COMMENTS
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The New *Canadian Environmental Assessment Act* — Bill C-78: A Disappointing Response to Promised Reform

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I. Background

Environmental impact assessment (E.I.A.) first appeared in Canada at the federal level in the early 1970s.[1] It represented this country's response to an earlier initiative of the Nixon administration in the United States, which culminated in the enactment of the *National Environmental Policy Act*[2] in 1969.

In terms of both methodology and purpose, E.I.A. marked a radical departure from existing regulatory models in environmental policy, changing the focus from regulation and control to planning and prevention. The regulatory model invariably contains a general prohibition against the discharge of pollu-

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[1]The environmental assessment process at the federal level in Canada began not as legislation, but rather as a series of Cabinet directives dated June 3, 1972 and December 20, 1973. A further Cabinet directive in 1977 initiated some additional improvements, and the *Government Organization Act, 1979*, S.C. 1978-79, c. 13 effectively reaffirmed the responsibility of the federal Minister of the Environment for E.I.A. of the activities of the federal government and related bodies. These early efforts were consolidated in the Environmental Assessment and Review Process Guidelines Order, SOR/84-467 (June 22, 1984) [hereinafter Guidelines Order or E.A.R.P.]. Following a series of decisions by the Federal Court (discussed *infra*, notes 9-29 and accompanying text), the federal government recently moved to legislate the environmental assessment process in Bill C-78, *An Act to Establish a Federal Environmental Assessment Process*, 2d Sess., 34th Parl., 1990 [hereinafter *Canadian Environmental Assessment Act* or *C.E.A.A.*]. The Bill was tabled June 18, 1990 and received second reading on October 30, 1990. It was then considered by the Special Committee on the Federal Environmental Assessment Process. Public hearings have been held, and while the bill died on the order paper, it has been reintroduced in identical form as Bill C-13, *An Act to Establish a Federal Environmental Assessment Process*, 3d Sess., 34th Parl., 1991 and has been referred to a legislative commitee.

[2]83 Stat. 852 (1970), as amended, 42 U.S.C. § 4321 (1975) [hereinafter *N.E.P.A.*]. The Act was proclaimed in force January 1, 1970.

tants into the natural environment, with permissible levels or concentrations set out in accompanying regulations. In contrast, E.I.A. is anticipatory in nature, involving the evaluation of alternatives to the proposed undertaking, and alternative methods of carrying it out, prior to the start of any construction. This approach is viewed as the principal means of ensuring an environmentally acceptable solution in matters of development. In essence, E.I.A. may be characterized as preventative rather than reactive. Unlike the regulatory approach, which emphasizes adherence to predetermined standards, E.I.A. is primarily used as a planning tool to provide the regulatory authority with an objective basis upon which to grant or deny project approval.

The underlying philosophy of E.I.A. is illustrated by the wording of s. 102 of *N.E.P.A.*, which states as a matter of policy that all federal government agencies must

> utilize a systematic interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment.[3]

It is not uncommon for courts in the United States to refer to the inherent objectives of environmental legislation in the context of specific decisions. For example, in the case of *Boston (City)* v. *Volpe*,[4] Coffin J. stated that

> the purpose of the statute [*N.E.P.A.*] was to "build into the agency decision process" environmental considerations, "as early as possible," taking into account "the overall, cumulative impact of the action proposed (and of further actions contemplated)" and "environmental consequences not fully evaluated at the outset of the project or program."[5]

Although the scope of the American legislation is extremely broad, it is nevertheless considered by many to be fundamentally flawed because it fails to provide an independent regulatory/enforcement mechanism or process. This lack of a separate administrative structure has meant that the task of enforcing statutory norms has gradually fallen to the courts.[6]

Until recently, reliance upon the courts in the United States for the necessary supervision with respect to environmental impact legislation stood in sharp contrast to the Canadian perception of the proper role of the judiciary in the process. In light of the more activist role of the U.S. Supreme Court, particularly with respect to social policy issues, it is not surprising that the American people

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[3]*Ibid.*, s. 102.

[4]464 F. 2d 254 (1972).

[5]*Ibid.* at 257, quoting 36 Fed. Reg. 7724 (1971); see also *Chelsea Neighbourhood Association* v. *U.S. Postal Service*, 389 F. Supp. 1171 (1975) at 1182; *Conservation Society of Southern Vermont* v. *Secretary of Transportation*, 362 F. Supp. 627 (1973); and *Indian Lookout Alliance* v. *Volpe* 484 F. 2d 11 (1973).

[6]See F.R. Anderson, *N.E.P.A. in the Courts* (Washington: Resources for the Future, 1973).

and their governments remain more willing to have environmental assessment legislation and policy interpreted and enforced through judicial intervention. In Canada, the opposite is certainly the case, for notwithstanding the increased role of the judiciary following the enactment of the *Canadian Charter of Rights and Freedoms*[7] in 1982, any supervisory function similar to that exercised by U.S. courts would most certainly be perceived as an unwarranted intrusion into the administrative and regulatory realm of government.[8]

II. The Legal Framework for the Federal Environmental Assessment Process

For reasons which are still not fully understood, the government which first introduced comprehensive environmental assessment at the federal level chose to do so by means of a Cabinet directive in the form of a Guidelines Order, rather than by way of legislative enactment. The "self-assessment" nature of the Guidelines Order clearly indicates that the government wished to retain as much flexibility as possible with respect to the environmental assessment of federal undertakings. In fact, right up until the Federal Court decisions in the *Rafferty Alameda*[9] cases, the government resisted any suggestion that the application of the E.A.R.P. was mandatory with respect to projects or proposals falling within the scope of the Guidelines.

By adopting guidelines as opposed to enacting specific E.I.A. legislation, the government quite reasonably assumed that the E.A.R.P. provisions were just that: guidelines to be followed when and if the governmental authority responsible for their application, in its unfettered discretion, thought it appropriate to do so. Supporters of this interpretation could also point to the wording of the supporting legislation which provided the basis in law for the Guidelines, and attested to the discretionary nature of the power of the Minister of the Environment to promulgate guidelines in the first place. Section 6 of the *Department of the Environment Act*[10] states:

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[7]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[8]See S.D. Clark, ed., *Environmental Assessment in Australia and Canada* (Vancouver: Westwater Research Centre, University of British Columbia, 1981) at 43.

[9]*Canadian Wildlife Federation Inc.* v. *Canada (Minister of Environment)*, [1989] 3 F.C. 309, [1989] 4 W.W.R. 526 (T.D.), Cullen J. [hereinafter *Rafferty Alameda No. 1* cited to F.C.], aff'd *Saskatchewan Water Corp.* v. *Canadian Wildlife Federation Inc.* (sub nom. *Canadian Wildlife Federation Inc.* v. *Canada (Min. of Environment)*) (1989), [1990] 2 W.W.R. 69, 38 Admin. L.R. 138 (F.C.A.) [hereinafter *Rafferty Alameda No. 2.*]. Since the first *Rafferty Alameda* decision on April 10, 1989, four decisions have been rendered by the Federal Court regarding the environmental assessment of the Rafferty and Alameda dam projects in Saskatchewan. See *infra*, notes 15-29 and accompanying text.

[10]Originally s. 6(2) of the *Government Organization Act, 1979*, *supra*, note 1, s. 14; now s. 6 of the *Department of the Environment Act*, R.S.C. 1985, c. E-10 [hereinafter *Department of the Environment Act*].

> **6.** For the purpose of carrying out his duties and functions related to environmental quality, the Minister of the Environment *may*, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule D to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions [emphasis added].

At the time the Guidelines Order was made, there appeared to have been no statutory obligation compelling the Minister to establish guidelines at all, for s. 6 uses the word "may," not "shall," in outlining the Minister's powers.

In hindsight it is reasonable to conclude that, until recently, both the government and indeed many others were oblivious to the possibility that the courts might find the E.A.R.P. Guidelines Order to be "not a mere description of policy or programme" but instead a Regulation which "may create rights and be enforceable by way of mandamus."[11]

The far-reaching decisions of the Federal Court in the *Rafferty Alameda* cases[12] generated shockwaves within the federal bureaucracy which are still being felt today. The result in these cases accelerated the pace of and gave a sense of urgency to reform already underway.

Before reviewing the circumstances giving rise to the Federal Court decisions in the *Rafferty Alameda* and *Oldman River*[13] cases, and their impact upon the proposed new *Canadian Environmental Assessment Act*, it will be useful to outline briefly the relevant provisions of the Guidelines Order.

A. The Guidelines Order

> **2.** In these Guidelines,
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> "Environmental Impact Statement" means a documented assessment of the environmental consequences of any proposal expected to have significant environmental consequences that is prepared or procured by the proponent in accordance with guidelines established by a Panel;
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> "department" means ...
> (a) any department, board or agency of the Government of Canada, and
> (b) any corporation listed in schedule D to the *Financial Administration Act* and any regulatory body;
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> "initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal;
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> "Minister" means the Minister of the Environment:
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> ...

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[11] *Rafferty Alameda No. 1*, *supra*, note 9 at 322.
[12] See *infra*, discussion accompanying notes 15-28.
[13] See *infra*, discussion accompanying notes 29-38.

"proponent" means the organization or the initiating department intending to undertake a proposal;

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

4.(1) An initiating department shall include in its consideration of a proposal pursuant to section 3

(a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and
(b) the concerns of the public regarding the proposal and its potential environmental effects.

(2) Subject to the approval of the Minister and the Minister of the initiating department, consideration of a proposal may include such matters as the general socio-economic effects of the proposal and the technology assessment of and need for the proposal.

5.(1) Where a proposal is subject to environmental regulation, independently of the Process, duplication in terms of public reviews is to be avoided.

(2) For the purpose of avoiding the duplication referred to in subsection (1), the initiating department shall use a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

6. These Guidelines shall apply to any proposal

(a) that is to be undertaken directly by an initiating department;
(b) that may have an environmental effect on an area of federal responsibility;
(c) for which the Government of Canada makes a financial commitment; or
(d) that is located on lands including the offshore that are administered by the Government of Canada.[14]

III. The *Rafferty Alameda* Cases

What have become known as the *Rafferty Alameda* cases in fact represent a number of interrelated proceedings before the Federal Court of Canada involving both the trial and appellate divisions. In view of the limited scope of this commentary, only the initial decision of Cullen J. of the Trial Division will be discussed in detail.[15] It is primarily this decision which gave rise to the controversy which followed regarding the binding nature of the Guidelines.

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[14]Guidelines Order, *supra*, note 1, ss 2-6.
[15]*Rafferty Alameda No. 1*, *supra*, note 9.

A. The Facts

In order to alleviate fluctuating flood and drought conditions in the Souris River basin in southern Saskatchewan, the provincial government indicated its intention to construct two dams, the Rafferty dam, to be located on the Souris River near the town of Estevan, and the Alameda dam on Moose Mountain Creek, which flows into the Souris near Alameda, Saskatchewan.

The Souris River is an international waterway, flowing from Saskatchewan. The project was to be undertaken by the Government of Saskatchewan through the Souris Basin Development Authority (S.B.D.A.) as agent for another Crown corporation, the Saskatchewan Water Corporation.

The S.B.D.A. prepared a provincial environmental impact statement which was publicly released and, after a review by a Board of Inquiry, the Saskatchewan Minister of the Environment and Public Safety granted the authority to proceed subject to certain conditions. On June 17, 1988 the federal Minister of the Environment (the Minister), determined that the review of the provincial environmental impact statement by Environment Canada, together with the conditions to be attached to the Saskatchewan licence, were sufficient to protect the interests of the Federal Government. He issued a licence for dam construction to the Saskatchewan Water Corporation pursuant to the *International River Improvements Act*.[16]

The Canadian Wildlife Federation (C.W.F.) had on several occasions requested that the Minister conduct an assessment and review under the E.A.R.P. Guidelines Order before approving the licence application. The E.I.A. prepared in Saskatchewan did not contain an assessment and review of the environmental impact of the project in North Dakota or in Manitoba, nor was one prepared in Manitoba with respect to the environmental impact there. The federal Minister nevertheless did not heed the request of C.W.F. for a more comprehensive review. In its subsequent application to the Court, C.W.F. sought: (i) an order for *certiorari*, quashing and setting aside the licence issued by the Minister under the *International River Improvements Act*; and (ii) an order for *mandamus* requiring the Minister to comply with the E.A.R.P. Guidelines Order, to subject the proposed project to an initial environmental screening to assess potentially adverse environmental effects. According to the Guidelines, wherever a proposal may cause significant adverse environmental effects, it must be referred to the Minister for public review by an Environmental Assessment Panel.

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[16]R.S.C. 1985, c. I-20, s. 4.

B. The Decisions

The Court held that the Guidelines Order was an enactment or Regulation as defined in s. 2 of the *Interpretation Act*,[17] and as such could create rights enforceable by way of *mandamus*.[18] In considering whether the Minister was required to comply with the provisions of the Guidelines Order, the Court found that the project was a "proposal" that would "have an environmental impact upon a number of areas of federal responsibility, namely, international relations [by virtue of], the *International Boundary Waters Treaty Act*,[19]... migratory birds (by virtue of the *Migratory Birds Convention Act*),[20]... inter-provincial affairs and fisheries."[21] In addition, the project would have an environmental effect on "4,000 acres of land 'owned' or at the very least held in trust and administered, by the Federal Government."[22]

Compliance with the E.A.R.P. Guidelines Order was held to be a condition precedent to the granting of a licence by the Minister under the *International River Improvements Act*. The Minister's failure to comply with the Guidelines constituted an excess of his jurisdiction entitling the applicant to an order of *certiorari* quashing the licence.

The Court further held that despite the apparently discretionary language of the Guidelines, the Minister had breached a duty by not complying with the provisions of the Guidelines Order. The applicant was therefore also entitled to an order of *mandamus* compelling the Minister to carry out an appropriate environmental assessment, as required by the Guidelines.

The Federal Court of Appeal upheld the decision of Cullen J.[23] Following these proceedings, the Minister ordered that a draft Initial Environmental Evaluation (IEE) be prepared, to be followed by a public consultation process prior to the preparation of the final IEE in August 1989. Without appointing a public review panel under the provisions of the Guidelines Order, the Minister granted a second licence for the projects on August 31, 1989. His decision was based on advice from his officials that any significant adverse environmental effects could be almost entirely mitigated. The Minister's decision triggered a further round of litigation, with two more applications for *certiorari* and *mandamus* being launched. Once again the Trial Division found the decision of the Minister not to appoint a panel review unlawful, and issued an order of *mandamus*

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[17]R.S.C. 1985, c. I-21.
[18]*Rafferty Alameda No. 1*, *supra*, note 9 at 322.
[19]R.S.C. 1985, c. I-17.
[20]R.S.C. 1985, c. M-7.
[21]*Rafferty Alameda No. 1*, *supra*, note 9 at 323.
[22]*Ibid.* at 325.
[23]*Rafferty Alameda No. 2*, *supra*, note 9.

requiring the Minister to comply with the provisions of the E.A.R.P. Guidelines Order by appointing a panel to review the project. The Court also ordered *certiorari* to quash the second licence unless a panel was appointed within a specified time.[24]

This decision was appealed on the grounds that the order of *certiorari* should have quashed the second licence absolutely as long as a review panel had not been appointed and its report had not been considered by the Minister prior to the issuance of the licence. The Saskatchewan Water Corporation cross-appealed.

The Federal Court of Appeal, in a decision issued December 21, 1990, once again upheld the decision of the trial judge and dismissed both the appeal and cross-appeal.[25] The Court confirmed that "a panel review must take place unless potentially adverse environmental effects that may be caused by the proposal are found to be insignificant."[26]

Construction of the Rafferty dam had continued virtually unabated even as court proceedings were being undertaken from 1989 to 1990. The dam was virtually completed by October 1990 when the panel appointed by the Minister in compliance with the Court's order resigned in protest at the continuing construction.

The federal government applied to the Saskatchewan Court of Queen's Bench in November 1990, for an injunction to stop Saskatchewan from proceeding with construction until public hearings were completed. The Court rejected federal arguments that continuing construction of the project could cause irreparable harm to the environment, and refused to issue a stop work order. Chief Justice Donald MacPherson referred to the federal E.A.R.P. as "badly flawed," and severely criticised the federal government for its procedural and legislative handling of the entire matter.[27]

At the same time, an application for an injunction to halt construction of the project pending completion of the review was brought by two local ranchers concerned over the potential loss of grazing land for their cattle in the vicinity of the proposed Alameda reservoir. The application for injunction was rejected by the Federal Court Trial Division, but in his reasons, Muldoon J. affirmed the

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[24]See *Canadian Wildlife Federation Inc.* v. *Canada (Minister of Environment)* (1989), [1990] 31 F.T.R. 1, Muldoon J. (T.D.) [hereinafter *Rafferty Alameda No. 3*]. The decision was rendered December 28, 1989.

[25]*Tetzlaff* v. *Canada (Min. of Environment)* (21 December 1990), T-2729-90 (F.C.A.) [unreported] [hereinafter *Rafferty No. 4*].

[26]*Ibid.* at 18.

[27]*A.G. Canada* v. *Saskatchewan Water Corp.* (15 November 1990), QB-4277/90 (Sask. Q.B.), MacPherson C.J. [unreported].

Minister's obligation to appoint a new panel.[28] The Court would not intervene to halt construction as long as panel hearings were taking place, but failure to appoint a new panel could lead to the issuance of an injunction to stop the project from proceeding further. In the words of the Court, "no panel — no licence — no construction."[29] Three days before Muldoon J. rendered his decision on February 8, 1991, the Minister had advised the Court that a new panel would be appointed.

In addition, the Saskatchewan Water Corporation and the Souris Basin Development Corporation recently launched two suits in the Saskatchewan courts claiming damages against the federal government in excess of $600 million.

IV. The *Oldman River* case[30]

Only a few months after the initial decision in *Rafferty Alameda*, the Federal Court was again asked to compel Ministers of the federal government to comply with the E.A.R.P. Guidelines Order.

The *Oldman River* case involved a proposal to construct a dam on the Oldman River in Southern Alberta to ensure a secure supply of water within the South Saskatchewan River Basin. The decision to proceed with construction was reached after several years of planning by the Alberta government, which included numerous studies and reviews by various provincial committees, with input in some cases from federal officials.

In 1986 the Alberta Department of the Environment applied for and subsequently obtained approval from the federal Minister of Transport for the dam site and plan pursuant to s. 5 of the *Navigable Waters Protection Act*.[31] No initial environmental assessment or screening was undertaken, and the application was not referred to the Minister of the Environment for review. Although the Southern Alberta Environmental Group had requested that the Minister of Fisheries and Oceans comply with the Guidelines Order, the Minister replied that environmental issues were being addressed by the Province, and refused to intervene.

The Friends of the Oldman River Society then requested that the Minister of the Environment subject the project to review under the Guidelines Order.

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[28]See *Tetzlaff* v. *Canada (Minister of Environment)* (8 February 1991), T-2230-89 (F.C.T.D.) at 9 [unreported].

[29]*Ibid.*

[30]*Friends of the Oldman River Society* v. *Canada (Min. of Transport and Min. of Fisheries and Oceans)* (1989), [1990] 1 F.C. 251, 30 F.T.R. 108 (T.D.) [hereinafter *Oldman River No. 1*, cited to F.C.], rev'd [1990] 2 F.C. 18, 68 D.L.R. (4th) 375 [hereinafter *Oldman River No. 2*, cited to D.L.R.].

[31]R.S.C. 1985, c. N-22 [hereinafter *Navigable Waters Protection Act*].

Once again the request was refused by the Minister, who believed that any potential environmental problems were being adequately mitigated by those responsible for the project, rendering a separate federal assessment unnecessary. The Minister also cited long-standing administrative arrangements with the province, governing the management of joint concerns such as environmental assessment and fisheries.

Many of the issues first raised in *Rafferty Alameda* were reconsidered by the Trial Division in *Oldman River*. In the *Oldman* case, however, Associate Chief Justice Jerome remained unconvinced of the applicability of the Guidelines Order in the circumstances and dismissed the application.[32]

The Federal Court of Appeal allowed the appeal, and granted an order of *certiorari* quashing the approval of the licence by the Minister of Transport under the *Navigable Waters Protection Act*. In addition, orders of *mandamus* were issued directing both the Ministers of Transport and of Fisheries and Oceans to comply with the E.A.R.P. Guidelines Order.[33] The reasoning of the Court of Appeal in *Oldman River* was similar to that of the same court in *Rafferty Alameda*;[34] however, some points of distinction should be noted. The Court specifically rejected the notion that the Guidelines Order does not apply to cases where specialized statutory provisions require consideration of criteria not directly related to environmental concerns. In reaffirming the position taken by the Court in *Rafferty Alameda*, Stone J. stated:

> By virtue of s. 6 of the *Department of the Environment Act*, any guidelines established are to be used "by departments ... in the exercise of their powers and the carrying out of their duties and functions" in furtherance of those duties and functions of the Minister of the Environment (Canada) himself which are "related to environmental quality" ... the Guidelines Order was intended to bind the Minister in the performance of his duties and functions. It created a duty which is superadded to the exercise of any other statutory power residing in him. The source of the Minister's jurisdiction and responsibility to address environmental questions in areas of federal responsibility springs not from the statutory law but from the Guidelines Order itself. The Minister had a positive obligation to comply with it.[35]

The Court found that the word "proposal," as it is used in the Guidelines Order,[36] goes beyond its ordinary meaning, which would signify something in the nature of an application. A Minister might become aware of the existence of an "initiative, undertaking or activity in some other way than having received an application for approval of a proposal that may have an environmental effect

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[32]*Oldman River No. 1*, *supra*, note 30 at 274.

[33]*Oldman River No. 2*, *supra*, note 30.

[34]*Supra*, note 9.

[35]*Oldman River No. 2*, *supra*, note 30 at 392-93.

[36]"Proposal" is defined in s. 2 of the Guidelines Order, as "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility."

on an area of federal responsibility for which he was the decision making authority."[37]

In this case the Minister of Fisheries and Oceans was required by statute to intervene to protect fisheries resources. As this was an area of federal responsibility under the *Fisheries Act*,[38] the Minister became the decision making authority with respect to determining what action would be taken. Having notice of the "proposal," he became obliged to comply with the Guidelines Order.[39]

The effect of *Rafferty Alameda* and *Oldman River* on the federal environmental assessment process has been profound. The cases reinforced the desire of the federal Minister of the Environment to ensure swift passage of the new *Canadian Environmental Assessment Act*. The following section will briefly examine the proposed legislative scheme, as well as some of the underlying factors which led to its introduction.

V. The *Canadian Environmental Assessment Act*

At least two years prior to the initial decision in *Rafferty Alameda*, the federal government initiated a series of studies and public consultation sessions aimed at reforming the E.A.R.P. process at both the structural and procedural levels. The process had long been criticised on a number of fronts, and the government at last appeared to be responding to an increasingly vocal minority calling for substantive reform.

The criticism most often levelled at the existing federal process is that it is based upon a principle of self-assessment. The process is triggered only when an initiating department with decision making responsibility determines that the potential impact of a proposal warrants referring the matter to the Minister of the Environment for public review. It must be remembered that in many cases the initiating department is also the proponent proposing to undertake its own project. It is only in recent years that the federal *Access to Information Act*[40] has helped the public obtain information concerning both the proposal and, more importantly, the decision of the initiating department with respect to the initial screening or assessment, thus providing a potential check on the dangers inherent in self-assessment.

A second perceived weakness concerned the lack of authority of the review panel, which under the Guidelines Order performs an advisory function only. Decision making powers were reserved for the Minister of the Environment and

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[37]*Oldman River No. 2*, *supra*, note 30 at 396.
[38]R.S.C. 1985, c. F-14.
[39]*Oldman River No. 2*, *supra*, note 30 at 396.
[40]R.S.C. 1985, c. A-1.

the Minister of the initiating department, significantly increasing the potential for politicizing the process.

Critics have also pointed to the absence of a quasi-judicial forum in which to rigorously examine a proposal using adversarial techniques for testing the truth of conflicting evidence.[41] This lack of an independent structure raises significant concerns where the process lacks a statutory foundation, and is therefore less insulated from the possibility of political interference. It is true that a quasi-judicial process might also be subject to political pressures. Even the decisions of a formally independent, quasi-judicial tribunal may often be varied by the government by way of appeal or petition to a Minister or Cabinet.[42] Nevertheless, the credibility of quasi-judicial decision making processes is maintained by the fact that the public hearing or review is conducted in an atmosphere that is generally perceived by those taking part to be fair, just, and devoid of political interference. This was not the case with E.A.R.P. hearings under the procedures outlined in the Guidelines Order.

In January 1987 the Federal Environmental Assessment Review Office (F.E.A.R.O.) announced the establishment of a study group to be chaired by the Honourable Allison M. Walsh, Q.C., a retired justice of the Federal Court. The study group was to review the existing procedures followed by F.E.A.R.O. in conducting public reviews, and to determine whether a more structured adversarial hearing format was required.

The study group released its report in January of 1988,[43] and concluded that the informal hearing procedures then in place should be continued. The report recommended that panels be given subpoena powers, but not the power to swear in participants. The report also recommended, however, that principles of procedural fairness guide the hearing process to a greater extent. Panels should be composed of panelists who were independent of both the government

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[41]The process of the Ontario Environmental Assessment Board, for example, is quasi-judicial in nature. As a statutory administrative tribunal with decision making powers, the Board is governed by the provisions of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, which provides for the cross-examination of witnesses (s. 10(c)), as well as other adversarial procedures. Some commentators have expressed the view that an adversarial hearing format allows for a more rigourous testing of scientific evidence and, based upon my own experience, their view is well-founded. See, for example, S.L. Smith, "Science in the Courtroom: The Value of an Adversarial System" (April/May 1988) 15 Alternatives 18, and M.I. Jeffery, Q.C., "Science and the Tribunal: Dealing with Scientific Evidence in the Adversarial Arena" (April/May 1988) 15 Alternatives 24.

[42]See, *e.g.*, the Ontario *Environmental Assessment Act*, R.S.O. 1980, c. 140, s. 23; and the *Consolidated Hearings Act, 1981*, S.O. 1981, c. 20, s. 13.

[43]Study Group on Environmental Assessment Hearing Procedures, *Public Review: Neither Judicial nor Political, but an Essential Forum for the Future of the Environment — A Report Concerning the Reform of Public Hearing Procedures for Federal Environmental Assessment Reviews* (Ottawa: Supply & Services, January 1988) (Chair: A.M. Walsh).

and the proponent, unbiased with respect to the particular project under review, and yet possess special expertise in the matters at issue.

In September 1987, the federal Minister of the Environment released a Green Paper[44] calling for the reform of the E.A.R.P. after a period of extensive discussion and consultation. The Green Paper canvassed a variety of options for improving the initial assessment phase, and alluded to the possibility of some form of environmental assessment legislation in lieu of guidelines issued under the authority of an Order in Council. The discussion paper also suggested improvements to the public review phase, and attempted to address the contentious issue of self-assessment. In addition, it suggested that measures be developed to prevent duplication of environmental hearings by more than one regulatory agency with respect to a particular proposal.

Although the *Rafferty Alameda* and *Oldman River* decisions did not in themselves provide the impetus for reform, they did provide the basis for pushing the government's reform package to the top of its political agenda. With the courts having decided that the E.A.R.P. Guidelines Order was enforceable as a regulation to be applied with respect to areas of federal responsibility, there seemed little point in delaying introduction of the long-awaited legislation. The new *Canadian Environmental Assessment Act* was tabled in the House of Commons on June 18, 1990.

In introducing the new Bill, the then Minister of the Environment, the Honourable Robert de Cotret, stated:

> I want to emphasize that the new Act will go much further than the original Guidelines. In fact, this legislation and Reform Package will result in an environmental assessment process which is more powerful in its impact on decision making than any other environmental assessment in the world.[45]

Not surprisingly, the Minister's enthusiastic endorsement of the proposed *C.E.A.A.* is not shared by all, particularly since many of the perceived areas of deficiency remain. The principal elements of the proposed legislative scheme are described in the following paragraphs.

A. *Provisions of the new* Canadian Environmental Assessment Act

Federal authorities subject to the Act include federal Ministers, agencies, departments and Crown corporations.[46] An initial screening and report concern-

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[44]Environment Canada, F.E.A.R.O., *Reforming Federal Environmental Assessment — A Discussion Paper* (Ottawa: Supply & Services, 1987) [hereinafter Green Paper].

[45]See "Statement of the Honourable Robert de Cotret, Minister of the Environment, Introducing the *Canadian Environmental Assessment Act*" (June 18, 1990) at 6 [hereinafter Minister's Statement].

[46]*C.E.A.A.*, s. 2.

ing possible environmental effects are to be carried out with respect to proposed projects where: the federal authority is the proponent; the authority provides financial assistance; the project is to be carried out on federal lands; or in circumstances where a federal permit, licence or approval is required.[47]

The Act provides for the development by Cabinet of exclusionary and mandatory study lists for different types of projects. The exclusionary list will list projects which have been determined by Cabinet to have negligible environmental effects, which should be excluded for reasons of national security or which entail minimal federal involvement. Mandatory study lists will include all projects deemed by Cabinet to have significant adverse environmental effects.[48]

The Federal Environmental Assessment Review Office is to be replaced by a new agency — the Canadian Environmental Assessment Agency. Although separate from Environment Canada, the Minister of the Environment will continue to be responsible for the agency, which will perform essentially the same advisory, as opposed to decision-making, role as that of its predecessor.[49]

Unless exempted by virtue of being located on the exclusionary list, the responsible authority, after completing a screening report, may proceed with the project if in its opinion:

> (i) the project is not likely to cause significant adverse environmental effects, or
> (ii) any such effects can be mitigated.[50]

Where the project is to be found on the mandatory study list, the responsible authority must conduct a mandatory study and submit a mandatory study report to the Agency, or refer the project to the Minister who will arrange for mediation or review by a panel.[51]

Where in the opinion of the responsible authority the project is likely to cause significant adverse environmental effects that may not be mitigable, or where public concern warrants it, the project must be referred to the Minister for mediation or review by a panel. The responsible authority may not in these circumstances proceed with the project while the environmental assessment is being conducted.[52]

The new legislation gives the Minister of the Environment the sole discretion to determine the need for panel review, and provides him with the option

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[47]*Ibid.*, s. 5. It is to be noted here that s. 5 narrows considerably the application of the review process from the broad requirement of an environmental effect on an area "federal responsibility" under s. 6(b) of the Guidelines Order.

[48]*Ibid.*, s. 55(1)(b)-(e).

[49]*Ibid.*, ss 57-59.

[50]*Ibid.*, s. 16.

[51]*Ibid.*

[52]*Ibid.*

of referring the project to mediation. In addition, where the Minister is of the opinion that the project is likely to cause significant environmental effects that may not be mitigable, or that public concern warrants it, he may after consulting the responsible authority refer the project to mediation or a review panel.[53] The responsible authority retains the ultimate decision making power with respect to the project following the submission of the report by the mediator or review panel.[54]

Environmental assessments are to take into account the environmental effects of a project, including cumulative environmental impacts, comments concerning those effects received from the public and mitigation measures that are technically and economically feasible. Every mandatory study, mediation or panel review must also include a consideration of the purpose of the project, and of alternative means of carrying it out that are technically and economically feasible, as well as the environmental effects of any such alternative means. In addition, studies must examine the need for, and the requirements of any follow-up program, as well as the capacity for short and long-term regeneration of renewable resources.[55]

A public registry is to be established for panel reports, supporting documents, and other information relative to the assessment, other than restricted information protected by the *Access to Information Act*.[56]

The Act also provides for the establishment of joint review panels in circumstances where jurisdiction with respect to a project is jointly shared with a province, foreign government or international organization of states.[57]

The extent to which the proposed legislation represents an improvement over the existing federal process has been the subject of considerable debate during past months. The following section will canvass some of the strengths and weaknesses identified to date with respect to the proposed legislation.

VI. Strengths and Weaknesses of the New *C.E.A.A.*

The proposed *C.E.A.A.* is disappointing in several respects primarily because it fails to address many of the more insidious deficiencies inherent in the existing environmental assessment process.

As presently drafted, the Act does not remove conflict of interest concerns, both real and perceived, associated with the underlying principle of self-assessment. The ultimate decision making power continues to rest with the

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[53]*Ibid.*, ss 21, 24 & 25.
[54]*Ibid.*, s. 36.
[55]*Ibid.*, s. 11.
[56]*Ibid.*, s. 51.
[57]*Ibid.*, s. 37.

responsible authority, which is often the proponent of the project itself. The credibility of the government's efforts to improve the existing environmental assessment process would be enhanced if the ultimate decision making power with respect to the environmental assessment of projects were given to an independent tribunal or, failing this, to the Minister of the Environment.[58] The intense debate in Cabinet leading up to the introduction of the new *C.E.A.A.* in the House of Commons indicates that other Ministers were reluctant to allow the Minister of the Environment or an independent tribunal to place environmental constraints upon projects or policy initiatives considered to be within their own specific areas of jurisdiction. This "turf battle" has once again left the federal process open to serious and justifiable criticism.[59]

The same protectionist sentiment is all the more evident in concerns voiced by many provincial officials, who worry about federal encroachment upon specific areas of provincial jurisdiction, such as the ownership and control of provincial natural resources.[60] The Act has attempted to overcome some of these objections by including provisions for joint review panels in areas where jurisdiction overlaps with that of provinces or foreign states. Nevertheless, the federal Minister of the Environment retains the power to appoint the chairperson, or a co-chairperson, and one or more members of the panel. The federal Minister also retains the power to require that the public be given an opportunity to participate in the assessment by the panel, and may fix or approve its terms of reference.

Although the Act provides for mediation in prescribed circumstances, it does not appear to contemplate mediation in the event of a disagreement between a province and the federal government. Further, the Act does not oblige the responsible federal authority to accept the findings or recommendations set out in the report of a joint review panel. Section 38 of the Act stipulates only that upon completion of the assessment, the report of the panel must be submitted to the Minister and be published. The responsible federal authority appears to retain the decision making power with respect to the project, even in cases where it has been subject to a joint panel review.

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[58]The government considered it to be a significant improvement upon the existing E.A.R.P. to empower the Minister of the Environment with the discretion to establish a panel, appoint its membership and provide its terms of reference. The government failed, however, to seize the opportunity to depoliticize the process by establishing an independent tribunal with decision making authority.

[59]See, *e.g.*, the report of submissions to the House of Commons Special Committee examining the draft legislation by the Canadian Bar Association and the Environmental Assessment Caucus: "Lawyers' Groups Urge Changes to Proposed Assessment Process" (1990) 1 Envt. Pol. & L. 121.

[60]See R. Ray, "Provinces, Lawyers See Disputes over Jurisdiction" (October 1990) 1 Envt. Pol. & L. 85.

These elements of federal control over matters in which provinces have a clear interest, such as natural resources, will undoubtedly contribute to a further polarization of the constitutional debate now raging across the country. This danger is evident in the continuing controversy over *Rafferty Alameda*, as the province of Saskatchewan continues to assert its right to make its own decisions free of federal encroachment through the environmental assessment process. The thrust of the recent decisions of the Federal Court will do little to quell the mistrust on the part of the provinces with respect to what some perceive as an unwarranted incursion into provincial affairs.[61]

In addition, many of the most important aspects of the process have not yet been spelled out in the Act, but remain to be addressed in future regulations. Essential elements such as which projects or classes of projects will be included on the mandatory study or exclusionary lists; the setting of procedures and relevant time periods relating to the environmental assessment process; and provisions concerning the conduct of assessments by review panels, all remain to be prescribed by regulations.[62] Although provision for public participation is contained in the proposed legislation, no participant funding program has been included, and might well succumb to political and/or budgetary pressures.[63] In addition, while subpoena powers have been given to review panels to compel witnesses to attend and give evidence, no mention is made of the right to counsel or the right to cross-examine witnesses.[64] The extent to which the public is entitled to participate in the process in any meaningful way is thus left ambiguous.[65]

Of particular concern is the apparently more restrictive scope of the *C.E.A.A.* Its application is limited to "projects" which, in turn, are defined in terms of physical works or physical activities.[66] In contrast, under the existing Guidelines Order the E.A.R.P. applies to a "proposal," which is defined to include "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility."[67] It is therefore doubtful that the

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[61]The James Bay II project slated for commencement of construction in 1992 will likely provide the litmus test with respect to federal/provincial cooperation in the environmental arena: see "Federal-Provincial Tangles over a Shared Environment" *The [Toronto] Globe and Mail* (22 November 1990) A18.

[62]These shortcomings were acknowledged by Raymond Robinson, Executive Chairman of F.E.A.R.O., who stated at a pre-introduction media briefing on the proposed *C.E.A.A.*: "The scope of this Act cannot be determined by what you have before you." Cited in K. Pole, "Proposal Labelled World's 'Most Comprehensive'" (1990) 1 Envt. Pol. & L. 41.

[63]A participant funding program had been announced by the Minister as part of his earlier reform package and was referred to in the Minister's Statement, *supra*, note 45 at 5.

[64]See *supra*, notes 41-42 and accompanying discussion.

[65]*C.E.A.A.*, *supra*, note 1, s. 32.

[66]*Ibid.*, s. 2.

[67]Guidelines Order, s. 2.

legislation in its present form would support the assessment of government policy initiatives, if those initiatives did not include in their implementation phase a physical work or physical activity. Many potentially important government policies impacting upon millions of Canadians will not be subject to assessment under the proposed Act.

The exclusion of policy review from the provisions of the *C.E.A.A.* is more difficult to understand in light of the announcement by the Minister of the Environment on March 19, 1991 that the Environment Committee of the House of Commons will review all major government policies.[68] By confining policy review to the political arena, the government has once again stepped back from allowing the affected public to examine the environmental effects of government policy in a non-partisan arena, as would more likely be the case if review took place under a legislative scheme.

On the positive side, the proposed legislation contains provisions for the design and implementation of follow-up monitoring programs not available under the Guidelines.[69] The new legislation also provides for mediation as an option to panel reviews in cases where the potential for reaching consensus appears promising;[70] and specifically provides for the assessment of transborder environmental effects.[71]

Conclusion

Overall, the environmental assessment process envisaged by the new *C.E.A.A.* remains susceptible to political pressure and interference. The federal government has squandered a prime opportunity to remedy a number of the systemic deficiencies present in the existing E.A.R.P. process.

The situation of *Rafferty Alameda* illustrates the danger of not specifically providing in the legislation that construction must stop while assessment is ongoing, if the process of environmental review is to be credible and achieve its purpose. Madam Justice Reed of the Federal Court (Trial Division) in the case of *Naskapi-Montagnais Innu Association* v. *Minister of National Defence*[72] found that there was no mandatory obligation in the Guidelines that a project be halted until a panel review was completed and its report submitted.

Under the existing Guidelines initiating departments and Ministers are able to ignore whatever recommendations a Panel might make. They, of course, do so at their peril insofar as public opinion is concerned. Under the scheme of the

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[68]See W. Walker, "Environmental Review Boosted" *Toronto Star* (20 March 1991) A. 18.
[69]*C.E.A.A.*, s. 35.
[70]*Ibid.*, s. 25(a).
[71]*Ibid.*, ss 43 & 44.
[72] [1990] 3 F.C. 381.

Guidelines it is the watchful eye of public opinion which is to operate as the leverage to ensure that environmentally responsible decisions are taken.[73]

As the *Rafferty Alameda* and *Oldman River* decisions amply illustrate, the task of ensuring that the government follows its own Guidelines fell to the courts when it continued to ignore the watchful eye of public opinion.

Instead of capitalizing upon the opportunity to implement a federal environmental assessment process capable of meeting the expectations of an increasingly sceptical public, the government has provided draft legislation that will neither silence its critics, nor avoid the protracted litigation of the recent past.

Indeed, for many, the watchful eye of public opinion may not be sufficient to ensure environmentally sound and responsible decision making by the federal government.

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[73] *Ibid.* at 22.