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Notes for a presentation to the House of Commons Standing Committee on Finance on Bill C-38, the *Budget Implementation Act*

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Mr. Chairman, thank you for the opportunity to participate in this discussion.

I am here today as a representative of MiningWatch Canada, a national non-governmental organisation (not a charity), and as co-chair of the Environmental Planning and Assessment Caucus of the Canadian Environmental Network, which brings together some 60 groups and environmental assessment experts from across the country.

I am here to urge you to ensure that the environmental provisions of Bill C-38 are given proper consultation and debate. Part 3 of C-38, with which we are concerned today, is seriously flawed and in our view to allow it to proceed without very major amendment would be irresponsible. With all due respect to the experience and knowledge of this Committee, there is simply no way of adequately addressing Part 3 as part of C-38. These provisions must be separated and debated on their own, and if needs be, removed and resubmitted to a new legislative process.

The government is arguing that the new *Canadian Environmental Assessment Act* (CEAA 2012) and related measures must be passed as part of the budget process because they are urgently required to protect and promote investment and development.

The urgency is clearly manufactured. The existing CEAA was referred for review by Parliament two years ago. The government did nothing *for sixteen months*, and had actually dropped efforts by the Minister's own Regulatory Advisory Committee, as well as the Caucus, to prepare for the review going back several years before that.

Just as importantly, these measures are more likely to exacerbate uncertainty and delay, ultimately putting development projects at risk and driving away investment.

I would like to focus on three key problems in the new Act:

1. the abdication of federal responsibility over the environment,

2. the abandonment of the principles of sustainable development and the integration of those principles into decision-making, and

3. the serious diminution of public participation and the opportunity to fulfil government's obligations towards Aboriginal peoples. (I am not here to speak for Aboriginal peoples, and I will not focus extensively on Aboriginal issues, but both MiningWatch and the Caucus have serious concerns in this area.)

1. Federal responsibility

In place of a positive assertion of a federal role in environmental assessment, the Act explicitly limits federal authority to specific regulatory jurisdiction (s.5(1)(a)). This flies in the face of the Supreme Court's rulings in *Oldman* and *MiningWatch* and ensures that federal EA will have no meaningful relation to ecological or social reality. This will make it all but impossible to establish any kind of consistent national practice.

The substitution and equivalency provisions (ss.32-37) do precisely what the Caucus and others have studied and warned against, creating a patchwork of inconsistent EA application both within the federal government and between federal and provincial processes. Rather than seeking to use the federal regime as a backstop for coordinated and harmonised processes, it is to be broken up among agencies with different mandates, structures, and capacities[1] – the CEA Agency, the National Energy Board, and the Canadian Nuclear Safety Commission – and further devolved to provincial and land claims-mandated processes that have little in common with each other.[2] The contrast between the federal and British Colombia assessments of the Prosperity mine project – which should have undergone a joint review – provide an excellent case study.[3]

By weakening the federal role and splitting up federal assessments between several federal agencies, as well as provincial and territorial EA processes, CEAA 2012 actually Balkanizes EA across about nineteen very different processes. It's certainly no longer a "one window" approach, and given the weakness of its transboundary and regional assessment provisions, it's also doubtful it will result in "one project – one assessment".

2. Integrated decision-making

[1] Schneider, Gary, John Sinclair and Lisa Mitchell. *Environmental Assessment Process Substitution: A Participant's View*. May, 2007. http://rcen.ca/sites/default/files/uploads/epa_final_substitution.pdf
[2] Fitzpatrick, Patricia, John Sinclair. *Multi-jurisdictional environmental impact assessment: Canadian experiences*. Environmental Impact Assessment Review 29 (2009) pp. 252–260.
[3] Haddock, Mark. *Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine*. Northwest Institute. July 2011. http://rcen.ca/sites/default/files/uploads/epa_nwi_report_072011.pdf

While the designated project list approach to triggering EA is not necessarily a bad thing, the way it is used in the Act is indeed problematic. It's one thing to focus assessment efforts on larger projects with potentially more significant impacts, but in our view it is a mistake to do so without making any effort to ensure that there are mechanisms to ensure that smaller projects are tracked, monitored, and, as necessary, assessed. At the same time the "screening" process and the layers of discretion on whether an assessment will be undertaken and its scope will tend to relegate EA to the margins of decision-making processes both for proponents and regulators, rather than integrating sustainable development into them.

As Bob Gibson recently noted:

> *The vast majority of federal assessments in the past have been of small projects in a highly streamlined and often ineffective process. Because the project list is not expected to cover small projects, these assessment requirements would be simply eliminated by CEAA 2012. The proposed law includes no other means of enabling and motivating relevant federal authorities to give serious attention of environmental considerations in their decision making, or of providing generic environmental guidance for categories of small projects, or of establishing mechanisms to consider the cumulative effects of multiple small undertakings.*[4]

In addition, any mention of strategic EA – the assessment of policies, plans, and programs – has disappeared completely.

3. Public participation

Public participation, a key element in environmental assessment, is curtailed by the restricted number of projects being assessed, diminished opportunities for participation, and artificially imposed timelines. Recall that the Supreme Court did back MiningWatch in its decision on the Red Chris mine review, which was based on the guarantee of public participation in comprehensive studies under the 2003 CEAA amendments.

The new Act promises public participation but provides no criteria and no guarantee this promise will be carried into substitute processes. It contemplates participant funding only for Panel reviews. Regardless, the arbitrary compressed time frames imposed under the new Act will make meaningful public participation almost impossible. It's important to note that while the Act imposes strict limits on the time available for public involvement, and specifies only limited options for federal agencies to extend their time, it places no restriction whatsoever on the time a proponent may take in responding to information requests, or to change and resubmit project plans.

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[4] Gibson, R.B. *What would remain? Notes on the key substantive changes to federal environmental assessment in the proposed Canadian Environmental Assessment Act 2012 included in the omnibus budget implementation Bill C-38*. University of Waterloo. May, 2012.
http://rcen.ca/sites/default/files/rb_gibson_ceaa_2012_what_remains.pdf

In addition, and in combination with the inconsistency created by substitution and equivalency, artificial timelines will make it very difficult for Aboriginal communities to fully participate in environmental assessments in recognition of their constitutionally protected rights.

In short, even giving the most generous benefit of the doubt to both the formulation of the Act's absent schedules and regulations and the application of ministerial and bureaucratic discretion – in the general absence of useful criteria – the key features of this Act cannot produce robust, effective, and efficient environmental assessment. In key aspects it makes the process significantly less predictable and consistent, and limits its utility as a forum for establishing a social licence to operate and for fulfilling the Crown's obligation to obtain the Free Prior Informed Consent of Aboriginal peoples for development projects affecting their lands and livelihoods.

The public has an expectation of fair treatment before the law, and I would not be the first to note that in the absence of a public process that is perceived to be fair, and that allows for the fulfilment of Aboriginal peoples' rights, people will tend to take matters into their own hands. Lawsuits and direct action will also create greater uncertainty and unpredictability, and can be reasonably expected to more than counter any anticipated efficiency gains.

It's hard to avoid the conclusion that faced with complex legal and jurisdictional questions, and under pressure from the provinces and some industry sectors, the government has chosen to basically throw up its hands and walk away from all but its essential legal obligations. This is simply not acceptable.