

An initial evaluation of Canada's new sustainability-based *Impact Assessment Act*

*Robert B. Gibson, Professor, School of Environment, Resources and Sustainability,
University of Waterloo rbgibson@uwaterloo.ca*

Abstract

Canada's new *Impact Assessment Act* includes important innovations, including a sustainability-based agenda and provisions for law-based regional and strategic assessments. It also has serious limitations. This paper reviews the new law using a framework that synthesizes lessons on assessment law and process effectiveness from the past 50 years of experience, especially in Canada. The next generation assessment framework used here has 16 criteria categories, specified for application to assessment law in the Canada at the federal level. The analysis sets out the key considerations for each next generation component, reports how they are addressed in the Act, and provides a non-quantified evaluation emphasizing areas of promise as well as needs for improvement. The concluding overall evaluation finds considerable potential but also serious deficiencies in the legislation and vulnerability to timid application in regulations, policies and administrative practice.

Key words

Sustainability, impact assessment, law reform, next generation assessment, Canada

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Introduction

Canada now has sustainability-based federal impact assessment legislation. After a long gestation and a tumultuous final period of Parliamentary deliberation, the *Impact Assessment Act* was passed and given Royal Assent on 22 June 2019.¹ The new law came into force on 28 August 2019,² replacing the also controversial *Canadian Environmental Assessment Act, 2012*.³ The environmental assessment process reform initiative that led to the new law was driven by a then newly elected government's commitment to environmental assessment process reform that would serve both "to regain public trust and help get resources to market."⁴ While many long-established features and more recent streamlining changes to federal assessment law have been retained, the new Act introduces potential for important advances. These include adoption of the more comprehensive, sustainability-based agenda; stronger language on respecting Indigenous rights and roles; an initial planning phase; provisions for law-based regional and strategic assessments; and requirements to consider project effects on meeting Canada's environmental obligations and climate change commitments.

The following review describes and evaluates the provisions of the new law in light of the core components of sustainability-based next generation assessment.⁵ The concept of

- 1 Canada, *Impact Assessment Act* in *Bill C-69: An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, given Royal Assent 21 June 2019. *Statutes of Canada*, 2019, c.28, online: https://www.parl.ca/Content/Bills/421/Government/C-69/C-69_4/C-69_4.PDF. Published separately as Canada, *Impact Assessment Act*, *Statutes of Canada*, 2019, c.28, s.1, online: <https://laws-lois.justice.gc.ca/eng/acts/I-2.75/index.html> [Canada, *Impact Assessment Act*].
- 2 Canadian Environmental Assessment Agency [now the Impact Assessment Agency of Canada], "News Release: Better rules for impact assessments come into effect this month" (Ottawa: 9 August 2019), online: <https://www.canada.ca/en/environmental-assessment-agency/news/2019/08/better-rules-for-impact-assessments-come-into-effect-this-month.html> [CEAA, "Better rules"].
- 3 Canada, *Canadian Environmental Assessment Act, 2012*. *Statutes of Canada*, 2012, c.19, s.52, online: <https://laws-lois.justice.gc.ca/eng/acts/c-15.21/>
- 4 Canada, Office of the Prime Minister, "Minister of Environment and Climate Change Mandate Letter" (12 November 2015), online: <https://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>.
- 5 RB Gibson, M Doelle and AJ Sinclair, "Fulfilling the promise: basic components of next generation environmental assessment," (2016) 27 *Journal of Environmental Law and Practice* 251-276 [Gibson et al., "Basic components of next generation environmental assessment"].

sustainability-based next generation assessment is built on recognition that assessments need to move from focusing only on mitigating significant adverse effects to the higher aim of making positive contributions to lasting wellbeing. Broad support for a sustainability-based approach to assessment at the federal level in Canada was identified by the Expert Panel that in 2016-17 carried out the initial public consultations leading to the new federal assessment legislation.⁶ The Expert Panel's recommendation that "sustainability be central to IA [impact assessment]"⁷ was accepted by the government and the new Act establishes "contribution to sustainability" as a key consideration in decisions on all assessed projects.⁸

Successful pursuit of sustainability-based objectives, however, depends on many other assessment law and process components, all of which have long been examined and in various ways tested by assessment practitioners and scholars in Canada and beyond. As will be discussed below, the sustainability-based next generation assessment framework applied in this evaluation of the new Canadian assessment regime incorporates well-established requirements for assessment best practice plus attention to the key generic stages of assessment processes, but is built especially for design and evaluation of sustainability-based assessment regimes. The framework used here also recognizes features (e.g., Indigenous rights and reconciliation and inter-jurisdictional collaboration) that are particularly important in the Canadian federal context.

The review faces the constraints of analysis in the early days of new legislation. While the *Impact Assessment Act* has been proclaimed in force, only some of the regulations and policies that will specify the general provisions of the legislation are now available⁹ and some of the key policies (e.g., those on consideration of contributions to sustainability and to meeting Canada's climate change commitments) are labelled "draft" or "interim."¹⁰ Also it is far too early to report the consequences of the day-to-day

⁶ Expert Panel for the Review of Federal Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (April 2017) [Expert Panel, *Building Common Ground*], online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>

⁷ *Ibid.*, at 3, 19-20.

⁸ Canada, *Impact Assessment Act*, *supra* note 1, s.63(a).

⁹ Canada, Impact Assessment Regulations, online: <https://www.impactassessmentregulations.ca/consultation>; and Canada, Policy and Guidance, *Impact Assessment Act*, online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance.html>

¹⁰ For example, interim guidance is provided in Canada, Practitioner's Guide to Federal Impact Assessments under the Impact Assessment Act, online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>, for applying Gender-based Analysis Plus in assessments [section 2.1, considering the extent to which a project contributes to sustainability [sections 2.2 and 2.3], Indigenous participation [sections 3.1 and 3.2] and public participation [sections 4.1 and 4.2].

decisions of assessment authorities and other players under new the Act. Evaluation now is consequently limited to general and tentative conclusions.

Nevertheless, the *Impact Assessment Act* represents a potentially important if yet-to-be-elaborated step in the on-going efforts to design assessment legislation that is effective, fair and manageable. While this is Canadian federal legislation facing expectations and barriers that are to some degree peculiar to that context, sustainability is a global concern and all next generation assessment issues are broadly shared internationally. An understanding of the strengths and limitations of the new Canadian law is likely to be helpful for those seeking to strengthen assessment law in many other jurisdictions, in Canada and beyond.

Legislative history

The new Canadian *Impact Assessment Act* is the main product so far of a reform initiative promised during the fall 2015 election campaign and begun in 2016. The preparatory work featured extensive public consultations and a report by an independent Expert Panel whose recommendations included transition to a sustainability-based approach.¹¹ The government responded to the Expert Panel report with further public engagement on the Expert Panel recommendations¹² and on initial law and process reform ideas.¹³ On 8 February 2018, the Liberal majority government introduced the *Impact Assessment Act* as part 1 of Bill C-69, for debate in the Canadian House of Commons.¹⁴ Bill C-69 was passed with minor amendments by the House on 20 June 2018. It then moved to the Senate, which is not effectively controlled by the governing party. There, the responsible Senate committee undertook additional cross-country consultations, and lively debates continued for nearly a year. The proposed assessment law faced vehement opposition led by Conservative Senators and hostile lobbying especially from interests centred in the oil and gas sector.¹⁵ On 30 May 2019, the Senate sent the Bill back to the House of

11 Expert Panel, *Building Common Ground*, *supra* note 6.

12 Canada. “Let’s Talk Environmental Assessment” (April 2017), online: <https://www.letstalkea.ca/>

13 Canada, “Environmental and Regulatory Reviews Discussion Paper” (July 2017), online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>

14 House of Commons, Canada, *Bill C-69: An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, First Reading 8 February 2018; online: <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading>

15 SJ Riley and S Cox, “Industry responsible for 80 per cent of Senate lobbying linked to Bill C-69,” *The Narwhal* (13 June 2019), online: <https://thenarwhal.ca/industry-responsible-for-80-per-cent-of-senate-lobbying-linked-to-bill-c-69/>

Commons with 56 pages of proposed amendments.¹⁶ The Liberal-dominated House of Commons quickly rejected or revised all Senate amendments judged to be contrary to the government's legislative intent and passed the Bill with a more modest set of changes.¹⁷

The Bill was given Royal Assent on 22 June 2019 and was proclaimed in force on 28 August 2019¹⁸ along with core initial regulations and policy guidance.¹⁹ Since then the government has gradually added to its published regulatory and policy guidance for application of the Act.²⁰ The guidance remains incomplete and several key items are labelled "draft" or "interim." The available guidance does, however, provide some official indication of how important aspects of the new law will be implemented.

The Act in its historical context

The *Impact Assessment Act's* difficulties in the Senate were due in part to short term partisan politics. These drove and dramatized much of the legislative controversy. The new assessment law replaces the Conservative-era *Canadian Environmental Assessment Act, 2012* [CEAA 2012],²¹ which was designed and presented as assessment law reform

16 Senate of Canada, *Report of the Senate Standing Committee on Energy, the Environment and Natural Resources on Bill C-69*, 42nd Parliament, 1st Session (28 May 2019), online: <https://sencanada.ca/en/committees/report/74834/42-1>.

17 Canada, *Impact Assessment Act*, *supra* note 1.

18 CEAA, "Better rules," *supra* note 2.

19 Canada, Physical Activities Regulations: SOR/2019-285, Canada Gazette, Part II, 153:17 (August 2019), online: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html>; Canada, Information and Management of Time Limits Regulations: SOR/2019-283. Canada Gazette, Part II, 153:17 (21 August 2019). <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors283-eng.html>; Canada, "Practitioner's Guide to Federal Impact Assessments under the *Impact Assessment Act*" (21 August 2019 with subsequent updates), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html> [Canada, Practitioner's Guide to Federal Impact Assessments under the *Impact Assessment Act*]; Canada, Tailored Impact Statement Guidelines Template for Designated Projects Subject to the *Impact Assessment Act and the Nuclear Safety and Control Act*, section 1.2 of the Practitioner's Guide to Federal Impact Assessments under the *Impact Assessment Act*, online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/tailored-impact-statement-guidelines-projects-impact-assessment-nuclear-safety-act.html> [Canada, Tailored Impact Statement Guidelines Template].

20 *Supra* notes 9 and 10.

21 Canada, *Canadian Environmental Assessment Act, 2012*, *supra* note 3.

to facilitate more economic growth through resource projects.²² In application, however, CEEA 2012 did not always deliver the promised streamlining of approvals. Its inflexibly defined timelines made alignment with overlapping provincial assessment processes more difficult. Its provisions for speeding deliberations through narrowed scope and restricted participation undermined process credibility in some quarters and contributed to successful court challenges.²³ Nevertheless, for some interests, CEEA 2012 remained an attractive symbol of faster and easier assessment.

All of this was only an episode in the longer and more complex history of non-linear assessment evolution in Canada. CEEA 2012 itself replaced predecessors in law and policy stretching back to an initial Cabinet order in 1972. Throughout that whole period, adoption and application of assessment requirements at the federal level in Canada was hesitant and contested.²⁴ Most of Canada's assessment story has been characterized by varying responses to tensions between and among minimally compatible objectives: (i) to increase assessment ambition to address evident deficiencies, incorporate new understandings, and respond to emerging problems and opportunities, (ii) to ensure fairness and credibility of process and product, and (iii) to avoid obligations that would be unduly onerous for proponents, unmanageable for administrators and unattractive to investors.

Those tensions have also been apparent in assessment law and practice beyond the federal level in Canada. All ten provinces, three territories and several Indigenous jurisdictions have their own law-based assessment regimes. No two of these regimes are the same and collectively they have tested a diversity of forms. While the results have been erratic and inconvenient, they have underlined the importance of respecting the peculiarities of different contexts and they have provided a rich base for learning how to do better.

The framework for evaluation and the approach to application

The following evaluation the new *Impact Assessment Act* is organized in a sustainability-based next generation assessment framework. This is a normative framework. The basic

²² Natural Resources Canada, "Press Release: The Honourable Joe Oliver, Minister of Natural Resources, Responds to Environmental Groups" (7 May 2012). <https://www.nrcan.gc.ca/media-room/news-release/2012/2017>.

²³ LE Ogden, "Canada aims to rewrite environmental law," (2016) 353:6307 *Science* 1480; Federal Court of Appeal, *Tsleil-Waututh Nation v. Canada (Attorney General)* 2018 FCA 153 (overturning federal approval of the Trans Mountain pipeline project), online: <https://decisia.lexum.com/fca-caf/decisions/en/item/343511/index.do?r=AAAAAQAMMjAxOCBmY2EgMTUzA>

²⁴ S Hazell, *Canada v. the Environment: Federal Environmental Assessment 1984-1998*. (Toronto: Canadian Environmental Defence Fund, 1999); RB Gibson, "From Wreck Cove to Voisey's Bay: The Evolution of Federal Environmental Assessment in Canada," (2002) 20:3 *Impact Assessment and Project Appraisal* 151-59.

structure is designed to facilitate progress towards sustainability and to incorporate lessons from international as well as Canadian experience on how best to strengthen assessment law and practice. However, the version used here is also specified for application to assessment regime design in Canada.

The basic structure draws from core impact assessment needs identified decades ago on best practice lessons from assessment experience,²⁵ all of which were informed broadly by the literature at the time. The sustainability-centred elements incorporate the requirements for sustainability assessment regime design in the 2005 book by Gibson et al.,²⁶ which also reflects a synthesis of insights from then available literature. These source materials along with updated lessons from international and Canadian experience were integrated into the structure and components of the detailed sustainability-based next generation assessment framework set out in an earlier JELP paper and associated monograph.²⁷ and that generic structure provides the foundations of framework used here. While the components can be and have been phrased and prioritized in various other ways,²⁸ none should be surprising or controversial as matters of importance in sustainability-based assessment regimes.

As is normally required in sustainability-based assessment applications to particular cases and contexts,²⁹ the generic next generation assessment components have been specified for the particular case and context of evaluating assessment law at the federal level in Canada. Most notably, the specification takes into account two crucial Canadian constitutional realities. The first is the Canadian Constitution's distribution of authority and jurisdiction among federal, provincial, territorial and Indigenous governments, and the consequential need for Canadian assessment law to foster inter-jurisdictional collaboration. The second is the Constitution's recognition and entrenchment of Indigenous rights, which entails that assessment processes must respect Indigenous rights

²⁵ For example, RB Gibson, "Environmental assessment design: lessons from the Canadian experience," (1993)15:1 *The Environmental Professional* 12-24; C Wood, *Environmental Impact Assessment: A Comparative Review* (Harlow: Longman, 1995); B Sadler, *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance* (Ottawa: Canadian Environmental Assessment Agency and International Association for Impact Assessment (IAIA), 1996); P Senécal, B Goldsmith, S Conover, B Sadler and K Brown, *Principles of Environmental Impact Assessment Best Practice* (IAIA, 1999).

²⁶ RB Gibson, S Hassan, S Holtz, J Tansey and G Whitelaw, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), chapter 7.

²⁷ RB Gibson et al., "Basic components of next generation environmental assessment," *supra* note 5; RB Gibson, M Doelle and AJ Sinclair, *Next generation environmental assessment for Canada: basic principles and components of generic design*, monograph, online: <https://uwaterloo.ca/next-generation-environmental-assessment/research-contributions/dissertations-theses-monographs-and-major-reports>

²⁸ See below, notes 31 and 32..

²⁹ RB Gibson, ed. *Sustainability Assessment: Applications and Opportunities* (London: Routledge/Taylor&Francis, 2017), especially chapter 2.

and facilitate Indigenous engagement.³⁰

The resulting specified framework is a set of 16 core requirements for Canadian sustainability-based assessment law at the federal level. For the evaluation of the *Impact Assessment Act*, the requirements are treated as criteria for evaluation of the new law. The 16 requirements/criteria categories are identified in Box 1, below. Elaborations of each requirement/criterion are provided in the evaluation discussions below.

Like the provisions in the Act, the requirements and criteria overlap and are interdependent. They should be seen as a package rather than as a set of discrete elements. An overall evaluation of the Act in light of the requirements for sustainability-based next generation assessment follows the discussion of the individual framework elements.

Box 1: The core considerations in the sustainability-based next generation assessment framework for application to law at the federal level in Canada

1. Sustainability-centred purpose
2. Comprehensive scope
3. Specified sustainability-based criteria
4. Comparative evaluation of potentially reasonable alternatives
5. Application to projects and regional/strategic undertakings
6. Defined and linked project and regional/strategic processes and options
7. Indigenous rights and reconciliation
8. Inter-jurisdictional collaboration
9. Meaningful public participation
10. Early initiation
11. Rigorous and credible impact assessment studies and reviews
12. Authoritative and accountable decisions
13. Mandatory follow-up monitoring of effects as well as compliance
14. Full process learning
15. Impartial administration
16. Efficient delivery of effective and fair assessments

Throughout the federal assessment reform process that led to the *Impact Assessment Act*, variations of this specified framework were used by extensively by advocates of stronger

³⁰ I Brideau, “The Duty to Consult Indigenous Peoples,” (Ottawa: Library of Parliament, 12 June 2019), online:
<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2019-17-e.pdf>

assessment law.³¹ The framework has also been applied in reviews of other assessment laws and processes in Canada.³²

Application of the framework criteria to the new Canadian *Impact Assessment Act*

The following review considers the new Canadian law in light of the Box 1 requirements/criteria and concludes with an overall summary. For each requirement/criterion, the discussion begins with a brief elaboration of the relevant expectations and identifies the main considerations to be addressed in the law and associated regulations and policy guidance; summarizes the main relevant contents of the new Act; and provides a concise assessment of how well the requirement/criterion is met by the Act.

No quantitative grading is attempted. That is for three reasons. First, the Act's strengths and limitations in practice will depend heavily on regulations and policies that have not

- ³¹ For example, Canadian Environment Network Environmental Planning and Assessment Caucus, "Achieving a Next Generation of Environmental Assessment: Submission to the Expert Review of Federal Environmental Assessment Processes" (14 December 2016), online: <https://www.cqde.org/wp-content/uploads/2018/10/Achieving-a-Next-Generation-of-Environmental-Assessment.pdf>; Nature Canada, "Next Generation Impact Assessment: Toward Sustainability, Submission to the Expert Panel on Environmental Assessment" (Ottawa: 31 October 2016), online: https://naturecanada.ca/wp-content/uploads/2015/11/Submission-EA-Experts-Panel-October-31-2016_E.pdf; A Johnston, ed, *Federal Environmental Assessment Reform Summit Proceedings*. (Vancouver: West Coast Environmental Law, August 2016) at 5-12, online: https://www.wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf; A Johnston ed, *Federal Environmental Assessment Reform Summit II*, consolidated discussion documents (Ottawa: West Coast Environmental Law, June 2017), online: <http://www.envirolawsmatter.ca/easummit2>; RD Lindgren, "Ensuring sustainability through statutory reform: essential elements of Impact Assessment law in Canada, submissions of the Canadian Environmental Law Association to the Government of Canada regarding *Environmental and Regulatory Reviews: Discussion Paper* (June 2017)" (Toronto: Canadian Environmental Law Association, 28 August 2017), online: [https://www.cela.ca/sites/cela.ca/files/1130-CELA Submissions on Federal Discussion Paper \(final\).pdf](https://www.cela.ca/sites/cela.ca/files/1130-CELA%20Submissions%20on%20Federal%20Discussion%20Paper%20(final).pdf); M Doelle and AJ Sinclair, "The new IAA in Canada: From revolutionary thoughts to reality," 79(2019) *Environmental Impact Assessment Review* 106292.
- ³² For example, West Coast Environmental Law, "A Blueprint for Revitalizing Environmental Assessment in British Columbia" (Vancouver: WCEL, 1 April 2018), online: <https://www.wcel.org/publication/blueprint-revitalizing-environmental-assessment-in-british-columbia>; AJ Sinclair, M Doelle and RB Gibson, "Implementing next generation assessment: a case example of a global challenge" (2018) 72 *Environmental Impact Assessment Review* 166-176.

yet been finalized and on administrative practices that have not yet been demonstrated. Second, the requirements/criteria are overlapping, interactive, not necessarily of equivalent importance and not defined clearly enough as standards for testing purposes to support precise evaluation. Third, but perhaps most importantly, the ultimate test is whether the law will put Canada on a path towards a socio-economic and ecological future that is actually sustainable. That test is far more demanding than the established aspirations and practices of assessment law in Canada. The exercise here is not to compare the *Impact Assessment Act* with its predecessor or with other Canadian assessment legislation. It is to compare the *Impact Assessment Act* with what is broadly needed. In that evaluation, what is most needed is encouragement of promise and recognition of deficiencies with an eye to improvements in the years ahead.

While the discussion focuses on how well the new federal *Impact Assessment Act* incorporates sustainability-based next generation assessment components, it recognizes that the proposed new law is a work in progress. Accordingly, the review anticipates needs for specification of many crucial aspects in regulations and policy guidance and the likelihood, sooner or later, of further legislative reform.

1. Sustainability-centred purpose

To serve the lasting public interest, assessment law must incorporate three linked characteristics. It must aim to enhance prospects for sustainability, including by ensuring that every approved undertaking (project, strategic or regional policy or plan or programs, etc.) makes the most positive overall contribution to sustainability in the circumstances. It must aim to deliver to the extent possible multiple, mutually reinforcing, fairly distributed and lasting gains, while avoiding or mitigating adverse effects. And, more specifically, it must incorporate sustainability-based purposes and associated decision rules to impose, guide and facilitate a contribution to sustainability test to be met by all assessed undertakings.

Treatment in the Impact Assessment Act

The Act defines “sustainability” [s.2] as “the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations,” and includes “to foster sustainability” as the first of its 14 purposes [s.6(1)(a)]. That stated purpose is supported by a requirement for decision makers to consider “the extent to which the designed project contributes to sustainability,” as the first of five public interest factors for mandatory consideration [s.63(a)]. Also, the mandatory considerations for decision makers include attention to meeting environmental obligations and climate change commitments [s.63(e)], which are especially crucial for potential contributions to sustainability. In support of these sustainability-based elements, the Act requires attention to positive effects, adverse effects and their mitigation, and interactions among effects [s.22(1)(a)]. However, it includes no direct statement about seeking multiple, mutually reinforcing, fairly distributed and lasting gains, while avoiding or mitigating adverse effects.

Evaluation

The Act's sustainability provisions are promising but need considerable elaboration. The adoption of the contribution to sustainability test provides a solid base for further elaboration in guidance and application. While the base is crucial, its practical utility will depend heavily on development and application of authoritative regulatory and policy direction that takes sustainability and other s.63 considerations seriously.

2. Comprehensive scope

To ensure a sufficient scope of information and analysis for sustainability-based deliberations and decisions, assessments under the law must cover all key sustainability-related factors and effects (biophysical and socio-economic, positive and adverse, individual and cumulative, direct and indirect, immediate and intergenerational, etc.) and their interactions. The law must also ensure that assessments report uncertainties and assess their implications; identify and evaluate distributional inequities; and consider implications of and for extensive cumulative effects, broad alternatives and major policy issues that affect or may be affected by the undertaking.

Treatment in the Impact Assessment Act

The Act [s.22(1)] requires consideration of the positive and negative consequences of project-related changes affecting the environment or health, social or economic conditions; cumulative effects; interactions between effects; effects on meeting Canada's environmental obligations and climate change commitments; effects on Indigenous groups or Indigenous rights; effects related to "the intersection of sex and gender with other identity factors"; and more broadly "the extent to which the designated project contributes to sustainability."

The Act requires application of the precautionary principle [s.6(2)]. The Act itself does not mention "uncertainty;" however, the initial template for the "tailored impact statement guidelines" that are to be prepared for each project assessment, requires attention to the "degree of uncertainty related to the data and methods used" in effects assessment.³³

The Act does not specify obligations to consider effects on distributional equity. While such effects may be treated as covered implicitly as social and economic effects, and effects on Indigenous groups or Indigenous rights, that treatment is not assured. However, the Act does require consideration of "the intersection of sex and gender with other identity factors," [s.22(1)(s)], a factor associated with the current government's commitment to "Gender-based Analysis Plus," which covers a range of identity-based distributional equity matters.³⁴

³³ Canada, "Tailored Impact Statement Guidelines Template," *supra* note 17, s.13.1.

³⁴ Canada, "Interim Guidance: Gender-Based Analysis Plus in Impact Assessment," section 2.1 of Practitioner's Guide to Federal Impact Assessments under the *Impact Assessment Act*. (21 August 2019), online: <https://www.canada.ca/en/impact->

Concerning strategic level matters, the Act does not include explicit requirements to address major policy issues that affect or would be affected by proposed projects, though some consideration may enter indirectly through attention to cumulative effects and other major issues at the project level. The Act is not clear about the extent to which broad alternatives (quite different approaches to project objectives) are to be considered [s.22(1)(f)]. Some strategic matters are expected to be addressed in strategic and regional assessments, for which the Act [s.92-95] includes basic enabling provisions. However, the Act is silent on whether or not the broad scope of provisions for project assessments apply as well to regional and strategic assessments.

Evaluation

The Act establishes a good foundation that awaits elaboration of specific requirements and implications. The Act's scope is explicitly broad for project assessments but less clear for other decision making. Even for project assessments, effective and efficient application will depend on strong guidance reflecting advanced understanding of the requirements for progress towards sustainability, especially in key areas including attention to uncertainty and distributional/equity effects.

3. Specified sustainability-based criteria

For clarity and consistency in deliberations and decision making within its ambit, the law must provide (or ensure that regulations provide) core sustainability-based principles/criteria for evaluations, and require and guide identification and evaluation of major trade-offs that would compromise sustainability objectives. To recognize the differences among individual applications and circumstances, the law must also require and guide specification of the core criteria for each case and context through an open, consultative process led by an impartial assessment body.

Treatment in the Impact Assessment Act

Although the Act adopts "contribution to sustainability" as a legislative purpose and mandatory consideration for decision making, it does not provide core sustainability-based principles or criteria aside from requiring attention to the precautionary principle [s.6(2)] and obliging authorities to adhere to "scientific integrity, honesty, objectivity, thoroughness and accuracy" [s.6(3)]. The Act does not include a specific requirement to establish core sustainability criteria by regulation, though the regulation-making powers assigned to the Governor in Council (Cabinet) are broad enough to enable such action [s.119(h)]. The Act does not mention trade-offs.

For application in individual assessments, the Act does not require case/context-specific criteria, but it does anticipate preparation of case/context specific guidance ("tailored impact assessment guidelines") that could include or require such criteria [s.18(1)(b)]. The Impact Assessment Agency of Canada [henceforth "the Agency"] has released an

[assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/gender-based-analysis.html](https://www2.ec.gc.ca/assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/gender-based-analysis.html)

initial template for the tailored guidelines, which is silent on specified sustainability criteria.³⁵ Similarly, the Agency's initial policy guidance on applying the "contribution to sustainability" test includes no generic sustainability-based criteria for evaluations and does not mention trade-offs or specification of criteria for case and context.³⁶ The drafts do provide a set of insightful but very broad principles and it is possible that future versions will go further.

Evaluation

Further work is required. Despite the seemingly inevitable need for explicit core and case/context-specific sustainability-based criteria and trade-off evaluations for defensible assessment decisions and reasons for decisions, the Act is silent on these matters. The initial sustainability-related policy guidance is disappointing but explicitly "interim" and could be revised usefully.

4. Comparative evaluation of potentially reasonable alternatives

To facilitate planning and delivery of best options in the lasting public interest, the law must establish requirements to identify potentially reasonable options – including fundamentally different approaches (alternatives to) as well as different design options (alternative means) – in light of specified sustainability criteria; compare these options/alternatives in light of the criteria (rather than merely evaluating the "acceptability" of projects and other undertakings as proposed); and identify the trade-offs involved in each option and in choosing among options.

Treatment in the Impact Assessment Act

The Act lists technically and economically feasible "alternative means of carrying out the designated project" and "alternatives to the designated project that are ... directly related to the designated project" as factors to "take into account" in assessments [s.22(1)(e) and (f)]. Those requirements might be taken to imply an expectation to carry out comparative evaluations to determine if the project as proposed is preferable to alternative means and alternatives to the proposed project, including the null alternative. However, that implication is not supported by a specific requirement. Also, the Act does not specify how alternatives are to be considered and consequently does not indicate how criteria specification or attention to trade-offs might be involved in any comparisons.

³⁵ Canada, "Tailored Impact Statement Guidelines Template," *supra* note 17.

³⁶ Canada, "Interim Guidance: Considering the Extent to which a Project Contributes to Sustainability," section 2.2 of Practitioner's Guide to Federal Impact Assessments under the *Impact Assessment Act* (2019), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-considering.html>; and Canada, "Interim Framework: Implementation of the Sustainability Guidance," section 2.3 of Practitioner's Guide to Federal Impact Assessments under the *Impact Assessment Act* (2019), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance.html>.

Similarly, the Act does not establish whether and how alternatives are to be considered in regional and strategic assessments.

Evaluation

Further work is required here too. The Act's requirements to consider alternatives provide a base that needs considerable elaboration. The needed steps to clarify what, where, when and how alternatives are to be identified and compared could be accomplished through regulatory and policy guidance and appropriate use of regional and strategic assessments.

5. Application to projects and regional/strategic undertakings

To maximize value in the use of assessment resources, the law's assessment requirements must apply to regional and strategic undertakings (responses to regional and strategic concerns and opportunities) as well as to physical projects. As well, the law must ensure that decision making on what undertakings are subject to or exempt from assessment is transparent, consultative and based on the potential positive or adverse significance of the undertaking (or category of undertakings) for progress towards sustainability.

To the extent possible, decision making on process application must be anticipatory so that proponents and other assessment participants know their assessment obligations and expectations from the outset of their planning. For cases where anticipatory designation is not possible, the law must provide a public process for identifying other undertakings for designation.

More generally, for credible deliberations and decision making on exemptions and for application to more and less demanding streams or process options (tied to impact significance and sustainability importance), the law must establish clear and open processes. Beyond the project level, the law must provide open and reasoned means to identify and act on needs for regional and strategic undertakings and assessments and for ensuring that credibly assessed regional/strategic undertakings (policies, plans and programs) can guide project assessments.

Treatment in the Impact Assessment Act

The Act is devoted mostly to assessments of major projects. For these, the Act provides for anticipatory designation through a regulation listing categories of projects that are automatically subject to assessment requirements [s.109(b)], as well as a process for designating further projects [s.9]. Assignment of designated projects to different process options (e.g., assessment by the Agency or a review panel) and further specification of particular requirements is left for case-by-case determination. The Physical Activities Regulation, which came into effect when the Act was proclaimed in force, sets out a tightly constrained "project list" of categories of major projects that will be subject to assessment.³⁷

³⁷ RD Lindgren, "Submissions by the Canadian Environmental Law Association to the Government of Canada regarding Discussion paper on the Proposed Project List and

In addition to its provisions for public assessments of major projects, the Act retains, with modestly increased transparency, an internal-to-government process stream for considering the environmental effects only of other federal projects in and outside Canada [s.81-91]. That stream received no serious attention in the assessment reform process and is given no further consideration here.

At the level of policies, plans and programs, the Act introduces law-based regional and strategic assessments for the first time at the federal level. However, it does so in a brief set of enabling provisions that provide little information about the scope, processes or products of these assessments [s.92-95]. The Act provides for such requirements and procedures to be established by regulation [s.112 (a.3)], but does not indicate the extent to which the regulation development must be open and consultative, or follow the general sustainability-based agenda and scope of project assessments, or be focused on regional or strategic undertakings and alternatives (rather than merely carrying out studies of regional or strategic issues).

The Act does require that regional and strategic assessments ensure public access to information and “opportunity to participate meaningfully” [s.98 and 99]. As well, the Act includes a process requiring ministerial response to public requests for initiation of regional or strategic assessments [s.97(1)].

Evaluation

Significant expansion and elaboration is needed. The Act remains focused on Agency or review panel assessments of an unduly limited range of major physical projects. The Act’s provisions for regional and strategic assessments are merely enabling and application possibilities are ill-defined. The Act also has provisions that may apply to other government undertakings in and outside Canada, but the assessment process involved lacks the transparency needed for potentially credible applications.

6. Defined and linked project and regional/strategic processes and options

To match process provisions to the nature and importance of the project or regional or strategic undertaking to be assessed, and to clarify obligations and opportunities for proponents, authorities and other participants, the law must incorporate three key components. It must establish clearly defined processes and process options for project

Discussion Paper on Information Requirements and Time Management Regulatory Proposal” (29 May 2019), online:

<https://www.impactassessmentregulations.ca/8869/documents/16566/download>

[Lindgren, “Submissions on the Proposed Project List and Information Requirements and Time Management Regulatory Proposal,”]; S Mascher, “As Bill C-69 Receives Royal Assent, Will the Project List Deliver on the Promise?” *ABlawg* (University of Calgary Faculty of Law, 25 June 2019), online: http://ablawg.ca/wp-content/uploads/2019/06/Blog_SM_ProjectListC-69.pdf

assessments and regional/strategic assessments (e.g., assessments with and without public hearings). It must provide for adjustment of requirements for individual assessments in light of the specifics of case and context, including the potential importance of anticipated concerns and opportunities in light of sustainability-based criteria. And it must provide for tiered links between regional/strategic and project assessments, clarifying how regional/strategic assessment findings can direct project assessments and how project assessment findings can inform regional/strategic assessments.

Treatment in the Impact Assessment Act

The Act sets out process requirements for assessment of designated projects [s.10-91] in two main streams – assessments by the Agency with public consultation [s.24-30] and assessments by an independent review panel with public hearings [s.36-59]. Selection between the Agency and review panel streams is assigned to case-by-case determination. Further differentiation of project assessment expectations for individual cases is established through a consultative process leading to case-specific “tailored impact statement guidelines” [s.18(1)(b)]. The Act also provides for joint and cooperative project assessments with other Canadian jurisdictions [s.18(2) and 21].

The Act’s very general provisions for regional and strategic assessments [s.92-103] do not include details on regional and strategic process options other than establishing that such assessments may be conducted by an appointed committee or by the Agency [s.92 and 95], must have terms of reference [s.96], must provide opportunity for meaningful public participation [s.99], must produce a report [s.98 and 102], and must make their information and reports public [s.103].

Tiered links between regional/strategic assessments and project assessments are limited to requirements for project assessments “to take into account” regional and strategic assessments [s.16(2)(e), 22(1)(p), 112(2)]. However, as noted above, the Act does not indicate what kinds of products or guidance regional/strategic assessments may produce. For example, the Act does not indicate the whether these assessments can be limited to studies of specific topics (e.g. identifying baselines for assessment of cumulative effects in defined areas), or involve actual assessments in the development of new policies or regional and strategic plans or programs with comparative evaluation of alternatives (e.g., regional cumulative effects scenarios and management options). Nor does the Act indicate what taking regional/strategic assessments into account may entail, including to what extent properly assessed regional/strategic undertakings may provide binding direction for project level planning and decision making.

The first strategic undertaking initiated in conjunction with the law reform process was a largely in-house policy-development exercise on climate matters. Officially, its purpose was to set out “how federal impact assessments will consider a project’s greenhouse gas (GHG) emissions and its resilience to climate change impacts”.³⁸ Actually, it was limited to guidance on how to define and report project-attributable GHG emissions in

³⁸ Canada, “Draft Strategic Assessment of Climate Change” (8 August 2019), online: <https://www.strategicassessmentclimatechange.ca/9529/documents/17911>

assessments under the new Act. The process and the resulting “draft strategic assessment” were criticized for setting a very low benchmark, even for GHG reporting,³⁹ but may not represent the practice to be expected in future strategic assessments under the Act.

Evaluation

The Act’s steps towards linked regional/strategic and project assessment are promising but incomplete. The provisions for Agency and panel review processes and resulting reports for major project assessments are reasonably well developed. The provisions for regional and strategic assessments are welcome but minimal. They do little more than provide a legislated base for development of regional and strategic assessments and perhaps associated undertakings. The prospects for credible and authoritative guidance for project assessments remain uncertain.

7. Indigenous rights and reconciliation

To meet Canadian Constitutional obligations, commitments to reconciliation and to the UN Declaration on the Rights of Indigenous Peoples (which Canada adopted in 2016), the law must require and facilitate assessment practice to respect Indigenous rights and interests, including through government-to-government consultation; incorporate Indigenous perspectives and knowledge; provide space for application of Indigenous laws and process; and facilitate collaboration with Indigenous authorities in project and regional/strategic assessments.

Treatment in the Impact Assessment Act

The Act recognizes effects on Indigenous peoples in Canada as matters of federal jurisdiction [s.2], recognizes certain “Indigenous governing bodies” as jurisdictions [s.2], includes respect for Indigenous rights and promotion of communication and cooperation with Indigenous peoples as purposes of the legislation [s.6(1)(e)-(f)], and provides for assessment cooperation with Indigenous governing bodies [s.114(1)(e)]. One of the five core considerations for project assessment decisions under the Act is

“the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*” [s.63(d)].

The Act requires attention to Indigenous knowledge [e.g., s.6(1)(j), 22(1)(g), 28(3.1), 59(3), 97(2)], to impacts (including cultural impacts) of a designated project on any Indigenous group [s.22(1)(c)], to any adverse impacts on the rights of Indigenous people [s.16(2)(c)], and to any assessment of a designated project’s effects, or any related regional study or plan, conducted by or for an Indigenous governing body [s.22(1)(q) and

³⁹ For example, Pembina Institute, “Pembina Institute comments on the draft strategic assessment of climate change” (12 September 2019), online: <https://www.pembina.org/pub/strategic-assessment-climate-change>

(r)]. It also requires the Agency in any project assessment to offer to consult with any potentially affected Indigenous group [s.12], to prepare plans for “engagement and partnership” with Indigenous peoples [s.18(1)(b)], and to coordinate and engage in such consultations [s.155(b) and (i)].

The Act’s preamble mentions the government’s commitment to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), but the key substance of the declaration – centred on “free, prior and informed prior to the approval of any project affecting their lands or territories and other resources”⁴⁰ – is not addressed. The Act’s language in references to Indigenous rights focuses on “the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*” [e.g., s.16(2)(c) and 22(1)(c)], not the language of UNDRIP.

Beyond the Act, the government has committed to consulting Indigenous organizations in the development of regulations and policies, and to providing “expanded and streamlined” funding for Indigenous participation in assessments (Canada 2018e). Some specifics on Indigenous participation in assessments are provided in interim policy guidance now available.⁴¹ Policy guidance on consideration of Indigenous knowledge, impacts on Indigenous rights, and collaborative assessments with Indigenous Peoples is promised.⁴²

Evaluation

The Act incorporates welcome but incomplete recognition of established obligations. The Act’s language of commitment to Indigenous rights, interests and engagement, and its provisions for partnerships and engagement are considerably stronger and more comprehensive than in the earlier legislation. However, the Act seems not to go much beyond what is now required in Constitutional law, as clarified by the continuing succession of court rulings confirming Indigenous peoples’ rights in law. More work is

⁴⁰ United Nations, Declaration on the Rights of Indigenous Peoples, article 32.1 (UN: 2007), online: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁴¹ Canada, “Interim Policy Context: Indigenous Participation in Impact Assessment,” section 3.1 of Practitioner’s Guide to Federal Impact Assessments under the *Impact Assessment Act* (2019), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-policy-indigenous-participation-ia.html>; and Canada, “Interim Guidance: Indigenous Participation in Impact Assessment,” section 3.2 of Practitioner’s Guide to Federal Impact Assessments under the *Impact Assessment Act* (2019), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-indigenous-participation-ia.html>

⁴² Canada, “Practitioner’s Guide to Federal Impact Assessments under the *Impact Assessment Act*,” *supra* note 17.

needed to address federal commitments to reconciliation with Indigenous Canadians,⁴³ and to apply the Canadian government's formal support for the United Nations Declaration on the Rights of Indigenous Peoples.⁴⁴ In collaborative assessment arrangements with Indigenous people, application of the UN Declaration principles could assist development of new forms of separate-but-aligned decision making under Canadian and Indigenous law.⁴⁵

8. Inter-jurisdictional collaboration

To gain from overlapping jurisdictional authority, responsibility and capacity, and to avoid inefficiencies, the law must encourage collaborative application of federal assessment requirements with those of other assessment jurisdictions (provincial, territorial and/or Indigenous). Relevant means include provisions that would allow both joint and separate-but-aligned application of federal assessment requirements with those of other assessment jurisdictions; enable overall as well as case-specific assessment cooperation agreements between federal and other authorities; and provide for joint study of regional/strategic concerns and opportunities, and joint development and assessment of regional/strategic options and proposed undertakings. Over time, requiring all joint assessments to retain and apply the highest standards of each participating authority should encourage shared evolution of all jurisdictions' assessment processes to the next generation standard (upward harmonization).

Treatment in the Impact Assessment Act

The Act encourages inter-jurisdictional collaboration in separate but aligned project assessments. These may be guided by broad federal-provincial or federal Indigenous cooperation agreements. However, the Act also provides for inter-jurisdictional consultations to develop cooperation plans in the planning phase of individual assessments [s.18(1)(b), s.21]. Joint project assessments by a review panel with members from the collaborating jurisdiction(s) are also facilitated under the Act [s.39].

The Act permits delegation of some part or parts of a project assessment to a cooperating jurisdiction [s.29]. It also permits substitution of another jurisdiction's project assessment process for the federal one [s.31-35], if specified conditions are met [s.33]. The

⁴³ Canada, "Principles respecting the Government of Canada's relationship with Indigenous peoples" (February 2018), online: <https://www.justice.gc.ca/eng/csjsjc/principles.pdf>

⁴⁴ C Bennett, "Speech for the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs at the United Nations Permanent Forum on Indigenous Issues 16th Session" (25 April 2017), online: https://www.canada.ca/en/indigenous-northern-affairs/news/2017/05/speaking_notes_forthehonourablecarolynbennettministerofindigenou.html

⁴⁵ S Mascher, "Aligning Canadian Impact Assessment Processes with the Principles of UNDRIP," CIGI online: Environmental Challenges on Indigenous Lands (27 June 2019), online: <https://www.cigionline.org/articles/aligning-canadian-impact-assessment-processes-principles-undrip>

conditions appear to be intended to ensure some degree of process equivalency, but neglect important considerations (e.g., substituted processes need not provide participant funding). Also, the possibility of substitution may reduce some jurisdictions' incentive for collaboration in joint process arrangements.

For regional assessments, the Act requires the Agency to offer to “consult and cooperate” [s.94] with other relevant jurisdictions, but does not specify any forms of acceptable cooperation.

Evaluation

The Act represents modest progress in building more collaborative assessment practice. The Act retains several established means of addressing overlapping assessment jurisdiction. The provisions for active collaborations, including joint assessments with Indigenous authorities are improved. Retained provisions for process substitution, however, may facilitate federal deferral to weaker assessment processes and reduce other jurisdictions' incentives for collaboration and progress towards next generation standards.

9. Meaningful public participation

To enhance the quality and credibility of assessments and associated learning, the law must foster early and active involvement of members of the public, other stakeholders, authorities, independent experts and proponents. To do so, the law must ensure participative openness and opportunity for meaningful engagement in the assessment of proposed undertakings (from initial scoping and criteria specification to the end of effects and monitoring), and in deliberations on regulations and policy guidance, applications of assessment requirements, and other matters of consequence. More specific requirements include open publication of and timely access to information and genuine public opportunities to review and comment through all phases of individual assessments, and in regulation and policy development; impartial administration of an intervenor funding program; and documented responses to public comments.

Treatment in the Impact Assessment Act

The Act includes provisions for access to information and broad engagement throughout most of the project assessment process (excepting engagement in post-decision monitoring) and in regional/strategic assessments [s.99]. The Act also requires that opportunities to “participate meaningfully” be provided, but “in a manner that the Agency [or review panel or regional/strategic assessment committee] considers appropriate” [e.g., s.11, 27, 51(1)(c), 99]. This opening for discretionary interpretation is not limited by existing or promised regulatory direction, but interim policy guidance has been provided.⁴⁶

⁴⁶ Canada, “Interim Framework: Public Participation Under the *Impact Assessment Act*,” Section 4.1 of Practitioner’s Guide to Federal Impact Assessments under the *Impact Assessment Act* (21 August 2019), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/framework-public-participation.html>; and Canada, “Interim Guidance: Public

The Act retains the established participant funding program managed by the Agency and extends it to regional/strategic assessments and the planning phase of project assessments [s.75(1)]. However, participant funding is not required in substituted assessments [s.75(2)].

Under the Act, Agency and review panel assessment reports must include summaries of comments from the public [s.28(3.2) and s.51(1)(d)(iii)] but documented responses to public comments are not required, with the exception of responses to requests (including from the public) for a regional or strategic assessment [s.97(1)].

The Act does not require opportunities for public engagement in the development of regulations or policies, though discussion papers and draft regulatory and policy guidance in several areas were posted for public comment during the law reform process (e.g., on the Project List⁴⁷ and the Information Requirements and Time Management Regulation⁴⁸).

Evaluation

The Act adds opportunities for meaningful public participation, but leaves uncertain prospects for implementation. The Act's sustainability agenda and the introduction of regional and strategic assessments expand the scope for public contributions. The Act also retains participant funding and refers often to ensuring opportunities for "meaningful" participation. However, interpretation of the implications is left to interim policy guidance and to the discretion of the Agency, review panels and regional/strategic assessment committees. Whether consistent "meaningfulness" is fostered effectively remains to be seen.

10. Early initiation

To facilitate incorporation of sustainability-based thinking and assessment learning from the outset of the conception and planning of project and regional/strategic undertakings,

Participation under the *Impact Assessment Act*," Section 4.2 of Practitioner's Guide to Federal Impact Assessments under the *Impact Assessment Act* (21 August 2019), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-public-participation-impact.html>

⁴⁷ Canada, "Discussion Paper on the Proposed Project List," with public submissions on the Discussion Paper (May 2019), online: <https://www.impactassessmentregulations.ca/consultation-on-the-proposed-Project-List?preview=true>

⁴⁸ Canada, "Discussion Paper on Information Requirements and Time Management Regulatory Proposal (May 2019)" and public submissions on the Discussion Paper, online: <https://www.impactassessmentregulations.ca/Consultation-on-the-proposed-Information-Requirements-and-Time-Management-Regulations?preview=true>.

the law must favour anticipatory approaches to application of assessment requirements (rather than case-by case screening and designation after undertakings are proposed), and establish early public notice and multi-interest consultation as the first assessment step at the stage when the undertaking's purpose and options are being delineated. The key is to ensure the public process begins before a preferred alternative has been selected, and while there is still time for sustainability-based case/context-based scoping and criteria development.

Treatment in the Impact Assessment Act

The Act introduces a planning phase at the beginning of project assessments [s.10-15]. The planning phase begins with an “initial description of the project” [s.10(1)], involves consultations among the proponent the Agency and other federal authorities [s.13], and includes opportunities for public participation [s.11] and consultation with other jurisdictions [s.12]. The main expected products of the planning phase include a summary of key issues to be addressed in the assessment and a response from the proponent on how it proposes to address these issues [s.14]; plans for cooperation and engagement with other jurisdictions, Indigenous peoples, and the public [s.18(1)(b)]; and a notice of commencement setting out information required from the proponent [s.18(1)].

These planning stage products are, however, relevant only if an assessment is required. The initial planning stage is also established as a screening process, ending with a screening decision by the Agency on whether or not an assessment is needed [s.16]. The Act also authorizes the Minister responsible for assessments to declare if the project is not likely to be approvable.

Beyond the Act, regulations specify the level of detail required in the “initial description of the project.”⁴⁹ The level of required detail effectively determines whether or not the planning phase actually begins “early” the project deliberations – whether it begins before or after the proponent has defined key project components, dismissed potentially relevant alternatives and commenced assessment studies. The information regulation that accompanied the Act when it came into effect sets out quite detailed project information requirements, including information about anticipated effects, and gives little attention to alternatives. Those pre-requisites would seem to be incompatible with early initiation.⁵⁰

Evaluation

The new planning stage for project assessments is an admirable initiative, but with some problematic components. Beginning assessment deliberations in early planning is needed for efficiency and effectiveness. Unfortunately, early commencement may be precluded by initial requirements for quite advanced project descriptions. Also, early planning is

⁴⁹ Canada, “Regulatory Impact Analysis Statement,” Published with Information and Management of Time Limits Regulations: SOR/2019-283, Canada Gazette, Part II, 153:17 (August 2019), online: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors283-eng.html> [Canada, “Regulatory Impact Analysis Statement”]

⁵⁰ *Ibid.*, schedule 1.

likely to be compromised by concurrent use of the planning stage as a screening process that could allow proponents to avoid federal assessment requirements.

11. Rigorous and credible impact assessment studies and reviews

To enhance the reliability and credibility of assessment findings, the law must require assessment work to be accessibly documented and to focus on most important options, most valued components and most significant interactions, while respecting the complexity of socio-ecological systems and the potential importance minor factors. Assessments must also draw on multiple sources of knowledge (modern science, Indigenous knowledge, independent expertise, stakeholder perspectives, etc.), justify selection among best practice assessment methods, and identify and report the implications of uncertainties.

The law must respect the core role of proponents, since assessments are meant to inform their planning as well assessment decisions, while also recognizing the particular interests of proponents and ensuring capable critical examination their studies and findings. For the latter, the law must establish the foundations for impartial assessment review analyses and recommendations informed by best expertise and open consultation.

Treatment in the Impact Assessment Act

The Act assigns most information gathering responsibilities to project proponents [s.18] and assigns “assessment” to the Agency [s.21, 24-29, 38 and 59] and review panels [s.36-57]. That division of roles suggests a step away from the traditional reliance on entirely proponent-produced assessments, which are then reviewed in a process led by government authorities. Under the Act, the proponent is to supply “information” and the Agency or review panel does the “assessment.” The Act does not specify what can be included as “information” of what assessment analyses must be completed for decision makers.

In addition to information from proponents, the Act emphasizes attention to Indigenous knowledge [s.22(1)(g), 51(1)(d)(ii.1) and 59(3)] and further information and evaluations from diverse sources including government experts, communities and members of the public. The Act assigns responsibility to the Agency for identifying key issues and defining and assigning information requirements [s.14 and 18(1)(b)]. The extent to which the Agency will be able ensure impartial rigour in assessment studies as well as reviews, despite the influencing interests of proponents and other participants, remains uncertain.

The Act establishes a reasonably comprehensive overall scope for project assessments [s.22(1)], but is not clear about the extent to which consideration of key considerations may be narrowed. Also, the Act does not set out detailed study requirements (e.g., concerning valued components and their interactions in complex socio-ecological systems) or responsibilities for analyses (e.g., significance of uncertainties, extent of contributions to sustainability), though these may be increasingly specified in policy.

The Act's provisions for access to information, consultation and meaningful public participation, participant funding, and attention to Indigenous knowledge and rights enhance prospects for rigorous critical reviews in project assessments. The Act includes no commitment to mobilizing independent expertise, but recent guidance introduces an option for the Agency and review panels to initiate "external technical reviews" on questions of importance and controversy or uncertainty.⁵¹ The strong provisions for engagement of diverse participants may be offset to some degree by the Act's emphasis on adhering to timelines and uncertainties about the influence of public and other submissions. See also below concerning impartial administration.

Prospects for rigour and credibility in regional and strategic assessments are far less certain due to the absence of process details in the Act [s.92-103].

Evaluation

The Act has a strong core agenda, but the specifics need work. The Act's overall scope and engagement provisions for project assessments are quite comprehensive. However, they are vulnerable to restriction through narrow scoping, neglect of system complexities, limited integration of independent expertise, and other effects of administrative incentives to streamline deliberations and minimize obligations.

12. Authoritative and accountable decisions

To help ensure that assessments are influential and decision makers are accountable, the law must address four core needs in provisions for key decisions on proposed undertakings and other assessment process matters (e.g., concerning application, designation and exemptions). These needs are to assign preparation of assessment analyses, conclusions and recommended decisions and conditions to an arms-length assessment body, but assign ultimate decision making to accountable elected authority; require publication of reasons for decisions and decision conditions, based on explicit application of specified sustainability-based criteria and trade-off rules; ensure decisions and decision conditions are enforceable, and provide tools and capacities for effective monitoring and enforcement (including allocation of powers and responsibilities and suitable sanctions/penalties); and permit judicial review.

Treatment in the Impact Assessment Act

Key decisions on project approval, rejection and conditions are assigned to the elected Minister and Governor in Council (Cabinet) [s.60-64]. Each project decision must be based on the assessment report from the Agency or panel and consideration of five public interest factors including contribution to sustainability [s.63] and the decision statement must be published with detailed reasons for the determination [s.65(2)].

⁵¹ Canada, "External technical reviews" (9 October 2019), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/external-technical-reviews.html>

The Act includes a decision power for project assessments, with provisions for conditions, compliance monitoring and enforcement [s.65-72 and 120-152]. The likely effectiveness of enforcement depends on budgets and other factors not addressed in the Act. The Act does not establish equivalent decision powers for regional and strategic assessments, and probably cannot do so without clarification of what potentially authoritative approved undertakings or other conclusions regional and strategic assessments may deliver.

The Act does not restrict existing avenues for judicial review by application to the Federal Court, but also does not establish a specialized appeal tribunal for cases involving assessment law, despite existing models in other Canadian jurisdictions.⁵²

Evaluation

Basic provisions are mostly in place for accountable decision making in project assessments. At the project level, the Act establishes enforceable decisions by elected officials, requires public reasons for decisions, and provides for monitoring and enforcement of compliance with decisions and decision conditions. Those elements are yet to be included for regional/strategic assessments and the project level provisions are not enough to guarantee compliance or effective enforcement in cases of non-compliance. Routes for judicial review are available, but potentially better options for conflict response have not yet been pursued.

13. Mandatory follow-up monitoring of effects as well as compliance

To facilitate effective application of decisions, continued attention to sustainability-related effects, and learning from experience, the law must require follow-up monitoring of the actual effects of approved undertakings in comparison with predicted effects, and provide means to ensure timely response to emerging problems and opportunities. As well, the law must require follow-up monitoring of compliance with conditions of approval; provide for clear assignment of responsibilities for monitoring of effects and compliance; and ensure that any reliance on adaptive management is associated with components of the undertaking that incorporate adaptable design.

Treatment in the Impact Assessment Act

The Act recognizes the importance of monitoring actual project effects to improve future predictions [s.6(1)(n)] and extends the ambit of effects monitoring from the established focus on biophysical effects to the much broader scope of sustainability-related effects. The Act also requires all conditions of approval to include follow-up monitoring [s.64(4)]. The conditions of approval are typically directed to the proponents of the approved projects. Accordingly, implementation is likely to rely heavily on proponents to

⁵² For example, Ontario's Environmental Review Tribunal (2019), online: <https://elto.gov.on.ca/tribunals/ert/about-the-ert/>; and British Columbia's Environmental Appeal Board (2019), online: <http://www.eab.gov.bc.ca/>

monitor their own implementation behaviour and test their own effects predictions.⁵³ The Act also provides for compliance monitoring and enforcement [s.120].

The Act requires accessible publication of a “description of the results of the follow-up program” [s.105(2)(e) and 105 (3)(e)]. However, the Act does not set out requirements or expectations for timely response to identified problems or opportunities, though these may be established in conditions of approval along with adaptive management plans [s.64(4)(b)].⁵⁴ Adaptable design is not mentioned in the Act.

Evaluation

The Act expands the ambit of follow-up actions significantly, but improvement of application seems likely still to be modest and gradual. The Act’s provisions make follow-up mandatory and expand its scope to cover sustainability-related effects. However, especially because of continued heavy reliance on self-monitoring by proponents, the Act’s provisions do not ensure improved performance in comparing actual to predicted effects to learn from experience or timely response to emerging problems and opportunities. Mobilization of independent expertise is not emphasized.

14. Full process learning

To improve the sciences and arts of assessment and to expand sustainability-related understanding and participative capacity among all assessment participants, assessment law needs provisions of several kinds. It must provide and facilitate opportunities for multi-interest collaboration in the full suite of key assessment components including specification of criteria for evaluations, development of regulations and policies, preparation of case-specific criteria and impact study guidelines, identification of reasonable alternatives and valued social and ecological system components, and preparation and implementation of follow-up plans. As well, the law must emphasize attention to uncertainties and monitoring of assessment predictions; ensure convenient open access to assessment information for case participants as well as broader audiences throughout; and establish an open access searchable library/science and data platform with all information from individual assessments and associated deliberations and decision making (with explicitly limited exceptions for Cabinet confidentiality and specified categories of Indigenous knowledge). Finally, it must require regular public review of assessment regulations and policy guidance, and regular Parliamentary review of the law and its implementation.

Treatment in the Impact Assessment Act

While the Act does not list learning explicitly as one its purposes [s.6], the Act’s provisions include participative and collaborative opportunities, mandatory publication and accessibility of documents, participant funding, and effects monitoring requirements (see above), all of which should facilitate learning about assessment issues and responses as well as capacity building related to deliberative processes.

⁵³ Canada, “Tailored Impact Statement Guidelines Template,” *supra* note 17.

⁵⁴ *Ibid.*

The Act retains provisions for an online public Registry [s.104-108] for information related to project assessments and an associated regulation requires proponent documents to be machine-readable.⁵⁵ The Act does not mention use of the Registry to ensure access to documents related to regional and strategic assessments, development of regulations or policy guidance, discussions with advisory bodies or other jurisdictions, or other assessment-related deliberations or findings.

Despite recommendations from the Expert Panel at the outset of the federal assessment processes reform initiative,⁵⁶ the Act does not establish a broader open data platform or anticipate links with such a platform established elsewhere in government.⁵⁷ However, links to a new “open science and data platform” within government have been promised.⁵⁸

The Act requires an annual report to Parliament on the Agency’s activities [s.166], and a Parliamentary review of Act after 10 years [s.167]. The Act provides for regular regulatory review only of the Project List regulation [s.111]. Review of policy guidance is not mentioned.

Evaluation

The Act includes important gains in learning possibilities, though significant opportunities are neglected. Especially in its sustainability agenda and its introduction of law-based regional/strategic assessments the Act is innovative enough to be implicitly a venue for learning. As noted above, these innovations rest in bare-bones provisions that need substantial elaboration. Many other retained or modestly strengthened components (e.g., information accessibility, public participation and inter-jurisdictional collaborations) also provide implicit learning opportunities. Most aspects of the new process – from initial planning to post-approval follow-up – offer openings for learning that could be exploited more fully than has been indicated in initial implementation steps.

15. Impartial administration

As a foundation for the credibility and integrity of the assessment regime, the law must establish an impartial, arm’s-length body or bodies for assessment administration, including responsibilities for developing generic and case-specific guidance and criteria, facilitating meaningful public participation, ensuring access to information, carrying out and/or supporting assessment reviews, drafting decision recommendations and supporting analyses, supervising monitoring and facilitating inter-jurisdictional collaboration. The

⁵⁵ Canada, “Regulatory Impact Analysis Statement,” *supra* note 49.

⁵⁶ Expert Panel, *Building Common Ground*, *supra* note 6, at 44.

⁵⁷ Canada, “Canada’s 2018-2020 National Action Plan on Open Government” (December 2018), online: <https://open.canada.ca/en/content/canadas-2018-2020-national-action-plan-open-government>

⁵⁸ Canada, “Discussion Paper on the Proposed Project List,” *supra* note 47.

law must insulate the administrative body/bodies from political interference and non-transparent lobbying. As well the law must provide for and support use of independent experts to provide advice in key matters of assessment application where other available sources of information are insufficiently informed or not clearly impartial. And to constrain openings for short-term political influences in assessment decision making, the Act must require application of explicit sustainability-based criteria and published reasons for administrative and review process decisions.

Treatment in the Impact Assessment Act

The Act assigns most overall responsibilities for assessment administration to the Agency. The Act assigns most project assessments (excepting those assigned to a substituted process of another jurisdiction) to the Agency [s. 10 and 25] and review panels [s.36 and 41] and it assigns regional/strategic assessments to the Agency and committees [s.92, 95 and 96]. The Agency [s.153] and the panels and committees [s.36, 41, 92, 95 and 96] are subject to Ministerial authority. The Act retains but reduces the influence of established regulatory bodies – the Canadian Energy Regulator (the new version of the National Energy Board), the Canadian Nuclear Safety Commission, the Canada-Nova Scotia Offshore Petroleum Board and the Canada-Newfoundland and Labrador Offshore Petroleum Board – that license energy and nuclear/uranium projects and have been closely tied to the industries they regulate [s.44-50].

The Act provides for establishment of research bodies and advisory committees [s.114(1)(b), 117, 156(1)(e), 157 and 158], which may include independent experts as well as representatives of important stakeholders and authorities. The Act is silent about obtaining independent expertise in individual assessments, other than in the appointment of review panel members with relevant knowledge and experience [s.41(1)]; however, as noted above, the government has signaled intent to draw upon independent expertise in “external technical reviews.”⁵⁹

Also as noted above, the Act establishes five core considerations that must be addressed in published reasons for decisions on project approvals/rejections/conditions [s.63 and 65(2)], but leaves any specification of these considerations to be provided by regulation and in policy guidance. The Act does not include a specific requirement to establish core sustainability criteria, or mention trade-offs, or require case/context-specific criteria, though these could be addressed in regulations and policy guidance. To minimize political interference, the Act introduces a proscription against Ministerial direction on reports, recommendations and other actions by the Agency [s.153(2)].

Evaluation

The Act moves in the direction of more impartial administration. The Act strengthens the role of the purpose-built Agency, discourages political interference and reduces somewhat the influence of the energy and nuclear sector regulatory bodies. However, it does not establish the Agency as a fully arm’s-length body with the independence needed to serve the long-term public interest represented by sustainability in a world of

⁵⁹ *Supra* note 51.

politically-charged short-term imperatives. Also, while the Act provides the basic foundations of core considerations for decisions that must be accompanied by reasons subject to public scrutiny, the structure will remain vulnerable to abuse until strong sustainability-based criteria and trade-off rules are built on that foundation.

16. Efficient delivery of effective and fair assessment

To maximize efficiency in the use of the assessment resources of all participants to deliver effective and fair assessments, the law must reflect care in incorporating both clarity of expectations and flexibility of application. It must establish (or require authoritative guidance to establish) core expectations and requirements, but also establish options for using different process streams for more and less significant project and regional/strategic assessment cases. Also for efficiencies, the law must facilitate initiation of public assessment deliberations at an early stage when project and regional/strategic options are flexible and timely guidance can direct studies; establish defined but flexible timelines; provide for and facilitate inter-jurisdictional collaboration and coordination with planning and regulatory bodies beyond assessment process; and foster full process learning.

Treatment in the Impact Assessment Act

The Act's comprehensive sustainability agenda is larger than the old biophysical focus, but the broader ambit should facilitate more coherent and less fragmented analyses and decisions if good, integrative guidance is provided. For clarity of expectations, the Act sets out key factors for attention in project assessments [s.22(1)], and provides for context-specific case-by-case scoping, but adds to uncertainties by being unclear about the extent to which the factors for consideration may be narrowed, perhaps even eliminated, in the scoping of individual assessments. Similarly, the Act sets out core considerations for project approval/rejection/conditions decisions [s.63], but is unclear about how they are to be elaborated in broad guidance and in individual case applications.

The Act's emphasis on case-specific determination of key issues, partnership and engagement arrangements, and information needs should enable respect for the particulars of case and context. However, timely influence and efficient process will depend on assessment work beginning while a range of options is still on the table (see above concerning early initiation).

The Act gives considerable attention to timelines, but retains realistic flexibility for application. As well, the Act enables regional and strategic assessments and encourages inter-jurisdictional cooperation, both of which could facilitate better and more efficient assessments. The Act is not as strong as it could be in fostering long term effectiveness and efficiency gains through learning from assessment experiences, including through improved monitoring and open data reporting.

Evaluation

The Act sets out a generally reasonable approach that is hampered by areas of vagueness and uncertainty. Despite legislative debates that pitted effectiveness (strong requirements) against efficiency (quick approvals) with both sides claiming to serve fairness, the Act generally recognizes the interdependence of the three. Many of the Act's limitations compromise effectiveness and efficiency equally. Major examples include the vagueness and uncertainties surrounding regional and strategic assessment processes and products, criteria for sustainability-based evaluations, and the role of alternatives in assessments. Such problems could be reduced through regulatory and policy clarification when the relevant authorities recognize the disadvantages of unguided discretion and gain greater confidence in the now unfamiliar elements of sustainability-based assessments.

Overall evaluation of the *Impact Assessment Act*

Adoption of a sustainability-based approach is incorporated prominently in the *Act*, including in the key public interest factors for consideration in decision making. The mandatory decision considerations, established in section 63, also include stronger language on respect for Indigenous rights and interests, and a focus on meeting Canada's environmental obligations and commitments to climate change (see Box 2). The potential influence of these requirements is supported by mandatory publication of reasons for decisions, which must be based on the assessment report and the section 63 considerations. The decision-making provisions, along with the introduction of law-based regional and strategic assessments, represent the most promising steps towards next generation assessment in the new legislation. With strong elaboration and implementation, they could establish the foundations for an admirably advanced assessment regime.

Box 2 The *Impact Assessment Act*, s.63, What Decision Makers Must Consider

63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

- (a) the extent to which the designated project contributes to sustainability;
- (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and

(e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

– Source: Canada, *Impact Assessment Act*, Statutes of Canada, 2019, c.28, s.1.

The promising innovations, however, are not well elaborated in the Act and are not certain to be well elaborated in authoritative regulations or other guidance. As a result, they are highly vulnerable to poor implementation practice.

Seven related areas of concern merit attention:

(i) The Act includes no commitment to providing core criteria for sustainability-based evaluations and decisions, no clear requirements for comparative evaluation of alternatives, and no mention of guidance for trade-off decisions. Given the long history of misleading and selective interpretations of sustainability requirements, vagueness on the core agenda and associated expectations could entirely undermine the Act's bold step into sustainability-based assessment.

(ii) The welcome introduction of provisions for regional and strategic assessments is weakened by failure to clarify the nature of the regional and strategic undertakings, the mandates that may be involved, the assessment process or processes to be used, and the potential form, substance, potential credibility and authority of results. Also, at least for now, the government appears willing to consider application only to regional and strategic matters that directly affect project assessments.

(iii) Rules for project-level assessments are more fully elaborated, with some improvements over past provisions. Application, however, is still to be focused on selected categories of major projects⁶⁰ with no potentially credible process for smaller projects. Project level process components include a new early planning phase that could contribute positively to assessment effectiveness and efficiency, but may be compromised by late initiation (after firm project plans are available) and competing use as a screening mechanism.

(iv) The Act's contents reflect some wrestling with the long-standing problem of assessment reliance on the work of understandably biased project proponents. Under the Act, project assessments are to be led by the renamed and more extensively empowered Impact Assessment Agency of Canada, with review panels for cases involving public hearings. Proponents are to provide "information" for assessments, while the Agency or review panel is to do the assessment. However, the Act does not specify what can be included as "information" or what assessment analyses (e.g., to compare alternatives, determine implications for meeting environmental obligations and climate change commitments, and evaluate overall contributions to sustainability) are to be done and by

⁶⁰ Canada, Physical Activities Regulations, *supra* note 19; Lindgren, "Submissions on the Proposed Project List and Information Requirements and Time Management Regulatory Proposal," *supra* note 37.

whom.

(v) Much depends on the capacities, courage and independence of the Agency, which gets more authority and some new protections from political interference, but is not established as a fully arm-length body and will, like all such bodies, be under constant pressure from powerful interests.

(vi) Provisions for inter-jurisdictional collaboration, including joint assessments and potentially innovative bijural partnerships with Indigenous authorities, get greater emphasis in the new Act. Despite historical difficulties and continuing political conflicts, the collaborations may foster gradual overall assessment improvements. Uncertainties remain about substitution provisions that could be used to defer to weaker assessment regimes.

(vii) Available opportunities not addressed in the new Act include adoption and specification of approaches to applying the “free, prior and informed consent” requirements of the United Nations Declaration on the Rights of Indigenous Peoples, clarification of how to ensure adequate opportunities for meaningful public participation, establishment of an expanded open data platform for assessment and related information and learning, and incorporation of broader engagement in effects and compliance monitoring.

At least to some extent, regulations and policy guidance under the Act could strengthen the basis for applying the contribution to sustainability test and help address the other seven areas identified above. While the guidance materials released so far do not provide grounds for confidence that adequately ambitious clarifications and elaborations will be delivered, improvements are certainly possible.

Overall, the new Canadian *Impact Assessment Act* brings important but evidently tentative and incomplete innovations in the direction of sustainability-based next generation assessment. The Act is reasonably understood as a work in progress, well worthy of recognition and further effort, but also vulnerable to immediate political opposition and to longer-term failure due to weak elaboration and timid implementation of key provisions. It merits modest initial celebration and encouragement to proceed to a higher level of accomplishment.