

Hazardous Waste

Environmental Assessment and Mining
A Submission to the *Canadian Environmental Assessment Act*

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Five-Year Review Process
CIELAP Brief 1/00

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Executive Summary

This paper deals with the issue of the environmental assessment of mining projects, in the context of the five-year review of the *Canadian Environmental Assessment Act* (CEAA). The paper finds that claims of "duplication" with respect to the provincial and federal environmental assessments of mining undertakings lack strong empirical foundations. Furthermore, the paper argues that the litigation that has accompanied the environmental assessment of certain mining projects has been a result of failures by governments to implement CEAA properly, rather than flaws in the legislation itself.

The importance of a strong federal role in the environmental assessment of major mining projects is emphasized, including the possibility of independent federal assessments where appropriate arrangements cannot be reached with a provincial or territorial government.

Proposals for the inclusion of a "privative" clause in CEAA, as advanced by the mining industry, are not supported. Rather the paper stresses the need to focus on the effective implementation of the Act.

1. Introduction

The environment matters more than ever before. Human activities are altering natural cycles and systems on an unprecedented scale. For the first time, the cumulative effects of development activities are estimated to be on par with biophysical processes as an agent of ecological change.

Environmental assessment is a process for providing decision-makers with information about the possible environmental implications of a proposed project or policy, thereby allowing for the better integration of environmental, social, cultural, and economic considerations into development proposals. It is a "public legal process to 'look before you leap'—to weigh the merit of human activity against its potential harm to the environment".

In order to "help promote a healthy environment and economy through sustainable development", the Government of Canada proclaimed the *Canadian Environmental Assessment Act* (CEAA) in January of 1995. Section 72(1) of the Act provides that "[f]ive years after the coming into force of this section, a comprehensive review of the provisions and operation of this Act shall be undertaken by the Minister". This review process is currently underway, and it provides stakeholders with an important chance to work together to improve the federal environmental assessment process.

CEAA replaced the *Environmental Assessment and Review Process Guidelines Order* (EARPGO), which had been established by Cabinet in 1984. Although this Cabinet directive was originally assumed to be non-binding, two important decisions of the Federal Court of Canada—the decisions in the Rafferty-Alameda and Oldman River Dam cases—found it to have the force of law. The Rafferty-Alameda decision "opened the door for more than 70 similar legal actions across the country by environmentalists, First Nations, and local communities". Many of these applicants were successful in demonstrating the government's failure to comply with EARPGO, and this flood of litigation was an important impetus for change. The enactment of CEAA was perhaps the most important direct effect of the Rafferty-Alameda and Oldman decisions.

With the passage of CEAA, the federal government committed itself to a legally binding environmental assessment regime. For the first time, "the obligations of federal departments and agencies to conduct environmental assessments of projects involving the federal government were enshrined in legislation". Although it is generally agreed that CEAA is an improvement over EARPGO, the new Act is not without its difficulties. Several important judicial review decisions have already provided clarification and direction on provisions of the Act, among them the Sunpine, Voisey's Bay, and Cheviot decisions.

This report aims to contribute to the Five Year Review of CEAA by demonstrating the crucial importance of both maintaining a strong federal role in the environmental assessment process and preserving access to the courts. These issues will be discussed with particular reference to the mining industry, a sector that warrants special examination for several reasons. Firstly, given the enormous environmental impacts of mining projects, comprehensive and effective environmental assessments are particularly important in this sector. Secondly, the mining industry has been an aggressive advocate of industry interests with respect to the federal environmental assessment regime, and it is important that there be a balanced presentation of views. Lastly, industry representatives have heavily criticized the role of the courts in reviewing decisions under CEAA. This position fails to recognize that, although court cases can

be both time-consuming and expensive, "they are often the last resort to ensure that government departments do the environmental assessments they are required to do". This report aims to demonstrate that litigation related to CEAA is often indicative of inadequate implementation and enforcement of the legislation.

This report will begin with a brief discussion of the environmental impacts of the mining industry in Canada, the application of CEAA to the industry, and the influence that the industry has had on regulators. The report will then respond to two arguments made by industry representatives in an effort to demonstrate that they are red herrings and, if accepted, will result in a relaxation of environmental assessment standards. In a push for greater efficiency and certainty in the environmental assessment process, mining industry representatives have argued both for the elimination of federal-provincial regulatory duplication through 'harmonization' and for the insertion of a privative clause into CEAA in order to severely restrict legal challenges. However, the problems of duplication and litigation have been overstated, and the solutions proposed by industry threaten to weaken not only the federal role in environmental assessment, but also the ability of the assessment regime to ensure environmental protection. National interest demands that the "federal government should play a strong role in assessing the environmental affects of projects over which it has decision-making responsibility", and access to the courts will ensure the public a measure of accountability.

2. CEAA and the Mining Industry

2.1 The Environmental Impacts of the Mining Industry

Undoubtedly, the mining industry is a major contributor to Canada's economy and industry leaders have stressed this in their demands for a more efficient regulatory process. In the words of the Chairman of the Mining Association of Canada, "[t]he future contribution of mining to the Canadian economy depends, in large part, on government's involvement in creating an attractive, certain, and stable policy environment to ensure that mining continues to work for Canada".

However, "[a]ny discussion of the environmental regulatory regime for the mining sector must begin with a recognition of the enormity of the sector's impacts on the environment". Major environmental effects are associated with each step in the metal mining process, as summarized in the table below:

Step in Process	Environmental Impacts May Include:
Excavation and Ore Removal	<ul style="list-style-type: none"> ~ the destruction of plant, animal and fish habitat, human settlements, and other surface features (surface mining); ~ land subsidence (underground mining); ~ increased erosion, and the silting of lakes and streams, resulting in the destruction of fish habitat; ~ waste generation (disposal of overburden); ~ acid mine drainage (if ore or overburden contain sulphur Compounds); and ~ metal contamination of lakes, streams and groundwater.

Ore Concentration	~ waste generation (tailings); ~ organic chemical contamination (tailings often contain residues of chemicals used in concentrators); ~ acid drainage (if ore contains sulphur compounds); and ~ metal contamination of lakes, streams and groundwater.
Smelting/Refining	~ air pollution, including emissions of sulphur dioxide, arsenic, lead, cadmium, mercury, and other toxic Substances; ~ waste generation (slag); and ~ the impacts of producing energy used in smelting and refining operations, such as the environmental effects of hydro-electric dams, and of fossil fuel extraction and use.

Compiled from Muldoon & Winfield.

The enormous negative impacts the mining industry has on the environment must be taken into consideration when environmental regulatory requirements are under review. In the context of this Five Year Review of CEAA, it is imperative that the quest for a more 'efficient' and 'certain' process does not become the dominant focus at the expense of ensuring the quality of federal environmental assessments. Comprehensive environmental assessments of mining undertakings are essential to informed and integrated environmental, economic, and social decision-making with respect to such projects.

2.2 The Application of CEAA to the Mining Industry

CEAA applies to projects for which the federal government has a decision-making authority, whether as a proponent, land manager, source of funding, or as a regulator. 'Project' is defined in s.2(1) of the Act as:

- a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or
- b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to the regulations made under paragraph 59 (b).

CEAA has four enabling regulations, developed to identify those types of projects required to undergo an environmental assessment under the Act. As described in the Canadian Environmental Assessment Agency's discussion paper, the regulations are as follows:

1. *Law List Regulations* list the federal permits, licences and approvals that trigger the need for an environmental assessment under the Act.
2. *Inclusion List Regulations* identify those physical activities not related to physical works that are defined as a project under the Act and that require an environmental assessment...
3. *Comprehensive Study List Regulations* list those types of projects requiring a comprehensive study, typically large or complex projects that are more likely to cause significant adverse environmental effects...
4. *Exclusion List Regulations* identify the types of projects not requiring an environmental assessment under the Act, because they are considered to have insignificant effects on the

environment....

In the case of mining projects, CEAA is most often triggered under the *Law List Regulations*, when aspects of a mine's operations will require a federal permit under the *Fisheries Act* or the *Navigable Waters Protection Act*. Pursuant to s.5 of CEAA, an environmental assessment is required prior to the federal approval being issued.

CEAA establishes a number of environmental assessment types. From least to most intensive, an environmental assessment can take the form of a screening, comprehensive study, or review by an independent panel or mediator appointed by the Minister of the Environment. CEAA provides a two-stage environmental assessment process: (1) self-directed assessment (which applies to screenings and comprehensive studies) and, where self-directed assessment raises outstanding issues, (2) public review.

Pursuant to s.16(1) of CEAA, all assessments must include a consideration of the environmental effects of the project (including cumulative effects), the significance of these effects, any comments received from the public, mitigation measures that are technically and economically feasible, and other matters deemed relevant by the 'responsible authority' or Minister, such as the need for and alternatives to the project. Further, s.16(2) provides that comprehensive studies, panel reviews and mediations must consider the purpose of the project, alternative means of carrying out the project that are technically and economically feasible (as well as their environmental effects), the need for and requirements of any follow-up program, and the effects of the project on the capacity of renewable resources to meet present and future needs. CEAA assigns the responsibility for carrying out the environmental assessment to the 'responsible authority' that must make a federal decision on the project. All legally binding decisions under CEAA are made by federal ministers or the federal cabinet, and thus there is no guarantee of independent decision-making.

To date, "of the hundreds of mine projects in Canada that have come under CEAA, only two—the Cardinal River Coal Cheviot Mine and the Voisey's Bay mine—have been subject to a Panel Review. Less than 20 have been subject to a comprehensive study". As the Canadian Institute for Environmental Law and Policy (CIELAP) has elucidated, these numbers do not necessarily shed light on the adequacy of the level of assessment in evaluating the potential environmental impacts of a given mining project, but are worth keeping in mind "when evaluating industry claims of 'regulatory burden' imposed by the federal Environmental Assessment Act".

2.3 The Influence of the Mining Industry

The legal regime pertaining to environmental protection and mining law in Canada is under a great deal of stress. As CIELAP has asserted, government and industry put one kind of stress on the legal regime,

advocating less regulation, reduced monitoring and enforcement, restricted public participation, exemptions from liability and weaker protection for Canada's wilderness. These pressures exist both directly, through demands for changes to regulations and policies affecting the industry, and indirectly, as a result of reductions to the budgets and capacities of regulator agencies.

Environmental advocacy groups, grassroots, and aboriginal groups, however, push in the other direction, arguing for

more public and community participation, better environmental protection, greater industry liability for environmental damage, stronger regulation, enhanced conservation of wilderness and biodiversity and an emphasis on changing consumption patterns to reduce demand for virgin materials.

Concerns with the environmental assessment process are similarly polarized, often breaking down along proponent vs. opponent lines.

The mining industry in Canada is "well-established with an organized network of well-funded national and provincial industry associations". Further, it "has been aggressive in its use of threats to move investments away from jurisdictions which it regards as imposing overly stringent environmental standards or requirements". Industry representatives have made clear that for the past two years, "the Canadian mining industry has been in a state of economic malaise" and their concerns with the current assessment regime center around maintaining competitiveness in the global market. The industry thus complains of overlapping jurisdictions and bureaucracies, delay (including the slow resolution of Aboriginal land claims), and an inconsistent environmental assessment process. Consequently, the mining sector champions the need for a 'single regulatory window' (to avoid duplication in federal and provincial processes), an efficient process, and regulatory stability.

Industry submissions have had a powerful influence on regulators, and the industry perspective is well-reflected in reports from both the House of Commons Standing Committee on Natural Resources and the federal government. In its 1994 report *Lifting Canadian Mining Off the Rocks*, the Standing Committee on Natural Resources asserted that "Canada needs to remove existing structural impediments to the achievement of a sound mineral investment climate" and identified these impediments as "the tax burden on industry, particularly that imposed by non-profit taxes; the inefficiencies of the current environmental regulatory regime; and the uncertainty surrounding land use policies and security of mineral title". In its 1995 report *Streamlining Environmental Regulation for the Mining Industry: An Interim Report*, this same Committee stated that it was 'troubling' that much of the regulatory reform effort continues "to lag behind the expectations of industry". Further, it stated that "above all else, governments have to make sure that environmental assessment processes do not discourage investment in the mining sector"(emphasis added). The Committee's final *Streamlining* report, tabled in November 1996, repeated this statement, and was similarly influenced by industry submissions. Its recommendations included "timelines for the granting of approvals for mining operations; limiting the consideration of the cumulative effects of mining operations in environmental assessments; devolution of federal environmental assessment and other regulatory responsibilities to the provinces; a review of the impact of environmental assessment requirements on competitiveness; and the review of the 'no net loss' policy regarding the protection of fish habitat under the federal *Fisheries Act*. The government accepted the bulk of these recommendations in its March 1997 response to the Committee's report".

Ironically, *Lifting Canadian Mining Off the Rocks* asserted that "[g]overnments must strike a much more realistic balance between environmental considerations and the economic viability of the industry" and meant that regulatory reform should further address industry concerns. If a realistic 'balance' is the goal, however, it is environmental concerns that require greater attention.

Although each of the aforementioned reports maintained that it was not proposing any downgrading or weakening of environmental standards, none devoted much time to seriously exploring perspectives other than those in line with industry goals. If the government's commitment to sustainable development is to be taken seriously, then the goal of ecological sustainability must weigh at least as heavily in both the theory and practice of environmental assessment as the concern for maintaining industry competitiveness.

3. Duplication: The First Red Herring

3.1 The Harmonization Initiative

In the constitutional framework of Canada, the provinces and the federal government share jurisdiction over the environment, and thus "share responsibility for environmental management, including assessment". The potential for overlap between federal and provincial environmental assessment processes has been among the principle complaints of industry and "a significant source of federal-provincial conflict since the passage of the CEAA". The general concern is one of a project proponent facing regulatory duplication or overlap, which occurs when different environmental assessment laws or processes impose duplicative, overlapping, or inconsistent requirements on the proponents of development projects. Proponents claim that the consequent delays, added work, and increased cost decreases industry competitiveness in the global market. The mining industry has been very active in lobbying the federal and provincial governments to 'harmonize' their environmental assessment processes, and the Canadian Environmental Assessment Agency's discussion paper devoted a significant amount of space to this issue.

In order to address the issue of federal-provincial duplication and overlap, the Canadian Council of Ministers of the Environment (CCME) adopted the *Canada-Wide Accord on Environmental Harmonization and the Sub-Agreement on Environmental Assessment* in January of 1998. This Sub-Agreement is intended to promote "the effective application of environmental assessment when two or more governments are required, by law, to assess the same proposed project", and will be implemented through bilateral agreements between the federal government and individual provinces.

The implementation of the Canada-Wide Accord into CEAA would allow the federal government to defer to provincial environmental assessments, provided that this legislation met the requirements of the agreement. Article 5.4 of the Sub-Agreement provides that there will be a lead Party responsible for the administration of the assessment process for each proposed project, and article 5.6 sets out how the lead Party will generally be determined. The effect of article 5.6 is that "for projects other than those proposed for federal and aboriginal lands, the federal government will be limited to a supporting role in the conduct of environmental assessments". The Sub-Agreement's "single-window" approach to EA based on a 'lead Party' being responsible for the administration of the assessment process "is equal to the federal government reigning in CEAA and allowing the provinces to largely determine their own EA process".

It is important to briefly note the problematic nature of CCME's role as the central administrative office for the harmonization initiative. As Hazell makes clear, CCME is a "particularly problematic example of executive federalism":

As an intergovernmental forum, CCME has no legal framework governing its roles and responsibilities, and no mechanisms to ensure its accountability, other than the indirect accountability of CCME ministers to their respective legislatures. So accountability to the public for decisions is at best indirect, and at worst is antithetical to participatory democracy.

CCME's consultations, discussions and agreements were not part of the public record and, despite the fact that recent rounds of discussion on harmonization have allowed for some public involvement through a multi-stakeholder advisory committee, CCME as a whole has been highly secretive in its deliberations. CCME is not directly accountable to the public and should not be acting in a quasi-legislative capacity when it has no legal authority to do so. Further, as CCME is comprised of ten provincial ministers, three territorial ministers, and just one federal minister, this imbalance in numbers virtually guarantees that, in the absence of public participation in CCME decisions, national interests in environmental assessment are not given appropriate weight. As CIELAP has asserted, "[t]he consensus-based decision-making required

at the CCME was a formula for lowest-common-denominator national standards and a regulatory race for the bottom".

As regulatory duplication has been a major complaint of both provincial governments and private sector proponents, both are eager to see the implementation of the harmonization agreement into CEAA. However, despite all the attention that the problem of federal environmental assessment overlapping and duplicating provincial processes has received, this 'problem' has been overstated.

CEAA already makes provision for joint federal-provincial assessments, and contains a variety of tools to address regulatory duplication issues. Subsections 12(1) to 12(3) of CEAA address situations where there are multiple responsible authorities, and ss.12(4) and 12(5) provide for federal authorities to carry out screenings or comprehensive studies in cooperation with provincial governments, other provincial statutory bodies, and any body constituted pursuant to lands claims agreements or self-government legislation. Further, as summarized by Hazell:

Screenings and comprehensive studies can be delegated [s.17], joint panel reviews can be held in conjunction with provinces and aboriginal comprehensive claims organizations [s.40], aboriginal panel reviews and federal boards can substitute for CEAA panel reviews in some circumstances [ss.43(1),44], and bilateral harmonization agreements with the provinces can be entered into by the Minister of the Environment [s.58(1)(d)]. The Federal Coordination Regulations under CEAA may also help to ensure that different federal departments required to assess the same project work together to produce a single environmental assessment.

Prior to the Canada-Wide Accord and its *Sub-Agreement on Environmental Assessment*, provinces without bilateral agreements on environmental assessment typically worked with the federal government to develop project-specific agreements for major proposed mines. Such was the case with respect to a proposal by the Voisey's Bay Nickel Company to develop a nickel-cobalt-copper mine and mill in Northern Labrador. In January 1997, the Government of Canada, the Government of Newfoundland, the Labrador Inuit Association, and the Innu Nation signed a memorandum of understanding (MOU) setting out how the environmental effects of the proposed mine and mill project would be reviewed. This MOU "was established to harmonize the environmental assessment processes of the federal and provincial governments and to recognize the interests of the two Aboriginal groups who have overlapping land claims in the area". A five-person panel was appointed to carry out this review and prepare the project's final report. The Government of Canada selected the panel members from a list of nominees chosen by the parties; each party selected three nominees at least one of whom was to be appointed to the panel. The environmental impact assessment guidelines developed by the expert review panel may be the most comprehensive environmental assessment guidelines for mining yet developed under federal procedures.

Despite the continuing emphasis that industry and the provincial government have given to the issue of harmonization, there is further evidence that this problem has been overstated.

According to one study for 1995-1996, 98% of projects subject to CEAA were not even subject to provincial environmental assessment legislation, less than 100 major projects were subject to environmental assessment by both levels of government and only 2% of projects were actually assessed by both levels of government.

Further, in December of 1997, the House of Commons Standing Committee on Environment and Sustainable Development found that there was "insufficient evidence of overlap and duplication of environmental regulation and activities of the federal and provincial/territorial

governments" and asserted that it "seems doubtful...that the Accord and Sub-agreements will be successful in achieving greater administrative efficiency or cost-savings". In May of 1998, the federal Commissioner of the Environment and Sustainable Development similarly concluded that there was little evidence of federal-provincial duplication in environmental assessment.

While the Canadian Environmental Assessment Agency acknowledges that only a small percentage of the projects reviewed under CEAA are also subject to provincial assessment, it asserts that "these projects tend to have a high profile or involve public concerns". However, quite aside from how many projects are subject to both federal and provincial environmental assessment or how important those projects are, it is not even clear that the presence of legislative requirements at both levels of government is detrimental to environmental protection. Environmental advocacy groups have argued that a federal system such as Canada's will not be 'improved' by reducing two levels of competency to one and that shared jurisdiction allows for oversight and provides a back-up in the event that one part of the systems fails.

3.2 The Cheviot Example: A Glimpse of the Future?

The case of the Cheviot coal mine in Jasper, Alberta illustrates the potential for CEAA to strengthen weaker provincial environmental assessment processes and provides an important example of the difficulties that can arise in the context of a joint federal-provincial panel review.

The Cheviot mine, a project proposed by Cardinal River Coals Ltd. in March of 1996, required a federal permit under subsection 35(2) of the *Fisheries Act*, which provides that an authorization be obtained from the Minister of Fisheries prior to the alteration, disruption or destruction of fish habitat. Prior to the issuance of this permit, however, a federal environmental assessment had to be conducted pursuant to ss.5(1)(d) of CEAA. Accordingly, the Minister became the responsible authority for the project pursuant to ss.11(1) of CEAA. As an environmental review was also required under Alberta legislation, the federal Minister of the Environment and the Alberta Energy and Utilities Board (AEUB) agreed to hold a joint federal and provincial review and thus signed a Joint Panel Agreement setting out the panel's terms of reference. The Agreement provided that the Panel would issue a single Decision Report designed to meet the requirements of both levels of government. The panel, which consisted of two representatives from the AEUB (including the Chair) and only one federal representative, issued its report in June of 1997 and recommended that the Minister approve the Cheviot project.

In August, 1998, the Minister issued the authorization pursuant to ss.35(2) of the *Fisheries Act*. However, the Federal Court of Canada has since quashed this authorization as a coalition of environmental groups successfully argued that the assessment failed to fulfill federal requirements under CEAA. This litigation will be discussed in greater detail in the following section of this report. The important thing to note here is the importance of CEAA in making Alberta's environmental assessment process more accountable to public and environmental concerns. As Chambers explains:

Participant funding [under Alberta's Environmental Assessment regulations] is granted only to those considered 'directly affected' by the development under review, and 'directly affected' is interpreted in the most narrow sense as only applying to 'affected' property owners. As a consequence the public has a great deal of difficulty getting standing at Alberta EA hearings because they are not considered 'directly affected', even though over 70% of Alberta lands are publicly owned. What CEAA was able to achieve in the case of Cheviot—at least in part—was an opening of the exclusionary public participation provisions inherent in the Alberta EA regulations. Thus, under the public participation provisions of CEAA, the public was able to get standing at the Joint Panel EA hearings and more fully participate in the Cheviot coal mine EA. CEAA also provided intervenor

funding.

Further, CEAA process requirements were more stringent than those required by the Alberta regulatory process. As noted by Justice Campbell at the Federal Court, "the CEAA information gathering investigation can reasonably be expected to go further than that necessary to meet Alberta requirements".

Unfortunately, the Joint Panel produced an assessment that failed to meet federal requirements under CEAA. As AEUB representatives (members of what is "largely a provincial development board") outnumbered federal members on the panel, the "weaker provincial process dominated, producing serious failings". The Panel's errors included a failure to assess the cumulative environmental effects from extensive logging and mining activities already planned for the area around the mine as well as a failure to properly consider the alternative of using underground mining instead of open-pit mining.

The Cheviot Joint Panel Assessment thus demonstrates that bilateral environmental assessment agreements "have the potential to increase the impact of the weaker and less environmentally desirable provincial EA Acts or regulations and decrease the effectiveness of CEAA". The federal government's adoption of the *Canada-Wide Accord's Sub-Agreement on Environmental Assessment* will only further restrict the ability of CEAA to strengthen weaker provincial processes. Had the Cheviot environmental assessment been done under a harmonized regime, the Sub-Agreement could have "effectively negated many of the most important elements CEAA brought to the Joint Panel process—namely increased public participation and funding".

Implementation of the Sub-Agreement would mean that, for most projects involving both levels of government, provincial officials would take control of the environmental assessment process. The Cheviot Joint Panel had at least one federal appointee, and still failed to meet the obligations enshrined in CEAA. It seems then, that "the likelihood of legal challenges will increase under the Sub-Agreement, where federal authorities rely totally on provincial colleagues and absent themselves from conduct of environmental assessment".

3.3 Accountability and the Need for a Strong Federal Role

In the constitutional framework of Canada, the provinces and the federal government share jurisdiction over the environment. Further, the Supreme Court of Canada has ruled that environmental assessment is *intra vires* both levels of government. CEAA requires federal agencies to make decisions based on CEAA assessments, and it is the federal government that must ensure that CEAA requirements are met. Further, the federal government has the constitutional responsibility to manage natural resources such as fish habitat protection, and must not abandon its authority. Any weakening of the federal role through further delegation of environmental assessment obligations to the provinces would be an abrogation of federal responsibility.

As previously discussed, there is little evidence of federal-provincial duplication to justify the Sub-Agreement. Further, the text of the Sub-Agreement provides no ecological rationale for the allocation of responsibilities:

The Sub-Agreement allocates Lead Party responsibilities purely on the basis of land ownership and territorial jurisdiction; there is no attempt to adopt ecosystem-based principles or to identify projects or situations where there is some national environmental interest at stake that might demand the participation of the federal government. The concept of a Lead Party itself is suspect, suggesting

that the one level of government is less important than the other(s).

Given that there is little evidence of duplication and no evidence that having a single lead Party would have any significant environmental benefits, an argument can be made that the entire duplication concern "is a smokescreen for proponents who do not want their projects to be subjected to proper environmental assessment and for provincial governments who want to ensure, for political reasons, that the federal government is shut out of any environmental assessment that does take place". It is likely that the implementation of the harmonization agreement into CEAA would serve both purposes. In its 1997 report on the CCME harmonization initiative, the House of Commons Standing Committee on Environment and Sustainable Development made the following conclusions, among others:

- This Committee concludes that the provinces may eventually assume a considerable number of functions to be covered by sub-agreements to the Accord, and that this approach would leave the federal government with only a limited set of responsibilities of considerably less importance than its current environmental protection role.
- This Committee cautions that a significant devolution of federal environmental protection powers to the provinces and territories might engender weaker environmental protection in Canada.
- This Committee concludes that rather than assuring that practices and regulations of the two levels of government are complementary, the ultimate effect of the Accord and sub-agreements will be to eliminate one level of regulations and practices.

The federal government is often the most objective party reviewing projects due to heavy provincial involvement (financially or otherwise). Retaining the opportunity and capacity for federal action is particularly important where a provincial government is a proponent or sponsor of a proposed project and a conflict of interest may arise. In viewing provincial environmental assessment processes across the country—particularly provinces such as Alberta and Ontario where deregulation has led the provincial government agenda—it should become apparent that the federal process requirements regarding transparency, participation and accountability must be preserved. All of this is not to say that proponents don't have a right to demand a coordinated environmental assessment process. However, coordinating processes, in those instances where there are federal/provincial overlaps, does not necessitate delegating or handing over federal responsibility or decisions to the provinces.

4. A Privative Clause: The Second Red Herring

4.1 The Industry Push for a Privative Clause

In its push for greater efficiency and certainty in the environmental assessment regime, the mining industry has been very critical of the role the courts play in the environmental assessment process. According to Gordon Peeling, President of the Mining Association of Canada, the "ability of the courts to overturn decisions made in an open, transparent process, creates tremendous uncertainty and a lack of finality in the reviewing and permitting process". John Carrington, Chairman of the Mining Association of Canada, speaks of "overlapping bureaucracies and tangles of red tape" that are "stalling" major natural resource developments and cites as examples the Voisey's Bay, Cheviot, and Sunpine projects. Even the Canadian Environmental Assessment Agency's discussion paper asserts that "the prospects for litigation and new court direction can contribute to greater uncertainty and unpredictability in the process...". Industry representatives have cited cases such as Cheviot as "sending a strong negative signal to investors when there are equal or better mineral investment opportunities

available elsewhere in jurisdictions where project risks are becoming more manageable".

In the context of the Five Year Review of CEAA, the Minister of the Environment has held national public consultation meetings in 19 cities across Canada between January 31 and March 15, 2000. At a number of these consultations, industry representatives have raised the issue of adding a privative clause to CEAA. This would prevent or severely limit the power of the courts to review decisions under CEAA. The addition of such a clause, one that would make it very difficult for environmental organizations and citizens groups to challenge non-compliance with CEAA, is simply not acceptable.

As was the case with the issue of duplication, industry has overstated the 'problem' of litigation under the Act (if, indeed, it can be termed a problem at all).

Firstly, as CEAA is a young piece of legislation the requirement for judicial interpretation of its provisions is not surprising and will likely decrease over time: "the Act will continue to evolve as judicial decisions provide clarification and direction on key issues of the process". Secondly, "[s]o far, the volume of litigation involving the new legislation has not matched the pace of that concerning EARPGO" and "is certainly nothing like the flood of environmental assessment court cases that occurred after the 1973 enactment of the *National Environmental Policy Act* in the United States". Thirdly, the handful of cases decided under CEAA are providing a measure of accountability to decisions made by federal authorities with respect to environmental assessments under CEAA. Through a brief examination of the litigation surrounding the Cheviot coal mine it should be apparent that court cases can impose a corrective influence on faulty implementation of CEAA.

4.2 A Case Study: The Cheviot Coal Mine

The case of the Cheviot coal mine in Jasper, Alberta illustrates the important role the courts can play in ensuring that projects are not allowed to proceed based on flawed environmental assessments.

As previously discussed, the project triggered both a federal environmental assessment pursuant to CEAA (as the mine required a federal permit under ss.35(2) of the *Fisheries Act*, a Law List trigger) and an environmental review under Alberta legislation. The federal Minister of the Environment and the Alberta Energy and Utilities Board (AEUB) agreed to hold a joint federal and provincial review and thus signed a Joint Panel Agreement setting out the panel's terms of reference.

The Joint Panel Agreement required that the factors listed in ss.16(1)(a) to (e) and ss.16(2)(b) of CEAA be considered. These factors include the environmental effects of the project (including cumulative effects) and their significance; comments from the public; mitigation measures; other matters deemed relevant by the 'responsible authority' or Minister (such as the need for and alternatives to the project); and alternative means of carrying out the project that are technically and economically feasible (as well as the environmental effects of such alternative means). Further, the Agreement stated that the Panel would ensure that all information required for the conduct of its review was obtained and made available to the public (pursuant to s.34(a) of CEAA). The panel issued its report in June of 1997, and recommended that the Minister approve the Cheviot project.

An initial application for judicial review of the Joint Review Panel's report was brought by a coalition of environmental groups, including the Alberta Wilderness Association, the Canadian Nature Federation, and the Canadian Parks and Wilderness Society. This initial application was dismissed by the Federal Court of Canada, but on appeal the matter was referred back to the Trial

Division for determination on its merits. In August, 1998, the Minister issued the authorization pursuant to ss.35(2) of the *Fisheries Act*, and in September the applicants applied for judicial review of that authorization. The two applications for judicial review were heard together. The Federal Court held that the application should be allowed and the authorization quashed, but declined to exercise its discretion to grant relief in the application concerning the Panel's report. In result, the Court remitted the matter back to the Joint Review Panel for the purpose of completing a report that would satisfy the requirements of CEAA.

The Federal Court's findings included the following:

1. The Joint Panel breached its duty to obtain all available information about likely forestry and mining in the vicinity of the project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about these factors, and to substantiate these conclusions and recommendations in its report.
2. The Joint Panel failed to properly consider the alternative of using underground mining instead of open-pit mining: the effects of this alternative means, as compared to the effects of open-pit mining, were not considered in any meaningful way. Further, the Joint Panel limited its consideration of underground mining because of the respondent's "practical and economic concerns".
3. As a result of a breach of due process based on legitimate expectations, the Panel committed a reviewable error in that it did not consider the submissions of the Canadian Nature Federation.

Justice Campbell found that, as a result of these breaches of duty and due process, the environmental assessment conducted by the Joint Panel was not in compliance with CEAA. The Court further ruled that Cardinal River Coal's plans to dump millions of tons of waste rock into stream valleys used by nesting birds would violate the federal *Migratory Birds Convention Act*. This was "the first time that the law was interpreted to protect migratory bird habitat, and not just the birds themselves". This violation would make the issuance of the *Fisheries Act* authorization "contrary to law" within the meaning of the Federal Court Act.

Although industry representatives tend to cite the Cheviot case as an illustration of the "uncertainty and lack of finality of the permitting process", the Cheviot mine litigation is more appropriately used to underscore "the crucial role of intervenors in the environmental assessment process. But for the participation of the coalition of environmental organizations, a seriously flawed environmental assessment would have provided the authorization for an environmentally disastrous project".

It bears mentioning that the proposed site for the Cheviot mine lies close to the border of Jasper National Park, on the Eastern Slopes of the Rocky Mountains. It is an environmentally rich area that is home to a variety of wildlife. Further, due to the fact that Jasper National Park, part of the Canadian Rocky Mountain Parks, is a United Nations World Heritage Site, UNESCO's World Heritage Committee has asked Canada to reconsider the mine. The sensitive nature of the area simply underscores the importance of ensuring a proper environmental assessment is completed for any proposed project.

4.3 The Need to Preserve Access to the Courts

Alan Johnson, president of the Coal Association of Canada, cited the Cheviot decision as "an alarming example of judicial interference". Such a comment is characteristic of an industry that "has generally sought processes which limit the scope and length of assessments, and which provide 'certainty' of outcome (i.e. a guarantee of approval)...". Simply stated, the Cheviot Joint Review Panel's assessment did not comply with the requirements of CEAA, and thus the

Federal Court of Canada imposed a corrective influence on faulty implementation of the Act.

It is important to note that it is not just environmental organizations that desire proper environmental assessments. Of the four cases in which CEAA environmental assessments have been overturned, only two—Cheviot and Sunpine—were initiated by environmental non-governmental organizations. The remaining two cases—*Union of Nova Scotia Indians v. Canada (Attorney General)* and *Bowen v. Canada (Attorney General)* were initiated by an aboriginal group and a project proponent, respectively.

Union of Nova Scotia Indians involved a CEAA screening report which concluded that dredging of the navigational entrance to the Bras d'Or Lakes in Nova Scotia was not likely to have a significant impact on the environment so long as appropriate mitigation measures were undertaken. The Federal Court of Canada set aside the decision (made on behalf of the Minister of Fisheries and Oceans and the Minister of the Environment) to accept the screening report, finding that the responsible authorities failed to meet requirements under CEAA to assess the potential adverse effects of the project upon the use of fishery resources by the Mi'Kmaq people for traditional purposes. In *Bowen*, the Federal Court, Trial Division, set aside the decision of the Minister of Canadian Heritage to decommission the Banff and Jasper airstrips. Although screenings of the two projects had been conducted, comprehensive studies were required pursuant to s.21 of CEAA and the *Comprehensive Study List Regulations*.

Thus, only four CEAA environmental assessments have been overturned, and each one legitimately so as the assessments in question were not completed in accordance with the basic requirements of the Act. Each of these decisions attests to the fact that it is desirable for courts to intervene when environmental assessments have been conducted improperly; restricting the ability of the court to do so would simply insulate flawed environmental assessments from review.

A privative clause in an Act such as CEAA is neither acceptable nor needed. Firstly, CEAA panels are one-time appointees rather than standing, expert tribunals (e.g. the Ontario Labour Relations Board) and thus it would be highly unusual for a privative clause to immunize their decisions from judicial review. Secondly, although the public may challenge the validity of an environmental assessment through the courts on points of law, procedural errors, or evidence of bias within a Review Panel, the substance of a review Panel's findings cannot be appealed directly and the chance of securing corrective measures or overturning a review decision is small. Decisions of the Federal Court indicate a high degree of judicial deference. Lastly, if decision-makers are to be fully accountable, then review by the courts must remain an option. This is particularly important given that follow-up and enforcement of what conditions are imposed through federal and provincial environmental assessment processes has been weak or non-existent. Thus, compliance with environmental assessment conditions of approval "rests largely with a well-informed, technically astute, and financially capable public".

4.4 Addressing the Reasons for Litigation

Litigation under CEAA has been neither voluminous nor frivolous. Rather, the courts act as an important check in the federal environmental assessment system by ensuring that projects are not approved without adequate scrutiny. It can be argued that litigation would not be required if government and project proponents would follow the provisions of the Act. Thus, if amendments to CEAA are required, they should address the issues that litigation centres on (such as unclear provisions and non-existent enforcement) rather than undermine the ability of citizens' groups to mount a legal challenge. The Cheviot decision would not have been possible had there been a privative clause in CEAA.

The possibility of litigation under CEAA could be significantly reduced by addressing unclear

provisions in the Act and by ensuring its enforcement. It is beyond the scope of this report to address these issues in detail, but some examples will be briefly touched upon.

As Hazell explains, litigation may arise under CEAA "as proponents, governments, and public interest groups seek to apply the various, sometimes incongruously defined terms in CEAA to the realities of the projects that are proposed". An example lies in the definitions of 'environment' and 'environmental effect' found in s.2 of the Act. 'Environment' is defined to mean 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 and natural systems that include components referred to in paragraphs (a) and (b). 'Environmental effect', however, is defined as follows:

- 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.

The definition of 'environmental effect' thus makes reference to the environment and thereby incorporates its definition: "a major issue is what is included in the definition of environmental effect that is not included in the definition of environment". The definition of environmental effect seems to indicate that the term 'environment' is confined to the biophysical environment, but it is not clear that the definition of 'environment' "can or should sustain such a narrow reading". It is important to understand the relationship between these two terms in complying with the requirements of s.16(1)(a) of CEAA to 'consider' the environmental effects of the project. This subsection also requires the consideration of any cumulative effects that are likely to result from the proposed project in combination with other projects or activities that have been or will be carried out. This concept is similarly difficult to pin down, and requires a clearer definition. Further, despite the fact that a guide to assessing cumulative effects has recently been prepared and released by the Canadian Environmental Assessment Agency, more detailed methodologies for the conduct of cumulative effects assessment are needed.

The issue of 'scoping' a project (s.15 of CEAA) has emerged as a crucial legal policy issue and has been the subject of some litigation. Scoping a project "involves identifying those components of the proposed undertaking or activity that are to be considered part of the project for the purposes of the environmental assessment under the Act". The scope of a project is different than the scope of the assessment, which concerns "the identification of those components of the environment that may be affected by or otherwise interact with the project". Responsible Authorities "have tended to set very narrow limits on assessments, focussing on the project itself (a bridge, for example) and the effects of its construction and use and not on the larger purpose (a forestry project, for example) the assessed project is being built to serve". This has led to legal challenges by public interest groups, and there is likely to be further litigation on this issue. As the Canadian Environmental Assessment Agency's discussion paper has suggested:

The Act could be amended to clarify the definition of terms relating to scoping and to provide greater consistency and predictability in the assessment of effects. For example, the definition of 'project' could clarify the relationship between a 'physical work' and 'undertakings in relation to a physical work'. Similarly, the definition of 'environmental effect' could provide greater clarity of the undertakings that need to be considered and address the possible inclusion of socio-economic and cultural effects.

Certainly, these definitions should be clarified. Further, the Agency could ensure that persons with assessment expertise be involved with scoping decisions as well as with other aspects of the environmental assessment's preparation and review.

As has been stressed in this report, litigation related to CEAA is often indicative of inadequate implementation and enforcement of the legislation. As has been asserted by CIELAP,

If it is accepted that an environmental assessment is the first, best chance to limit the environmental impact of a project, then it reasonably follows that what limits and mitigation mechanisms are imposed by an assessment will be put in place. It also follows that some provision would be made for follow-up to ensure compliance. It follows, but, in Canada, it almost never happens.

There are no formal mechanisms under CEAA for ensuring enforcement of monitoring and mitigation requirements. Further, there is no penalty for a failure to comply with CEAA. This problem, however, is not a new one. As Hazell asserts,

The lack of monitoring and follow-up was just as serious a problem under [EARPGO] as it is now under CEAA. What it means is that the federal environmental assessment community is not and has not been learning from experience in any disciplined or rigorous way. Monitoring and follow-up allows predictions about relative harm of a project's environmental effects and the efficacy of mitigation measures to be tested. That information should be used systematically in making predictions and designing mitigation measures for other projects.

Thus, in addition to amending the Act to include a provision that mandates a structured monitoring and follow-up process, the Agency should provide for a process of institutional learning. Environmental assessment can be improved over time "by an increasing information base about on-the-ground effectiveness of environmental assessments and related mitigation measures and follow-up".

5. Conclusion

Canadian Mining companies and their associations "have been in the forefront of pressing for environmental deregulation in Canada over the last few years. Recognized for having one of the most sophisticated public lobbying campaigns...the industry has been a force to be reckoned with". In the context of the five-year review of CEAA, mining industry representatives have argued both for the elimination of federal-provincial regulatory duplication through 'harmonization' and for the insertion of a privative clause into CEAA in order to severely restrict legal challenges. Both of these proposals, if accepted, would only serve to weaken the federal environmental assessment regime.

The current scale and intensity of human activity is creating imbalances that threaten the natural world and thus compromise the future: "[m]any reputable scientists consider that the impact of human activities on the biosphere is reaching critical thresholds, with the consequent threat of ecological breakdown and social conflict". Environmental assessment "provides a basis for designing policies and plans that take account of environmental potentials and constraints, and for managing the impacts and risks of development projects and activities". As such, it is "potentially the most powerful tool in the hands of governments, citizens and the private sector to protect the environment and achieve sustainable development".

The Preamble to CEAA "establishes the broad principles upon which the environmental assessment process under the Act is based". The Preamble provides that CEAA was enacted because:

- the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;
- environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;
- the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality; and
- the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based.

These statements reflect the federal government's commitment to environmental assessment in Canada, and the federal government must remain accountable for its own legislation. Although the issue of duplication is often used to argue against a strong federal role in environmental assessment, there is little evidence of such a problem existing. The fact that the provinces and the federal government share constitutional jurisdiction over the environment should be viewed as a strength and not a weakness; two levels of government provide for more checks and balances in the system. Cooperation and coordination of assessment activities is desirable, but devolution of federal responsibility should not proceed.

Further, while the federal government is responsible for setting the standard for environmental assessment, access to the courts will help to ensure that the standard is upheld. "In order to maintain the integrity of the system, public interest groups should be able to seek judicial review of administrative decisions". As the experience with the Rafferty-Alameda and Oldman Dam litigation demonstrates, "governments are unlikely to take environmental assessment obligations seriously unless those obligations are mandatory and enforceable".

6. Recommendations

6.1 Recommendations Regarding Harmonization and the Federal Role in Environmental Assessment

1. Discussions between the provinces and the federal government with respect to environmental assessment coordination or harmonization should occur in an open and transparent manner, and be accompanied by meaningful consultation with the public.
2. Efforts to strengthen the coordination of federal and provincial environmental assessment processes should emphasize the establishment of consolidated processes that meet all of the requirements of CEAA and the relevant provincial legislation, rather than the substitution of provincial processes for federal requirements.
3. In order to ensure accountability and the meaningful assessment of projects, the possibility of independent federal environmental assessments of undertakings, where agreement cannot be reached on a consolidated federal- provincial meeting

all of the requirements of CEAA and the relevant provincial legislation process, should be maintained.

6.2 Recommendations Regarding CEAA and Judicial Review

4. A privative clause should not be added to CEAA. The retention of the possibility of judicial review of environmental assessment decisions is essential to the accountability of responsible authorities for the implementation of the Act.

5. Judicial review of the Act's implementation has been a corrective influence on Responsible Authorities. It has also provided clarification and direction on the interpretation of provisions of the Act. The results of judicial decisions regarding the Act should be incorporated into guidelines for Responsible Authorities and participants in the environmental assessment process.

6. The integrity of the environmental assessment process should be protected through improved enforcement of conditions associated with the approval of projects assessed under CEAA.