

2.0 Regulatory Mandates

Table 3 summarizes the primary legislative instruments pertaining to cumulative effects in 13 Canadian jurisdictions.

Table 3: Legislative Instruments Pertaining to CEA in 13 Canadian Jurisdictions

| Jurisdiction | Legislative Instruments | CEA Provisions |
|------------------|--|---|
| Federal | <i>Canadian Environmental Assessment Act</i> Section 16(1)(a) | Every screening or comprehensive study shall include a consideration of any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out. |
| British Columbia | <i>Environmental Assessment Act</i> Section 22(j) Environmental Assessment Guide <i>Section 5.3</i> <i>Section 5.4</i> | A project report must include data necessary or useful to enable the assessment of the probable cumulative effects of the project. The impact assessment, guided by the project report specifications, must provide any information or analysis requested on cumulative effects. Data on cumulative impacts may include consideration of trends in characteristics and conditions, and additive effects of the project in relation to other development activities. |
| Alberta | <i>Environmental Protection and Enhancement Act</i> Section 47(d) | An environmental impact assessment report shall include a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative considerations. |
| Saskatchewan | <i>Environmental Assessment Act</i> Draft Guidelines re environmental impact statements re hog operations, etc. <i>Section 5.0</i> | None In an environmental impact statement, long-term and cumulative effects should be considered. |

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|--------------|--|---|
| Manitoba | <p><i>Manitoba Environment Act</i></p> <p>EIA Guidelines <i>Section D</i></p> | <p>None</p> <p>Cumulative and long-term effects of the proposed action which either significantly reduce or enhance the state of the environment should be described.</p> |
| Ontario | <p><i>Environmental Assessment Act</i></p> <p>1989 Interim Guidelines on Environmental Assessment and Planning Approvals <i>Section 3.6(b)</i></p> | <p>None</p> <p>In addition to the direct effects of implementing a particular alternative, wherever reasonable proponents should also identify and evaluate the indirect and cumulative effects of alternatives.</p> |
| Quebec | <p><i>Environment Quality Act</i></p> <p>Regulation Respecting Environmental Impact Assessment and Review (applies to southern Quebec) <i>Sections 3(b) and (c)</i></p> <p>Regulation Respecting the Environmental and Social Impact Assessment and Review Procedure Applicable to the Territory of James Bay and Northern Quebec <i>Sections 5 (b), (c) and (d)</i></p> | <p>None</p> <p>An environmental impact assessment may include a list and evaluation of positive, negative and residual impacts of the project on the environment, including indirect, cumulative, latent and irreversible effects on aspects of the environment which could be affected by the project, such as fauna, flora, human communities, the cultural, archaeological and historical heritage of the area, agricultural resources and the use made of resources of the area.</p> <p>Any environmental and social impact statement must include the evaluation of the impact, including direct, indirect, cumulative, long and short term, reversible and irreversible, local, regional and national effects, which the project is likely to have on the environment and the social milieu (both of which are defined in detail) at various stages of the carrying out of the project.</p> |

| Jurisdiction | Legislative Instruments | CEA Provisions |
|-----------------------|--|----------------|
| New Brunswick | <i>Clean Environment Act</i> | none |
| | Environmental Impact Assessment Regulation | none |
| | Environmental Impact Assessment Guidelines | none |
| Prince Edward Island | <i>Environmental Protection Act</i> | none |
| Nova Scotia | <i>Environment Act</i> | none |
| | Environmental Assessment Regulations | none |
| Newfoundland | <i>Environmental Assessment Act</i> | none |
| | Environmental Assessment Regulations | none |
| Yukon Territory | <i>Environment Act</i> | none |
| Northwest Territories | <i>Environmental Protection Act</i> | none |

Protection of the public and the public interest is the primary, some would say the only, role of government. Naturally, defining the public interest is rarely a simple exercise. There are, in fact, many competing interests in many different sectors, and protecting the public interest is a matter of weighing these competing interests to achieve a balance which is as favourable as possible overall. Environmental protection is a particularly difficult balancing act, given that government must protect the public interest in both economic development and a healthy environment.

In a democratic society, government is required to legitimate its exercise of power by functioning in accordance with statutes duly enacted by an elected assembly. Provided it operates within the scope of its broad legislative mandate, government may choose to discharge its responsibilities as it sees fit, although in practice contemporary governments take public opinion (especially that of interested and affected stakeholders) into account when making policy and operational decisions. The current organization of government in Alberta, for example, reflects public priorities which have evolved over time. The Department of Environmental Protection did not exist prior to the 1970s, when a new government responded to public concern about unchecked environmental degradation throughout the western world, and the Department of Consumer and Corporate Affairs was disbanded in the mid-1990s when public concern over consumer issues had diminished.

Government may delegate but not abdicate its responsibilities. Again, formal delegation, whether to individuals or organizations, is typically authorized by statutory instrument. History has resulted in the devolution of parts of governments' regulatory roles to a number of arms' length, quasi-judicial tribunals set up to review applications and grant approvals for various activities. For example, the Energy and Utilities Board (EUB) is Alberta's primary regulatory agency for the energy industry. The Board's roots go back to the 1930s, when the Oil and Gas Conservation Board was spun out of the Public Utilities Board to ensure efficient development of petroleum resources, the ownership of which had just been granted to the provinces. The Public Utilities Board itself had originated in 1915 from a government effort to protect the public from unscrupulous and fraudulent railway developers and was modeled in part on the Texas Railway Commission. The National Energy Board was constituted in 1959 following an extended public debate over Canadian ownership of energy resources and the desire to build pipelines across Canada to carry oil and gas from the west to major consumer markets in central Canada. A proposal to create the Natural Resources Conservation Board (NRCB) received considerable impetus when the public vigorously voiced its opposition to accelerated exploitation of Alberta's forestry resources, focusing particularly on AIPac's request for various permits with respect to its Athabasca pulp mill.

Government may not abdicate its responsibility, at least not without impunity. However it may decide that its mandate has been sufficiently met as a result of others' activities. In some cases in which they have the discretion to decide, for example, the Canadian Environmental Assessment Agency or the Department of Fisheries and Oceans choose not to launch their own formal assessment proceedings, even if their jurisdiction has been triggered, because other proceedings are deemed to address the environmental issues adequately. In the context of environmental impact assessments, the federal and provincial governments have now signed an agreement to ensure that their respective assessment regimes do not result in undue overlap or duplication.

There are some distinctions between AEP's role and that of its federal counterpart, mostly arising from the constitutional division of powers. Pursuant to the *Constitution Act, 1867*, environmental matters generally fall within provincial jurisdiction. A 1982 constitutional amendment granted exclusive jurisdiction to the provinces in relation to exploration for, development, conservation and management of non-renewable natural resources and development, conservation and management of sites and facilities for the generation and production of electrical energy. The federal government exercises jurisdiction over the environment in some cases, however, through its powers over sea coast and inland fisheries and its residual power to "make laws for the peace, order, and good government of Canada." This power covers such issues as interprovincial and other transboundary pollution, and environmental matters that are of national concern, such as marine pollution. The federal duty to ensure an adequate environmental assessment is undertaken arises when some aspect of federal jurisdiction is brought into play — for example, where a federal statute such as the Fisheries Act applies to an activity, or where the federal government is providing some sort of financial support to the activity.

In Alberta, government's responsibility for environmental management has been assigned to more than one authority, including AEP, EUB and NRCB.

The broadest stewardship role falls to AEP. The Minister of Environmental Protection has environmental responsibilities under several acts, including the *Environmental Protection and Enhancement Act* (EPEA), the *Public Lands Act*, the *Forests Act*, the *Fisheries Act*, three *Parks Acts*, the *Water Resources Act* and the *Wildlife Act*. EPEA requires the Minister to develop ambient environmental quality objectives, report annually on the state of the environment in the province, and to administer Division 1 of Part 2 which sets out the procedure to be followed with respect to the environmental assessment of certain activities listed in the schedule. AEP has a legal responsibility to ensure that all activities listed in the schedule are assessed at the level required by the Act and the Regulations.

Both the EUB and the NRCB have also been charged with environmental responsibilities. The *Energy Resources Conservation Act* requires the EUB "to control pollution and ensure environmental conservation" in the development of energy resources. In addition, the Board is required to "give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment." The same requirement is found in the purpose clause of the *Natural Resources Conservation Board Act*. The NRCB is charged with reviewing and licensing a variety of non-energy projects, including forest industry projects, recreational or tourism projects, metallic or industrial mineral projects and water management projects. The EUB has been authorized to make final decisions with respect to many proposed projects, but for major developments such as electrical generating plants it acts in an advisory capacity making recommendations to government. The NRCB has been authorized only to make recommendations to government.

Because the Boards have been constituted as quasi-judicial tribunals, they are free to decide for themselves both what environmental effects will satisfy the public interest test and what evidence the tribunal will need to make its decision. The EUB in part relies on AEP's opinion of an applicant's environmental impact statement, although its panel members make their own decision, and necessarily take the views put forward by or on behalf of the applicant and intervener into account. The NRCB relies more on its own panel members to make the decision. The different approaches owe much to the circumstances in which the two tribunals originated and to the expertise of the individuals appointed to the boards. The EUB grew out of the Oil and Gas Conservation Board; environmental issues were not a paramount concern in the 1930s and did not become so until some 40 years later; and most board members are still selected for their energy, engineering and legal knowledge and experience. The NRCB, on the other hand, was conceived primarily for environmental considerations and its members are selected for their environmental and regulatory knowledge and experience. Both Boards rely on EIAs as key components of the applications they review.

The National Energy Board (NEB) regulates interprovincial and international pipelines and transmission lines pursuant to the federal government's power to regulate trade and commerce. Although the NEB is subject to the *Canadian Environmental Assessment Act*, there is little in the Board's constituting statute, the *National Energy Board Act*, which explicitly requires it to protect the environment. However, the Board is specifically authorized to make regulations and designate inspection officers for the purpose of protecting the environment, and an inspection officer may order any measure, including suspension of work, to protect the environment when necessary. The criteria applied by the NEB in deciding whether transmission lines should be designated as international power lines, and thus under its jurisdiction, also include a reference to environmental impacts and the Board considers environmental impacts with respect to proposed electricity exports.

The NEB acts in an advisory capacity to the federal government when deciding whether a pipeline is required by "present and future public convenience and necessity" and is obliged to consider a number of factors in making its decision. Four of the five factors focus on economic feasibility and commodity reserve adequacy. The fifth relates to "any public interest that in the Board's opinion may be affected" by its decision (section 52). Because the Board has been constituted as a quasi-judicial tribunal, it is free to decide for itself both what will satisfy the public interest test and what evidence the tribunal will need to make its decision. The Board has chosen to interpret public interest to include environmental protection. It relies on the provisions of the *Canadian Environmental Assessment Act* to govern its procedures in this regard, and convenes joint panels to review and consider applications having a significant environmental component. Like the EUB, this approach owes much to the circumstances in which the NEB originated and to the expertise of the individuals appointed to sit on the Board.

Several Canadian jurisdictions have not included specific CEA provisions in their environmental legislation. The Institute contacted representatives in three such jurisdictions - Saskatchewan, Ontario and New Brunswick - to discuss their approach to current assessment practices.

Overall, the Saskatchewan Environmental and Resource Management Department tends to focus on regional developmental impacts and sustainability. Regulators have found cumulative effects assessments to be useful when gathering an overview of how environmental effects overlap on issues such as the large-scale development of several uranium mines. A cumulative effects monitoring program has been developed for uranium mines and is considered to be a practical application of CEA, using information from various EIAs to design the program which will determine if and when cumulative effects are occurring. Although Saskatchewan has not mandated CEA in its *Environmental Assessment Act*, in practice cumulative effects assessments are often conducted to support applications involving large projects or several projects in one region. Generally speaking, proponents are asked to consider additional or marginal effects of their projects using current environmental conditions as the baseline, but are not asked to include other proposed projects. With respect to applications involving smaller projects such as oil and gas wells, regulators will sometimes look at cumulative impacts if the marginal impact is close to tipping the scale and causing significant effects in a region. Regulators are considering "class assessments," which they are currently discussing with stakeholders.

The Ontario Ministry of the Environment and Energy (MOEE) introduced a new statute, the *Environmental Assessment Act*, in January 1997. The *Act* stipulates that EIAs must focus on "net environmental effects," which will shift the emphasis from a planning perspective to a consideration of broader environmental effects. Although regulators and practitioners are still in transition and have not formally begun practicing this approach, it has been applied in at least one case involving a new marina proposed for the Windsor region. The proponent was required to look at the effects of all other marinas within a catchment area and to contact the city of Detroit for additional information. MOEE has also introduced a new mechanism for determining terms of reference. Essentially, the process provides an early step during which proponents identify their proposed undertaking, other review agencies and interested parties raise their concerns and MOEE then follows up on the concerns. Formal cumulative effects assessments are required by Ontario's 1989 Interim Guidelines on Environmental Assessment and Planning Approvals, which are technically still active, and by federal legislation, which is applied in cases involving joint provincial and federal jurisdiction. A bilateral agreement between Ontario and Canada will also deal with CEA.

New Brunswick has apparently considered changing its legislation to include a requirement for cumulative effects assessments. However, a representative of the Environmental Impact Assessment Section, Environmental Planning and Sciences Branch in the Department of the Environment indicated that provincial regulators want to be sure they can prescribe something practical and not something that opens the door to too many challenges. Proponents in several recent proceedings which required a full EIA were required to provide a CEA component, notably with respect to an expansion of the TransCanada highway.

Overall, New Brunswick considers cumulative effects to be more useful for making broad government policy decisions related to land use than for making decisions related to individual projects. The work Parks Canada has done in connection with the Fundy National Park was cited as an example of good current practice.