplete – which is perhaps even more troubling, as there are still many unknowns and critical gaps as to how CEAA 2012 will be implemented. As enacted, and without supporting regulations and schedules, we have no way of knowing which projects or parts thereof will be assessed – we only know that the number of assessments will be dramatically reduced and there is increased opportunity for exceptions and exemptions in the new CEAA 2012 – leaving the health, safety and security of Canadians, our environment and our economy at risk.

The following is a breakdown of the ten principles for strong environmental laws and how CEAA 2012 measures up – or fails to:

1. Adopt sustainability as the core objective of environmental assessment (EA)

Why is this important? EA laws should be directed, at the core, to achieving specific and measurable sustainability goals and leaving a positive environmental and socio-economic legacy.

Does the Budget Bill⁶ measure up?

- Within the Budget Bill, CEAA 2012 narrows dramatically the “environmental effects” that must be assessed, including eliminating assessment of how environmental changes may impact on non-Aboriginal human health and socio-economic conditions in most circumstances. CEAA 2012 also empowers Cabinet to change what components of the environment receive protection under CEAA 2012 and decide if they are relevant for particular projects at any time.
- The anticipated elimination of environmental assessments for many projects by CEAA 2012 compounds the impacts of amendments weakening fish habitat protection found elsewhere in the Budget Bill.⁷
- Assessments are no longer required to consider “the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future” (i.e., sustainable development), although sustainable development is still mentioned in listed purposes of the CEAA 2012.
- There is an overall theme of prioritizing expedited short term resource development over the need to understand and work within the limits of ecosystems while respecting local communities, human health and long term economic sustainability.

⁶ In particular, we are referring to Part 3 of Budget Bill C-38 (*An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*). Full text available at:

<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5514128>

⁷ West Coast Environmental Law. June 2012. *Bill C-38 and Offloading Fisheries onto the Provinces*. Available at:

<http://wcel.org/resources/publication/bill-c-38-and-offloading-fisheries-provinces>

2. Strengthen public participation

Why is this important? An effective and inclusive EA process should have early and ongoing ways to meaningfully engage the public in assessments of proposed projects or policies, including demonstrated participation opportunities from the initial identification of the proposal through to monitoring. Meaningful engagement with the public also requires that funding is provided through an independent body for multi-faceted assistance to participants and on an early and ongoing basis.

Does the Budget Bill measure up?

- CEAA 2012 excludes concerned groups and citizens from the environmental assessment process for pipelines⁸ and review panel hearings for other projects unless they meet a narrow definition of ‘interested party.’⁹
- New, strict timelines for all kinds of EAs will mean that there will necessarily be less time for the public to understand and engage in the process, and to provide comment at the various stages of the assessment.
- A significantly reduced number of projects undergoing EA at all means the public will have less say in various types of resource or infrastructure projects that may have local significance.

3. Meaningfully involve Aboriginal governments as decision makers

Why is this important? An EA process should uphold Aboriginal and Treaty rights, including Aboriginal Title, with First Nations having a meaningful government-to-government role in decision making on resource development in their territories and in all aspects of environmental planning and assessment. Decisions should reflect the international legal standard of free, prior and informed consent.

Does the Budget Bill measure up?

- The Budget Bill does not include any substantive changes¹⁰ to address long-standing concerns First Nations peoples have had with EA.¹¹
- The Budget Bill limits the ability of the Crown to deal honourably with Aboriginal and Treaty rights by imposing rigid timelines that may not be adequate to permit meaningful consultation and accommodation as required by the Constitution. Timelines contained in CEAA 2012 do not acknowledge the complexity of some projects and the seriousness of their potential impacts on Aboriginal and Treaty Rights. The new CEAA 2012 also eliminates environmental assessments for many projects that *may* impact on Aboriginal and Treaty rights.
- First Nations have publicly stated that changes in Part 3 of the Bill will open the Crown to future risk due to its failure to consult on the potential impacts of the Bill on Aboriginal and Treaty rights.¹²

⁸ West Coast Environmental Law. June 2012. *Bill C-38, Kinder Morgan, Enbridge Northern Gateway Pipeline, Pipeline, Tankers*. Available at: <http://wcel.org/resources/publication/bill-c38-pipelines-how-budget-implementation-act-will-affect-enbridge-tankers>

⁹ West Coast Environmental Law. *Who is silenced under Canada's new environmental assessment act?* Available at: <http://wcel.org/resources/environmental-law-alert/who-silenced-under-canada%E2%80%99s-new-environmental-assessment-act>

¹⁰ There is an increase in funding for Aboriginal consultation, but our understanding is that this is to stay within the government, not be distributed to enable capacity of Aboriginal governments or communities to effectively engage in the EA process.

¹¹ See e.g., Assembly of First Nations, Submission to the House of Commons Standing Committee on the Environment and Sustainable Development Canadian Environmental Assessment Act Seven-year Review (2011). Available at: <http://www.afn.ca/uploads/files/parliamentary/ceaa.pdf>.

¹² See, for example:

4. Establish a legal framework for strategic environmental assessments to integrate sustainability considerations into government decisions and policies

Why is this important? Strategic EA should systematically integrate environmental considerations into government planning and decision making processes relating to proposed policies, plans and programs and there should be public records to demonstrate how this integration has been carried out and implemented.

Does the Budget Bill measure up?

- CEAA 2012 does not provide for strategic EA at all, either in a mandatory or optional manner.

5. Establish and implement a legal framework for regional environmental assessments (REAs) to enable a ‘big picture’ planning for truly responsible resource development

Why is this important? REAs undertaken ahead of industrial development, or a major expansion of development, should be carried out to help define the terms and requirements of subsequent project assessments as well as providing baseline data and analysis for subsequent assessments.

Does the Budget Bill measure up?

- CEAA 2012 provides the option for the Minister – by agreement with other jurisdictions such as a province – to have a committee undertake a regional study. This is only an option that the Minister has the sole discretion to exercise, there is no requirement that such a study be done and if it is done, there is no requirement for how, if at all, the findings are to be considered in subsequent decision making.

6. Require comprehensive, regional cumulative effects assessments in particular regions and across all resource sectors

Why is this important? Managing for sustainability will require the creation and implementation of a mechanism for comprehensive, regional cumulative effects assessments that takes into account the cumulative effects of multiple forms of resource development on valued ecosystem components, and legally integrates outcomes from these assessments into decision making.

Does the Budget Bill measure up?

- CEAA 2012 continues to approach EA on a project-by-project basis and offers no improvements to the current inadequate federal approach to cumulative effects assessment, which has been widely criticized.¹³
- CEAA 2012 will eliminate the assessment of thousands of smaller projects, creating a real risk that cumulative effects of multiple projects in an area will not be addressed.

(1) Assembly of First Nations submission to the Finance Subcommittee studying Part 3 of Bill C-38. June 2012. Available at: <http://www.afn.ca/uploads/files/parliamentary/c-38.pdf>

(2) Open Letter: Union of BC Indian Chiefs' Opposition to Bill C-38. June 2012. Available at: http://www.ubcic.bc.ca/News_Releases/UBCICNews06121201.html#axzz1yGmjYP9F

¹³ See e.g., P. Duinker and L. Greig. 2006. “The impotence of cumulative effects assessment in Canada: Ailments and ideas for redeployment.” *Environmental Management*, 37(2): 153-161.

7. Employ coordinated multijurisdictional assessment and avoid substitution to the provinces that creates regulatory inconsistency across the country

Why is this important? Effective EA should require that all provinces and territories negotiate, in serious consultation with Aboriginal governments, and execute harmonization agreements with the federal government that: allow for predictable sharing of EA responsibilities; follow the highest standards and best practices; and allow for efficient administration of the process among all affected levels of government and departments.

Does the Budget Bill measure up?

- CEAA 2012 provides for mandatory substitution of “appropriate” provincial processes for federal EAs at the request of a province, but does not, as of yet, ensure that there is any real national baseline standards.
- This will increase the potential for inconsistency between assessments conducted in different provinces, and introduces the very real risk that proposed projects may ‘fall through the jurisdictional gaps’ entirely.¹⁴

8. Ensure transparency of process and decision making, and facilitate access to information

Why is this important? For any EA process to be credible and transparent, all project information, including all studies and documents produced by the proponent, should be readily accessible online. The process by which decisions are made and the information that is taken into account should be transparent, open and accountable.¹⁵

Does the Budget Bill measure up?

- CEAA 2012 carries over the current online registry, allowing reasonable access to the information that the government chooses to require of the proponent, although information will no longer be available for the many projects that will now avoid assessment altogether.
- The Bill has many provisions that give authority to the Minister or to Cabinet to make decisions about which projects are assessed, how they are assessed, and if particular criteria should be set on a project-by-project basis. This means that many decisions are politicized and can be made out of the public sphere by Cabinet and the Minister alone.

9. Make EA procedures more fair, predictable, and accessible

Why is this important? Each type of EA should have predictable processes, actors, and procedures; but predictability of process must not be conflated with predictability of outcome. Even where simplified, each step in an EA should demonstrate how all information required to make the best decision, including

¹⁴ West Coast Environmental Law. June 2012. *Bill C-38 and Offloading Fisheries onto the Provinces*. Available at: <http://wcel.org/resources/publication/bill-c-38-and-offloading-fisheries-provinces>

¹⁵ In March 2011 the government of Canada joined the Open Government Partnership (OGP), which is an international effort to make governments more transparent, effective and accountable. Under the OGP the government of Canada has put forward an Action Plan, with commitments to achieve these goals, in three areas: open information, open data and open dialogue. Read more here: <http://www.opengovpartnership.org/countries/canada>
And see our submissions to the House of Commons Finance Subcommittee on how Part 3 of the Budget Bill does not align with these goals: <http://wcel.org/resources/publication/west-coast-submission-house-commons-finance-subcommittee-part-3-budget-bill-c->

that provided by Aboriginal peoples and the public, is being fully considered. An efficient EA regime should provide for clear rights of appeal for affected parties and for those with public interest standing.

Does the Budget Bill measure up?

- Currently there is no publicly available project list (or any other) regulation to accompany CEAA 2012, and thus there is no way to predict which projects or parts thereof will be assessed. There is an option built into the Act to exempt projects, creating additional uncertainty.
- The inclusion of strict timelines for assessments will not necessarily increase predictability of process because they do not apply to proponents, and may result in higher levels of conflict in the courts or otherwise that could cause unpredictable delay.
- A more onerous test for members of the public to participate in the process (see principle 2, above) impairs fairness and accessibility of the EA process.

10. Apply design principles throughout the EA process to ensure that focus and efficiency do not come at the expense of democratic and constitutional rights

Why is this important? A successful EA regime must be applied broadly and consistently, while ensuring particular reviews are focused and efficient. Any policy or proposed project that could inhibit progress toward sustainability goals or cause significant adverse environmental impacts must undergo an EA.

Does the Budget Bill measure up?

- The very design of the new CEAA 2012 has a strong potential to compromise the Crown's ability to meet its constitutional duties to Aboriginal peoples.¹⁶
- The process by which the Budget Bill has been drafted and presented to Canadians raises issues with respect to proper study, debate, and consultation on dramatic changes to legislation and introduction of entirely new legislation.¹⁷

Canadians want strong environmental laws to protect our communities, ecosystems, health, and economy. Environmental assessment, through which potential impacts of proposed projects and plans are assessed before harm is done, is an essential tool to maintain a healthy, secure and sustainable Canada.

CEAA 2012 does not respond to these Canadian values. Instead, CEAA 2012 takes a highly politicized, reckless approach to values that Canadian hold dear. This is a step that we fear will have lasting negative consequences for our nation.



West Coast Environmental Law Association is grateful for the generous support of the Law Foundation of British Columbia for our environmental assessment work.
The views expressed in this paper are those of the authors.

¹⁶ See footnote 11, above.

¹⁷ West Coast Environmental Law. May 2012. *Submission to House of Commons Finance Subcommittee on Part 3 of Budget Bill C-38*. Available at: <http://wcel.org/resources/publication/west-coast-submission-house-commons-finance-subcommittee-part-3-budget-bill-c-38> ; and West Coast Environmental Law. June 2012. *Submission to the Standing Senate Committee on Energy, the Environment and Natural Resources regarding Budget Bill C-38*. Available at: <http://wcel.org/resources/publication/west-coast-submission-standing-senate-committee-energy-environment-and-natural>