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Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward

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A cornerstone of sustainable development is environmental assessment. Through environmental assessment processes regulators identify and assess the environmental, social, and economic consequences of proposed projects to assist them in determining whether projects should be approved, and if so, under what conditions. Despite the benefits of environmental assessment (EA), the federal government has undertaken a course of action that is diminishing federal EA in Canada under the Canadian Environmental Assessment Act. The federal government claims that there is unnecessary overlap and duplication between federal and provincial EA processes. This article deconstructs the premise that there is such unnecessary overlap and duplication and that federal EA should therefore be diminished. The article concludes that where improvements relating to joint federal and provincial or territorial assessment are needed, they should be made through increased but appropriate harmonization, and better cooperation, coordination, and convergence.

1. INTRODUCTION

A cornerstone of sustainable development is environmental assessment (or EA). Through EA regulators identify and assess the environmental, social, and economic consequences of projects to assist them in determining whether they should be approved, and if so, under what conditions. Because of EA, projects are better planned, mitigated, and monitored, and they may have reduced environmental impacts and social costs.

Despite the benefits of the EA, the federal government has undertaken a course of action that, in effect, is diminishing federal EA in Canada under the *Canadian Environmental Assessment Act* [\[FN1\]](#) (CEAA). It is doing this in part because government perceives that EA sometimes holds up project approvals, and in part to address what it perceives as unnecessary overlap and duplication between federal and provincial EA processes. For example, as reported by the *Globe and Mail*, then Natural Resources Canada Minister John Baird stated “There's a real hodge-podge of environmental assessment requirements-- of overlap and duplication” [\[FN2\]](#) and Federal Environment Minister Jim Prentice stated that in “some cases it is slowing down projects with no consequential environmental benefits.” [\[FN3\]](#)

A large component of this course of action was executed on March 12, 2009, through Cabinet's registration of an amendment to the *Exclusion List Regulations* and the new *Infrastructure Projects Environmental Assessment Adaptation Regulations* (*Adaptation Regulations*) under the CEAA. [\[FN4\]](#) Cabinet registered further regulatory exclusions and adaptations on May 13, 2009. [\[FN5\]](#) These regulations will result in a massive reduction in the number of federal EA's carried out in Canada. [\[FN6\]](#) The amendments to the *Exclusion List Regulations* will exclude from federal EA an anticipated 2000 Building Canada Plan projects over the next two years. [\[FN7\]](#) The *Adaptation Regulations* purport to authorize substitution of provincial EA processes for federal ones for Building Canada Plan projects that are not excluded under the amendments to the *Exclusion List Regulations*. [\[FN8\]](#) More reductions of federal EA may be expected from recent amendments to the federal *Navigable Waters Protection Act*, [\[FN9\]](#) set forth in the federal

March, 2009, budget Bill. Provisions in the Bill [\[FN10\]](#) give both Cabinet and the Transport Minister the discretion to exempt works and waterways from the approvals requirements under the Act, and thereby eliminate the need for a federal EA. Media reports suggest that changes to the federal *Fisheries Act* [\[FN11\]](#) or regulations will soon follow, with a consequent further reduction of federal EAs.

This article deconstructs the premise that there is unnecessary overlap and duplication between federal and provincial or territorial EA processes and the processes should therefore be diminished, whether by unduly reducing the number of federal EA's conducted in Canada, by inappropriate declarations of equivalence, or by substituting provincial or territorial EA processes for federal ones. This article argues that, federal EA plays a critical role in environmental management in Canada and, although it could be improved, it should not be diminished when both a federal and provincial or territorial EA process apply to a project. The article concludes that where improvements relating to joint federal and provincial or territorial assessment are needed, the place to look is to improved harmonization, and better cooperation, coordination, and convergence.

The article criticizes the reasons given by governments and industry for reducing the federal role in these circumstances. The article argues that in some instances these reasons are based on a misconception of the role of overlap in the Canadian federation, or a failure to wait for government initiatives to deal with duplication to proceed. The article distinguishes among terms used in connection with joint federal and provincial or territorial EA such as substitution, equivalency, and harmonization, and describes when substitution, equivalency, and harmonization are appropriate in joint EA situations, and when they are not. In doing so, the article recommends abandoning inappropriate quests for equivalency and substitution and instead, aiming for effective harmonization through coordination, cooperation, and where appropriate, convergence.

Part 2 provides a brief overview of the federal EA and joint federal/provincial or territorial EAs. Part 3 sets out definitions for terms associated with joint EA processes. These are “harmonization,” “equivalency,” “substitution,” “overlap,” and “duplication.” Part 4 focuses on substitution and equivalency, two key concepts that governments invoke when attempting to address perceived unnecessary or inefficient overlap and duplication where a project is subject to both a federal and a provincial or territorial EA. This Part also considers when substitution and equivalency are appropriate, given the constitutional fabric of Canada, and argues for an appropriate role for federal/provincial or territorial harmonization. Part 5 argues the criticisms that *harmonization* has not succeeded and that more radical streamlining is “necessary,” often originating from an industry perspective, may be, in effect, flogging the wrong horse. Part 6 concludes the article with suggestions for a path forward for a better joint EA future in Canada.

2. FEDERAL EA AND JOINT EA

(a) About EA

Government decision-makers need information in order to decide whether to issue a statutory authorization or to take some other action that will enable a project to proceed, such as granting an interest in land, or lending or giving money to the project developer (the “proponent”). This is especially so if a proposed activity could have significant environmental effects or other social costs. EA offers a planning tool for identifying and preventing or mitigating environmental problems that will likely result from proposed activities. Through the EA process governments can become aware of the overall impact on the environment of development projects proposed by the public and private sectors. Armed with this awareness, governments are in a position to decide whether they should issue the required statutory authorization so that the activity may go ahead, issue the authorization with conditions, or decline to grant the authorization.

(b) Federal EA under the CEAA

(i) *The Federal EA Process*

A project proposed in Canada will require a federal EA when the CEAA applies. The CEAA applies when a “federal authority” who is a “responsible authority” (RA) exercises certain powers or duties or performs certain functions in respect of a “project” or proposed “project.” A “federal authority” means a Minister of the Crown, and certain government agencies, departments or bodies. [\[FN12\]](#) A “responsible authority” is the federal authority that oversees or administers an environmental assessment under the CEAA and assures that the statutory requirements are met. [\[FN13\]](#) “Project” means, in relation to a physical work, any “proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work.” [\[FN14\]](#) Section 5 of the CEAA sets out the main circumstances that will trigger the Act. [\[FN15\]](#) These are where a federal authority:

- (i) is the proponent of a project;
- (ii) lends or contributes financial assistance for a project to proceed;
- (iii) provides an interest on federal lands to enable a project to proceed; or
- (iv) issues a permit or other authorization listed in the *Law List Regulations*. [\[FN16\]](#)

The *Law List Regulations* referred to in paragraph (iv) set out provisions of federal acts or regulations that confer powers, duties or functions on federal authorities, the exercise or performance of which will require a prior environmental assessment. It is also noted that the *Exclusion List Regulation* excludes certain projects from the need for federal environmental assessment under the CEAA. [\[FN17\]](#) These are projects that the federal government has deemed to have minimal or insignificant environmental effects.

There are four types of federal assessment: screenings, comprehensive studies, mediations, and panel reviews. Depending on type, an environmental assessment may vary in intensity in respect of such matters as public participation, depth of study, and whether there will be a formal hearing. Screenings are the least intensive level of assessment. They require even less time and effort if a project may proceed as a class screening. With class screenings there is a government developed ready-made screening report that sets out mitigation measures and design standards for a type of project. A “model class screening” adjusts a report to account for a project’s specific location and characteristics. A “replacement class screening” completely replaces the EA report and is not adjusted for a particular project. [\[FN18\]](#)

Projects requiring a comprehensive study assessment are listed in the *Comprehensive Study Regulation*. [\[FN19\]](#) These projects are likely to result in significant environmental effects. The Canadian Environmental Assessment Agency’s examples are large oil and natural gas developments, some projects in national parks, and larger projects that can cause harm in migratory bird sanctuaries. [\[FN20\]](#) As further described later in this article, the RA may refer a screening of a project to the Minister of the Environment to “bump up” a review to a panel review or a mediation where there is uncertainty regarding whether the project as mitigated will result in a significant adverse environmental effect, where the project as mitigated will likely result in a significant adverse environmental effect, or where public concerns warrant a bump-up. [\[FN21\]](#)

Where a project is described on the *Comprehensive Study List Regulations* the responsible authority must consult with the public regarding the scope of project and any concerns that the public may have. After the consultation the responsible authority must decide whether to continue the assessment as a comprehensive study, or to refer it to the Minister for assessment as a panel review or mediation. [\[FN22\]](#)

(ii) The CEAA EA Decision and the Subsequent Regulatory Decision

At the end of the assessment process, the CEAA requires that the RA decide whether the project, as mitigated, is likely to cause a significant environmental effect. [\[FN23\]](#) Where the RA determines that the project as mitigated will not cause a significant environmental effect, then it may, at its discretion, allow the project to proceed. This “regulatory decision” may take the form of a federal authorization, a federal loan, or the grant of an interest in federal land. Where the RA determines that the project, as mitigated, is likely to result in a significant environmental effect, the RA

must not allow the project to proceed, in whole or in part, unless the significant environmental effect can be justified in the circumstances. [\[FN24\]](#)

(iii) Statistical Information: Screenings, Comprehensive Studies, and Panel Reviews

A 1999 government sponsored report states that of the thousands of assessments conducted annually under the CEEA more than 99 per cent are screenings. [\[FN25\]](#) Recent statistical information confirms this. It indicates that the vast majority of federal EA is carried out by the screening process and further suggests that the process is fairly quick. The Canadian Environmental Assessment Agency's [\[FN26\]](#) Departmental Performance Report to the Environment Minister for the 2007-8 fiscal year indicates that there were 2,962 screenings ongoing April 1, 2007 and 3,916 initiated during the period. This totals 6878. Of these 6878, EA decisions were made of 3,904 during the year period, or about 57 per cent of the total. An additional 2,475 federal class screenings commenced and completed during the period. If class screenings are added to the mix, the completion rate for screenings over the year was over 68 per cent.

Compared with screenings, there are only few comprehensive studies and panel reviews. As these tend to be larger, more complex projects for which there is significant public interest, the review period is understandably longer, but, based on the statistics does not seem to be inordinately long on average. There were 29 ongoing comprehensive studies at the start of the fiscal year and 13 initiated during it. Nine of these 42 were resolved during the period, or just over 21 per cent. Thirteen review panels were ongoing at the commencement of the fiscal year and 4 four were initiated. Five of these 17 review panels completed their work during the fiscal year, or just over 29 per cent. In addition there was one panel substitution (CEEA and the National Energy Board) and it completed the assessment during the fiscal year.

All of the panel reviews were joint panel reviews, meaning a review by the federal government and another jurisdiction. This means that of the total 6,938 federal EAs being carried out in whole or part during the fiscal year, only a very small percentage, (1/5th of 1 per cent), was federal/provincial or territorial.

(c) Provincial, Territorial, and Joint EA

All of the provinces and territories have EA legislation of some kind. [\[FN27\]](#) Although particulars of EA processes differ, they are all similar to the federal process. Provincial legislation requires that proponents of certain projects obtain a provincial statutory authority before commencing construction or operation. For some proposals, statutes require or give a statutory delegate the right to require an EA to assist with making the decision and for imposing mitigation measures to lessen environmental impacts.

(d) List Approach and Trigger/Category Approach

A question to ask of any jurisdiction is how an EA process is triggered. Answering the question reveals a key difference between federal and provincial EA and reveals why federal EA cannot be triggered in the same manner as EA is triggered in many provinces or territories.

Most, but not all, provincial and territorial EA requirements are triggered by proponent proposals to carry out a project that falls under a specific activity description; this may be called the "List Approach." For example, in Alberta, the *Environmental Protection and Enhancement Act* (EPEA) [\[FN28\]](#) governs most environmental assessment matters in the province. The schedule to the Act lists projects which *may* be assessed. A regulation lists which of these projects *must* be assessed -- mainly large-scale projects such as sizeable pulp mills, oil refineries and dams. The same regulation sets out which projects are exempt from assessment. [\[FN29\]](#) For any assessable project that is not specifically listed as either mandatory or as exempt, a Director appointed under EPEA may determine whether environmental assessment is needed.

Although most provinces and territories adopt a List Approach to EA there are exceptions. For example, the *Saskatchewan Environmental Assessment Act* [FN30] requires a Ministerial review, including an environmental assessment, of any “development,” defined under the Act as any “project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to have an affect on any unique, rare or endangered feature of the environment.” [FN31] Similarly, the Ontario *Environmental Assessment Act* applies to all government projects, plans, and programs, and all private sectors ones unless excluded by regulation. [FN32]

In contrast to the List Approach, federal environmental assessment under the CEAA adopts what might be called a “Category Approach.” As set out earlier, a project proposal is subject to federal environmental assessment if it falls under a number of categories. There must be a “project” as defined by the CEAA, there must be a federal authority involved, and there must be a trigger. [FN33] If a proposal fits under the categories, it must be assessed. If a proposal does not fit under the categories, it is not subject to federal environmental assessment (subject to special authority in the CEAA to require an environmental assessment in other circumstances.) [FN34]

I mention the List v. Category approach since the federal government has toyed with switching from a Category to a List Approach in its quest to reduce the overall number of federal assessments. [FN35] However, it is not clear whether the federal government could adopt a List Approach without also including a Category type trigger. This is because, except for projects that take place entirely on federal lands, federal constitutional authority does not easily extend to projects *per se*, such as a paper mill, a mine, or a dam. Rather it extends to aspects of projects, such as impacts to a coastal or inland fishery, impacts to migratory birds or nests, transboundary impacts, or an interference with navigation. [FN36] Accordingly, even if the federal government's legislation relied on a List Approach [FN37] the legislation also would require a federal trigger, such as is now present in section 5 of the CEAA, or a mechanism comparable to a federal trigger. Because of this core difference between federal and provincial or territorial EA, there could never be complete harmonization in the sense of there being uniform EA legislation that could be adopted by the federal, provincial, and territorial governments. [FN38]

(e) Joint EA Processes

Some projects may be required to undertake an EA both provincial or territorial law and federally under the CEAA. This is a relatively rare occurrence. A 1999 report carried out in relation to CEAA five-year review states “[a] large majority (98% in 1995/6) of projects subject to the Act are not subject to provincial EA legislation. Both governmental levels applied EA requirements to less than 100 projects in 1995/6. In the same year, 7.5% of projects, subject to EA under provincial legislation, were subject to EA under the Act. The same pattern persisted over the next two years. These figures demonstrate that the potential for EA duplication and overlap is very limited.” [FN39]

As discussed below, federal/provincial or territorial agreements called EA *harmonization* or cooperation agreements may apply when both a federal and provincial or territorial process apply. These agreements are developed with the aim of both levels of government meeting their legislative requirements under a single, joint assessment process. [FN40] Under a *harmonization* agreement the proponent must prepare only one EA report. If a hearing is required, the agreements enable a joint hearing, provided that the requirements of both levels of government are accommodated. The bilateral agreements require both levels of government to use the results of the joint assessment in making regulatory decisions regarding the proposed project. However, each government retains its legislative authority to make decisions on a proposed project independent of the other government.

3. LEXICON: HARMONIZATION, EQUIVALENCY, SUBSTITUTION, OVERLAP, AND DUPLICATION

(a) Introduction

This primary purpose of this article is to deconstruct the premise that there is unnecessary overlap and duplication between federal and provincial or territorial EA processes and the processes should therefore be diminished, whether

by unduly reducing the number of federal EA's conducted in Canada, by inappropriate declarations of equivalence, or by substituting provincial or territorial EA processes for federal ones. As a path forward the article argues, among other things, for appropriate and improved harmonization. In order to carry out this purpose it is necessary to understand the terms “harmonization,” “equivalency,” “substitution,” “overlap,” and “duplication.” This Part provides an analysis of each term and paves the way to Part 4, which discusses when harmonization, substitution, or equivalency are proper responses to claims of overlap or duplication, and when they are not.

(b) Harmonization

(i) Introduction

The term “harmonization” is used to cover a variety of processes or situations. The lack of precision with which the term is used can confuse these discussions. In academic literature, *harmonization* describes a range of situations from uniformity to vague attempts to coordinate two or more processes. To clarify and simplify the discussion, this article distinguishes among a number of concepts associated with the term “harmonization” [\[FN41\]](#) while striving to be true to the classic (or most accepted) meanings.

(ii) Meaning of “Harmonization”

This article seeks to limit the use of the word ‘harmonization’ to its classical sense, the sense that is most at home in discussions of trade and economics. When the article uses the word in a more generalized, non-classical sense, it puts the term in italics, i.e. *harmonization*.

Steve Charnovitz, an expert in this area, uses the word ‘harmonization’ in its classic sense and defines it as a movement towards adopting or requiring equivalent standards in laws, regulations, and policies. Charnovitz defines two kinds of standards applicable to harmonization: process standards, relating to how something is manufactured, transported, and used; and product standards, which relate to the characteristic of a good, such as its size, design or performance. [\[FN42\]](#) For example, a process standard relating to a dress might include labour condition regulations, worker safety rules, environmental conditions standards, manufacturing regulations, rules governing type of machinery used in manufacturing, and so on. By contrast, product standards might include what a size “6,” “8,” “10” and so on means, what expressions like “cotton-acrylic blend” mean, and various other standards and rules relating to the design and quality of the product.

Harmonization of process standards involves, for example, minimum worker safety rules among trading partners. By contrast, harmonization of product standards involves, for example, standardized sizing of a product among trading partners. Charnovitz remarks that it is “dogma in trade policy circles that unilateral import standards should relate to products only-- not processes.” [\[FN43\]](#)

What I have dubbed the “classic” meaning of “harmonization” is no stranger in a Canadian/environmental context. For example, Francis Bedros, who won second prize in a Canadian government NAFTA @ 10 essay contest, states that “[h]armonization” refers to [the] limited situation [that is] observable when environmental standards in a particular field are virtually identical. [\[FN44\]](#)

(iii) Harmonization and Environmental Assessment

EA is comprised of processes and activities and as such, using Charnovitz' distinction, process harmonization is the more applicable. In principle, process standards could relate to a number of steps within EA. For example, best practices requirements for: EA in the planning stage of proposed projects; cumulative effects assessments; monitoring and follow-up; determining level of public participation opportunities; and, carrying out public participation procedures.

These types of “best practice” standards have already been developed by several organizations. The International Association for Impact Assessment (IAIA) develops best practices standards for EA processes such as what should be included in an environmental impact assessment and how the steps of an environmental assessment should be carried out. [\[FN45\]](#) The Canadian Environmental Assessment Agency has also developed a number of guidelines for proponents and federal authorities that may be seen as, what the Agency regards as best practice standards. [\[FN46\]](#) In years past, the *Regulatory Advisory Committee* (RAC) [\[FN47\]](#) -- created under the CEAA to advise the federal environmental Minister of matters relating to environmental assessment -- was involved in the development of a Canadian Standards Association (CSA) standard for EA processes. [\[FN48\]](#) The RAC CSA project eventually was abandoned, but if it had succeeded, it would have set out process standards for EA, allowing jurisdictions throughout Canada to incorporate the standards into legislation and policy.

(c) Equivalency

(i) Meaning of “Equivalency”

Mathematically “equivalency” occurs where two mathematical expressions have equal value, equal amount, or equal measure. [\[FN49\]](#) For example, 3/6 is equivalent to 1/2. It follows that, except for how a quantity is expressed, if A is equivalent to B, then everything true of A is true of B.

In a legal context the term “equivalency” typically is used with respect to a determination that a law or process of jurisdiction “A” is equivalent to a law or process of jurisdiction “B.” If two regulations are determined to be equivalent, they are essentially the same and have the same effect even though they may be expressed differently.

An example of “equivalency” in the legal context may be found in the *Canadian Environmental Protection Act, 1999* [\[FN50\]](#) (CEPA). Among other things, CEPA regulates substances that are determined to be toxic under the Act. Given shared constitutional jurisdiction in this area, provinces may also regulate toxic substances. [\[FN51\]](#) Subsection 10(3) of the CEPA provides:

10(3) ... where the Minister and a government agree in writing that there are in force by or under the laws applicable to the jurisdiction of the government

(a) provisions that are equivalent to a regulation made under a provision referred to in subsection (1) or (2), and

(b) provisions that are similar to sections 17 to 20 for the investigation of alleged offences under environmental legislation of that jurisdiction,

the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in an area under the jurisdiction of the government.

Pursuant to this provision, the Government of Canada and the Government of Alberta entered an equivalency agreement regarding the regulation of certain toxic substances. [\[FN52\]](#) Under the agreement, regulatory provisions may be considered to be equivalent only where the “standards, measurement or testing methods” are the same, any statutory authorizations such as approvals, “will not contain standards, measurements and testing methods which are less stringent than the corresponding standards”, citizen rights to require investigations are equivalent, and sanctions and enforcement mechanisms are equivalent. [\[FN53\]](#) Under the agreement the governments agree that Alberta’s regulations under the *Environmental Protection and Enhancement Act* [\[FN54\]](#) governing a number of CEPA toxic substances are equivalent to the CEPA regulations, and hence only the Alberta regulations apply. [\[FN55\]](#) This illustrates a key point about “equivalency”-- where two legislative provisions or processes are determined to be “equivalent,” it is so that there may be a direction that only one of the provisions or processes will apply. The other is inapplicable.

(ii) Equivalency, EA, and Constitutional Authority

A. The Regulatory Decision, the EA Decision, and the Constitution

To reiterate the distinction made above, usually the EA process and is separate from the regulatory decision. The EA process is carried out to gather information on the potential environmental, social, and economic impacts of a proposed project. The EA report (that summarizes and explains potential impacts, proposed mitigation of impacts, monitoring and reporting) is provided to the statutory delegates who regulate the project. The regulators, using the information provided in the report, make regulatory decisions in deciding whether they will exercise their authority under legislation to take action to enable a project to proceed.

Federal regulators make regulatory decisions pursuant to federal legislation, and provincial regulators make regulatory decisions pursuant to provincial legislation. Given the Canadian Constitutional division of heads of power, sometimes only the federal government may legally regulate something, and sometimes only the provincial government may legally regulate something. If one level of government passes a statute or regulation governing a matter over which the Constitution gives the other level exclusive power to legislate, a court may strike down the law as being *ultra vires* since it is beyond authority given by the Constitution. Where legislative authority is unclear, a court will generally first attempt to characterize the essence of the regulated subject matter (the *pith and substance*). [\[FN56\]](#) Then it considers whether the matter falls under provincial or federal constitutional authority. For example, the court might ask whether a provincial law prohibiting timber imports into a province really has to do with regulating provincial timber resources, (a matter within provincial authority) or whether it really has to do with trade and commerce (a matter within federal authority). If the essence of the law is the former, the court will find the provincial law to be valid, but if it is the latter, it will declare the law to be *ultra vires* the Constitution. A court could find that both levels may validly legislate some aspect of the matter. An example is toxic substances, which as noted earlier, may be regulated either federally or provincially, or by both levels of government. [\[FN57\]](#) However, if provincial and federal laws directly conflict, our courts will apply the doctrine of paramountcy to confirm the operation of the federal law, and to order the provincial law to be inoperative, to the extent that it conflicts with the federal law. [\[FN58\]](#)

B. Equivalence in the Regulatory Decision Context

To see how these rules may be applied to the regulatory decision an example is considered. The federal government has exclusive legislative jurisdiction over inland and coastal fisheries. [\[FN59\]](#) Some matters relevant to a fishery are in constitutional provincial jurisdiction such as the regulation of water and water quality. [\[FN60\]](#) Although a provincial government may regulate in the fields of water and water quality, it may not legally directly regulate for the protection of an inland or coastal fishery. If a provincial government did this, a court could declare the purported regulation to be *ultra vires* the Constitution. Accordingly a provincial government could not make a regulatory decision that directly involves inland or coastal fisheries, or any other matter that falls within exclusive federal legislative jurisdiction. Since a province may not regulate in such area, legally there may not be federal/provincial equivalence with respect to making regulatory decisions following an EA where the matter regulated is a matter exclusively under provincial or under federal jurisdiction.

C. Equivalence in the EA process Process and Exclusive Constitutional Jurisdiction

Although there cannot be true equivalence with respect to the regulatory decision, the question may be raised as to whether there can be equivalence with respect to the EA process. More precisely, where government level “A” and government level “B” both need to assess a project to determine its impact on an area falling within each's jurisdiction, could, for example, level “A” legitimately rely on level “B's” EA process to assist “A” in making its regulatory decision? In addressing this question, first note that there should be no constitutional objection to a level of government considering matters outside of that level's constitutional jurisdiction during the EA process. An EA process is, after all, as Supreme Court Justice La Forest has said, an information gathering exercise. [\[FN61\]](#) Accordingly, there is nothing

wrong, constitutionally, with a level of governing considering information in an EA process where that information relates to a head of power of the other level of government. [FN62] The federal EA process itself is not the making of a regulatory decision. [FN63]

Nevertheless, there is strong argument that there can be no true federal/provincial equivalence in the EA process that leads to a regulatory decision where the decision is within exclusive constitutional jurisdiction. The argument is based on the fact that although the EA process and the regulatory decision, though separate, they are intimately connected. The main reason for conducting an EA process is to guide and assist the regulator in making the regulatory decision. Accordingly, which impacts are considered in an EA will directly relate to the regulatory decision. For example, consider a proposal to build a dam. Assuming the project will impact a fishery, the federal regulator, the Department of Fisheries and Oceans, will want to ensure that the EA covers all matters relevant to fishery impacts. The provincial government also may require information on impacts to fish habitat in the EA process, but since that level of government does not have direct regulatory authority over fish habitat, its concerns in this regard will be limited. Its concerns will focus on matters within its constitutional jurisdiction, such as water flow and water quality.

Similarly, consider mitigation. Mitigation proposals form a key component of EA. In determining whether there are significant environmental impacts the government official overseeing an EA process will consider to what degree potential impacts may be mitigated. Which mitigation measures are considered in the context of an EA depends on the power of the regulator to impose mitigation conditions in exercising its regulatory authority. [FN64] It is only the regulator in a jurisdiction that knows precisely what kind of conditions may be imposed on a proponent, and what kind of monitoring and follow-up may be required to determine whether mitigation is successful.

D. Equivalence in the EA process Process and Shared Constitutional Jurisdiction

Another issue concerns matters that do not fall under exclusive constitutional jurisdiction. The question is, can there be true equivalence with respect to the EA process relating to them? Although it is not possible to fully cover this topic in this short article, it is submitted that even where there is shared constitutional jurisdiction federal/provincial equivalence in EA processes may not be possible. For example, the federal government and provincial governments share jurisdiction over water quality. The federal interest stems from its constitutional authority over inland and coastal fisheries, exhibited in the *Fisheries Act*, [FN65] especially s. 36, which prohibits the discharge of deleterious substances into waters frequented by fish, and its constitutional authority over criminal matters [FN66] as they relate to water quality and exhibited in the *Canadian Environmental Protection Act*, under which the federal government regulates discharges of toxic substances. [FN67] For the sake of simplicity, this article will focus on the fisheries power. The provincial interest relates to provinces' constitutional powers over property and civil rights. [FN68] There are two accounts as to why true equivalence may not be possible in such a situation. One is practical and one is conceptual. Both accounts concern how reasons and motives relate to actions or courses of actions.

The practical account is best understood in the context of an example. The example concerns an action or course of action-- John's cleaning his apartment--that may be done for different reasons or motives. John's cleaning his apartment might well differ if he is cleaning in anticipation of his buddies' visit, in contrast to cleaning in anticipation of his mother's visit, or in anticipation of his new girlfriend's visit. There might be much overlap in each case (e.g. straightening up the living room, vacuuming the floors) but there will be differences in approach and concern. For example, John's kitchen is likely to end up much cleaner for his mother, than for his buddies. John may pay special interest to his bathroom for his girlfriend (lest she discover "secrets" such as John's complexion treatments) and his bedroom, in case the relationship takes a certain turn. For his mother or buddies, he might forget the bedroom altogether and simply close the door to it. So, even though it may be true that there are a set of actions that constitute John's cleaning his apartment in all three cases (for his buddies, for his mother, and for his girlfriend), there is no true equivalency in the actions. The reason for the lack of equivalency was because the actions were done for different motives or reasons.

Now apply the practical account to federal/provincial situation where each level of government regulates water

quality. Assume that the federal government's regulation is necessarily grounded in its concern for fisheries and that the provincial government's regulation is grounded in its concern for environmental quality in general. The course of action that the federal government takes in regulating water quality will necessarily be related to what is needed for fish health and habitat. The provincial government's course of action will necessarily be related to what is needed for environmental water quality generally. Although there may be overlap in regulation (e.g. both levels may prohibit discharges of a given chemical over a certain quantity and concentration) each level of government will have different reasons or motives for the prohibition. This is because, from a practical standpoint, the reasons or motives that one possesses to undertake a course of action have an effect on the nature of the course of action, regardless of the overlap. For example, if a province regulates for water quality generally it may be interested in maintaining quality through the use of chemicals such as chlorine. However, the federal regulator, interested in fishery health, might not want to use such chemicals because of their impacts on the fishery. As well, given the different reasons and motivations for regulating water quality, it would be expected that the federal government would be paying more attention to certain aspects of water quality than the provincial government, and that federal monitoring and enforcement would differ from provincial because it would concern fishery health, and not water quality in general. As well, practically speaking, it would be expected that technological and scientific advances concerning fishery health *per se* would more likely lead to changes in the federal regulatory approach than lead to changes in the provincial regulatory approach. Accordingly, from a practical point of view, a claim that a provincial regulatory course of action is equivalent to a federal regulatory course of action, cannot be true, even though specific regulatory actions may be identical. A declaration of equivalence in this regard invites disregard for one jurisdiction's reasons and motives to regulate and could result in, from that jurisdiction's perspective, deficient monitoring, enforcement, and innovation.

The conceptual account relies on a large body of philosophical literature concerning the relationship between reasons, motives, and actions. [FN69] Reasons and motives rationalize actions in the sense that they justify or explain why they were done. John turned left at the stop sign because he wanted to go to the Safeway. John's desire of wanting to go to the Safeway, justifies or explains the action of turning left. Some philosophers would go so far as to say that some reasons are the causes of actions. [FN70] But whether or not reasons are causes, it is undeniable that there is a conceptual connection between reasons and motives and actions. Without identifying reasons or motives, events involving humans would be unintelligible. For example, it would be impossible to ascertain whether Mary's action of fatally stabbing George with a kitchen knife was self-defense, murder, or an accident without identifying her reasons or motives for the stabbing. If Mary's reasons or motives for stabbing George were solely because he had a gun pointed at her and he was ready to shoot, the stabbing was self-defense; if Mary's reasons or motives were to kill the dirty son-of-a-gun for doing her wrong, the stabbing was murder; if Mary's reasons or motives were to puncture a lamb roast on the cutting board and George slipped and fell into the knife over the cutting board just as the knife was irretrievably descending, the stabbing was an accident. Indeed some human events can only be explained by reference to a given motive or intention. For example, the act of murder may only be done intentionally or with reckless disregard. This is because 'murder' by definition requires *mens rea* or at least the mental attitude of reckless disregard.

Another way of putting stating the point relies on the distinction between *de dicto* and *de re* as these terms may apply to events in the world. Philosophers have explained these terms in various ways [FN71] but this article relies on the simple, classic, direct translation that "*de dicto*" means of the word, whereas "*de re*" means of the thing. Thus an intentional description of an action is *de dicto* but the action/event in the world, irrespective of a description, is *de re*. Using the Mary/George scenario, the act of stabbing is *de re*, but describing the event as a murder, self-defense, or an accident, is *de dicto*.

The conceptual account may be applied to actions or courses of actions taken by provinces or the federal government in carrying out constitutional authority where each level of government carries out the same regulatory act. An example would be where both the federal government and provinces prohibit the discharge of a chemical into watercourses over a certain amount and concentration. Call this "Prohibition A." The federal government could legislate Prohibition A to protect the fishery, whereas a provincial government could legislate Prohibition A to protect water quality in general. However, Prohibition A, when carried out by a province, could not be validly described, in the *de dicto* sense, from a constitutional point of view, as a province's protection of the fishery. Indeed if the *pith and*

substance of the provincial legislation incorporating Prohibition A was to protect the fishery, a court could declare the legislation to be *ultra vires* the constitution. [\[FN72\]](#) Likewise, Prohibition A, when carried out by the federal government, could not be validly described, in the *de dicto* sense, from a constitutional point of view, as the federal government's regulation of water quality in general, as this area of legislation constitutionally falls to provinces under the provincial right to control property and civil rights. Accordingly, from a conceptual point of view there cannot be true equivalence between federal legislation to protect the fishery and provincial legislation to protect water quality generally, even where both level of governments, in the *de re* sense take the same regulatory action in the exercise of shared constitutional jurisdiction.

If there can be no true equivalence with respect to a federal/provincial regulatory actions on both the practical and conceptual approach, even when the actions are the same in the *de re* sense, can EAs carried out prior to regulatory actions be truly equivalent? For the reasons set out in the discussion above concerning equivalency and exclusive legislative jurisdiction it is submitted there can be no true federal/provincial equivalency with respect to the EA process where the project falls under shared constitutional jurisdiction, such as water quality.

(d) Substitution

(i) Meaning of "Substitution"

"Substitution" occurs where a law or process of one jurisdiction or agency "A" is substituted for a law or process of jurisdiction or agency "B" such that the application of A's law or process is deemed to be an application of B's law or process. Substitution differs from "equivalency" (as used in the CEPA context) in several key ways. First, when a law is substituted for another, it is *deemed* to be the application of another. No such deeming is required where the laws are declared equivalent because only one law/process applies.

Second, substitution does not require equivalence between the processes or laws substituted one for the other. For example, subs.43(1) of the CEEA provides:

Where the referral of a project to a review panel is required or permitted by this Act and the Minister is of the opinion that a process for assessing the environmental effects of projects that is followed by a federal authority under an Act of Parliament other than this Act or by a body referred to in paragraph 40(1)(d) would be an appropriate substitute, the Minister may approve the substitution of that process for an environmental assessment by a review panel under this Act.

In exercising his or her discretion under this provision, the Minister must only be of the opinion that the substituted process is an "appropriate substitute." There is no requirement that the processes be identical or equivalent. [\[FN73\]](#)

(ii) Substitution, EA, and the Canadian Constitution

For the same reasons set out under "Equivalence in the EA Process and Exclusive Constitutional Jurisdiction" substitution of a provincial regulatory decision for a federal regulatory decision (or *vice-versa*) is not legally possible where the project requires regulatory authority that falls under a head of exclusive constitutional authority. Also, for the same reasons set out under "Equivalence in the EA Process and Shared Constitutional Jurisdiction," the substitution of a provincial assessment for a federal EA (or *vice-versa*) is not appropriate where the project requires regulatory authority that falls under shared constitutional authority. Hence, if substitution is to have a role in the EA process, it should be within one jurisdiction's family, such as is permitted under para. 43(1) of the CEEA set out above. [\[FN74\]](#)

(e) Overlap

(i) Meaning of "overlap"

The *Canadian Oxford Dictionary* (2000) defines “overlap” as “1. lay over. 2. ... cover and extend beyond. 3. ... partly coincide, extend beyond”. Hence in the Venn diagram below area B may be said to overlap areas A and C.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Overlap in and of itself is neither bad nor good. If a mother has five children, the time that the children's appetites are active may overlap on a daily basis. This is not a good thing, or a bad thing; it is just the way things are in the world. Regulatory requirements of two jurisdictions may overlap as well. For example, suppose a company wishes to discharge deleterious substances into a fish bearing river in Nova Scotia. The Department of Fisheries and Oceans in carrying out its mandate under the *Fisheries Act* may need information on impacts on water quality impacts in order to ascertain whether the project would have a negative impact on the fishery, a matter within federal authority. The Nova Scotia Department of Environment and Labor also may need information on water quality impacts to ascertain whether the project would cause water pollution, a matter within provincial authority. [FN75] In other words their information requirements overlap, although their constitutional mandates extend beyond the overlap. The overlap is not good or bad, it is just what would be expected in a federation such as Canada.

(ii) *Overlap, EA, and the Canadian Constitution*

A Canada Google search of “overlap & environmental assessment” reveals numerous pages of claims and concerns that there is unnecessary overlap between federal and provincial requirements and that such overlap should be minimized or eliminated. The web pages typically are those of a level of government, industry, or business or their representatives. Although not every link was followed, a cursory review revealed no links where a member of the public was complaining about overlap in EA. Rather the review revealed claims or concerns by self-interested private or governmental entities that overlap somehow lead to or resulted in inefficiencies, wasting time and so on.

It is submitted that these claims are ill founded. [FN76] Overlap per se is not bad or inefficient. Just as a mother's five children's appetites overlapping is not bad nor inefficient, different levels of government's overlapping requirements for EA information in order to carry out regulatory responsibilities is neither bad nor inefficient. It is only the duplication that may result from overlap that may raise questions of inefficiency, wasting time, etc. This takes us to the next heading.

(f) Duplication

(i) *Meaning of “Duplication”*

“Duplicate” means “copied or exactly like something already existing.” [FN77] “Duplication” thus means the result of doing the same thing more than once. We are all asked to duplicate the providing of information or doing things from time to time and, with the aid of electronic copies and photocopiers, the task may not be onerous. However, the task could be more time consuming if certain inefficiencies are introduced. Taking the example of the mother with five children, it should not be overly onerous for the mother to make a large quantity of food and serve five identical meals to satisfy the children's overlapping appetites. However, if the children eat at different times, the job gets harder. The challenge for the mother, as with all inefficient duplication, is attempting to arrange affairs to minimize the inefficiencies when having to do the same thing more than once.

(ii) *EA, Duplication, and the Canadian Constitution*

First it is important to distinguish between what truly is duplication where a project undergoes joint multi-jurisdictional EA, and what is not. Again, duplication relates to doing the *same* thing more than once. So, for example, having to obtain a federal authorization and a provincial authorization to carry out a project, is not duplication. The authorizations relate to different constitutional heads of power, and distinct mandates and interests. It is part and

parcel of the fabric of Canada, as a federal republic, that the federal government regulates some matters and provincial governments regulate other matters.

This article assumes that industries' and provinces' complaints about duplication are not, in the usual case, complaints about federalism. If provinces' and industries' complaints about duplication were about federalism, then asking governments to address duplication would be asking, in effect, for constitutional amendments to alter the current division of powers with the result that industries need only deal with the requirements of one level of government. On the contrary, this article assumes that, at least in the usual case, industries' and provinces' complaints about duplication involve the claim that proponents are asked to provide the same information to federal and provincial regulators or assessors, where there are inefficiencies. For example, industry may be asked to provide the same information to different levels of government, or different agencies within a level of government, but in different formats, or at different times, or more than once.

Sometimes such duplication is not very onerous, and involves only, say, sending out photocopies or electronic copies to more than one regulator or assessor. However, it has been claimed that sometimes it can be quite onerous. Industry's allegation is that such duplication could result in project delays, additional expenses, losses of opportunities, etc. For example, Jacques Whitford, an industry consultant, in the paper "Environmental Assessment Crisis in Canada: Reputation versus Reality?" [\[FN78\]](#) lists perceived duplication. One is the Department of Fisheries and Oceans' requiring a detailed review and providing of information by the proponent to determine whether a project will result in a harmful alteration, disturbance or destruction of fish habitat and therefore require a subs. 35(2) *Fisheries Act* authorization. Then, after determining that an authorization is required, since subs. 35(2) triggers a CEAA assessment, asking for the same information again in connection with the EA.

To respond to Jacques Whitford, first note that this example has nothing to do with *harmonization*. The example concerns only what happens within the federal family and does not involve a province. Second, this kind of "duplication" could be avoided if the Department of Fisheries and Oceans simply would simply trigger an EA earlier. The author has argued elsewhere that under a correct interpretation of the relationship between the CEAA and the *Fisheries Act* subs. 35(2) triggers a CEAA EA at the planning stage of a project and accordingly a proponent should only be required to provide information in respect of the EA and the regulatory decision should be made on the basis of that information. [\[FN79\]](#)

Another example of alleged duplication of Jacques Whitford concerns where in a joint federal/provincial assessment each jurisdiction scopes a project differently. The consultants claim that where the federal responsible authority scopes narrowly and the provincial authority scopes more broadly there is less duplication than where both the federal responsible authority and the provincial authority scope broadly. [\[FN80\]](#)

To respond to Jacques Whitford, the consultants' logic breaks down. It would seem that if both jurisdictions scoped the same (broadly) for the most part they would require the same information. The proponent could then simply provide the same information to each of them. However, if one scopes narrow and one scopes broad then the proponent would likely have to send different information to each authority. It appears that rather than duplication being the problem here, it is rather instead uncertainty and discretion regarding scoping decisions, at least federally, and this could be dealt with by clearer policy directives or legislation.

In summary, it is not the fact of federalism that is the problem of inefficient duplication. Nor is it the fact that provincial interests and mandates differ from federal mandates and interests. It is the fact that either a single jurisdiction with more than one agency involved in an EA, or multiple jurisdictions involved in an EA, require the same or similar information of industry and industry finds this to result in inefficient duplication.

4. EA AND HARMONIZATION, SUBSTITUTION AND EQUIVALENCE: THE GOOD, THE BAD, AND THE UGLY

(a) Introduction

This section considers what is good, what is bad, and what is ugly about actual and prospective *harmonization*, substitution and equivalence in respect of federal/provincial or territorial EA. The section builds on distinctions made in *Lexicon* in Part 3.

(b) The Good

Upward harmonization of EA standards, where it does not interfere with constitutional jurisdiction or unduly affect autonomy, can be good. For example, if all jurisdictions in Canada had the same standard for measuring cumulative effects, and it was a high and defensible one that would serve public interests, it would discourage jurisdiction shopping and “death by a thousand cuts” throughout Canada, and would encourage environmental protection.

As well, equivalency can work if legislative provisions of two jurisdictions are the same and there are no issues of loss of jurisdiction or, in the case of the federal government loss of national approach and concerns. For example, CEPA equivalency, at least with respect to the example given in this article, appears to raise few jurisdictional or approach issues.

It is unlikely that full substitution can ever be good in a federalist state. For example, for reasons given earlier, provincial EA processes cannot be substituted for federal ones without loss of jurisdiction or national perspective. However, in theory parts of processes may be substituted without such loss. For example, in harmonization agreements the processes of a lead party sometimes are substituted for processes of the other party. However, for substitution to be acceptable the processes must be at least equivalent or better than equivalent. For example, it would be good if public participation opportunities and processes under the CEAA were substituted for provincial opportunities and processes where the latter were not as encompassing as the CEAA.

(c) The Bad

Harmonization of EA processes are bad whenever a jurisdiction lowers its standards or approaches in order to participate in the *harmonization*. Fitzpatrick and Sinclair give a number of examples in their paper “Multi-jurisdictional Environmental Assessment.” [\[FN81\]](#) One example considers the fact that a CEAA hearing process provides informal opportunities for the public to “present information about a project to an ‘unbiased’ selection of experts appointed by the Minister.” [\[FN82\]](#) Section 34 of the CEAA requires a panel to make information available to the public and to give the public an opportunity to participate in hearings. However, where the hearing process of a party to a *harmonization* is other than the federal government, the informal nature of the hearing and meaningful opportunities to participate may be compromised. For example, where the National Energy Board’s hearing processes prevail, hearings are more formal than CEAA hearings, including requirements for affidavits, and formal cross-examination. [\[FN83\]](#)

As well, *harmonization* processes are bad where one level of government characteristically is in the inferior role in an environmental assessment process. This often is the case with joint hearings pursuant to federal/provincial or territorial EA cooperation and coordination agreements. Most agreements provide a process for designating a “Lead Party” and designating the “Other Party.” Applying the formulae to determine the Lead Party, the province or territory typically assumes that role. [\[FN84\]](#) The Lead Party is very important in that the Lead Party administers the EA process, subject to the agreement. The Other Party often is reduced to a consultative role under an agreement. For example, in the Federal/Alberta agreement the Lead Party will determine the terms of reference for an EA after consultation with the Other Party, though the Lead Party is meant to ensure that the Other Party’s requirements are met. [\[FN85\]](#)

Another example of when *harmonization* is bad is when it results in one or either party not complying with a provision of their statutory authority in order to *harmonize*. This could be either bad or ugly. It is bad when statutory directives are compromised, it is ugly when a party, in carrying out a *harmonization* fails to exercise authority in an area of constitutional jurisdiction. An example would be if an EA process, in following the Lead Party's process, fails to provide the public with the extent and quality of participation opportunities that would have been available if the process were only under the CEAA. [\[FN86\]](#) A declaration of 'equivalence' can be bad in many ways, two of which I will mention. Equivalence is bad when it results in one jurisdiction failing to make improvements in legal substance or process. It stands to reason that if there are equivalency arrangements between two jurisdictions, A and B, where B's law is determined to be equivalent to A's, it would take more effort for A to make improvements in the substance or process elements of the law independent of B, as this would require either breaking the equivalency relationship, or foisting changes in B's legislation. Another example deals with enforcement. Equivalence is bad where enforcement efforts are less than they would be if there had not been a determination of equivalence.

Substitution of jurisdiction B's law or process for jurisdiction A's law or processes can be bad in the same way as equivalency. It can result in a state of complacency in A such that improvements are not made, and where B's enforcement is less rigorous than A's would have been but for the substitution. Similarly it can result in stagnation of B's law or process lest the substitution arrangement be disarranged.

(d) The Ugly

Harmonization, equivalency, and substitution, each can be ugly if it leads to one level of government failing to exercise an area of exclusive constitutional jurisdiction. An example is where *equivalency* or substitution were to apply to enable a province to carry out EA processes on behalf of the federal government in an area where the federal government has exclusive legislation jurisdiction. A less ugly, but ugly nonetheless, version would occur where there is shared constitutional jurisdiction in an area, and through the application of *equivalence* or substitution in EA processes the national interest drops out or is compromised.

In my experience, both representatives of provinces and industry representatives have pushed for ugly *harmonization*, equivalency, or substitution. [\[FN87\]](#) This is not a common front of these institutions, as the main complaints about having more than one EA process to deal with typically are not attacks on federalism *per se*, but rather are attacks on how federalism is implemented in joint EA processes. Nevertheless, attempts to invoke ugly *harmonization* are made and should be recognized for what they are.

Environmental concerned public interest advocates consistently have argued against both the ugly and bad versions of this kind of *harmonization*, equivalency, and substitution. For example, in the 1999 action *Canadian Environmental Law Assn. v. Canada (Minister of the Environment)*, the CELA took the federal government to court arguing that the federal Minister exceeded jurisdiction in signing the Harmonization Accord. CELA argued that the Harmonization Accord in effect devolves constitutional federal responsibility to the provinces without the required constitutional amendment. [\[FN88\]](#) The Court's decision and reasoning for it are telling.

After examining the Harmonization Accord the Court concluded that the agreement merely was an "effort to cooperate and coordinate." This implies that an agreement to cooperate and coordinate processes between jurisdictions is fine. However, the Court acknowledged that there could be specific fact situations that would amount to unauthorized devolution. [\[FN89\]](#) Although the Court was not specific, the Court opened the door to challenges of unconstitutional devolution pursuant to harmonization agreements. I submit that where a fact situation involves *harmonization*, equivalency, or substitution of the ugly sort, as described here, there could well be such a challengeable unconstitutional devolution.

5. FLOGGING THE WRONG HORSE

(a) Introduction

The Canadian Council of Ministers of the Environment [\[FN90\]](#) (CCME) is a particularly strong voice in the field of *harmonization*. The CCME developed the Canada-wide Accord on Environmental Harmonization, under which the federal/provincial EA agreements are entered.

A new and ongoing CCME initiative seeks to further streamline EA processes on the basis that past attempts to *harmonize*, including under federal/provincial agreements, has not worked. [\[FN91\]](#) The CCME has claimed that despite attempts to *harmonize* EA processes, undesirable states of affairs yet exist. In a recent CCME report “CCMR Action on Environmental Assessment” the CCME has claimed that despite bilateral agreements that call for a cooperative approach to EA there are still challenges to be met to integrate two processes. [\[FN92\]](#) It contends that, as a result there are “process inefficiencies, overlapping mandates and responsibilities, [and] lack of timeliness”. [\[FN93\]](#) Because of these perceived problems the CCME has undertaken an initiative to further streamline environmental assessment where there is more than one jurisdiction involved. As well, as mentioned in Part 1, the federal government itself has made claims that there is too much “overlap and duplication” in EA processes and, based on these and other claims of alleged EA inefficiency, it amended the *Exclusion List Regulations* and promulgated a new *Adaptation Regulations*. [\[FN94\]](#) Finally, as set out in the last Part, industry has made similar claims regarding EA processes.

This Part argues that the CCME, the federal government's, and industries' claims regarding inefficiencies of EA, especially when more than one process applies to a project, may not be the fault of ineffective *harmonization*, or, in some cases, resulting from “duplication of work, inconsistencies and delays.” It points out that there are numerous factors, independent of *harmonization*, and duplication, that can account for these. It stresses that some duplication and so-called “inconsistencies” are necessary in a federation such as Canada and they cannot be compromised away through *harmonization*.

(b) Other Horses

(i) Weak Role of the Federal Coordinator under the CEAA and Adherence to Self Assessment

The environmental community and others interested in federal environmental assessment have long argued that the Canadian Environmental Assessment Agency or some other entity should have greater control over the federal assessment process. [\[FN95\]](#) It has been argued that the principle of self assessment accounted for many of the perceived problems with federal environmental assessment. For example, late triggering has been identified by both the environmental community and industry as lending uncertainty and delays in EA. The environmental community was and still is particularly concerned because late triggering often results in a project being planned and mitigation considered prior to a determination that an EA is required under the CEAA. If an independent agency ran the EA process more consistently, certainty, and timeliness likely would result.

(ii) Lack of a Revised Federal Coordination Regulation

In 1997 *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* came into effect [\[FN96\]](#) (federal coordination regulation). The regulations set timelines for federal authorities to determine whether they likely will require an EA, and timelines for matters related to an assessment such as notifying the proponent that more information is required, making a determination as to whether an assessment will be required after obtaining information, and reporting on the determination. [\[FN97\]](#) Unfortunately the regulation contained no enforcement provisions or consequences for federal authorities who failed to comply with its provisions.

Following CEAA amendments in 2003 the federal government began developing a new federal coordination regulation to accommodate changes in the CEAA and to impose stricter timelines on members of the federal family in

order to effect greater certainty and timeliness to the environmental assessment process. Although six years have passed, the new federal coordination regulation has not yet seen the light of day.

The lack of a revised, stricter federal coordination regulation with consequences for non-compliance is in part responsible for delays and uncertainties originating within the federal family. These delays and uncertainties could be better dealt with through a federal coordination regulation with teeth. Consequences must result for federal authorities who do not comply with regulatory provisions, such as an independent agency coming in and taking over processes.

(iii) Failure to Wait for the Federal Quality Assurance Program

It would be precipitous, to say the least, to leap into further streamlining activities without a clear idea of what is the problem is. As mentioned earlier, the Agency is carrying out a Quality Assurance Program that is designed to acquire actual data on federal EA, to pinpoint where there is a lack of quality, and to address how better quality may be assured. [FN98] The first Report contains much valuable information about quality assurance and federal screenings and offers ways to address quality assurance issues. [FN99] Although it has taken a long time to compile, without the information that the Program provides it would be wrong to assume that further streamlining is the answer to perceived problems. For example, paragraph 6.3 of the Report states “Although there has been considerable anecdotal commentary about screenings that have taken an unacceptably long time to complete, the Internet site data does not necessarily reinforce that impression. In some cases the data might even give the opposite impression.” Given this fact, it would be irresponsible, for example, to pursue a general program designed to shorten timelines in federal screenings. As the Agency continues to produce Quality Assurance reports, all stakeholders will have the opportunity to test their views as against actual data.

(iv) Failure to Fully Implement the Role of the Agency as the Federal Environmental Assessment Coordinator

In 2003 amendments to the CEAA created the Federal Environmental Assessment Coordinator (FEAC) to carry out numerous functions to make federal EA more efficient, especially in relation to joint assessment. FEAC duties include ensuring that the federal authorities that may be RAs have the needed information and knowledge regarding the project, coordinating RA's involvement through the EA process, ensuring EA's fulfill their CEAA duties in a timely manner, and coordinating federal authorities' involvement with other jurisdictions. [FN100] If the FEAC were to vigorously pursue these functions, many of the complaints of industry and others could be addressed.

(v) Failure to Wait for the Major Projects Management Office to Carry Out its Mandate

The Major Projects Management Office (MPMO), housed in Natural Resources Canada, was created by Cabinet Directive in 2007. [FN101] According to the MPMO website, its role is to “to provide overarching project management and accountability for major resource projects in the federal regulatory review process, and to facilitate improvements to the regulatory system for major resource projects.” [FN102] The Cabinet Directive defines a “major resource project” as a “large resource project which is subject to a comprehensive study, a panel review or a large or complex multi-jurisdictional screening.” [FN103] The MPMO is meant to provide a “single window” into the federal regulatory process, provide guidance to EA participants, coordinate project agreements and timelines between federal departments and agencies, and track and monitor projects through the federal regulatory review process. This organization is just beginning to do its work, and should be given an opportunity to reduce unnecessary duplication and inefficiencies before “throwing the baby out with the bathwater” by removing much of the federal role in joint EA.

(vi) Industry Itself to Blame

Proponents themselves are sometimes the cause of delays in the environmental assessment process. For example, proponents could insist that the Department of Fisheries and Oceans require an environmental assessment up front rather than participating in attempts to mitigate projects down to below the harmful alteration, disturbance or de-

struction of fishery habitat threshold and then provide a so-called “Letter of Advice.” [FN104] In addition to avoiding delays, such early triggering would be in compliance with the CEAA which requires that environmental assessment be conducted in the planning stages of a project [FN105] and not after a project has been planned. It also would show good faith and a willingness to provide an opportunity to involve the public in planning and mitigation measures as required by the CEAA for screenings, as appropriate, and for all other levels of assessment, rather than conduct planning and mitigation behind closed doors.

Instances of proponents causing delay also may be found in the context of the EA process. For example, on March 3, 2008, the Joint Panel reviewing the proposed EnCana Shallow Gas Infill Development project [FN106] for three well licenses in the Suffield National Wildlife Area in Alberta, announced that it would postpone the hearing, originally scheduled for March 2008, until October 2008. It did this as a response to a request by EnCana in order to respond to intervenor requests. Another example concerns the Whites Point Quarry (Digby) Nova Scotia. The proponent delayed the process by not filing the environmental assessment and requested amendments in a timely fashion. The panel finally called a hearing, but in a number of places in its Report noted that the Proponent's processes or information were lacking. Because of such deficiencies the EA process took longer than it would have without them. [FN107]

(vii) Onus to Substantiate the Issue Has Not Been Met

Finally, the onus to substantiate and quantify alleged delays, uncertainties, overlap, duplication, and so on is on the entity claiming that the same exist. It is unfair to expect government and the citizens of Canada to respond to address complaints unless they are substantiated. This is particularly so when the response involves reductions in federal EA or substitution that may not be in public interest. Although the Agency, as noted above, is gathering information in the context of its Quality Assurance Program, the onus is still on the complainant to document and establish problems. If the complainant argues that further diminishment of federal EA is required to address issues, then the complainant must establish how it is that the presence of federal EA is to blame and not some other cause.

6. A PATH FORWARD

This article has argued that on a detailed analysis of terms associated with joint EA there does not seem to be unnecessary overlap, though there may be unnecessary duplication. The article has argued that the fact of duplication alone is not sufficient grounds to reduce the role of the federal government in EA in Canada. The article contended that given the constitutional division of powers in Canada, there are practical reasons and theoretical ones to tread carefully on the road that leads to equivalence declarations and substitutions. It argued that in many instances it simply is inappropriate to take this road at all.

As a path forward I offer a number of recommendations and introduce new terminology.

Regarding recommendations:

- The federal government should cease its current course of action that is diminishing the role of federal EA in Canada and reconsider and suspend or repeal the amendments to the *Exclusion List Regulations* and the passing of the new *Adaptation Regulations*. [FN108]
- The actions and initiatives set out in Part 5 of this article should be assessed and carried out as appropriate prior to any further decision to pare down the role of the federal government in EA in Canada. These actions and initiatives include:
 - an accurate determination and assessment of actual instances of unnecessary or inefficient duplication and related issues identified with respect to federal and provincial or territorial EA (such as late federal triggering);

- an analysis of the causes of unnecessary or inefficient duplication and related issues and the developing of and carrying out of a plan that addresses these matters without compromising federal jurisdiction or the national perspective;
- assessing the initiatives that currently are in place identified in Part 5 that are designed, at least in part, to address unnecessary and inefficient duplication and related issues, reducing unnecessary duplication in relation to this initiatives, [\[FN109\]](#) and devoting the time, energy, and money for the appropriate ones to be carried out; and
- industry proponents assessing to what extent their actions contribute to any inefficiencies in joint EA and addressing problems.

In closing, I identify additional terms for the EA Lexicon. These are “cooperation, coordination, and convergence.”

According to the Canadian Oxford English Dictionary, “co-operation” means “working together to the same end,” “coordination” means “the harmonious or effective working together of different parts,” and “converge” means coming together from several diverse points toward a common point. “Convergence” means “the action, fact, or property of converging.” Steve Charnovitz, characterizes “convergence” as a “lessening of a gap, not uniformity.” [\[FN110\]](#)

Provided that constitutional jurisdiction is respected and national and provincial and territorial perspective retained, cooperation, coordination, and convergence, are key elements of a successful federal/provincial or territorial joint assessment. The federal government, provinces and territories should cooperate and coordinate their EA processes through improved harmonization agreements, and lessen gaps by using upward harmonization as appropriate. Cooperation, coordination, and convergence also should be pursued within a single jurisdiction where more than one agency is involved in an EA process.

[\[FN11\]](#). Associate Professor Faculty of Law University of Calgary.

[\[FN1\]](#). S.C. 1992, c. 37 (CEAA).

[\[FN2\]](#). Brian Laghi and Steven Chase, “Ottawa Seeking to Speed Up Process for Works Projects,” *Globe and Mail*, January 13, 2009, p. A5.

[\[FN3\]](#). Billy Curry, “Prentice confirms cuts planned to environment reviews,” *Globe and Mail*, March 14, 2009, p. A10. Also see the Regulatory Impact Assessment Statements (RIAS) filed in connection with amendments to the *Exclusion List Regulations* (SOR/07-108) and the registration of a new *Infrastructure Projects Environmental Assessment Adaptation Regulations* (SOR/09-89). For example, the summary opening statement of the RIAS filed in connection with the May 13, 2009 amendment (SOR/09-131) to the *Exclusion List Regulations* states “Concerns have been expressed that federal environmental assessment requirements can unnecessarily slow down funding decision ...” and “First Ministers have agreed to work together on a number of important actions to provide stimulus to the Canadian economy. One of the actions identified is to streamline the regulatory and environmental approvals process for infrastructure projects to avoid unnecessary overlap and duplication.”

[\[FN4\]](#). *Exclusion List Regulations*, *ibid*. The March 12, 2009 amendment is SOR/09-88: *Adaptation Regulations* *ibid*.

[\[FN5\]](#). *Exclusion List Regulations*, *ibid*; the May 13, 2009 amendment is *supra* note 4. The amendment to the *Adaptation Regulations*, *ibid*., is SOR/09-132.

[FN6]. In April, 2009, the Sierra Club of Canada commenced proceedings in federal court in which they ask the court to find the amendments to the *Exclusion List Regulations* and the promulgation of the *Adaptation Regulations* (both *supra* note 4) to be *ultra vires* the CEAA.

[FN7]. Information from the *Regulatory Impact Analysis Statement* published with the regulations. The ‘Building Canada Plan’ refers to the federal government's 2007 Building Canada: Modern Infrastructure for a Strong Canada. The Building Canada Plan promises \$33 billion dollars of federal funds over seven years for public infrastructure projects throughout Canada. There are about 7000 federal EAs a year, the vast majority of them (99 per cent) being screenings, the least intensive level of federal assessment (see Canadian Environmental Assessment Agency, online at <<http://www.ceaaacee.gc.ca/default.asp?lang=En&n=CE87904C-1>>).

[FN8]. For more information on and a critique of these regulations see my ABLAWG “The Eviscerating of Federal Environmental Assessment in Canada” posted on the University of Calgary's Faculty of Law online: <<http://www.law.ucalgary.ca/>> link to ABLAWG and my article “Not so fast: Don't scrap environmental assessments” in *Lawyer's Weekly*, May 15, 2009, at 5.

[FN9]. R.S.C. 1985, c. N-22.

[FN10]. *Budget Implementation Act*, S.C. 2009, c. 2, ss. 317 - 341.

[FN11]. R.S.C. 1985, c. F-14.

[FN12]. CEAA, *supra* note 1, s. 2. The Act excludes some bodies from the definition.

[FN13]. *Ibid.*

[FN14]. *Ibid.*, s. 2; “Project” also means any physical activities set out in the *Inclusion List Regulations*, SOR/ 94-637. These regulations set out undertakings that do not necessarily relate to a physical work yet but are subject to the Act. Examples include dumping specified substances, certain aviation activities and killing of migratory birds. The CEAA definition section does not include “construction,” “operation,” “modification,” “decommissioning,” “abandonment” or “undertaking.”

[FN15]. *Ibid.*, s. 5. The CEAA may also apply in circumstances in which there is no s. 5 trigger. For example, the federal Environment Minister may order an environmental assessment in certain circumstances where a project may have significant adverse effects on another province, or where the project is carried out on federal lands or elsewhere in Canada and may have significant adverse environmental effects outside of federal lands or outside of Canada (s. 48) or where public concerns warrants an environmental assessment requirement (s. 28).

[FN16]. SOR/94-636.

[FN17]. *Supra* note 3.

[FN18]. See CEAA, *supra* note 1, s. 19.

[FN19]. SOR/94-638.

[FN20]. See <http://www.ceaa.gc.ca/010/basics_e.htm>.

[FN21]. CEEA, *supra* note 1, s. 20(1)(c). The *Adaptation Regulations*, *supra* notes 4 and 6, purport to remove the bump up potential for projects assessed under the regulation.

[FN22]. *Ibid.* s. 21. Projects are on the *Comprehensive Study Regulations* since they have potential for significant adverse environmental effects or may generate significant public concerns. They typically (though not always) are larger projects. The CEEA (*supra* note 1, ss.16(2) and 21-23) require additional considerations and processes for comprehensive studies over screenings. For example, early in the comprehensive study process the Minister must determine whether the project should undergo a panel review or mediation. If the project remains a comprehensive study, there are mandatory public consultation and funding opportunity requirements, and the Minister must consider purposes of, alternatives to, the need for the project, and the project's potential impacts on natural resources in relation to their ability to meet the needs of future generations. As well the Minister must set out mitigation measures and consider a follow up program.

[FN23]. *Ibid.*, ss.20 and 37.

[FN24]. *Ibid.*

[FN25]. See *Review of the Canadian Environmental Assessment Act*, Cat. No. EN 194-211-1999E, (Ottawa: 1999) at 25.

[FN26]. See the Canadian Environmental Assessment Agency's Departmental Performance Report to the Minister for the 2007-2008 year, Statistical Summaries of Environmental Assessment at <http://www.tbs-sct.gc.ca/dpr-rmr/2007-2008/inst/ea/ea04-eng.asp#Review_Panels>.

[FN27]. A useful, though dated, reference for finding provincial and territorial environmental assessment legislation and policies is S. Dupuis & P. LeBlanc, *Directory of Environmental Assessment Practices in Canada* (Hull: Canadian Environmental Assessment Agency, 1995). This document was prepared for the Canadian Environmental Assessment Agency and may be accessed from the Agency's website online: <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&E=6AA81607-1>>. For more up to date information, the Agency's web site provides links to the provincial or territorial departments or agencies that administer EA online at: <<http://www.ceaaacee.gc.ca/default.asp?lang=En&E=223FBFDB-1>>.

[FN28]. R.S.A. 2000, c. E-12.

[FN29]. *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93. Section 47 of the EPEA gives the Environment Minister the right to order an environmental assessment on any proposal to carry out an exempt activity.

[FN30]. S.S. 1979-80, c. E-10.1.

[FN31]. *Ibid.*, s. 2(d)(i).

[FN32]. R.S.O. 1990, Ch. E.18.

[FN33]. See discussion in Part 2(b)(i).

[FN34]. Sections 46 and 47 of the CEEA enable the federal Minister of the Environment to require a CEEA environmental assessment of a project where there is no s. 5 CEEA trigger, where a project would have transboundary or international environmental effects.

[FN35]. This fact is based on a number of federal initiated consultations in which I participated, including one initiated by Natural Resources Canada's Major Project Management Office held in Ottawa on December 10, 2008.

[FN36]. Legislative authority over these impacts is found in the opening and closing clauses of s. 91, and ss. 91(2), (10), (12), and s. 132 of the *Constitution Act, 1867*, formerly the *British North America Act, 1867*, (U.K.) 30 & 31 Vict., c. 3.

[FN37]. CEAA, in part, adopts a List Approach regarding level of assessment. The *Comprehensive Study List Regulations* (*supra* notes 19 and 22) lists projects that will require a comprehensive study.

[FN38]. The oldest North American institutional advocate of uniform legislation is the National Conference of Commissioners on Uniform State Laws (NCCUSL) of the U.S. established in 1892. In the last 116 years, the NCCUSL has produced 200 "model statutes." (See the NCCUSL online: <<http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>>.) The objective of model statutes is that they be adopted by states. Except for model conservation easement legislation, and the *Transboundary Pollution Reciprocal Access Act* (joint U.S./Canada), there are no NCCUSL environmental model statutes. More to the point of this article, the NCCUSL has not developed uniform environmental assessment legislation, notwithstanding that the federal government and several U.S. states have environmental assessment legislation. The NCCUSL's Canadian counterpart is Uniform Law Conference of Canada, created in 1918. Its mandate "is to facilitate and promote the harmonization of laws throughout Canada by developing, at the request of the constituent jurisdictions, Uniform Acts, Model Acts, Statements of Legal Principles and other documents deemed appropriate to meet the demands that are presented to it by the constituent jurisdictions from time to time." (See the Uniform Conference of Canada's website at <<http://www.ulcc.ca/en/about>>). Similar to the U.S.'s NCCUSL, although the Canada Conference has developed numerous uniform models (currently there are over 110) environmental legislation does not feature. There is only one uniform model addressing an environmental topic and it is the *Transboundary Pollution Reciprocal Access Act* (joint U.S./ Canada).

[FN39]. See David Lawrence, *Multi-Jurisdictional Environmental Assessments* (Ottawa: Canadian Environmental Assessment Agency, 1999), online: <<http://www.ceaaacee.gc.ca/default.asp?lang=En&xml=93B6B094-F022-4894-96FF-A787F717ED46>>.

[FN40]. In 1998, the Canadian Council of Ministers of the Environment (with the exception of Quebec) signed the *Canada-Wide Accord on Environmental Harmonization* and the *Sub-agreement on Environmental Assessment*. This accord provides a framework for dealing with overlapping constitutional jurisdictional relating to environmental matters. Provinces and the federal government have entered into a number of sub-agreements under this Accord that deal with specific matters. The *Sub-Agreement on Environmental Assessment* deals with application of environmental assessment when laws require two or more governments to assess the same proposed project. It provides for shared principles, common information elements, a defined series of assessment stages, and a single assessment and public hearing process. Bilateral agreements between the federal government and individual provinces implement the sub-agreement. To date, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and Quebec have developed bilateral agreements with the federal government. These agreements may be accessed online: <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=CA03020B-1#1>>.

[FN41]. Here I follow Ludwig Wittgenstein, who is renowned for his view that many verbal disputes and misunderstandings boil down to different speakers using words in different ways. If we clarify our meanings, disputes may disappear. If they do not disappear, at least the true nature of the dispute is revealed. See generally, Ludwig Wittgenstein, *Philosophical Investigations*, (first published in 1953) (Englewood Cliffs: Prentice Hall, 1999).

[FN42]. Steve Charnovitz, "Environmental Harmonization and Trade Policy," ch. 20 in Durwood Zaelke, Paul Or-

buch, and Robert Houseman, *Trade and the Environment, Law, Economics, and Policy* (Washington: Island Press, 1993) at 267.

[FN43]. *Ibid.* at 280.

[FN44]. Francis Bedros in Harmonization of Environmental Standards and Convergence of Environmental Policy in Canada available online: <<http://www.international.gc.ca/tradeagreementsaccords-commercial/x/agr-acc/nafta-alena/bedros.aspx?lang=en>>.

[FN45]. Information available at <<http://www.iaia.org/modx/>>.

[FN46]. See the Agency's website at <www.ceaa.gc.ca> link to Publications, link to Guidance Materials and Operational Policy Statements.

[FN47]. The RAC was established by the federal government in 1991. It is a multistakeholder body with representatives from provincial governments, federal government, Aboriginal interests, industry, environmental law organizations, and environmental groups. Its original purpose was to help develop regulations under the CEAA. Over time the RAC's mandate has expanded to include assisting government in developing policies and guidelines under the CEAA and providing advice on law and policy reform.

[FN48]. The CSA is an organization that promotes best practices harmonization through process and product standards. The CSA website is <www.csa.ca>.

[FN49]. See, for example, <www.sosmath.com/algebra/fraction/frac2/frac2.html>.

[FN50]. S.C. 1999, c. 33.

[FN51]. *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213. At para 122, Justice LaForest for the majority stated “In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in *Oldman River [Friends of the Oldman River Society v. Canada (Minister of Transport)]*, [1992] 1 S.C.R. 31 ... made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, “the *Constitution Act, 1867* has not assigned the matter of ‘environment’ sui generis to either the provinces or Parliament” (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the *Constitution Act, 1867* to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (*Ibid.* at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.

[FN52]. *An Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta*, (1994), available online: <<http://www.mb.ec.gc.ca/pollution/e00s61.en.html>>.

[FN53]. *Ibid.*, s. 2.

[FN54]. *Supra* note 28.

[FN55]. The CEPA regulations that are not applicable in Alberta under the Agreement are: *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations*, SOR/92-267 (all sections), *Pulp and Paper Mill Defoamer and Wood Chips Regulations*, SOR/92-268 (ss. 4(1), 6(2), 6(3) (b), 7 and 9 only), *Secondary Lead Smelter Release Regulations*, SOR/91-155 (all sections), and *Vinyl Chloride Release Regulations*, SOR/92-631 (all sections).

[FN56]. In determining whether a statute is *intra* or *ultra vires* the Constitution, a court will engage in a “pith and substance” analysis. The elements of a pith and substance analysis were spelled out in *Ward v. Canada (Attorney General et. al.)* (2002), 283 N.R. 201 (SCC), in which McLachlin, C.J.C., for the Court, at paragraph 16 stated that the “... pith and substance analysis asks two questions: first, what is the essential character of the law? Second, does that character relate to an enumerated head of power granted to the legislature in question by the *Constitution Act, 1867*?” In answering these questions a court will examine the essential character of a law, as well as its legal and practical effects.

[FN57]. See *supra* note 52.

[FN58]. For a succinct summary of the constitutional rules see Alastair Lucas, “Natural Resources and Environmental Management: A Jurisdictional Primer”, in *Environmental Protection and the Canadian Constitution* (1990).

[FN59]. Section 91(12) of the *Constitution Act*, *supra* note 36.

[FN60]. Section 92(5), (13) and (16) of the *Constitution Act*, *supra* note 36.

[FN61]. *Friends of the Oldman River Society*, *supra* note 51 at paras. 95 and 101.

[FN62]. Although there should be no constitutional objection, if a court found that considerations are irrelevant to a jurisdiction's statutory mandate, there could be an administrative law related objection. This interesting point, made by a reviewer of this article, will not be further explored in this context.

[FN63]. Although this is the case federally and in many provinces, it may not be the case in all provinces. For example, the environmental assessment and approval processes are joined under the Ontario *Environmental Assessment Act*, *supra* note 32.

[FN64]. Section 20(1.1) of the CEAA only allows mitigation to be taken into account if the responsible authority (the federal authority that oversees the environmental assessment) can ensure that it will be implemented or is satisfied that some other person or body will implement it.

[FN65]. *Supra* note 11.

[FN66]. Section 91(27) of the *Constitution Act*, *supra* note 36.

[FN67]. See *supra* note 52 and accompanying text.

[FN68]. Section 92(13) of the *Constitution Act*, *supra* note 36, assigns “Property and civil rights” exclusively to provincial legislatures. This covers all private law, including the law of property, contracts, torts and trusts, and generally government regulation affecting private relations and property.

[FN69]. E.g., John Austin, “A Plea for Excuses” published in Proceedings of the *Aristotelian Society*, 1956-7. Transcribed into hypertext by Andrew Chrucky, August 23, 2004. available online: <<http://www.ditext.com/austin/plea.html>>; Donald Davidson, “Actions, Reasons, and Causes,” (1963) LX:23 The

Journal of Philosophy 685; and Anthony Kenny, *The Metaphysics of Mind* (Oxford: Oxford University Press, 1992).

[FN70]. E.g. Donald Davidson, *ibid.*

[FN71]. See, for example, Alvin Plantinga, *The Nature of Necessity* (Oxford: Oxford University Press, 1974) and Saul A. Kripke, *Naming and Necessity*, 2nd ed. (Cambridge: Harvard University Press, 1980).

[FN72]. See *supra* note 56 for an explanation of “pith and substance.”

[FN73]. To date there has been only one substitution under the CEAA which was the 2006 Emera Brunswick Pipeline panel review. In this review, the National Energy Board’s assessment process under the *National Energy Board Act* (R.S.C. 1985, c. N-7). For a critique of the substitution see G. Schneider, J. Sinclair and L. Mitchell. *Environmental Assessment Process Substitution: A Participant’s View*, available at <<http://www.cenrce.org/eng/caucuses/assessment/docs/Final%20Substitution%20Paper%20March29.pdf>>.

[FN74]. The *Exclusion List Regulations* amendment and *Adaptation Regulations* and amendment (*supra* notes 3-5) discussed in Part 1 purport to authorize provincial EA process substitution for federal CEAA EA for all Building Canada Plan projects that were not excluded by the March and May amendments to the *Exclusion List Regulations* where a federal EA and a provincial EA would otherwise apply. See my publications referenced in *supra* note 8 for a further critique of the substitution authorized by the *Adaptation Regulations*.

[FN75]. Nova Scotia generally regulates pollutant discharges under the *Environment Act*, S.N.S. 1994-5, c. 1. Section 68 of the Act prohibits discharges of substances into the environment “in an amount, concentration or level or at a rate of release that is in excess of that expressly authorized by an approval or the regulations.”

[FN76]. For an environmentally concerned public interest perspective on overlap, see “Duplication and Overlap” in the Planning and Environmental Assessment Caucus’ Citizen’s Briefing Kit (#14) online: <http://www.cen-rce.org/eng/caucuses/assessment/index.html#top_of_page>, link to citizens briefing kit #14.

[FN77]. The *Canadian Oxford Paperback Dictionary* (Toronto: Oxford University Press, 2000).

[FN78]. Jeffrey Barnes *et al.*, “Environmental Assessment Crisis in Canada: Reputation versus Reality? (June 2, 2005) available online: <http://www.jacqueswhitford.com/sitejw/media/JacquesWhitford/ea_crisis.pdf>.

[FN79]. See “Slow on the Trigger: The Department of Fisheries and Ocean, the Fisheries Act and the Canadian Environmental Assessment Act” (2004) 27 Dal. L.J. 349. The paper criticizes the DFO’s practice of attempting to avoid a harmful alteration, disturbance or destruction of fisheries habitat by project redesign or relocation, outside of the federal environmental assessment process, and giving the proponent a “Letter of Advice” instead of triggering the CEAA and going through the subs. 35(2) authorization process.

[FN80]. *Supra* note 78 at 8.

[FN81]. Patricia Fitzpatrick and John Sinclair, “Multi-Jurisdictional Environmental Assessment” in *Environmental Impact Assessment Process and Practices in Canada*, K.S. Hanna (ed.) (Toronto: Oxford University Press, 2005) 160-184.

[FN82]. *Ibid.* at 171.

[FN83]. *Ibid.* at 172.

[FN84]. This is because the Lead Party is determined in all agreements (except the Quebec agreement that does not contain the words “Lead Party”) according to similar criteria. Applying the criteria normally results with the federal government being the Other Party. For example the Federal/Manitoba agreement (see *supra* note 40) provides:

32. For the purposes of the cooperative environmental assessment, the Lead Party will generally be determined as follows:
- a. Canada will be the Lead Party for project proposals on federal lands where federal approvals apply;
 - b. Manitoba will be the Lead Party for project proposals on lands within its provincial boundary, not covered under clause 32(a) of this Agreement where provincial approvals apply; and
 - c. if a project proposal will be located on lands under federal and provincial jurisdiction, the Lead Party will be determined by mutual agreement of the Parties taking into account the criteria in clause 34 of this Agreement.

Clause 34 provides:

In the notice referred to in clause 33 of this Agreement, the Party will provide its rationale for suggesting a variance based on an evaluation of any of the following criteria:

- a. scale, scope, and nature of the environmental assessment;
- b. capacity to administer the assessment including available resources;
- c. physical proximity of the government's infrastructure;
- d. effectiveness and efficiency;
- e. access to scientific and technical expertise;
- f. ability to address client or local needs;
- g. interprovincial, inter-territorial, or international considerations; or
- h. existing regulatory regime, including the legal requirements of quasi judicial tribunals.

Note: Some agreements provide that where the equivalent of s. 32(c) is the case the parties will mutually agree on the Lead Party. In mid-2008 I conducted an email survey of the members of the Canadian Environmental Network, Planning and Environmental Access Caucus asking whether they could recall any joint assessments where the federal government clearly was the Lead Party. Of the responses there were only a few cases where an agency or ministry of the federal government took the lead. In the vast majority of cases, a province lead the assessment process. For more information on the Canadian Environmental Network and its Caucuses, go to <<http://www.cenrce.org/>>.

[FN85]. For example, para. 6.1.2 of the 2005 Federal/Alberta agreement; see *supra* note 40.

[FN86]. For example the 2005 bilateral Alberta/Canada agreement (*supra* note 40) contains the following provision:

6.2 The Lead Party will administer its process used for the cooperative environmental assessment to enable both Parties to meet their legal environmental assessment requirements. *The Other Party will adapt its procedures and practices, to the extent its legal requirements allow, to follow the process of the Lead Party.*” [Emphasis added].

And later

10.0 PUBLIC INVOLVEMENT 10.1 The Parties involved in a cooperative environmental assessment will facilitate public participation, *where consistent with their policies and legislation*, which may include providing access to information, technical expertise, and participation at public meetings.” [Emphasis added].

Under s. 44(6) of the Alberta *Environmental Protection and Enhancement Act* (*supra* note 28), (EPEA), only those who are “directly affected” by a proposed project may file a statement of concern regarding it and regarding the need for an environmental assessment. Where government determines that an environmental assessment is required, under s. 3(1) (iii) (b) of the *Environmental Assessment Regulation* (Alta. Reg. 112/1993) only those who are directly affected by a proposed project may file a statement of concern and participate in the assessment process. Alberta court and tribunal decisions have determined that the class of “directly affected” persons is fairly narrow. For example, in the oft referred to [*Kostuch v. Alberta \(Director, Air & Water Approvals Division, Environmental Protection\)*](#) (1995), 17 C.E.L.R. (NS) 246 at p.257. (Alta. Environmental

App. Bd. the Court stated: [T]he possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. "Directly" means the person claiming to be "affected" must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Alberta's narrow participation window may be contrasted with Canada's wide-open one. The CEEA (para. 3 of the purposes, s. 4(1)(d), and ss.18(3), s. 21.2, 22, and 34) by contrast to Alberta's EPEA in numerous places requires opportunities for public review and participation, where "public" means anyone, and not just those who are directly affected. Given the differences in legal thresholds for participation in an environmental assessment process it is difficult to see how the Alberta/Canada bi-lateral agreement could be complied with in a manner that favours the federal process.

[FN87]. This experience is from my nearly 11 years as counsel with the Edmonton based Environmental Law Centre, about 10 years as a member of the Canadian Environmental Network Planning and Environmental Assessment Caucus, and 6 years as a member or alternate on the Regulatory Advisory Committee.

[FN88]. [1999] 3 F.C. 564 (Fed. T.D.).

[FN89]. *Ibid.* para. 45.

[FN90]. The CCME is made up of the 14 environment ministers from federal, provincial and territorial governments. For more information visit the CCME website online: <<http://www.ccme.ca/>>.

[FN91]. The CCME has formed four sub-committees to examine perceived issues concerning environmental assessment. These are: short term streamlining actions that can be implemented within existing legislative frameworks and bi-lateral agreements, options to streamline consistent with a one project one assessment approach, exploring regional strategic environmental assessment to streamline environmental assessment processes, and coordinating Aboriginal consultation in joint assessments.

[FN92]. This report was circulated for review to various "stakeholders" including to the steering committee of the Canadian Environmental Network Environmental Planning and Assessment Steering Committee. To the writer's knowledge it is not publically available. Although the CCME has been engaged with its environmental assessment process review for "inefficiencies" since at the latest January 2008, it took at least seven months for this initiative to be posted on its website. An Internet search on November 16th, 2008 disclosed that brief references to the CCME review and to the members of the Environmental Assessment Task Group, comprised of provincial and territorial government representatives. The CCME website and reference to this initiative is at <http://www.ccme.ca/ourwork/environment.html?category_id=135>.

[FN93]. See CCME website, *ibid.*

[FN94]. *Supra* notes 3-5.

[FN95]. See for example, Andrew Nikiforuk, *The Nasty Game: The Failure of Environmental Assessment in Canada* available online: <http://www.gordonfn.ca/resfiles/Nasty_Game.pdf>.

[FN96]. SOR 97/181.

[FN97]. *Ibid.*, ss. 5 and 6.

[FN98]. The report is available at <http://www.ceaa-acee.gc.ca/017/reports_e.htm> link to Federal Screenings: An Analysis based on Information from the Canadian Environmental Assessment Registry Internet Site.

[FN99]. *Ibid.* It is not possible to analyze or take a position on aspects of the report in this article. The report is raised to demonstrate that the Agency is taking steps to gather the kind of information that is necessary to rationally debate whether further streamlining is necessary.

[FN100]. CEAA, *supra* note 1. Section 12.2 states that the Agency is the FEAC for joint EA processes.

[FN101]. Available online at <<http://www.mpmo-bggp.gc.ca/documents/directive-eng.php>>.

[FN102]. See <<http://www.mpmo-bggp.gc.ca/index-eng.php>>.

[FN103]. *Supra* note 101.

[FN104]. See *supra* note 81 and accompanying text.

[FN105]. CEAA, *supra* note 1, recitals, and s. 5(1)(b)(i).

[FN106]. EUB Application No. 1435831.

[FN107]. Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, Joint Panel Review Report, October 2007, pp. 6, 7, 11 and 12.

[FN108]. *Supra* notes 3 and 5.

[FN109]. For example, it is not clear why the CCME, the MPMO and the Agency all are pursuing more efficient joint EA processes. Only the Agency has a mandate (its FEAC role) set out in the CEAA to do. See discussion in Part 5(b) (iv).

[FN110]. Steve Charnovitz, *supra* note 42 at 272.

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