

**Undertaking #1:** CAC to provide examples of jurisdictions in Canada that have addressed hydroelectric grandfathered projects.

**Response:**

We have identified a number of Canadian examples which expressly exempt projects from scrutiny:

- In British Columbia, s. 51 of BC's *Environmental Assessment Act* **expressly** exempts pre-existing undertakings from B.C.'s environmental assessment process. By contrast, s. 23 of BC's not yet in force *Water Sustainability Act* will create a legal mechanism that will require Water Licences issued before the date the legislation comes into force to undergo a review if there is no expiration date or at least 30 years left in the licensing term. Such review could result in an alteration of the licensing conditions or the substitution of a new licence.
- Section 128 of *CEAA, 2012* **expressly** creates a legal mechanism for exempting projects from the current federal environmental assessment process.
- In the NWT, section 157.1 of the *Mackenzie Valley Resource Management Act* **expressly** creates a legal mechanism for exempting projects with licences, permits or other authorizations issued before June 22, 1984

In contrast, we note that s. 58(1) of Nova Scotia's *Environment Act* **expressly** allows the Minister to amend approvals issued under the legislation that pre-dates the current act if there is no expiry date, which would then result in the project to eventually have to re-new the approval or apply for a new approval which could then trigger the current environmental assessment process.

Our understanding is that the examples above would apply to hydroelectric projects as well as other types of projects.

**1) British Columbia**

***Environmental Assessment Act***, SBC 2002, c. 43, s. 51\_

Section 51 of BC's *Environmental Assessment Act* exempts pre-existing undertakings from B.C.'s environmental assessment process.

**Transitional provisions**

**51** (1) This Act does not apply to any activity, construction, operation, modification, dismantling or abandonment that, immediately before this subsection comes into force,

(a) is substantially started, and

(b) is not a reviewable project under the [Environmental Assessment Act](#),

R.S.B.C. 1996, c. 119.

(2) This Act does not apply to any activity, construction, operation, modification, dismantling or abandonment that, on the date this subsection comes into force, has not been substantially started and

(a) is the subject of a proposal that is being made by a person who is designated by regulation or is within a prescribed class of persons, or

(b) is the subject of a proposal and is a project that is designated by regulation or is within a prescribed class of projects.

(3) An assessment of a project must be continued and disposed of under this Act as an application for an environmental assessment certificate if, immediately before this subsection comes into force, the project is a reviewable project under the [Environmental Assessment Act](#), R.S.B.C. 1996, c. 119, and a review of an application under section 7 of that Act is in progress.

(4) Subject to subsection (2), an assessment of a project must be undertaken or continued and disposed of under this Act if,

(a) immediately before this subsection comes into force, the project

(i) is a type of project for which one or more approvals under other enactments are required,

(ii) is the subject of an existing proposal made by a person who does not have all of the required approvals under other enactments, and

(iii) is not the subject of an application under the [Environmental Assessment Act](#), R.S.B.C. 1996, c. 119, and

(b) on the date this subsection comes into force, the project is a reviewable project under this Act.

(5) The executive director may make an order

(a) specifying the step in the environmental assessment process under this Act to which a project described in subsection (3) or (4) must proceed, or

(b) varying the review process to the extent necessary to accommodate the review under this Act of that project.

(6) The executive director must give reasons for an order made under subsection (5) and may attach conditions to the order.

(7) Records that before the coming into force of this subsection were filed or submitted under the [Environmental Assessment Act](#), R.S.B.C. 1996, c. 119, may be accepted by the executive director in full or partial fulfilment of the requirements of this Act.

(8) Any certificate, order, approval or decision that, immediately before the coming into force of this subsection, is in effect under the [Environmental Assessment Act](#), R.S.B.C. 1996, c. 119,

(a) is deemed to have been issued under this Act, and

(b) subject to subsection (9), continues in force until it expires or, under this Act, is suspended or cancelled.

(9) An energy operation certificate or energy project certificate under the [Utilities Commission Act](#), S.B.C. 1980, c. 60, an order issued under section 19 (1) of that Act, a mine development certificate or mine operation certificate under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, or an approval given as part of the major project review process, if the certificate, order or approval is in effect immediately before the coming into force of this subsection, remains in effect, despite its term or expiry date, for the life of the project in respect of which it was issued, unless it is suspended or cancelled under this Act.

(10) During the 6 month period beginning on the date this subsection comes into force, the executive director, with respect to a certificate that remains in effect under subsection (8), by order may remove or amend any condition that requires the holder of the certificate, for the life of the certificate, to seek the written consent of the minister before materially altering the project that is the subject of the certificate.

***Water Sustainability Act***, SBC 2014, c 15, s. 23 [not yet in force]

Section 23 of BC's not yet in force *Water Sustainability Act* will create a legal mechanism that will require Water Licences issued before the date the legislation comes into force to undergo a review if there is no expiration date or at least 30 years left in the licensing term. Such review could result in an alteration of the licensing conditions or the substitution of a new licence.

### **Thirty-year review of licence terms and conditions**

23 (1) This section applies to a licence that

(a) was issued on or before the date this section comes into force for an unlimited period or that has, at that date, at least 30 years remaining in its term, or

(b) is issued after the date this section comes into force for an unlimited period or a term exceeding 30 years, but does not apply to licences

(c) issued for a power purpose, or a storage purpose related to a power purpose, on or after October 23, 2003,

(d) issued under the *Industrial Development Act*, or

(e) issued following a review, or reviewed, under the Water Use Plan directives published by the government and dated December 1998.

(2) On the direction in writing of the comptroller or a water manager, a licensee who holds a licence to which this section applies must submit to a review of the terms and conditions of the licence,

(a) for a licence issued on or before the date this section comes into force, any time that is at least 30 years after that date, and any time that is at least 30 years after the immediately preceding review under this section, and

- (b) for a licence issued after the date this section comes into force, any time after the licence has been in effect for 30 years after its issue and any time that is at least 30 years after the immediately preceding review under this section.
- (3) A licensee who is given a direction under subsection (2) must, within the period specified in the direction, provide to the decision maker who gave the direction,
- (a) the information, plans, specifications and reports of assessments, including a water conservation audit carried out in accordance with and meeting the requirements of the regulations, specified by the decision maker, and
  - (b) in the form and manner specified by the decision maker, the consents that are necessary for the decision maker to verify information provided under paragraph (a).
- (4) The decision maker may require that a specified assessment be performed, and a report of the assessment be prepared, by a person with the qualifications specified by the decision maker.
- (5) Section 12 (1) (b) (iii), (2) and (3) applies for the purpose of a review under this section.
- (6) The decision maker may review the terms and conditions of a licence taking into account
- (a) the best available technology in respect of water use efficiency and water conservation,
  - (b) best practices in respect of water use efficiency and water conservation,
  - (c) any increase in knowledge respecting actual stream flow or aquifer conditions,
  - (d) the effects of climate change,
  - (e) the licensee's beneficial use of the water,
  - (f) the use, operation or maintenance of works, and
  - (g) prescribed factors.
- (7) On a review under this section, the decision maker may amend the terms and conditions of the licence to require the licensee, for the more efficient use or conservation of water, to
- (a) reduce the maximum rate of diversion of water under the licence,
  - (b) alter the time of diversion or use, including storage, of water under the licence,
  - (c) construct, alter, install, replace, repair, maintain, improve, seal, deactivate, decommission or remove any works, or
  - (d) adopt a more efficient practice.
- (8) If the decision maker considers that the changes under this section in terms and conditions of a licence would substantially change the licence, the decision maker may substitute a new licence and the rights under the licence issued in substitution have the same precedence as the rights had under the replaced licence.
- (9) A direction given under subsection (2) is final and may not be appealed to the appeal board.

## **2) Federal:**

**Canadian Environmental Assessment Act, 2012**, SC 2012, c 19, s 52

Section 128 of *CEAA, 2012* creates a legal mechanism for exempting projects from the current federal environmental assessment process.

### **Non-application of this Act**

**128.** (1) This Act does not apply to a project, as defined in the former Act, that is a designated project as defined in this Act, if one of the following conditions applies:

- (a) the proponent of the project has, before the day on which this Act comes into force, initiated the construction of the project;
- (b) it was determined by the Agency or a federal authority under the former Act that an environmental assessment of the project was likely not required;
- (c) the responsible authority has taken a course of action under paragraph 20(1)(a) or (b) or subsection 37(1) of the former Act in relation to the project; or
- (d) an order issued under subsection (2) applies to the project.

### **Exception**

(1.1) Paragraph (1)(b) does not apply if the carrying out of the project in whole or in part requires that a federal authority exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act and that power, duty or function was a power, duty or function referred to in subsection 5(1) of the former Act.

### **Cessation of effect**

(1.2) Subsection (1.1) ceases to have effect on January 1, 2014.

### **Minister's powers**

(2) On the day on which this Act comes into force, the Minister may, by order, exclude from the application of this Act a project, as defined in the former Act, that is a designated project under this Act, if the Minister is of the opinion that the project was not subject to the former Act and that another jurisdiction that has powers, duties or functions in relation to the assessment of the environmental effects of the project has commenced that assessment.

### **Posting of notice of order on Internet site**

(3) The Agency must post a notice of any order made under subsection (2) on the Internet site.

**Canadian Environmental Assessment Act**, S.C. 1992, c. 37, s. 74(4)

Section 74(4) of the *Canadian Environmental Assessment Act*, which was repealed in 2012, contained a grandfather clause exempting pre-existing projects which also created a mechanism for bringing such developments under the assessment regime if the project is to be modified, decommissioned, abandoned or other alterations to such projects are to be undertaken.

**74. (4)** Where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, this Act shall not apply in respect of the issuance or renewal of a licence, permit, approval or other action under a prescribed provision in respect of the project unless the issuance or renewal entails a modification, decommissioning, abandonment or other alteration to the project, in whole or in part.

### **3) Northwest Territories:**

***Mackenzie Valley Resource Management Act***, SC 1998, c 25, s. 157.1

Section 157.1 of this Act creates a legal mechanism for exempting projects with licences, permits or other authorizations issued before June 22, 1984. This section does not apply if the project is to be abandoned, decommissioned or other significant alterations of the project are to take place.

**157.1 Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project.**

### **4) Nova Scotia:**

***Environment Act***, SNS 1994-95, c 1, s. 58(1)

Section 58(1) of Nova Scotia's *Environment Act* allows the Minister to amend approvals issued under the legislation that pre-dates the current act if there is no expiry date, which would then result in the project to eventually have to re-new the approval or apply for a new approval which could then trigger the current environmental assessment process.

#### **Amendment of approval**

**58 (1)** On application by an approval holder, the Minister may amend a term or condition of, add a term or condition to or delete a term or condition from an approval, if the Minister considers it appropriate to do so.

**(2)** The Minister may amend a term or condition of, add a term or condition to or delete a term or condition from an approval

(a) if an adverse effect has occurred or may occur;

(b) for the purpose of addressing matters related to a temporary suspension of the activity by the approval holder; (c) if, since the approval was issued, a standard has changed or been created for an activity to which the approval relates;

(d) if the Minister determines that a term or condition imposing a monitoring or reporting requirement should be changed or added;

(e) if the approval was issued prior to January 1, 1995, and has no expiry date; or

(f) to correct a typographical error.

**(3)** For greater certainty, the Minister may add a term to an approval issued prior to January 1, 1995, specifying an expiry date for the approval.

**(4)** The Minister shall give notice in writing, together with reasons, to the approval holder at least thirty days in advance of making an amendment, addition or deletion pursuant to subsection (2). 2011, c. 61, s. 25.