Submission to the House of Commons Standing Committee on Environment and Sustainable Development concerning its review of the proposed *Impact Assessment Act* in Bill C-69

Recommended amendments concerning four key requirements for next generation assessment law and process:

- **contribution to sustainability as the core purpose and main basis for decision making in the public interest,**
- **identification of best options through comparative evaluation of alternatives,**
- **effective application to project level undertakings, and**
- **effective application to regional and strategic undertakings**

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21 March 2018

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For much of the past decade, Dr. Gibson has been working with other scholars and practitioners, most notably Meinhard Doelle at Dalhousie University's Law School and John Sinclair at the University of Manitoba's Natural Resources Institute, to elaborate and examine application of next generation assessment law and policy for Canada. That has included involvement throughout the current federal assessment reform process.

Dr. Gibson is a member of the Minister of Environment and Climate Change's Multi-Interest Advisory Committee on assessment reform. He has appeared before the Committee during earlier federal assessment law reform deliberations, dating back to when the Committee was chaired by the Hon. Charles Caccia.

Submission summary

This submission looks closely at substantial needs and openings for amendments to improve the proposed *Impact Assessment Act* ("the Act") in Bill C-69. It focuses on four key requirements for transition to next generation assessment. Many other areas need similar attention, on their own merits and as complementary parts of an effectively integrated package.

The analyses and recommendations below focus exclusively on what is actually in the Act, with minimal reliance on clarifications from the Agency and others about how they expect the Act will be applied. While many of those clarifications point in positive directions, experience suggests that, beyond what is ensured in the law, expectations are unreliable.

All of the proposed amendments are meant to be true to the evident legislative intent of the Government in drafting and seeking Parliamentary approval for the proposed Act.

Selected key recommendations for amendments

1. Sustainability-based purposes and decision making in the public interest

Section 63's factors for decision making are the heart the *Impact Assessment Act.* They need better support through amendments that

- make the s.63 factor *the* bases for decision making, rather than considerations "entre autres";
- add a specific regulation-making power under s.109 to establish the core criteria for evaluating net contribution to sustainability and the other factors set out in s.63;
- require assessment reports of the Agency and review panels under s.28(3) and s.51(1)(d)(iv) to include conclusions and recommendations concerning potential approvals and conditions based on the s.63 factors, and their proposed rationale for any trade-offs; and
- extend application of the s.63 factors to decisions arising from strategic and regional assessments.

2. Identification of best options through comparative evaluation of alternatives

To clarify the importance and application of the s.22(1)(e) and (f) requirement for all assessments to consider reasonable alternatives to the project and alternative means of carrying out the project, amendments are needed to

- require comparative evaluation of alternatives in Agency and panel review reports in s.22, 28(3) and 51(1)(d)(iv), and through other adjustments; and
- replace the "detailed project description" as a product of early planning in s.15 with a "detailed description of project options."

3. Effective application to project level undertakings

To ensure credible public assessments of all projects and groups of projects that may have important implications for sustainability, amendments are needed to

- include, in the Project List under s.109(b), categories of projects by federal authorities, on federal lands, with federal funding or requiring federal funding, where these projects may, individually or cumulatively, have substantial effects on prospects for progress towards sustainability, including effects that would hinder meeting the Government of Canada's climate change commitments; and
- replace the non-transparent and non-accountable self-assessment process for projects on federal lands and outside Canada (set out in s.81-91) with a transparent but more modest public assessment process stream with independent oversight for federal projects and classes of projects that merit credible assessment but would not be major designated projects.

4. Effective application to regional and strategic undertakings

To ensure credible public assessments of proposals for policies, programs and plans, including regional plans and responses to unmet strategic-level needs, that may have important implications for sustainability-related federal responsibilities, as introduced in s.92-95, amendments are needed to

- establish a formal designation process for strategic and regional undertakings;
- provide regulation-making powers under s.109 to establish an adjusted equivalent to the Project List for regional and strategic undertakings, and criteria for decision making on public requests for such assessments;
- clarify that the scope of regional assessments in s.92 and 93 includes identifying and comparing options for responding to the findings about regional cumulative effects and related concerns;
- provide explicitly in s.95 for strategic assessments concerning important sustainability-related issues not addressed by existing or anticipated federal strategic undertakings;
- amend s.102 and 103 to require formal and authoritative responses to regional and strategic assessment reports, with reasons in light of the s.63 factors, specifying implications for proposed policies, plans and programs, for further strategic actions, and for project level assessments; and
- provide for regulations to clarify how and by whom cumulative effects, broad alternatives and big policy issues are to be addressed in project level assessments in the absence of completed and up-to-date regional or strategic assessments.

Specifics on each of the four key requirements, the relevant contents of the *Impact Assessment Act* as proposed, issues to be addressed and recommended amendments in each area

Requirement 1. Contributions to sustainability as the core purpose of the law and the main basis for decision making in the public interest

What's needed

The law should ensure that all approved undertakings deliver positive contributions to sustainability, rather than merely aim to mitigate adverse environmental effects.

This purpose should be supported by

- an integrated concept of sustainability, recognizing interactions among biophysical, social, economic, cultural, etc. considerations and covering all sustainability-related effects – direct, indirect, cumulative and interactive, positive and adverse, intra- and inter-generational;
- explicit sustainability-based core criteria to guide assessment decision making, including criteria for evaluating and justifying trade-offs;
- provisions for specification of the criteria for individual cases and contexts; and
- requirements for assessments to include application of the sustainability-based criteria in comparative assessment of reasonable options (including alternatives to the proposed undertaking and alternative means of carrying out the proposed undertaking and the null option), determination of overall contributions to sustainability, conditions of approval (to enhance positive effects as well as to mitigate adverse effects), and justification for any trade-offs;
- enforceable decisions based on the core criteria and accompanied by detailed public rationales.

What's in the Impact Assessment Act as proposed

The purposes section of proposed Act begins with the purpose "to foster sustainability" [s.6(1)(a)] and that initial purpose is followed by 13 others that are generally supportive of its achievement. Consistent with that purpose, the proposed factors for consideration in assessments [s.22] and the requirements for decision making [s.60-63] establish a "contribution to sustainability" test for assessed undertakings, at least at the project level.

For the decision on each assessed project, the Act requires the Minister or Cabinet to determine "if the adverse effects within federal jurisdiction[1] … are … in the public interest"[2] [s.60(1)] when considered in light of the following five factors:

[1] The scope of "adverse effects within federal jurisdiction" is not entirely clear, but may

[2] The notion that adverse effects are potentially in the public interest may be a drafting error. Presumably the intent was to consider whether the project despite its adverse effects would be in the public interest, overall, or would be if the suitable conditions of

(a) the extent to which the designated project contributes to sustainability;
(b) the extent to which the adverse effects … are adverse;
(c) the implementation of the mitigation measures [the Minister or Cabinet] 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 [s.63].

As well, the Act requires the Minister or Cabinet to provide reasons for their decisions that "demonstrate" the decision maker "considered all of the factors" listed in s.63 [s.65(2)]. However, in the provisions for conditions of approval accompanying a decision, and perhaps playing a crucial role in approval, the Act focuses on mitigation of adverse effects and fails to mention enhancement of positive effects that could substantially improve a project's contributions to sustainability. See for example, s.2's definition of follow-up program, and s.22(1)(b), s.63(c), s.64(4), s.84(e), s.86(2) and s.106(3)(e). The words "enhance" and "enhancement" do not appear in the Act.

Comments
The five decision making factors in section 63 are appropriate and progressive. They are consistent with the proper purpose of next generation assessment law as set out above and provide an integrated framework for addressing all of the factors for assessment consideration in s.22. If clarified, interpreted consistently and applied seriously as the core criteria for assessments and decision making, they would move Canadian practice well beyond past standards and deliver lasting gains.

There are, however, serious limitations with the presentation of the sustainability-related provisions in the Act as they now stand. The following points address seven important areas needing improvement through amendments.

1. *Unspecified other considerations:* The s.60-65 requirements for decision making may be taken to imply that the decisions are to be based on consideration of the five factors in s.63. That would be consistent with the stated purposes of the law [s.6]. But the Act does not say so directly and consistently.

Under s.60, the decision makers (the Minister and the Governor in Council) are required to "determine if the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in s.63, in the public interest." That presents the five s.63 factors as the only factors, (beyond the information on the adverse effects) to be considered in this decision. But

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approval were imposed effectively. A more sensible phrasing is provided in summary point (c) in the preface to the bill.

s.63 itself seems to leave the door open to decision making based substantially on other, unstated considerations. This is especially evident in the French version of s.63, which refers to the five factors "entre autres."

We have had Agency assurance[3] that the "entre autres" opening refers to other s.22 considerations, all of which seem to be contained within, or are elaborations of, considerations needed to address s.63 factors. If that is indeed the intent, the government should ensure the intent is clear in the wording of the Act. The text in s.63 should be amended to replace "include a consideration of the following factors" with a clear requirement that the decisions must "be based on consideration of the following factors" or "be based on consideration of the following factors and related matters set out in s.22."

2. *Absence of explicit core criteria:* The five factors in s.63 need elaboration in more specific criteria and associated guidance. Two sets of explicit core sustainability-based criteria are needed – one to guide evaluations of "contribution to sustainability," and one to guide the identification and evaluation of trade-offs.

2a. *Core sustainability assessment criteria:* The "contribution to sustainability" factor can and should be more clearly specified to identify the core requirements for progress towards sustainability. With 30 years of deliberation and experience since the Brundtland Commission popularized the concept, we now have easily enough common understanding of the requirements for sustainability to support broadly applicable clarification. We also know that without such clarification there will be endless selective misinterpretations, inconsistent assessment practice, and high uncertainty about expectations. Clarification would be in the interest of all participants in the process.

Elaboration of defining criteria for "contribution to sustainability" is possible under the current provisions in the bill. The section on regulations made by the Governor in Council (Cabinet) includes an open provision "generally, for carrying out the purposes and provisions of this Act" [s.109(h)], under which criteria for applying the "contribution to sustainability" test could be set out. However, a specific provision for regulation making explicitly focused on elaboration of the five factors would be less vulnerable to neglect.

With or without a specific regulatory provision, the government should take immediate steps to develop a regulation or set of regulations under s.109(h) to establish criteria and otherwise clarify how the contribution to sustainability and other considerations are to be addressed.

In addition, the Act should require specification of these elaborated criteria in each assessment case to recognize the particular contexts of individual undertakings.

2b. *Core trade-off evaluation criteria:* The Act does not provide explicit reference to trade-offs, or promise any guidance on how to consider them. The essence of the decision

[3] Christine Loth-Bown, Canadian Environmental Assessment Agency, 6 March 2018.

provisions set out in s.63 appears to centre on trade-offs. The Minister or Cabinet must determine "the extent to which" effects are adverse, and whether identified adverse effects can be justified because the project is "in the public interest" in light of the five s.63 factors to be considered. The approach is a more accountable version of the old consideration of significant adverse effects that may be "justified in the [entirely undefined] circumstances."

Unfortunately, while the five factors are to inform the decision making, there is no explicit requirement to identify and justify any trade-offs involved and no promise of guidance on evaluating trade-offs. Clear identification of potential trade-offs and justification for any trade-offs that are accepted by a decision would seem to be entirely consistent with the intent of the Act. Moreover, basic criteria for evaluation of trade-offs are easily available as are processes for specifying these trade-off criteria for particular cases.[4]

The necessary requirements could be specified in a simple addition to the list of matters to be included in decision statements [s.65(1)].

3. *Analyses and conclusions to be provided in Agency and review panel reports:* The problems arising from ambiguities and lack of clarifying criteria and trade-off rules for decision making under s.63 are deepened by the absence of any specific requirements for reporting on findings from the consideration of these factors in the Agency and review panel assessments that are to inform decision making by the Minister or Governor in Council.

The list of factors to be considered in project level impact assessments [s.22(1)] does incorporate the five factors for decision making in s.63, plus others that should inform consideration of the five core factors. However, attention to the factors for consideration and decision is not mentioned in the provisions for reports from the Agency or review panels to the decision maker (the Minister or Governor in Council).

3a. *Analyses and conclusions to be provided in review panel reports:* In cases where the assessment is assigned to a review panel, the current provisions of the Act require a report "with respect to the impact assessment of the designated project" [s.51(1)(d)]. The report must set out

- "the effects that … are likely to be caused by the carrying out of the designated project," including "adverse effects within federal jurisdiction and those that are adverse direct or incidental effects, and … the extent to which those effects are adverse" [s.51(1)(d)(i) and (ii)];
- a summary of public comments [s.51(1)(d)(iii)]; and
- the panel's "rationale, conclusions and recommendations, including conclusions and recommendations with respect to any mitigation measures and follow-up

[4] See Robert B. Gibson, with Selma Hassan, Susan Holtz, James Tansey and Graham Whitelaw, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), chapter 6.

program" [s.51(1)(d)(iv)].

The requirements for panel reports make no explicit reference to addressing the s.22 considerations, including alternatives to and alternative means of carrying out the project, and make no mention of reporting findings from analysis comparing the alternatives and the project as proposed (or the project plus conditions that could be required). Nor do the requirements suggest the panel will report or recommend on the s.63 factors for decision making, including "the extent to which the designated project contributes to sustainability," or impacts Indigenous groups or rights, or hinders or contributes to meeting Canada's environmental and climate change commitments.

The s.51(1) emphasis on project effects raises uncertainties about where and how consideration of alternatives might be incorporated. Similarly, the absence from s.51(1) of explicit reference to "the extent to which the project would contribute to sustainability" [s.63(a)] raises questions about what analysis a panel is to undertake and report in support of its "rationale" for conclusions and recommendations.

3b. *Analyses and conclusions to be provided in Agency reports:* In cases assessed by the Agency, the Act's requirements for the Agency's "report with respect to the impact assessment of the designated project" are even less helpful. The relevant requirements, set out in s.28(3) specify only contents covering the likely effects of the proposed project, defined as in s.51(1)(d)(i) and (ii). There is no mention of reporting on public comments, or presenting conclusions or recommendations or rationales, or any other matters suggesting analysis of the overall merits and deficiencies of the proposed project in light of alternatives, the decision factors, or criteria defining the public interest.

Rigorous analytical assessment advice to decision makers may not be precluded by the current narrow and inconsistent provisions for panel and Agency reporting. The requirements of s.22 concerning factors for considerations still apply. However, the limited reporting requirements of the bill undermine confidence that panels and, especially, the Agency will feel empowered to do assessments that fully integrate the factors for consideration in evaluations of the proposed project and its alternatives.

Without such assessments, the Minister and Governor in Council will not be able to base their decisions on independent analyses consistent with the purposes of the Act.

The statute should be clear and explicit in requiring that the reports from the Agency and review panels provide a sufficient basis for decision making by the Minister or Governor in Council on whether the assessed project is in the public interest, in light of the factors in s.63 (which are elaborated by the s.22 factors). The reporting requirements should specify that Agency and panel reports must include the following:

- a comparative evaluation of the project as proposed, and of the project with recommended conditions of approval, in comparison with any relevant alternatives identified under s.22(e) and (f), recognizing adverse effects and net contributions to sustainability;

- assessment of the implications of potential effects on Indigenous groups and rights;
- assessment of the implications of prospects for hindering or contributing to meeting environmental and climate change commitments; and
- overall assessment of (net) contributions to sustainability, including the justifiability of any trade-offs involved.

Unless these components are required and delivered in Agency and panel reports, the key assessment steps will be taken outside the public processes of the Agency and panels. The results will not be included in the public assessment reports. There will be no assurance that the analyses on these matters will be undertaken by those most familiar with the evidence. Instead, the key assessment components may be prepared in a non-transparent process, by unidentified assessors.[5]

It is appropriate that the Minister or Governor in Council makes the final decisions in assessment cases. But it is necessary that both the public and the decision makers get the full value of independent assessments, that we get to see the assessors conclusions and recommendations and that in cases where the decision making choose to depart from the recommendations of the assessors, those departures are clearly identified and explicitly justified.

4. *Justification of trade-offs in decision statements:* The Act provides for decision statements to be issued to proponents [s.65] and posted as public information [s.67]. The decision statements are to be accompanied by reasons for the determination, and the intent seems to be to require "detailed reasons" as suggested by the topic heading for s.65(2). Logically the reasons ought to include justification of any trade-offs involved, but that should be ensured by including such justification as an explicit component of the reasons for decision.

5. *Decision making requirements for regional and strategic assessments:* The Act's provisions for decisions in light of legislated factors apply only to the assessment of designated projects. No equivalent is provided for assessments of strategic and regional undertakings. If strategic and regional assessments are to deliver authoritative results, the provisions in sections 60-65 will have to be extended to decision making on strategic and regional undertakings, as well as projects.

6. *Interactive and inter-generational effects:* The proposed Act's list of considerations that must be addressed in the assessments is evidently meant to be broad enough to support reasonable assessments of the potential projects to make contributions to sustainability. In the Act as proposed, "effects" are defined to be inclusive of changes in environmental, health, social and economic conditions and the consequences of these

[5] We have seen this before, in the recent trend for review panels to be given narrow mandates excluding recommendations on overall approval matters and the acceptability of significant effects in the circumstances. The Lower Churchill case is one of these and the results are not to be celebrated.

changes [s.2]. Attention to cumulative effects is required among the factors to be considered in impact assessments [s.22(1e(ii)]. In addition, the purposes section clarifies that both positive and adverse effects are to be considered [s.6(1)(c)].

The Act would be improved by explicit emphasis on attention to long term, lasting, intergenerational effects. It should be obvious that these effects are central to any serious consideration of contributions to sustainability. But setting out the obvious in the statute is likely to be helpful and should not be controversial.

The Act would also be better if it included explicit attention to interactions among effects. Again, while these may be captured under the "consequences" referenced in the definition of effects, explicit inclusion is likely to be helpful and should not be controversial.

7. Adverse effects and the public interest: In what appears to be a mere drafting error, s.60(1) suggests that adverse effects may be found to be in the public interest. The intent, surely, was to require determination of whether proceeding with the proposed project would be in the public interest, despite any likely adverse effects.

Recommendations

R1.1a Amend s.63 concerning the decisions of the Minister and the Governor in Council on proposed projects to replace the requirement that the decisions "*include a consideration of* the following factors" with requirement that the decisions "*be based on* consideration of the following factors."

R1.2 Add further provisions to s.109 concerning regulation-making powers, to include the following:

(x) clarifying that consideration of the s.63 factors must be informed by consideration of the factors set out in s.22;

(y) establishing the core criteria to be applied in assessments and decision making for evaluating net contribution to sustainability and the other factors set out in s.63; and

(z) establishing core criteria for evaluating trade-offs to guide assessments and decision making on whether adverse effects can be justified in the public interest.

R1.3a Amend s.51(1)(d)(iv) with the following requirements for a review panel to prepare a report that

(iv) sets out the panel's findings comparing the positive and adverse effects of the proposed project and its alternatives through application of criteria based on contribution to sustainability and the other s.63 factors for decision, as specified for the case; and

(v) sets out the panel's conclusions and recommendations, including conclusions and recommendations with respect to any mitigation and enhancement measures and follow-up program, with a rationale based on the s.63 factors, the comparative evaluation referred to above, and consideration of the trade-offs involved.

Also add provisions to the regulation-making powers in s.109 and 112 to provide for elaboration of the requirements above, to ensure inclusion of

- a comparative evaluation of the project as proposed, and of the project with recommended conditions of approval, in comparison with any relevant alternatives under s.22(e) and (f);
- assessment of the implications of potential effects on Indigenous groups and rights;
- assessment of the implications of prospects for hindering or contributing to meeting international and domestic environmental and climate change commitments; and
- overall assessment of (net) contributions to sustainability, including the justifiability of any trade-offs involved.

R1.3b Expand and amend s.28(3) to require that an Agency assessment report contain basic content expectations identical to those for review panel assessments, as amended above. These revisions would include ensuring that Agency assessment reports incorporate a summary of public comments, and present conclusions or recommendations or rationales, as is already required for panel reports.
Also add regulation-making powers in s.109 and 112 to provide for elaboration of these requirements to ensure inclusion of the components listed under R1.5, above.

R1.4 Amend s.65(1) concerning the requirements for the decision statement issued to the proponent (and posted as public information under s.67) to clarify that detailed reasons for the determination and justifications for any trade-offs are to be included in the decision statement, by adding the following clause:

> (e) includes detailed reasons for the determination, based on consideration of all the factors referred to in section 63, and with identification of and justification for any trade-offs related to those factors that may be inherent in or consequential to the determination.

R1.5 Further amend the project assessment decision making provisions in s.60-65 to extend application to decision making on strategic and regional undertakings, or provide the equivalent provisions separately for strategic and regional assessments.

R1.6a Amend the Act generally to include enhancement of positive effects along with mitigation of adverse effects, wherever there is reference to the latter. Relevant sections include s.2's definition of follow-up program, and s.22(1)(b), s.63(c), s.64(4), s.84(e), s.86(2) and s.106(3)(e).

R1.6b Amend s.2 definition of "effects" to add explicit attention to interactive and intergenerational effects, as follows: "changes to the environment or to health, social or economic conditions, and the *interactions and* consequences of these changes*, including across generations*."

R1.7 Since adverse effects themselves are never in the public interest, repair s.60(1) of the proposed Act by replacing "if the adverse effects within federal jurisdiction … are …

in the public interest" with "whether proceeding with the project, given its adverse effects … and its overall effects on sustainability, is in the public interest."

Requirement 2. Identification of best options through comparative evaluation of alternatives

What's needed

In each case, the assessment should focus on identification of the best options in the public interest, as revealed through application of sustainability-based criteria.

This should be supported by

- requirements for comparative evaluation of alternatives to proposed undertakings (including the "no-go" alternative) in light of context-specified sustainability criteria;
- strong anticipatory guidance on consideration of alternatives;
- an early planning stage in assessments that clarifies the range of potentially reasonable alternatives to be addressed, and avoids premature selection of the preferred alternative to be assessed as the proposed project;
- clarity on responsibilities for provision of relevant information on alternatives and for undertaking the comparative evaluation; and
- emphasis on use of strategic assessments to address broad alternatives as well as major cumulative effects and big policy issues.

What's in the Impact Assessment Act as proposed

In the list of factors that must be considered in assessments, the Act identifies among others, consideration of

> (d) the purpose of and need for the designated project;
> (e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
> (f) any alternatives to the designated project; … [s.22(1)].

The Act does not provide further guidance or requirements on how alternatives are to be addressed in assessments and decisions, though regulation-making powers under s.109 or 112(a) could be used for this purpose.

The Act does establish a planning phase for assessments, which could involve attention to alternatives. The planning phase is to begin with early notice from the proponent with "an initial description of the project" [s.10(1)] as a basis for engagement with the proponents, consultations with other jurisdictions and Indigenous groups, public participation, and information requests to federal authorities [s.11-13]. In the planning phase, the Agency must provide the proponent with a summary of issues to be addressed [s.14] and the proponent must respond with a more detailed project description and its plans for responding to the identified issues [s.15]. The bill does not identify alternatives as among

the issues to be addressed by the proponent, but alternatives are presumably included since they are mandatory factors for consideration in assessments under s.22. If so, however, the Act would require the detailed project description before the proponent has acted on its plans for addressing alternatives, unless "detailed project description" is defined to include reasonable alternatives.

Comments

Experience in jurisdictions that have required attention to alternatives suggests that comparative evaluation of reasonable alternatives can lead to some of the most significant contributions of assessment processes to better decision making and better decisions.

The experience also points to several key requirements:

- The assessment law and process must ensure that the range of alternatives to be considered in assessments is centred on potentially feasible and desirable options and is sufficiently broad to identify possibilities for substantially greater contributions to lasting public interest.
- Where the identification of relevant alternatives is tied to the identified purposes of the project, the purposes must be defined as public interest purposes (not the narrower purposes of the proponent) and open to public scrutiny and adjustment.
- The statute must provide for, and associated regulatory guidance must clarify, assignment of responsibility for considering the relevant alternatives, including alternatives that may lie outside the capacities and authority of the proponent.
- The consideration of alternatives is most useful where comparative evaluation of alternatives leads to selection of the preferred alternative as the proposed project. Where consideration of alternatives follows identification of the project to be proposed, the benefits are at best compromised.
- The law must require decision makers to include comparative evaluation of alternatives (in light of sustainability-based criteria) as a basis for their decisions.

As proposed, the Act provides a key foundation by listing alternative means and alternatives to as mandatory factors for consideration in assessments. The requirement to consider alternatives is, however, not supported by clear obligations to

- provide regulatory and policy guidance on how reasonable alternatives for assessment purposes are to be identified and compared;
- examine alternatives in light of the s.22 factors before selecting the preferred alternative as the proposed project;
- carry out a comparative evaluation of the alternatives and proposed project (including with anticipated conditions of approval) in the assessments and assessment reports prepared by the Agency and review panels,
- incorporate consideration of the comparative evaluation of the alternatives and proposed project in decision making by the Minister and Governor in Council.

All these obligations could be met, at least in part, through regulatory steps, but none is currently ensured under the Act as proposed. Also it is not clear that the early planning phase will be used to facilitate comparative evaluation of alternatives prior to selection of the preferred alternative as the proposed project. On the contrary, the requirement for the

proponent to deliver a detailed project description at the same time as a plan for addressing the identified issues (presumably including alternatives) suggests a design that will treat alternatives as an afterthought.

Recommendations
Recommendations R1.3a and R3.1b apply here as well as to purposes and decision making.

R2.1 Amend s.22(1)(d) to replace "the purpose of and need for the designated project" with "the public interest purpose of and need for the designated project."

R2.2 Amend s.22(1) to add after s.22(1)(f) "comparative evaluation of the project as proposed with alternatives means and alternatives to the project in light of the other factors for consideration in this section."

R2.3 For consistency with s.22(1), amend s.6(1)(k) to add the italicized text as follows: "to ensure that an impact assessment takes into account *potentially reasonable alternatives to a designated project* and alternative means of carrying out a designated project, including through the use of best available technologies."

R2.4 Amend s.13(1) and s.23 concerning the obligation of federal authorities to provide information to refer to provision of "information or knowledge with respect to a designated project, including alternative means and alternatives to the project."

R2.5 Amend s.15 to replace the "detailed project description" with a "detailed description of project options."

Requirement 3. Effective application to project level undertakings

What's needed
The legislated assessment requirements should apply to all projects within the reach of federal jurisdiction that may have important implications for efforts to ensure lasting wellbeing.

The requirements for application to projects should be supported by

- anticipatory identification of categories of projects automatically subject to assessment, for example through a regulation-based Projects List, developed in an open process with explicit criteria centred on implications for sustainability, including categories of projects of the federal government, on federal lands, with federal financial support, requiring federal licensing, or with potential to hinder meeting the Government of Canada's climate change commitments.
- establishment of an open designation process with explicit sustainability-based criteria for designation of projects and project categories not initially captured by the Projects List and/or other mechanisms for initial application of the law; and

- provisions for different streams of project assessment to address more and less demanding cases; and
- provisions for collaborative identification of project assessment needs and collaboration in the assessments by federal, provincial, Indigenous and/or territorial authorities.

What's in the Impact Assessment Act as proposed

The Act's mechanism for applying assessment requirements to project level undertakings is through designation by regulation. Section 109(b) on regulation making by the Governor in Council provides for designation of physical activities or classes of physical activities by regulation. The result is apparently to be known as the Project List regulation, generally following the model in the *Canadian Environmental Assessment Act, 2012*.[6] The project list in *CEAA, 2012* reduced application of assessment requirements to a small number of major projects under federal jurisdiction. In contrast, the original *Canadian Environmental Assessment Act* (1995), applied a much larger number of projects proposed by the federal government, on federal lands, requiring specified federal permits, or supported with federal funding.

In addition, the Act provides for further designations by the Minister of Environment and Climate Change ("the Minister") [s.9(1)]. The Minister may make such a designation if "in his or her opinion" the project in question "may cause adverse effects within federal jurisdiction or adverse direct or incidental effects or public concerns related to those effects warrant the designation" [s.9(1)]. As well, the Minister must consider any adverse impact on constitutionally recognized Indigenous rights [s.9(2)] and implications of any relevant regional or strategic assessment undertaken under the act [s.9(2)]. Otherwise, the Minister's discretion is not constrained.

The Minister may choose to make a designation "on request" [s.9(1)]. The Act does not define (or restrict) who can request a designation, but requires the Minister to respond "with reasons," normally within 90 days [s.9(4, 5)].

Designation under the regulation or by the Minister does not necessarily entail assessment. Every assessment of a designated project begins with a planning stage, during which the Impact Assessment Agency of Canada (IAAC or "the Agency') determines whether or not a federal assessment is needed [s.16(1)], and if so what guidance and specific requirements apply.

For projects that continue into the assessment process, the proposed Act provides for two pathways: assessment by a review panel or assessment by the Agency. Both pathways

[6] The Project List regulation is now the subject of public consultation, with the existing Project List as the starting point. See Government of Canada, "Consultation paper on approach to revision the project list," released 8 February 2018, https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/consultation-paper-approach.html.

include time-limited components and other standard rules but also permit case-specific variations.

The Act does not otherwise provide for substantially different pathways of more and less demanding public assessment process requirements for projects involving different levels of complexity and concern.

Alongside the public assessment process, however, the proposed Act continues a non-transparent self-assessment process by which federal authorities are required to consider the solely environmental (biophysical) effects of non-designated projects on federal lands or outside Canada [s.81-91]. That process is to involve the authority determining the likelihood of significant adverse environmental effects, and the Governor in Council determining whether any such effects are "justified in the circumstances" [s.83]. No public information or opportunity to comment is required except for a posted notice of intent from the authority before it finalizes its determination [s.86(1)]. The public is given a minimum of 15 days to become aware of the notice and respond before the authority makes and posts its determination [s.86(2)]. While the posted determination is to identify any mitigation measures, there is no mention of providing background information, assessment findings or reasons for the determination.

The provisions for this self-assessment process also allow for authorities to "designate" additional undertakings, including "a physical activity, or a class of physical activities, carried out on federal lands or outside Canada that is not in relation to a physical work and is not a designated project, but that, in the authority's opinion, may cause significant adverse environmental effects" [s.87].

The term "designate" here may refer only to designation for attention under the self-assessment process, but could be read as referring to the designation of projects generally under the new Act.

Comments

The scope of designations under section 109(b) appears to permit application of federal assessment requirements to a wide range of projects, so long as federal jurisdiction is involved. Whether and how that openness is likely to be used is uncertain.

Generally, reliance on a designation mechanism, rather than the more inclusive approach of *CEAA* (1995), signals an inclination to limit application to a small number of the most significant and potentially controversial projects. That expectation is supported by the adoption of the existing Project List as the starting point for consultations on what categories of project should be designated by regulation, the absence of provisions for a defined public assessment process stream for more modest undertakings. At the same time, however, s.16(1) of the Act establishes the planning phase of project assessments in part as a screening process, which reflects an assumption that the new Project List will err on the side of inclusion and cover more projects than merit federal assessment.

The continuation of a non-transparent environmental self-assessment process for projects on federal lands and federally supported activities outside Canada in sections 81-91 preserves a discredited vehicle for shielding most federal projects from effective assessment with public scrutiny and engagement.

The proposed Act also fails to address projects receiving federal funding even in the non-transparent self-assessment process.

As drafted, the Act's application provisions do not ensure credible public assessments of all projects and groups of projects that may have important implications for sustainability.

Recommendations

R3.1 Establish explicitly that the categories of projects that may be designated under s.109(b) or s.9, and required to be assessed under s.16, include

- categories of projects by federal authorities, on federal lands, with federal funding or requiring federal funding, where these projects may, individually or cumulatively, have substantial effects on prospects for progress towards sustainability; and
- categories of projects that may, individually or cumulatively, hinder meeting the Government of Canada's climate change commitments.

Inclusion of the latter categories will entail, for example, amending s.16(2)(b) to add the phrase in italics below:

> (b) the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, *including potential to hinder meeting the Government of Canada's climate change commitments*.

R3.2 Amend the Act, especially s.81-91, to replace the non-transparent and non-accountable self-assessment process for projects on federal lands and outside Canada with a transparent but more modest public assessment process stream with independent oversight for federal projects and classes of projects that merit credible assessment but would not be major designated projects. At minimum that will entail

- provision for regulation-making to establish categories of projects and classes of projects to which this assessment stream applies;
- public notice of initial planning of projects in this assessment stream;
- opportunity for meaningful public participation in the assessments;
- public posting of the assessment findings and recommendations with opportunity for public comment before decision by the relevant authority;
- provision for public requests to the Minister for designation of additional projects and project classes, with requirements for response from the Minister with reasons based on the purposes of the Act and the considerations in s.63; and
- posting of information pertaining to each assessment on the Registry established under s.104.

Requirement 4. Effective application to regional and strategic undertakings

What's needed
The legislated assessment requirements should apply to all policies, programs and plans, including regional plans within the federal ambit, that may have important implications for efforts to ensure lasting wellbeing.

Regional strategic assessments would be undertaken especially for addressing options for dealing with existing and/or anticipated adverse cumulative effects. They would be defined to include assessment of regional plans or other undertakings to address regional issues, based on alternative scenarios and with pathways to achievement. Regional strategic undertakings may often have implications for project assessments. If the regional undertakings are developed and reviewed through rigorous assessments with meaningful public engagement, they may provide credibly authoritative guidance for project assessments as well as more encompassing benefits of credible responses to anticipated cumulative effects, broader alternatives and big policy issues.

Strategic assessments of policies, plans and programs with sustainability implications, would be undertaken where guidance is needed for regional or project assessments, and/or where the cumulative effects of the strategic undertaking could otherwise have important cumulative effects on prospects for progress toward sustainability (e.g., where the strategic undertaking would clarify how to ensure designated projects are consistent with Canada's international commitments on climate change mitigation, including the *Paris Agreement*).

The requirements for application to regional and strategic undertakings should be supported by

- anticipatory identification of categories of regional and strategic undertakings automatically subject to assessment, for example through a regulation-based Strategic and Regional Undertakings List, developed in an open process with explicit criteria centred on implications for sustainability, including categories of regional and strategic undertakings of the federal government, on federal lands, with federal financial support and requiring federal licensing,
- anticipatory identification of a special regulation-based sub-list for regional and strategic undertakings that should be automatically subject to assessment, but would be viable only if undertaken by the federal government in cooperation with one of more other jurisdictions and would be dependent on a cooperation agreement with those jurisdictions;
- establishment of an open designation process with explicit sustainability-based criteria for designation of projects and project categories not initially captured by the Strategic Undertakings List and/or other mechanisms for initial application of the law, developed in an open process with explicit criteria centred on implications for sustainability;
- establishment of a Regional Undertakings List, identifying the categories of regional undertakings to which strategic assessment requirements automatically

apply if necessary agreements for inter-jurisdictional collaboration can be reached,
- provisions for different streams of regional and strategic assessments to address more and less demanding cases; and
- provisions for collaborative identification of regional assessment needs and collaboration in the planning and assessment by federal, provincial, indigenous and/or territorial authorities in undertaking regional strategic assessments.

What's in the Impact Assessment Act as proposed

The Act includes enabling provisions for both regional and strategic assessments [s.92-95]. It also identifies such assessments as factors to be taken into account in project level impact assessments [s.22(1)(p)].

The provisions for regional assessments do not mention cumulative effects explicitly but the assessments are to address "the effects of existing or future physical activities" [s.92] in a region. The region involved may involve federal lands or non-federal lands or a combination [s.92, 93] and the proposed Act provides for agreements between the federal government and other Canadian or foreign jurisdictions to carry out regional assessments [s.93].

Regional assessments are to be carried out by a committee appointed by the Minister, or established by agreement with one or more other jurisdictions. Alternatively, a regional assessment involving only federal lands may be assigned to the Impact Assessment Agency of Canada (the Agency) [s.93]. In all cases, the committee or Agency operates under terms of reference for the assessment set by the Minister, or the Minister along with the Minister of Foreign Affairs [s.96].

The provisions for strategic assessments enable the Minister to appoint a committee or authorize the Agency to assess a proposed or existing federal strategic undertaking or "any issue that is relevant to conducting impact assessments of designated projects" [s.95].

In the Act, the decision to initiate a regional or strategic assessment lies with the Minister. If there are requests for a regional or strategic assessment, the Minister is obliged to respond publicly, with reasons and within a time limit [s.97].

All regional or strategic assessments are to ensure opportunity for public participation [s.99] and make the information used in the assessment publicly available [s.98]. The product of each assessment is a report to the Minister [s.102], also to be posted for public information.

Comments

Provision of a legislated base for regional and strategic assessments is long overdue and welcome. The base established in the proposed Act is, however, minimal and in important aspects inadequate.

- The Act provides no mechanisms for automatic application of law-based assessment requirements to any regional or strategic undertaking. It does not provide for a strategic level equivalent of the list for designated projects, despite decades of criticism of the non-transparent federal Cabinet Directive on strategic level assessments.[7]
- Instead, use of the regional and strategic assessment provisions is to be *ad hoc,* and left to Ministerial discretion. The Act provides no process or criteria for decision making on whether and how to initiate a regional or strategic assessments.
- The Act implies a public process for requesting regional or strategic assessments by requiring the Minister to respond to requests and provide reasons, but in the absence of any criteria for decision, the reasons seem not to be tied even to the purposes of the legislation.
- Regional assessments are to be about "the effects of existing or future physical activities" [s.92, 93]. That agenda may be open to generous interpretation, but on the surface it suggests a focus only on identifying and evaluating the potential cumulative effects in the region. If so limited, the new regional assessments would promise not more than the "regional studies" that were a possibility under CEAA, 2012, but never undertaken.
- To be more useful, regional assessments would need to be defined and used to deliver not only findings about possible cumulative effects but also options for responding to the findings. Their key role would be to determine how best to remediate and avoid further adverse cumulative effects and to enhance positive ones. That would involve going well beyond effects prediction to identify and compare future scenarios and best means of developing or adjusting regional plans, policy guidance or targeted programs to strengthen prospects for positive futures. Without clear establishment of this broader agenda, regional assessments would provide little guidance on how identified cumulative effects concerns and opportunities may be addressed regionally, and little guidance for participants in individual assessments about the implications of the regional findings for planning and decision making on individual projects subject to assessment.

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[7] Since 1990, federal strategic undertakings have been subject to requirements of successive versions of Cabinet Directive on assessment of federal policies, plans and programs. The process is not open to public scrutiny but its implementation has been roundly criticized in audits by the federal Commissioner on Environment and Sustainable Development. In 2003, the House of Commons Standing Committee on Environment and Sustainable Development recommended establishing law-based processes for federal strategic assessment. The current version is Canadian Environmental Assessment Agency, *The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (Ottawa: CEAA, 2004), https://www.canada.ca/en/environmental-assessment-agency/programs/strategic-environmental-assessment/cabinet-directive-environmental-assessment-policy-plan-program-proposals.html.

- A broader range of possible strategic assessment applications is established in the Act. It includes existing or new federal policies, plans and programs, and issues related to project-level assessments. However, the latter applications, centred on "issues," suffer from the same uncertainty as regional assessments – they are not clearly aimed at assessing options for effective response. Also the law should provide for initiation strategic assessments concerning important sustainability-related issues that are not addressed by existing or anticipated federal policies, plans or programs and not tied to project level assessments.
- No specifics are provided concerning whether or how public participation opportunities are to be meaningful.
- For both regional and strategic assessments, the product is simply a report to the Minister that is also posted for public information. The proposed Act provides no indication of possible action other than expectation that relevant findings would be considered in project assessments. There is nothing to suggest the Minister would respond to or make any decisions on the report – approve or reject or request changes, or determine implications for project assessments or other activities, including the level of authoritative influence to be accorded the conclusions and recommendations, if any.
- Beyond the contents of the Act, the federal government has indicated that it will be initiating a strategic level assessment of the project-level implications of Canada's climate change mitigation commitments. This is a worthy application of legislated provision for strategic assessment. Climate change action is crucial and defining how our commitments under the *Paris Agreement* translate to the project level involves big challenges and inevitable sensitivities. A climate-centred strategic assessment process will be a demanding test of whether the strategic assessment process is sufficiently rigorous, open and independent to provide credible results.
- Strategic guidance from the expected strategic assessment on climate commitments is likely to take some time. On other matters, desirable guidance from regional and strategic assessments may not be available for decades, depending on government priorities and inter-governmental willingness to collaborate. In the interim all of the big cumulative effects concerns remain to be addressed in project-level assessments. The same is true of issues surrounding broad alternatives and big policy gaps. The Act will need to ensure suitable arrangements for addressing these matters effectively and credibly at the project level.

Recommendations

R4.1 Amend s.109 to provide for a regulation to designate categories of strategic and regional undertakings automatically subject to law-based assessments, and to establish sustainability-centred criteria and public processes for identifying and defining the categories. The categories should be defined to include regional and strategic undertakings of the federal government, on federal lands, with federal financial support requiring federal licensing, and with potential to hinder meeting the Government of Canada's environmental and climate change commitments.

Suitable additions to s.109 could be inserted after the current s.109(d), as follows:

> (e) establishing a Strategic and Regional Undertakings List of categories of regional and strategic undertakings automatically subject to assessment, developed in an open process with explicit criteria centred on implications for sustainability, including categories of regional and strategic undertakings of the federal government, on federal lands, with federal financial support and requiring federal licensing; and
>
> (f) establishing a special regulation-based sub-list for regional and strategic undertakings automatically subject to assessment, but viable only if undertaken by the federal government in cooperation with one of more other jurisdictions and dependent on a cooperation agreement with those jurisdictions.

R4.2 Add a new section to the law to establish a formal designation process for strategic and regional undertakings not captured in the designated strategic undertakings list regulation The process should be parallel to that in s.9(1) for projects (physical activities) and would provided a credible foundation for a ministerial decision to appoint a regional or strategic assessments committee.

R4.3 Amend s.109 to provide for a regulation establishing criteria for decision making on public requests for regional and strategic assessments, and requiring responses from Minister or Governor in Council, with reasons based on the criteria.

R4.4 Amend the description of the scope of regional assessments in s.92 and s.93 to provide explicitly for regional assessments that identify and compare options for responding to the findings about regional cumulative effects and related concerns – determining how best to remediate and avoid further adverse cumulative effects and how to enhance positive ones, including through strategic undertakings such as regional plans, policies and targeted programs.

R4.5 Amend the definition of the scope of strategic assessments in section 95 to provide explicitly for strategic assessments concerning important sustainability-related issues that are not addressed by existing or anticipated federal policies, plans or programs and not tied to project level assessments. Specifically, s.95 (b) should be amended to provide for an assessment of "(b) potentially reasonable strategic responses to any issue relevant to the purposes of this Act."

R4.6 Amend s.102 to require the regional or strategic assessment committee's report to

- to present the committee's findings and recommendations; and
- to provide justification for the recommendations on the evidence and knowledge made available to the committee, and attention to the purposes of the Act in section 6, the considerations in s.22, and the decision factors in s.63;
- to identify implications for proposed policies, plans and programs, for further strategic actions, and for project level assessments.

R4.7 Amend s.102 and 103 to require the Minister or the Governor in Council to

- respond to the report of a regional or strategic assessment committee, specifying a decision on what actions are to be taken in light of the report;
- establish that the actions may include new policy, plan or program initiatives, requirements or guidance for project level assessments based on the committee's report, and determination of the authority of the requirements or guidance in project level decision making;
- set out the reasons for the decision, based on the factors set out in s.63; and
- ensure that both the decision and the reasons for decision are posted on a publicly-accessible internet site.

R4.8 Amend s.99 to read "… must ensure that the public is provided with an opportunity to participate *meaningfully* in any assessment …" and specify in sections 109 and 112, provisions for regulatory and other guidance on means of ensuring meaningful public engagement in regional and strategic assessments.

R4.9 Add to the s.109 provisions for regulations to specify

- to specify the matters to be considered by regional and strategic assessments; and
- to specify the means of ensuring meaningful public participation in regional and strategic assessments.

R4.10 Add to s.109 a provision for regulations to clarify how cumulative effects, broad alternatives and big policy issues are to be addressed, including by government authorities where proponent capacities and authority are insufficient, in project level assessments in the absence of completed and up-to-date regional or strategic assessments.

Supplementary submission to the House of Commons Standing Committee on Environment and Sustainable Development concerning its review of the proposed *Impact Assessment Act* in Bill C-69

Sustainability in the proposed new federal assessment law as proposed: an initial report card

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6 April 2018

The following is a summary evaluation of core sustainability-related components of the proposed *Impact Assessment Act,* which is included as part 1 of Bill C-69, introduced into the House of Commons on 8 February 2018. The new assessment law is to replace the *Canadian Environmental Assessment Act, 2012.* That law also replaced predecessors in law and policy stretching back to an initial Cabinet order in 1972.

Through the intervening 45 years, assessment law and practice in Canada and elsewhere have tested a diversity of forms, and provided a rich base for learning how to do better. For Canadian applications the key lessons for law reform have been summarized in depictions of regime design elements for "next generation assessment"[8]

As is elaborated briefly below, the concept of next generation assessment is built on now widely-shared recognition that assessments need to move from the modest old objective of mitigating significant adverse effects to the higher aim of making positive contributions to lasting wellbeing. Accordingly, the following evaluation focuses on provisions in the proposed *Impact Assessment Act* that are closely tied to effective incorporation of sustainability-based objectives for federal assessments in Canada.

The evaluation here is presented as a report card, but it recognizes that the proposed new law is a work in progress. The *Act* is subject to amendment through the legislative process and it anticipates need for specification of many crucial aspects in regulations and other guidance.

The basic requirements for sustainability in next generation assessment
For sustainability-enhancing purposes, the federal law should require every approved

[8] Robert B. Gibson, Meinhard Doelle and A. John Sinclair, "Fulfilling the promise: basic components of next generation environmental assessment," *Journal of Environmental Law and Practice* 27 (2016), pp.251-276. The associated monograph is available at https://uwaterloo.ca/next-generation-environmental-assessment/research-contributions/dissertations-theses-monographs-and-major-reports.

undertaking to make a positive contribution to sustainability. To do this, the law must incorporate sustainability-based purposes, and decision rules to

- require application of explicit sustainability-based criteria for evaluations and decisions, and the criteria should be specified for the context of each particular case;

- focus on identifying best options (rather than merely evaluate the "acceptability" of projects and undertakings as proposed by their proponents); and

- discourage trade-offs and instead aim to deliver to the extend possible multiple, mutually reinforcing, fairly distributed and lasting gains, while avoiding significant adverse effects.

For effective application the following associated requirements are also crucial. The process established in law must

- be the core planning and decision making process applied to all undertakings (individual projects and categories of projects plus policies, plans programs and other strategic undertakings) that are important to our prospects for lasting wellbeing;
- link strategic and project assessment
- focus on cumulative effects
- compare alternatives and pick the best
- facilitate meaningful public engagement
- coordinate with regulatory licensing
- ensure effective monitoring and response to monitoring findings
- foster learning throughout the process
- establish credible deliberative practices and impartial decision making
- respect Indigenous rights, perspectives, interests, laws and process and provide for co-governance with Indigenous authorities
- build multijurisdictional collaboration
- encourage the upward harmonization of assessment practice

Evaluation of key sustainability-related components of the Impact Assessment Act, as introduced

Next generation requirement	**Evaluation of the provisions in the proposed *Act***
Positive contribution to sustainability as central test for each assessed undertaking	Yes, but needs clarification and support: included in purposes, factors for consideration and factors for decisions, but could be undermined by absence of criteria and other limitations (see below)
Core sustainability-based criteria	Missing: could be provided under general regulation

in law	making provision, but no requirements or expressed intent to do so
Criteria to be specified for the context in each assessment	Missing: could be required, but application would be difficult and inconsistent without core criteria for application in all cases
Avoidance of adverse effects	Yes, but could be undermined by absence of trade-off guidance
Trade-off guidance	Missing: not mentioned, could be provided under general regulation making provision, but no requirements or expressed intent to do so
Broad scope covering all key sustainability-related effects	Yes, mostly: explicitly covers direct, indirect and cumulative, positive and adverse effects, but should also explicitly require attention to inter-generational effects
Application to projects and regional and strategic level undertakings important in transition to lasting wellbeing	Limited, but possibly important improvements if clarified: (i) Projects – maybe some improvement: major ones in Designated Projects regulation, but even they may be screened out in the planning phase; no explicit provision for application to smaller projects, even those with cumulative effects (except for some categories of smaller government projects covered by a non-transparent internal process) (ii) Regional undertakings – maybe some improvement: opening provided but with emphasis on regional studies of cumulative effects; no mention of assessment of possible responses to identified issues (e.g., regional plans based on alternative scenarios); no requirement for response to or decision on report produced (iii) Strategic undertakings – yes but needs clarification: opening and potentially broad ambit provided, but process ill-defined; no requirement for response to report produced; may be rarely used though welcome assessment of implications of climate commitments promised
Comparative evaluation of alternatives in light of context-specified sustainability criteria	Uncertain: alternatives to and alternative means both listed as mandatory considerations in assessments, but no explicit requirement for assessment to do comparative evaluation of project and alternatives
Meaningful public engagement	Uncertain, needs clarification: opportunities mandatory except in non-transparent process for smaller projects; specifics mostly missing (i) little elaboration in planning phase, (ii) Agency reviews not required to report on public comments

	(iii) panel reviews required to report on public comments, but assessment process not specified (iv) both regional and strategic assessments required to provide opportunity for public participation, but processes unclear
Monitoring and response to findings	Uncertain: monitoring mostly left to proponents; government authority responsibilities not defined; potential for monitoring participation by local groups not mentioned
Full process learning	Maybe some improvements, but not emphasized in the Act: depends on quality of assessments with broader agenda, whether explicit criteria are developed and applied, how requirements for reason for decisions are respected, whether monitoring and response practice improves and whether the Registry includes more information, permanently and accessibly
Credible process and impartial administration	Some improvement: modestly decreased role of regulatory bodies, but with new role for offshore boards; more emphasis on Agency will depend on capacity, transparency, responsiveness to public and other participation, and evident independence from political expectations
Early initiation	Yes, but needs clarification: new planning phase presented in Act as mostly a screening process, with time for interjurisdictional and stakeholder consultations, and issues identification; could be used more broadly and openly for setting the assessment agenda and scope (including alternatives), case-specified sustainability framework, study responsibilities, but that is not clear in the Act.
Respect for Indigenous rights, perspectives, interests, laws and process and provision for co-governance with Indigenous authorities	Evident improvement, but some hesitancy: recognition at least of Constitutional rights reiterated often, but no reference to the UN Declaration on the Rights of Indigenous People and emphasis on avoiding effects on *current* uses of traditional lands; firmer commitment to include Indigenous knowledge
Encourage multijurisdictional collaboration	Uncertain: multiple references to encouragement of collaboration but retention of openings for process substitution and for delegation of components of the assessment.

Overall evaluation of the Impact Assessment Act as introduced

Commitment to a sustainability-based approach is included prominently in the proposed *Act,* including in the key factors for consideration in decision making (section 63), which is arguably the most promising section of the proposed Act. That commitment, however, is not supported well by other components.

As proposed the Act offers
- no provision or promise of core criteria for sustainability-based evaluations and decisions;
- no clear requirements for comparative evaluation of alternatives;
- no mention of guidance for trade-off decisions;
- project level application apparently still focused on selected categories of major projects, with no potentially credible process for smaller projects;
- project level processes with a new planning phase that could be helpful but is ill-defined in the Act except as a screening mechanism;
- Agency and panel-led assessments that seek only "information" from proponents and government bodies, and leave uncertainties what analysis, including of overall contributions to sustainability, is to be done and by whom;
- ubiquitous reliance on discretionary language to preserve political flexibility at the expense of clarity and predictability;
- welcome introduction of provisions for regional and strategic assessments, but with major uncertainties about the assessment processes involved, the potential substance and authority of results, and how often the provisions will be used;
- plenty of other undefined areas of potential for important advances in effectiveness, efficiency, fairness and credibility, some of which may be addressed usefully in amendments to the statute and/or in regulations under the Act.

In summary, the Act's heart seems willing but its flesh is weak, so far at least.