Submission on Bill C-19

Canadian Environmental Assessment Act Amendments

NATIONAL ENVIRONMENTAL LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Environmental Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Environmental Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Environmental Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on Bill C-19, *Canadian Environmental Assessment Act* (the CEAA or the *Act*) amendments. The CBA Section has been involved in commenting on draft legislation to implement a federal environmental assessment process since 1990. Our submissions concerning the CEAA include the following:

- Submission on *Canadian Environmental Assessment Act*: Draft Procedures for Panel Review (August 1996)
- Submission on *Canadian Environmental Assessment Act*: Cost Recovery and Process Efficiency (November 1996)
- Submission on Five-Year Review of the *Canadian Environmental Assessment Act* (April 2000)
- Five-Year Review of the *Canadian Environmental Assessment Act*: Appeals of Decisions to Federal Court (December 2000)

Where appropriate, this submission refers to our comments submitted during the Five-Year Review of the CEAA.

II. INTEGRITY OF NATIONAL ENVIRONMENTAL ASSESSMENT PROCESS

It is important to highlight some substantive problems with the environmental assessment process that has evolved under the CEAA. To fulfill the *Act*'s goals, the public must accept the CEAA as a valid precursor to development and, where

necessary, a mechanism for reshaping or precluding development. The present CEAA does not meet goal of providing full public participation in environmental assessments. To the contrary, for over 99 per cent of CEAA assessments — those which only proceed to screening — there is no obligation to provide public participation.[1] According to the courts, there is also no obligation to provide access to information.[2] Given that the vast majority of projects (including significant projects) only go through screening, the absence of public knowledge and participation in that screening process is a problem. The CEAA should require greater disclosure of, and access to, screening documents on a public registry and provide the public and interested parties with the ability to comment on these screening documents and the overall screening process.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the CEAA require greater disclosure of, and access to, screening documents on a public registry and provide the public and interested parties with the ability to comment on those screening documents and the overall screening process.

A related issue is the treatment of internal screenings within the federal government. For significant projects, detailed technical screening reports may only be circulated

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1 Canadian Environmental Assessment Agency, *Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation* (December 1999) "Screenings, Frequency and Nature of Application", available on the internet at http://www.ceaa-acee.gc.ca/0007/0002/0001/index_e.htm.

2 *See Lavoie v. Canada (Minister of Environment)* (2000), 35 C.E.L.R.(N.S.) 183 at 213-14, where the Federal Court Trial Division held that there was no obligation to provide any information from the public registry unless the government decided under section 18 to consult the public on the screening. The decision has been appealed to the Federal Court of Appeal but has not yet been heard.

within government. The CBA Section believes that government departments should be accountable for consulting the public and summarizing public concerns. The public should have a means to review screening reports and respond to significant matters. The CEAA should therefore require screening reports to describe public consultation and any public concerns arising from that consultation. The *Act* should require a summary of the screening report to be placed on a registry, permit interested parties to obtain access to these underlying documents and provide a time period for response and permit interested persons to obtain access to these reports. The registry should describe the screening process for each project so that the public can see how the project was described in the first instance. The CBA Section believes that these requirements would not be onerous for routine matters.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the CEAA require screening reports to describe public consultation and any public concerns arising from that consultation. The *Act* should require a summary of the screening report to be placed on a registry, permit interested parties to obtain access to these underlying documents and provide a time period for response.

The government must improve the preamble and purpose section of the *Act*. The preamble to the CEAA currently states:

> WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;
>
> WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;
>
> WHEREAS the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality;

Section 4 establishes the purposes of the *Act*. It states:

> 4. The purposes of this *Act* are
> (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;
> (b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;
> (b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;
> (c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and
> (d) to ensure that there be an opportunity for public participation in the environmental assessment process.

The preamble and the purpose sections could help to resolve uncertainty as to the interpretation and application of the *Act*. Unfortunately, these provisions are so general that they are largely useless in clarifying issues that give rise to legal uncertainty.

The preamble to the CEAA should be amended to expressly reference applicable international conventions. At a minimum, it should set out that the CEAA implements the terms of all international conventions dealing with environmental assessment within the federal government's jurisdiction.

The purposes of the *Act* should include the promotion of environmental quality. In addition, "environmental quality" should be defined. Although we recognize that this is a challenging task, it will focus attention on what the government wants to achieve with the CEAA. For instance, the definition could include respect for the environment. Because of concerns over federal constitutional jurisdiction, it does not need to encompass the socio-economic environment. While the Supreme Court of Canada has defined "environmental quality" to encompass socio-economic concerns,[3] "environmental effect" is narrowly defined for such concerns. The relationship between environmental quality and "significant adverse environmental effects" could also be defined. Another possibility would be to eliminate the term, environmental quality, and replace it with the objective of "avoiding significant adverse environmental effects". In addition, it may be preferable for the *Act* to promote environmental health rather than the current goal of simply avoiding significant adverse effects.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the preamble and the purpose clause of the *Act* (section 4) be clarified and improved.

In 1990, the CBA Section sponsored a report on sustainable development,[4] which recommended that the word "environment" be broadly defined. However, The CEAA does not permit this broad definition. There is also significant uncertainty on how to reconcile the content of the *Act* with the objective of sustainable

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3 In *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 7 C.E.L.R. (N.S.) 1 at 25-26, the Court concluded that the term, "environmental quality" should not be confined to the biophysical environment alone and should include consideration of consequences on a community's livelihood, health and other social matters.

4 Canadian Bar Association National Environmental Law Section, *Sustainable Development in Canada: Options for Law Reform*, (Ottawa: Canadian Bar Association, 1990), pp. 231-241.

development. As The CEAA is presently worded, nothing about the *Act* "ensures" or even "promotes" sustainable development. The *Act* should therefore provide more guidance on whether or when an unsustainable activity is a significant adverse environmental effect. The *Act* should clearly state that responsible authorities should support and promote sustainable development. It is debatable whether the current wording is sufficiently clear. In particular, section 4(c) should be amended to state that a purpose of the *Act* is to ensure that "projects triggering assessment of their environmental effects do not cause significant adverse environmental effects", with no further qualification. An "automatically in" proposal for Law List triggers may expedite the process considerably.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that section 4(c) be amended to state that a purpose of the *Act* is to ensure that "projects triggering assessment of their environmental effects do not cause significant adverse environmental effects", with no further qualification.

The present wording of section 4(b) implies that "sustainable development" of the physical environment is preferable to maintaining that environment in its current state. Although it is not clear that this is the legislative intent, on its face the section tilts the playing field against the "do nothing" alternative. There is a significant difference between encouraging responsible authorities to promote environmentally sustainable development and encouraging responsible authorities to ensure that the development which they do promote is environmentally sustainable. The CBA Section recommends that section 4(b) be amended to provide that one of the purposes of the *Act* is to " encourage responsible authorities to ensure that development which they promote is environmentally sustainable and thereby achieve or maintain a healthy environment and a healthy economy."

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that section 4(b) be amended to provide that one of the purposes of the *Act* is to " encourage responsible authorities to ensure that development which they promote is environmentally sustainable and thereby achieve or maintain a healthy environment and a healthy economy."

Prescribed physical activities not relating to physical works are currently subject to environmental assessment. However, government policies are not covered by the *Act* even though they may have profound short and long-term environmental consequences. Such policies could involve a wide array of matters, including federal fiscal and monetary policy, tax policy, military and security measures, federal-provincial transfers, health and education and emissions control. Indeed, the effects of government policies may match or exceed those of individual construction projects. One of the primary purposes of environmental assessment should be to identify the true environmental costs, including the long-term costs, of the matter being assessed. If environmental assessment is available for "government action which may have adverse significant environmental effects", then in principle policies should be subject to environmental assessment. While applying the CEAA regime to the wide range of government policies (for example, budgets) may be difficult, the federal government should develop a regime which will subject government policies to an assessment of environmental effects in order to determine their long- and short-term environmental costs.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the federal government develop a regime which will subject government policies to an assessment

of environmental effects in order to determine their long- and short-term environmental costs.

III. SCOPING, TIMELINES AND CERTAINTY

The CBA Section's comments concerning the Five-Year Review of the CEAA included six recommendations concerning scoping and timeliness. The CBA Section stated that it:

> 1. agrees with Option #1 at p. 49 of the Discussion Paper insofar as it suggests that part "(a)" of the definition of "project" in CEAA be amended to clarify the relationship between a "physical work" and "undertakings in relation to a physical work".
>
> In light of the case law and in the interest of predictability and certainty, we recommend that the definition clarify that an "undertaking in relation to a physical work" is (i) an activity (ii) which pertains to the life cycle of the physical work and (iii) is analogous to the enumerated stages of the life cycle included in the definition, namely construction, operation, modification, decommissioning or abandonment.
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> 2. agrees with Option #1 at p. 49 of the Discussion Paper insofar as it suggests that CEAA be amended to clarify the definition of terms relating to scoping.
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> In this regard, s. 15(1) requires no amendment. Where the "project" is a physical work, the scoping required under s. 15(1) should be restricted to identifying the "undertakings [i.e. activities related to the life cycle of the physical work] in relation to" that single physical work which must be considered. Other physical works are best addressed under s. 15(2) or by cumulative effects assessment.
>
> 3. recommends, in light of recent court decisions that the government consider whether s. 15(3) needs to be maintained. If it is maintained, then the government should consider amending it to reduce the confusion and complexity which has arisen through its application.

> 4. agrees with Option #1 at p. 58 of the Discussion Paper, that CEAA be amended to clarify the definition of "environmental effect". There is no general consensus among NELS [CBA National Environmental Law Section] members, however, as to whether this should take the form of restricting the consideration of environmental effects to effects on areas of federal jurisdiction. This consensus may arise if harmonization efforts result in more effective systems of Environmental Assessment (EA) in all jurisdictions and these principles and objectives are supported. The tension is between ensuring a quality EA and the risk that the process will balloon out of control.
>
> 5. recommends that the appropriate scope of cumulative effects assessment is optimally addressed by policy, not by legislation. In that regard, we agree with the recommendations in the Discussion Paper which promote co-ordination with other jurisdictions and the further development of policies and guidelines in this area.
>
> 6. recommends that timelines be imposed at all stages of the EA process, including scoping, EA development and submission, RA [responsible authority] and the public review periods and response to public comments by the proponent. We also recommend that timelines be imposed on all players, including the proponent, the public, the RA and the Agency. This would avoid the need to take an "automatically in" approach to the Law List trigger. We also recommend that CEAA be amended to allow for design changes that remain within the range of activities considered in the EA. It should be noted that this recommendation did not receive unanimous consensus support among NELS members.[5]

The CBA Section continues to support the recommendations made in the Five-Year Review. Unfortunately, most of those recommendations have not been reflected in the Bill. As a result, the Bill needs to clarify several key sections of the *Act*. By failing to do so, the government is missing a window of opportunity to provide guidance and certainty to the environmental assessment process.

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[5] Canadian Bar Association National Environmental Law Association, *Submission on Five-Year Review of the Canadian Environmental Assessment Act* (Ottawa: Canadian Bar Association, 2000) at 38-39. We have provided a copy of the Five-Year Review Submission for your reference.

The definition of "project" must clarify the relationship between a physical work, and undertakings in relation to a physical work. The proposed Bill does not address this concern. Both "physical work" and "undertaking in relation to a physical work" must be defined and that definition should address the relationship between the two terms. The definition of "physical work" could clarify that one work may include many structures, and that a physical work includes worked-upon natural features such as farms.

Confusion over the definition of "project" in section 2 arises in part from the undefined terms "physical work", "undertaking" and "in relation to". As noted in the CBA Section's Five-Year Review submission, much of the confusion concerns the appropriate treatment of multiple structures. The first part of the definition of "project" in section 2 could be amended to read: "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking relating to a physical work". The recommended amendment does not change the meaning. However, it does remove the unnecessary phrase "in relation to", which is used twice in the definition. It also eliminates the potential confusion arising from the use of the similar phrases "in relation to" and "relating to" in the same definition.[6]

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the first part of the definition of "project" in section 2 should be amended to read: "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking relating to a physical work".

The objective and definition of environmental assessment is to assess the environmental effects of a project and to determine whether or not they are adverse

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6 The problem does not appear to arise in the French version, which uses the expression "liée à".

and significant. This determination is not made under section 16 but elsewhere in the *Act*. Thus, in the context of section 16, which deals with the factors to be considered, the word "consider" is appropriate. It would seem impossible to consider an effect without first identifying it. Conversely, effects can be determined or described without really "considering" them. The "evaluation" of effects occurs under section 16(1)(b), when significance is considered.

The *Act* should be amended to provide certainty on its central concept, "significance". Presently, this term is undefined and the approaches taken for different projects show no consistency or predictability. The justification for this vagueness is the preservation of federal discretion; but that objective conflicts with providing certainty. The *Act* could be amended to allow "significance" to be defined in the regulations and require decision-makers to have regard to this definition. The lack of referrals for panel reviews under the *Act* (approximately 10 for over 25,000 projects) indicates that the current approach to significance is to define all effects as "not significant", with or without mitigation.

RECOMMENDATION:
The National Environmental Law Section of the Canadian Bar Association recommends that "significance" be defined, either in the *Act* or in the regulations.

The process for identifying the lead federal authority should be clarified. Where there is ambiguity or a dispute, the Canadian Environmental Assessment Agency should have the authority to designate a lead authority or take on that role itself.

RECOMMENDATION:
The National Environmental Law Section of the Canadian Bar Association recommends that the process for identifying the lead federal authority be clarified.

Timelines should be imposed at all stages of the environmental assessment process and should be imposed on all players in the process. One problem with the Bill may be the failure to impose any specific timelines. Uncertainty of timelines can also result in uncertainty of process. In some instances, time limitations can be an important factor. For instance:

- section 18, which the Bill would amend to allow the responsible authority discretion as to the timing of public participation, although that discretion is subject to a decision made by the federal assessment environmental co-ordinator;
- section 21, which states:

> Where a project is described in the comprehensive study list, the responsible authority shall
> (a) ensure that a comprehensive study is conducted, and a comprehensive study report is prepared and provided to the Minister and the Agency; or
> (b) refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

  Presently this section does not place any time constraints on the process. The Bill would require the responsible authority to report to the Minister as soon as it believes that it has sufficient information to do so and provided that it has given the public an opportunity for participation; and
- sections which state that a certain course of action must be taken as early as is practicable given the circumstances. The phrase "as early as is practicable" is ambiguous and needs to be defined to avoid uncertainty.

If timelines are suggested or required, fairness would dictate that they be in place throughout the process and bind all participants, including the applicant, government and the public. Timelines could be available for all aspects of public participation, as long as the obligation and time period for comments is not undermined by a failure to provide access to information. The issue of timelines and certainty is also significant for the proposed reforms to the comprehensive study process.

One suggestion is that the *Act* be amended to authorize different timelines for different types of panel review. In particular, it might be useful to consider three scales of panel review: abridged (1-2 issues), focussed (2-5 issues), and comprehensive (6 or more issues), with varying timelines for each (for example, 30, 90 and 180 days respectively). Some believe that the lengthy duration of panel review is the principal reason so few reviews occur and that this undermines the ability of the *Act* to ensure serious scrutiny of significant effects. The opportunity for abridged or focussed panel reviews could also reduce the instances of litigation, as the public would get a hearing before an independent and expert body on the very issues (science and planning) that the courts may be reluctant to address. This proposed change would not go as far as the CBA Section's recommendation for panel decision-making authority, but is likely to increase the use of panels and thus improve consideration of planning and science issues under the CEAA.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that timelines be considered for all stages of the environmental assessment process and, if they are implemented, that they be imposed on all players in the process.

The Bill would create an array of instances where the Minister may exercise discretion, which in turn creates uncertainty. The outcome of a particular process or avenue may be unpredictable depending on when and how the Minister chooses to exercise his or her discretion. Although it may be necessary to have a degree of Ministerial discretion, there should be some certainty when the exercise of that discretion can have significant economic and environmental consequences. Given the varying means by which a project may only proceed to screening and not go to public review, the CBA Section recognizes that the Minister must be able to refer projects to review in certain circumstances. This may result in some uncertainty as to mediation and public review. That being said, referrals to mediation are very

unlikely and little used. However, the CBA Section would support greater description as to the circumstances and manner in which the Minister will exercise that discretion.

Some examples of Ministerial discretion are:

- section 28(1), which gives the Minister discretion to refer a project to a mediator or a review panel if the Minister believes that this course should be taken;
- section 29(3), which gives the Minister discretion to refer an issue relating to a review panel to a mediator if the Minister feels that mediation is more appropriate;
- section 43, where the Minister is given discretion to substitute an appropriate process for an environmental assessment by a review panel; and
- section 47(1), where the Minister and the Minister of Foreign Affairs may refer a project to a mediator or a review panel if they are of the opinion that the project may cause significant adverse environmental effects.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the CEAA be amended to provide further description of the circumstances and manner in which the Minister will exercise their discretion.

Similarly, there is a lack of clarity for the treatment of comprehensive studies, which in turn has precipitated litigation and confusion as to the role and treatment of comprehensive studies.[7] For example, under the existing *Act*, the Minister has the

[7] *Environmental Resource Centre v. Canada (Minister of Environment)*, 2001 F.C.T. 1423 (December 20, 2001, Court File Nos. T-274-99, T-1799-99, T-100-00).

ability to transfer a comprehensive study to a review panel. The proposed amendments — and more particularly section 21.1(2) — go a long way in alleviating that uncertainty. However, it may not go far enough. The proposed section 21.1 (2) reads as follows:

> Despite any other provision of this *Act*, if the Minister refers the project to a responsible authority under paragraph (1)(a), it may not be referred to a mediator or review panel in accordance with section 29.

To achieve greater certainty of process, the term "may" could be replaced with the term "shall". On the other hand, this change could in turn eliminate Ministerial discretion on this matter, where that review might be appropriate.

IV. MECHANICS, PROCESS AND MONITORING

One issue is the lack of direction on the process of assessment. One view is that there shouldn't be such guidance. On the other hand, some believe that such direction enhances the quality of assessments and addresses the need for certainty about an assessment. The only possible advantage to having no guidance is that small assessments might be facilitated by not having to do certain things. Given the proposed modifications to section 19 to improve the use of class assessments under the CEAA, the need for flexibility should be reconsidered.

In particular, section 16 could be amended to specify a standard process — for example, start with a description of the existing environment, prior to an examination of potential effects or their significance. Section 16 could be amended to replace the word "consider" with something more specific such as "describe", "determine" or "evaluate". The consideration of alternative means and sustainability in section 16(2), which has not been extensive to date, could be incorporated into section 16(1). This would encourage the general point that alternatives are the logical starting point for assessment.

The treatment of cumulative effects needs to be consistent with the priority given to certainty and protection of the environment. The existing guide to cumulative effects would be a useful starting point. However, the guide should be amended to specifically state that its priority is to address CEAA requirements. It should also be expanded to address socio-economic effects.

A major monitoring issue is that The CEAA does not contain offences for failure to comply with the *Act*, including provisions for fines and imprisonment. This is inconsistent with other federal environmental legislation and with the general trend for environmental legislation to contain a range of penalties and enforcement provisions. Therefore, the CBA Section recommends that the *Act* be amended to contain offense provisions. The offense provisions in the *Canadian Environmental Protection Act* may be a useful model, though not all of these provisions will be useful or suitable for The CEAA.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the *Act* be amended to contain offense provisions.

It has also been suggested that there be changes to sections 46 and 47 for interprovincial and international effects. Some believe that existing provisions are unworkable, and may be inconsistent with the "gap" in federal authority over the environment.

V. PUBLIC PARTICIPATION, REGISTRY AND ACCESS TO INFORMATION

In 1991, the Canadian Bar Association passed a resolution calling on the federal government to ensure full public participation in environmental assessments.[8] Unfortunately, the CEAA does not meet this standard. To the contrary (as noted above), over 99 percent of CEAA assessments are screenings, for which there is no obligation to provide public participation. According to the courts, there is also no obligation to provide access to information.[9] If a project meets the CEAA threshold of having the potential to cause significant adverse environmental effects, there should be public notice, disclosure and participation. At a minimum, the CEAA should comply with requirements set out in the recently signed Aarhus Convention on public notice and access to information led by the United Nations Economic Commission for Europe.[10]

There should be an obligation to provide public notice of all CEAA assessments on an electronic registry. This obligation should not replace the existing practices of notice; it should supplement them.

The most important problem is that the list of mandatory documents set out in the Bill is dominated by process documents. The key to the *Act* is access to technical reports and comments and assessment documents. Neither type of document is subject to mandatory disclosure under the Bill, although the Bill does have a provision to disclose summaries of assessment documents in place of the full

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8 Resolution 91-05-M (see Appendix A). We have included other relevant CBA resolutions in Appendix A.

9 *Supra*, notes 1 and 2.

10 United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (June 1998), available at http://www.unece.org/env/pp/documents/cep43e.pdf. The United Nations Economic Commission for Europe also led the development of the "Espoo Convention" on transboundary Environmental Impact Assessment.

document. At present, technical documents, which are at the core of the environmental assessment process, are not posted on the registry. Bill C-19 does not require that they be posted. If the government is concerned that disclosure would harm confidentiality and national security, then these matters are best addressed on a case-by-case basis, with the onus to justify non-disclosure on the parties who want to prevent disclosure. In general, public notice and disclosure should be provided, subject to concerns of confidentiality and security.

The CBA Section understands that the government's concern in this regard historically resulted from the operation of the *Official Languages Act* and the expense of translating such documents. The government's failure to incur this expense means that technical documents are not posted on the registry, which deprives Canadians of this valuable information. The CBA Section believes that this situation should be addressed.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that if a project meets the CEAA threshold of having the potential to cause significant adverse environmental effects, there should be public notice, disclosure and participation. There should be an obligation to provide public notice of all CEAA assessments on an electronic registry and the ability to access the underlying documents.

VI. EXTRATERRITORIAL APPLICATION OF THE *ACT* TO PROJECTS OUTSIDE OF CANADA

The preamble to the CEAA should be amended to specify that the *Act* applies to federal actions which promote, permit or approve projects outside Canada and that Canada will respect the sovereignty of states and the developing norms of international law in applying the *Act* to such actions.

Proposed section 10.1 of The CEAA would expressly include Canadian International Development Agency within its scope, once the applicable regulations have been issued. Under s. 24.1(1) of the recently amended *Export Development Act*,[11] section 5(1) of the CEAA would not apply where the Minister exercises a power or performs a duty or function under the *Export Development Act* or exercises a power of authorization or approval with respect to the Export Development Corporation under any other *Act*. Section 24.1(2) establishes the same exclusion in respect of Cabinet.

Section 24.1(3) provides that s. 8(1) of the CEAA does not apply to the Export Development Corporation. Instead, the amended *Export Development Act* sets up a self-regulated regime under which the Corporation is required to determine whether a project is likely to have adverse environmental effects despite the implementation of mitigation measures, and if so, whether Corporation is nevertheless justified in entering into the transaction. The determination would take place before the Corporation could exercise certain powers to enter into a transaction related to a project. The criteria used to make that determination would be set out in a directive issued by the Corporation's Board of Directors.

RECOMMENDATION:

The National Environmental Law Section of the Canadian Bar Association recommends that the preamble to the CEAA should be amended to specify that the *Act* applies to federal actions which promote, permit or approve projects outside Canada and that Canada will respect the sovereignty of states and the developing norms of international law in applying the *Act* to such actions.

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11 *An Act to amend the Export Development Act*, S.C. 2001, c. 33.

VII. RELATED LEGISLATION AND CONCERNS

Bill C-19 is occurring in the context of the enactment of Bill C-36, *Anti-Terrorism Act*,[12] and Bill C-31, *Export Development Corporation Act Amendments*.[13] The Canadian Bar Association has made extensive comments on the *Anti-Terrorism Act* which will not be reiterated here, except to the extent that it has an impact on access to previously public information under the CEAA. The CBA Section, together with the CBA's National Administrative Law Section, has also previously commented on the appeal process for decisions under the CEAA to the Federal Court.

A. Anti-Terrorism Act

Section 38.13(1) of the *Canada Evidence Act* [clause 43 of the *Anti-Terrorism Act*] and section 69.1 of the *Access to Information Act* [clause 87 of the *Anti-Terrorism Act*] permit the Attorney General to issue a certificate to prohibit the release of information for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity or to protect national defence or national security. We are concerned about the implications of this power on the disclosure of information under the CEAA. The Canadian Bar Association's submission on Bill C-36 noted that:

> Canadians have a legitimate interest in obtaining information about their government and its operations. Public information is often used by individuals and groups for legitimate legal purposes. One example is environmental law, where review proceedings or enforcement actions (including private prosecutions) are often commenced after public information has come to light. This frequently occurs after individuals or non-governmental organizations obtain information from public registries through access requests.[14]

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12 S.C. 2001, c. 41.

13 *Supra*, note 10.

14 Canadian Bar Association, *Submission on Bill C-36, Anti-Terrorism Act* (Ottawa: Canadian Bar Association, 2001) at 43.

Public information is also often used by individuals and groups in the context of environmental review proceedings and for a variety of other legitimate purposes. Much of this information is maintained in public registries. While it is important to protect information that is legitimately classified as sensitive, it also necessary to have clear and objective standards for determining the type of information that may be withheld, and a mechanism for review of any designation once it is issued. While there is a review mechanism in the *Anti-Terrorism Act*, it is limited to determining whether a Minister's certificate "relates to" confidential information from or about a foreign entity, national defence or security.

B. Appeal Process under *Federal Court Act*

In a December 12, 2000 letter to the Canadian Environmental Assessment Agency, the CBA Section, together with the CBA's National Administrative Law Section, took the position that appeals and judicial review applications under the CEAA should continue to be heard at first instance in the Federal Court Trial Division.[15] That letter stated:

> In its 1990 submission to the federal government concerning a Bill to amend the *Federal Court Act*, the Canadian Bar Association took the position that all applications for judicial review of federal tribunals should commence at the Trial Division. The one exception would be tribunals composed of judges (e.g. the Competition Tribunal or the Pension Appeals Board), as it would be inappropriate for Trial Division judges to be reviewing decisions of their Trial Division colleagues. Our position has not changed.

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15 Letter dated December 12, 2000 from National Environmental and Administrative Law Sections to Canadian Environmental Assessment Agency concerning Five Year Review of the *Canadian Environmental Assessment Act*, Appeals of Decisions to Federal Court.

In Canada, the United States, the United Kingdom and a number of other countries, there is a hierarchy of trial and appeal courts whereby trial courts are required to follow the decisions of appeal courts. This centuries-old system serves important functions. First, it ensures that litigants have an avenue of sober second thought to correct erroneous decisions by trial courts. Second, it ensures that the trial courts apply legal principles consistently, by allowing appeal courts to establish the general legal principles to be followed in certain classes of cases. Third, it allows trial courts to develop expertise on matters involved in fact finding - assessing the testimony of witnesses, applying evidentiary rules and so on - while leaving appeal courts to concentrate on general legal principles in particular areas of the law. These first two principles apply with equal force to decisions on an application for judicial review.

The effect of having CEAA matters go directly to the Federal Court of Appeal will be that in most cases, parties will only have one level of judicial review with no further right of appeal. Except in certain limited categories of cases, the Supreme Court of Canada only hears appeals which involve questions of public importance. The Court only grants about 12-15 per cent of applications which seek permission (or "leave") to appeal. Appeal to the Supreme Court is therefore not an option in most cases.

From our experience, this proposal could result in an initial flood of applications to the Court of Appeal, as they hear cases which might otherwise have been disposed of (without appeal) at the Trial Division. Appeal courts have tended to respond to an increased volume of appeals by strictly interpreting any privative clauses in the authorizing legislation or by reducing the circumstances under which the decision will be set aside or even reviewed. The end result is to limit access to an appeal mechanism, even where the decision appealed from appears to be objectively wrong.

While there is a superficial attraction to skipping one level of court, allowing one level of judicial review will cause more problems than it will solve. It will increase, not decrease, inconsistency in the law. It raises the spectre of inconsistent decisions from different panels of the Court of Appeal - each of whose decisions have equal legal weight - when the Court should be deciding the legal principles to be followed in the trial courts below. One level of review would also create injustice, as it would prevent most parties who have received an erroneous initial decision, from the Court of Appeal, from getting that decision overturned.

We recognize that some participants in the environmental assessment process are frustrated by the delays and costs caused by litigation. However, this is a common feeling among all types of litigants - not just those in the environmental field. Delays and cost could arguably be used to justify the complete elimination of all appeal courts, however that result would be inappropriate and unjust. There is nothing peculiar about environmental assessment which would justify special treatment. If delay is the ultimate issue, the answer is to impose a time frame for making and hearing appeals under the CEAA and, if need be, for rendering a decision.

Concerns about applications for judicial review which are strategic, frivolous, premature or too broad in scope can be addressed in other ways. For instance, the CEAA or the *Federal Court Act* could limit the scope of such applications. Strategic, premature or frivolous applications can be dealt with summarily by the Court, through the operation of the Court's Rules or through case law. They can also be discouraged by more liberal use of the Court's power to award costs.

We acknowledge that under section 28 of the *Federal Court Act*, judicial review of the decisions of certain administrative tribunals go directly to the Court of Appeal. These include the Canada Industrial Relations Board, the Pension Appeals Board and the Competition Tribunal. However, the listed tribunals can be distinguished from decision-makers under the CEAA in that they are "senior" tribunals which closely resemble courts and whose decisions are afforded a high level of deference by the courts. Indeed, a number of the tribunals listed in section 28 are staffed at least in part by Federal Court judges.

In contrast, the CEAA establishes a process to assess the environmental aspects of a project before that project is either authorized by a federal department, federal lands are used or federal money is provided. Government departments who are responsible authorities, usually because they approve some aspect of a project, are required to cooperate with the Canadian Environmental Assessment Agency in the assessment of that project. Environmental review of a project, if necessary, is administered by an independent panel appointed on an ad hoc basis to address that specific matter. This review results in non-binding recommendations by the panel that are considered by responsible authorities when making their decisions.

> As a result of this process, the legal challenges under CEAA are not appeals of the decisions of an established administrative tribunal. Instead, legal challenges under CEAA address the process of environmental assessment and the interpretation of the requirements of the *Act*. In some cases, the courts are assisting in the understanding of novel concepts such as cumulative effects. Therefore, it is particularly appropriate to retain two levels of scrutiny, namely at Federal Court Trial Division and the Federal Court of Appeal.

The CBA Section remains of this view.

VIII. CONCLUSION

The CBA Section appreciates the opportunity to provide input into this important Bill. Unfortunately it does not address a number of issues which were of concern to the CBA Section in its submission on the Five-Year Review. In particular, many of the provisions of the CEAA give rise to legal uncertainty. These should be addressed.

IX. SUMMARY OF RECOMMENDATIONS

The National Environmental Law Section of the Canadian Bar Association recommends:

1. **That the CEAA require greater disclosure of, and access to, screening documents on a public registry and provide the public and interested parties with the ability to comment on those screening documents and the overall screening process.**
2. **That the CEAA require screening reports to describe public consultation and any public concerns arising from that consultation. The *Act* should require a summary of the screening report to be placed on a registry, permit interested parties to obtain access to these underlying documents and provide a time period for response.**
3. **That the preamble and the purpose clause of the *Act* (section 4) be clarified and improved.**
4. **That section 4(c) be amended to state that a purpose of the *Act* is to ensure that "projects triggering assessment of their environmental effects do not cause significant adverse environmental effects", with no further qualification.**
5. **That section 4(b) be amended to provide that one of the purposes of the *Act* is to " encourage responsible authorities to ensure that development which they promote is environmentally sustainable and thereby achieve or maintain a healthy environment and a healthy economy."**
6. **That the federal government develop a regime which will subject government policies to an assessment of environmental effects in order to determine their long- and short-term environmental costs.**
7. **That the first part of the definition of "project" in section 2 should be amended to read: "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking relating to a physical work".**

8. **That "significance" be defined, either in the *Act* or in the regulations.**
9. **That the process for identifying the lead federal authority be clarified.**
10. **That timelines be considered for all stages of the environmental assessment process and, if they are implemented, that they be imposed on all players in the process.**
11. **That the CEAA be amended to provide further description of the circumstances and manner in which the Minister will exercise their discretion.**
12. **That the *Act* be amended to contain offense provisions.**
13. **That if a project meets the CEAA threshold of having the potential to cause significant adverse environmental effects, there should be public notice, disclosure and participation. There should be an obligation to provide public notice of all CEAA assessments on an electronic registry and the ability to access the underlying documents.**
14. **That the preamble to the CEAA should be amended to specify that the *Act* applies to federal actions which promote, permit or approve projects outside Canada and that Canada will respect the sovereignty of states and the developing norms of international law in applying the *Act* to such actions.**

X. APPENDIX A

91-05-M

FEDERAL ACTION FOR ENVIRONMENTAL PROTECTION AND SUSTAINABLE
DEVELOPMENT

Environmental Law Section
CARRIED AS AMENDED

WHEREAS The Canadian Bar Association at its Annual Meeting in Vancouver in August 1989 confirmed a strong commitment to promoting sustainable development in Canada, resolving to:

(1) endorse the goal of sustainable development;
(2) commit itself to ensure that its law reform activities promote the goal of sustainable development;
(3) encourage its Branches, Sections and Members to participate actively in efforts towards sustainable development;
(4) urge the federal, provincial, territorial and municipal governments in Canada to review and reform their legislation, regulations, policies and programs in order to promote sustainable development; and
(5) call on other professional associations, industry, academia, labour, governments and the public to work together to foster sustainable development in Canada and worldwide;

WHEREAS The Canadian Bar Association formed a Sustainable Development Committee consisting of forty-three participants from across Canada, and the Committee has prepared a Report identifying key national and international law reform issues entitled Sustainable Development in Canada: Options for Law Reform;

WHEREAS a motion to receive the Report of the Sustainable Development Committee was passed at the Annual Meeting of The Canadian Bar Association in London, England in September 1990;

BE IT RESOLVED THAT The Canadian Bar Association urge the adoption of the following measures to promote sustainable development:

(1) that the Government of Canada take strong measures to protect the environment and promote sustainable development to the full extent of its constitutional authority, including, where appropriate, under its peace, order and good government power;
(2) that the Government of Canada demonstrate its commitment to promoting sustainable development by legislating an environmental impact assessment process which:
    a) ensures full public participation;
    b) covers all areas of federal responsibility, all types of new and existing initiatives (including policy, planning and expenditures) as well as regulatory activities and

permitting practices, and;

c) which provides for:
   i) an independent review agency with authority to grant or deny approval of initiatives;
   ii) intervenor funding and awards of costs during the course of public hearings; and
   iii) mandatory environmental impact analyses regarding proposed cabinet decisions;

(3) that the Government of Canada demonstrate its commitment to improving public access to environmental justice by modifying relevant federal statutes:
   a) to broaden the rules of standing in environmental matters, including in respect of civil liability, injunctive and declaratory relief and upon judicial review;
   b) to improve citizen suits and civil remedies for the violation of environmental statutes and regulations;
   c) to remove statutory limits on the quantum of civil liability for environmental damages where they currently exist; and
   d) to legislate a rule-making process for the development of environmental regulations to enhance the opportunities for public input;

(4) that the Government of Canada affirm its commitment to reducing solid wastes in Canada by:
   a) adopting federal procurement policies which give preference to products and materials that are recyclable, contain recycled material or are otherwise environmentally sound; and
   b) requiring labelling of products and materials in Canada to communicate whether the product or material is recyclable or otherwise environmentally sound and other relevant information, including recommendations as to environmentally sound use and disposal;

(5) that the Government of Canada adopt a national strategy to address the problem of toxic contamination and set a national regulatory goal of zero discharge for persistent toxic chemicals;

(6) that the Government of Canada strengthen the enforcement of federal environmental legislation in Canada, especially by:
   a) promulgating clear standards to enable precise verification of compliance;
   b) legislating expanded investigation and enforcement powers, including a wide array of sanctions; and
   c) formulating and submitting for public review and comment written enforcement and compliance policies and the details of any proposed or existing federal-provincial agreements for the administration and enforcement of federal environmental statutes;

(7) that the Government of Canada show its commitment to conservation of the marine environment by:
   a) developing regional action plans for internationally shared marine areas and specific protocols for the setting of regional standards and to address land-based pollution, ocean dumping, special-areas protection, and liability and compensation for marine spills; and
   b) adopting an Oceans Act, launching a national coastal-zone management program, and establishing a coordinated and integrated process for designating and managing protected marine areas;

(8) that the Government of Canada:
   a) participate actively in the formulation of international agreements on biodiversity and forestry within the framework of the United Nations and its 1992 Conference on Environment and Development, and future treaties on wildlife and habitat;
   b) implement the North American Waterfowl Management Plan on migratory birds agreed to by Canada and the U.S.A. in 1986, and accede to the 1979 UNEP Convention on the Conservation of Migratory Species of Wild Animals; and
   c) adopt legislation within the scope of federal jurisdiction to conserve efficaciously Canadian and foreign wildlife, endangered species and their habitat subject to the recognition of the traditional use by aboriginal people of wildlife habitat for harvesting and subsistance activities;

(9) that the Government of Canada demonstrate its commitment to the conservation of the Arctic environment by developing an international strategy which recognizes the rights of aboriginal people and includes:
   a) review of existing and development of new international agreements to regulate internationally shared resources according to the principle of sustainable development; and
   b) reaching agreement with the United States, the Soviet Union and other circumpolar states to ensure the environmental and socioeconomic assessment and ongoing regulation of projects which have or may have an impact on Arctic ecosystems and Indigenous people;

(10) that the Government of Canada take a leading role in the development and implementation into domestic law of international instruments, including conventions and protocols, regarding the protection of the atmosphere and the regulation of climate change.

86-21-A
FEDERAL ROLE IN ENVIRONMENTAL PROTECTION
Environmental Law Section
CARRIED

WHEREAS accounts of an un-released report for the Nielsen Task Force (the Desfosses report) cast doubt on federal jurisdiction over environmental issues and proposed the dismantling of Environment Canada's regulatory and advocacy functions; and

WHEREAS it is reported that such down grading of Environment Canada is happening already; and

WHEREAS numerous studies and opinion polls have shown that Canadians place a high priority on protection of a clean environment; and

WHEREAS Environment Canada plays an increasingly important regulatory and advocacy role in areas such as acid rain and other air pollution, Great Lakes water quality, and PCBs and other toxics; and

WHEREAS the Royal Commission on the Economic Union and Development Prospects for Canada (the MacDonald Commission) anticipated "a quantum leap in the size of the environmental task facing Canadians" and concluded that "the environmental field is one in which greater government intervention will prove to be necessary"; and

WHEREAS the original report on Environment Canada for the Nielsen Task Force called for "a stronger commitment of the federal government to environmental issues and a more effective role at the federal level for the Department of the Environment in addressing these issues"; and

WHEREAS a strong federal role in environmental issues has been advocated by other reports such as:

* Crimes Against the Environment, Working Paper No. 44 of the Law Reform Commission of Canada;
* Soil At Risk: Canada' Eroding Future, A Report on Soil Conservation by the Standing Committee on Agriculture, Fisheries, and Forestry to the Senate of Canada;
* Current of Change: Final Report, Inquiry on Federal Water Quality;

THEREFORE, BE IT RESOLVED THAT:

(1) the Canadian Bar Association affirms its support for strong federal leadership by Environment Canada on environmental issues facing Canadians;

(2) the Canadian Bar Association appoint a Task Force to be chaired by a member of the executive of the Environmental Law Section to advise the Executive Committee of the Canadian Bar Association on a plan of action to study the federal regulatory and administrative mechanisms for environmental protection in Canada, with particular reference to the respective constitutional roles of the federal and provincial governments;

(3) the Canadian Bar Association calls for immediate public release of the Desfosses report to allow full public discussion on the appropriate role of the federal Department of the Environment.

WHEREAS in 1990 the Sustainable Development Committee of the Canadian Bar Association prepared a Report entitled "Sustainable Development in Canada: Options for Law Reform" (the "Report");

WHEREAS the Report noted that information respecting the prosecution of environmental offences is not available or is inadequate in most jurisdictions of the country;

BE IT RESOLVED that The Canadian Bar Association urge federal, provincial and territorial Ministers of Justice and the Environment to provide the public with information respecting the prosecution of environmental offences, by:

a) preparing a list of those charged with environmental infractions, the specific charge, the time and location of the alleged offence and the final disposition of the case;

b) preparing a disposition sheet for each unreported conviction, stating those convicted, counsel, the specific offence, the time and location of the offence, the date of the decision and the decision and any Order of the Court;

c) releasing the list and disposition sheets at least on a quarterly basis; and

d) advising the legal profession and the public of the availability and cost of the lists and disposition sheets.

CERTIFIED TRUE COPY OF A RESOLUTION CARRIED BY THE COUNCIL OF THE CANADIAN BAR ASSOCIATION AT THE ANNUAL MEETING HELD IN WINNIPEG, MB ON AUGUST 19-23, 1995.

STEPHEN BRESOLIN
ACTING EXECUTIVE DIRECTOR

Resolution 97-02-A

Federal Enforcement of Environmental Laws

WHEREAS the Canadian Council of Ministers of the Environment has recently approved the *Canada-wide Accord on Environmental Harmonization*;

WHEREAS the National Environmental Law Section has indicated its support for federal/provincial/ territorial harmonization of environmental laws, but wishes to ensure that the federal government maintains and enhances its role in enforcing Canada's national environmental laws;

WHEREAS the federal government has repeatedly promised to enhance enforcement, but has not yet done so;

BE IT RESOLVED THAT the Canadian Bar Association urge the Government of Canada to reaffirm its commitment to environmental enforcement by:

- maintaining or increasing Environment Canada's staff of investigators and inspectors;
- increasing enforcement activity in areas of federal jurisdiction; and
- using a flexible range of compliance promotion and enforcement tools, including warning letters and tickets.

Certified true copy of a resolution carried by the Council of the Canadian Bar Association at the 1997 Annual Meeting held in Ottawa ON, August 23-24, 1997.

John D.V. Hoyles
Executive Director

Notice of Proposed Legislation

WHEREAS the federal government adopts statutes and regulations on an ongoing basis;

WHEREAS the Canadian Bar Association provides comments and assistance to the government with respect to draft legislation;

WHEREAS the Canadian Bar Association is not able to provide full and proper comments unless it is provided with adequate notice before the statute or regulation is passed;

BE IT RESOLVED THAT the Canadian Bar Association urge the federal, provincial and territorial governments to provide adequate notice of all proposed legislation, including at least:

(a) a defined pre-consultation period of not less than sixty days before any proposed legislation being tabled before Parliament or a legislature, where submissions will be received and considered by the government; and

(b) adequate notice of any legislation tabled

Avis des projets législatifs

ATTENDU QUE le gouvernement fédéral adopte régulièrement des lois et règlements;

ATTENDU QUE l'Association du Barreau canadien fournit des analyses et son assistance au gouvernement relativement à ses projets législatifs;

ATTENDU QUE l'Association du Barreau canadien est incapable de fournir des analyses complètes et adéquates sur un projet de loi ou de règlement si elle n'est pas avisée suffisamment à l'avance.

QU'IL SOIT RÉSOLU QUE L'Association du Barreau canadien exhorte les gouvernements fédéral, provinciaux et territoriaux à donner un avis suffisant pour tout projet de loi et que cet avis respecte les conditions minimales suivantes :

(a) des consultations préalables relatives à tout projet de loi et une période de temps suffisante pour permettre au gouvernement de recevoir et d'examiner les mémoires soumis à ce sujet, cette période devant être de 60 jours minimum avant le dépôt du projet de législation devant le Parlement ou la législature; et

(b) un avis suffisant de toute législation

before Parliament or a legislature, as well as a defined consultation period after tabling proposed legislation where submissions will be received, such period to be not less than ninety days prior to second reading of the proposed legislation.

Certified true copy of a resolution carried by the Council of the Canadian Bar Association at the Annual Meeting held in Edmonton, AB, August 21-22,1999.

déposée devant le Parlement assortie d'une période de temps déterminée après le dépôt de la législation pendant laquelle les de la législation pendant laquelle les mémoires seraient présentés et des consultations menées, cette période devant être de 90 jours minimum avant la seconde lecture du projet de législation.

Copie certifiée conforme d'une résolution adoptée parle Conseil de l'Association du Barreau canadien, lors de l'Assemblée annuelle 1999, à Edmonton, AB du 21 au 22 août 1999.

John D.V. Hoyles
Executive Director/Directeur exécutif

Implementation of International Environmental Conventions

WHEREAS Canada is entering into an increasing number of international agreements addressing environmental issues which need timely implementation and enforcement of laws and regulations at all levels of government and cooperative arrangements between those governments;

BE IT RESOLVED THAT the Canadian Bar Association urge the federal, provincial and territorial governments to implement these international agreements in a timely and complete manner within their area of jurisdiction and in cooperation with other levels of government.

Certified true copy of a resolution carried by the Council of the Canadian Bar Association at the Annual Meeting held in Saskatoon, SK, August 11-12, 2001.

Mise en vigueur des conventions environnementales internationales

ATTENDU QUE le Canada ratifie un nombre croissant d'ententes internationales portant sur des aspects environnementaux, qui nécessitent une mise en vigueur par la mise en oeuvre et l'application des promulgations, aux tous niveaux de gouvernement, et d'ententes intergouvernementales;

QU'IL SOIT RÉSOLU QUE L'Association du Barreau canadien exhorte les gouvernements fédéral, provinciaux et territoriaux à mettre en oeuvre ces ententes internationales en temps opportun et intégralement, dans les secteurs de leur compétance et en collaboration avec les autres niveaux de gouvernements.

Copie certifiée d'une résolution adoptée par le Conseil de l'Association du Barreau canadien, lors de son Assemblée annuelle, à Saskatoon, SK les 11 et 12 août 2001.

John D.V. Hoyles
Executive Director/Directeur exécutif