Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options

Robert B. Gibson,[*] *Hugh Benevides*,[**] *Meinhard Doelle*[***] *and Denis Kirchhoff*[****]

Canada has a long and diverse but largely disappointing record in integrating environmental and sustainability considerations into the development of policies, plans, programs and other strategic undertakings. For over 25 years, the federal government has had a policy-based strategic environmental assessment (SEA) process. In 2003, the deficiencies of this process led the House of Commons Standing Committee on Environment and Sustainable Development to recommend establishment of a legislated framework for mandatory SEA before the 2010 Parliamentary review of environmental assessment. Governments since then have not acted on this recommendation but have promised to strengthen federal SEA. In this paper, we examine the three basic options for strengthening federal SEA — a law-based option, a policy-guided option and a combined law and policy approach — using criteria drawn from international assessment literature and reviews of Canadian and international SEA experience. In the Canadian context, the combined approach appears to be most promising. Accordingly, we provide a broad outline of how an integrated law and policy-based SEA regime could be structured to satisfy the criteria and deliver a workable union of firmness and flexibility.

Le Canada a une longue et décevante histoire en ce qui concerne l'intégration de considérations environnementales et de développement durable dans l'élaboration de ses politiques, plans, programmes et stratégies. Depuis plus de 25 ans, le gouvernement fédéral utilise un procédé d'évaluation environnementale stratégique fondé sur des politiques. En 2003, en raison des lacunes de ce procédé,

[*] Professor, Department of Environment and Resource Studies, University of Waterloo, Ontario, Canada N2L 3G1; rbgibson@uwaterloo.ca.

[**] Former counsel, Canadian Environmental Law Association and East Coast Environmental Law; hughbenevides@gmail.com.

[***] Associate Professor of Law and Associate Director, Marine & Environmental Law Institute, Schulich School of Law, Dalhousie University, Halifax, N.S., Canada B3H 4H9; mdoelle@dal.ca.

[****] Doctoral candidate, Department of Geography and Environmental Management, University of Waterloo, Ontario, Canada N2L 3G1; dkirchho@uwaterloo.ca.

le Comité permanent de l'environnement et du développement durable a recommandé que soit mis en place un encadrement législatif concernant les évaluations environnementales stratégiques, et ce, avant le suivi parlementaire de l'évaluation environnementale en 2010. Depuis, les gouvernements n'ont pas suivi cette recommandation, mais promettent de renforcer les évaluations environnementales stratégiques au fédéral. Dans cet article, l'auteur examine les trois méthodes possibles pour améliorer les évaluations environnementales stratégiques au fédéral - une méthode basée sur la loi, une méthode basée sur la politique et une méthode basée sur la loi et la politique. Dans son examen, l'auteur fait appel à des critères provenant d'analyses documentaires internationales et de comptes rendus des expériences canadienne et internationale en matière d'évaluation environnementale stratégique. Compte tenu du contexte canadien, la méthode basée sur la loi et la politique semble être la plus appropriée. Par conséquent, l'auteur fournit un plan général pour illustrer comment une approche basée sur la loi et la politique pourrait être structurée de façon à remplir les critères et maintenir un équilibre entre la fermeté et la flexibilité.

1. INTRODUCTION

For more than 25 years, the Canadian federal government has been officially committed to carrying out environmental assessments of its significant policy, plan and program proposals. Assessment of such strategic undertakings was loosely included in the 1984 *Environmental Assessment and Review Process Guidelines Order*,[1] and the expectations were reiterated and gradually specified in a 1990 Cabinet announcement on EA reform, a 1993 clarification of the requirements, and formal updates or reinforcements of the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (Cabinet Directive) in 1999 and 2004.[2]

The process established under the Cabinet Directive has not been sufficiently transparent to allow evaluation by outside observers. The main publicly available reviews are from the Commissioner of Environment and Sustainable Development, who reported on process compliance audits of Cabinet Directive implementation in 1998, 2000, 2004 and 2008. While the Commissioner's reports include evidence of gradual improvement, the 2008 audit still found uneven application of the Directive, weak accountability and widespread non-compliance with transparency re-

1 Government of Canada, *Environmental Assessment and Review Process Guidelines Order* SOR/84-467 (22 June 1984).

2 The current version is Canadian Environmental Assessment Agency, *The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (Ottawa: CEAA, 2004), online: <http://www.ceaa.gc.ca/016/directive_e.htm>.

quirements.[3] Internal reviews that have given more attention to effectiveness considerations have apparently also found serious deficiencies.[4]

In 2003, in the course of its five-year review of the *Canadian Environmental Assessment Act* (CEAA), the House of Commons Standing Committee on Environment and Sustainable Development considered federal performance in strategic as well as project-level environmental assessments (SEA). The Committee concluded that implementation of the Cabinet Directive suffered from insufficient commitment and recommended development of a legislated framework for mandatory SEA before the 2010 Parliamentary review of environmental assessment.[5] While the government of the time made no commitment to legislated SEA, it accepted the goal of stronger assessment at the strategic level and promised to seek guidance from the Minister of the Environment's multi-stakeholder Regulatory Advisory Committee on how to improve federal SEA.[6]

The Regulatory Advisory Committee, accordingly, established a subcommittee on Strategic Environmental Assessment (the SEA sub-committee) to report on means of improving the conduct of SEA in Canada, with a focus on the federal level. From 2006 through 2008, the SEA subcommittee — with federal, provincial, industry, Aboriginal and environmental representatives — examined a wide range of issues related to SEA purposes, coverage, processes, participation, and potential links between strategic and project-level assessments.

The subcommittee reached remarkable consensus on the essential issues, commissioned a detailed monograph on law and policy options for SEA in Canada, accepted its conclusions, and prepared a report that was to be presented to the Regulatory Advisory Committee at a meeting in late 2008. The planned meeting was,

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3 Commissioner of the Environment and Sustainable Development, *2008 March Status Report* (Ottawa: Office of the Auditor General, 2008), c. 9, online: <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200803_09_e_30135.html>.

4 In a public presentation in 2008, a Canadian Environmental Assessment Agency official reported that "lack of appropriate and timely integration of SEA in policy development leads to ineffectiveness" and "lack of a prescribed approach or lack of understanding results in weak motivation and implementation," and that reviews had found "little evidence of SEA informing project-level assessment and decision making." Candace Anderson, "Strategic and regional environmental assessment," presentation to the Ontario Association of Impact Assessment, Ottawa (19 November 2008). A more recent review, *Evaluation of the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, prepared by Stratos consultants for the Canadian Environmental Assessment Agency and an interdepartmental Evaluation Advisory Group, in 2009, has not yet been released.

5 House of Commons Standing Committee on Environment and Sustainable Development, *Sustainable Development and Environmental Assessment: Beyond Bill C-9* (Ottawa: Parliament of Canada, June 2003), online: <http://cmte.parl.gc.ca/ Content/HOC/committee/372/envi/reports/rp1032309/envirp02/envirp02-e.pdf> at 34.

6 Government of Canada, "Government Response to the Report of the House of Commons Standing Committee on Environment and Sustainable Development. Sustainable Development and Environmental Assessment: Beyond Bill C-9" (Ottawa: Government of Canada, October 2003), online: <http://www2.parl.gc.ca/HousePublications/ Publication.aspx?DocId=1140712&Language=E&Mode=1>.

however, postponed indefinitely and the Regulatory Advisory Committee has not been called to meet since. In the interim, the government has introduced several major regulatory and legislative measures to reduce federal environmental assessment requirements at the project level.[7] The subcommittee's work on strengthening SEA, and multi-stakeholder consultation on assessment law and practice more generally, remain in limbo.

This is regrettable, given the evident need for policies, plans and programs that help us reverse trends towards deeper unsustainability, given the great and largely untapped potential of SEA to improve strategic decision-making and reduce of the delay and frustration at the project level, and given the extraordinary consensus achieved by representatives of often warring interests on this matter.

As a partial corrective, this paper presents for public discussion the main substance of the research monograph that the subcommittee commissioned through the Canadian Environmental Assessment Agency.[8] Both the monograph and this paper aim to identify how best to establish a more effective federal SEA regime for Canada, recognizing the diversity of contexts and conditions under which SEA is needed in this country, the frequently intersecting nature of federal, provincial and other government responsibility, and the challenges evident from SEA experience in Canada to date. The intent is not to specify regime design, but to evaluate the main approaches and sketch out key aspects of how the apparently most desirable approach might work. The elaborations are, however, provided only for illustrative purposes. We recognize the need for more careful thinking about the specifics.

2. REASONS FOR STRENGTHENING SEA IN CANADA

Especially in recent years, applications of SEA have been expanding in many jurisdictions around the world. While particular forms of SEA have varied widely, the essential purpose of SEA has been the effective integration of environmental considerations in the conception, planning/design, approval and implementation of policies, plans, programs (PPPs) and other strategic undertakings. The undertakings assessed are usually new PPPs that have important implications for the ecological and socio-economic environment and for sustainability. SEA may also be applied usefully to reviews of existing or past PPPs that raise persistent and perhaps deep-

7 These measures include regulatory and legislative steps in 2009 to exempt or ease assessments for new stimulus infrastructure projects, and steps in the 2010 Budget Implementation Act to amend CEAA to exempt certain categories of infrastructure projects to allow the Minister of the Environment to narrow the scope of assessments. See Government of Canada, *An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures*, online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=40&Ses=3&Mode=1&Pub=Bill&Doc=C-9_1&File=9>, given Royal Assent July 12, 2010, S.C. 2010, c. 12.

8 Hugh Benevides *et al., Law and Policy Options for Strategic Environmental Assessment in Canada*, a report commissioned by the Canadian Environmental Assessment Agency, September 2008, revised October 2009. The full monograph is available for downloading at http://ssrn.com/abstract=166043.

ening concerns, or to examine emerging or neglected problems and/or opportunities, review response options and guide the initiation of strategic action.[9]

In advanced practice, SEA is intended to ensure positive contributions to sustainability, as well as mitigation of adverse environmental effects; to enhance the openness and credibility of strategic level decision-making; to provide earlier, clearer and more reliable guidance for the planning and approval of particular projects and other subsequent undertakings; and to improve the overall efficiency and fairness as well as the effective quality of decision-making. Expanding use of SEA is in part a response to the limitations of environmental assessment processes focused at the project level. While project-level assessment processes have led to more environmentally informed and generally more transparent and participative decision-making on many particular undertakings, they have typically not been able to deal well with larger or underlying concerns — about cumulative effects, broad objectives and alternatives, underlying policy conflicts and longer-term options. Because project assessment processes often provide the only significant public opportunity for open deliberations on these larger matters, project-level assessments are often expected to accommodate attention to these concerns. The results have often been useful; sometimes they have been groundbreaking. But, project assessments are usually too narrowly mandated and come too late in decision-making to be generally effective vehicles for examining strategic concerns and options. Where strategic concerns have emerged in project assessments, it has rarely been possible to address them adequately or efficiently. Too often, the experience has been frustrating to all concerned.

An effective SEA regime is, therefore, attractive as a means of dealing directly with strategic issues in a way that has the advantages of strong project-level assessment processes (firm obligations, commitment to the integration of environmental considerations, transparency and participative process, etc.) but also has the necessary scope and mandate for effective influence in strategic level decisions at a time and level that can provide authoritative guidance to subsequent project planning.

These qualities can lead to gains for all of the major stakeholders. For federal government agencies that are PPP proponents, SEAs can improve the quality as well as profile and defensibility of PPPs, broaden the range of benefits from PPPs, reduce the risk of unanticipated adverse effects, demonstrate competence and enhance public credibility. For federal authorities with responsibilities at the project level, properly assessed PPPs can clarify expectations, and facilitate more timely and efficient decision-making on project assessments and approval applications. For private sector project proponents, SEA can establish a more certain context for project planning, guide selection among investment options, clarify and simplify assessment requirements, and speed project-level assessment review and approval processes. For other jurisdictions, more open strategic deliberations at the federal level can provide openings for early awareness, consultation and possible collaboration. For the broader public, including those who may be affected by specific PPPs and subsequent projects, good SEA brings more transparent and potentially

9 For a survey of international approaches see Barry Dalal-Clayton & Barry Sadler, *Strategic Environmental Assessment: A Sourcebook and Reference Guide to International Experience* (London: Earthscan, 2005).

responsive strategic planning and decision-making, and the promise of more broadly positive and sustainable outcomes, due to more effective attention to cumulative effects, better integration of ecological and socio-economic considerations, and a longer-term perspective. And, for everyone, SEA can play a major role in reversing the overall direction of current practices, which, taken together, are placing ever greater pressures on ecological goods and services, allowing deeper inequities and undermining the legacy for future generations.

3. INTERNATIONAL EXPERTISE AND EXPERIENCE WITH STRATEGIC ENVIRONMENTAL ASSESSMENT

The research monograph includes a review of the international literature on SEA theory and experience.[10] In summary, the investigation revealed broad international agreement on the following major aspects of effective SEA regime design:

- The regime must be applied early and proactively to ensure that attention to environmental and sustainability considerations begins at the outset of deliberations on strategic initiatives.
- The assessment must integrate biophysical (or narrowly "environmental"), social and economic aspects, and their interactions, and the assessment work must be effectively integrated into the core of the larger planning and decision-making process(es) for strategic undertakings. While special attention to ecological concerns is desirable, it is effective only if the interactions among ecological, social and economic factors are recognized and the full suite of sustainability factors is integrated effectively into PPP development. The regime cannot work if ecological assessment is treated as a marginal side activity and an additional approval hurdle to get over.[11]
- The assessment regime must take into account multiple, mutually influential tiers of strategic decision-making (*e.g.* broad policies, more specific plans, detailed plans) and be designed to provide clear guidance for assessment and decision-making at the project level. Where appropriate,

10 Benevides *et al.*, *supra* note 8.

11 The SEA community has debated the relative merits of SEA focused on biophysical matters versus SEA with a more comprehensive sustainability agenda. Advocates of the narrower approach argue that it is more able to ensure that ecological considerations are not immediately overwhelmed by economic priorities. See, for example, Angus Morrison-Saunders & Thomas Fischer, "What is Wrong with EIA and SEA Anyway? A Sceptic's Perspective on Sustainability Assessment" (2006) 8 Journal of Environmental Assessment Policy and Management 19–39. But the biophysically-focused approach is vulnerable to marginalization and leaves to other, less certain and typically less open mechanisms the task of ensuring due attention to ecological considerations in overall planning and decision-making. The sustainability-based approach is better suited for attention to interactive effects, integration of ecological and other concerns, and incorporation at the core of planning deliberations. It must, however, include special efforts to retain a focus on the biophysical foundations of lasting well-being in the face of many decision-makers' entrenched inclinations to favour short-term, economic objectives. See the full report, *supra* note 8, especially appendix 1, s. 1.1.2.

application of the guidance in relevant lower-tier planning and decision-making should be mandatory unless there is evidence that the guidance is obsolete or unsuitable for the particular circumstances.

- The process must be guided by regulatory, policy and/or other forms of direction that establish a standard of assessment to be met, enhance consistency and facilitate improvement through ongoing strengthening and clarification of the guidance.
- The process must be flexible and adaptable to different kinds of and contexts for strategic decision-making.
- The process must be transparent and must include opportunities for public involvement throughout, subject to due recognition of legitimate needs for Cabinet confidentiality.
- Effective incentives or sources of motivation must be in place to ensure the process is applied with care and commitment.
- The assessment must be followed by monitoring and enforcement addressing actual performance, comparing actual effects to predictions, and encouraging lesson learning to improve future PPPs as well as the assessment process itself.
- Effective SEA requires broad engagement of all the relevant players who may be affected by or, otherwise, concerned about strategic level issues and effects, and who have an interest in ensuring that they are well-addressed well in PPPs.

4. CANADIAN SEA EXPERIENCE AND PARTICULAR CANADIAN CHALLENGES

No Canadian jurisdiction has a well-established and transparently functioning SEA regime. Nonetheless, Canadian experience with SEAs and SEA-like exercises is surprisingly long and diverse. It includes, in addition to the largely invisible strategic level assessment experience under the current policy-based federal SEA process, initiatives under the old policy-based federal assessment process, under legislated provincial environmental assessment regimes, under formal resource management and land use planning laws and processes (often under provincial jurisdiction), and under a wide variety of arrangements for inquiries and reviews addressing particular emerging or continuing concerns (royal commissions, public inquiries, expert panel reviews, special collaborative processes, etc.).

Past examples of SEA and SEA-like case applications in Canada include: the regional futures assessment that characterized the Mackenzie Valley Pipeline Inquiry conducted by Justice Thomas Berger pursuant to the federal *Inquiries Act*;[12] the conceptual review of the deep disposal of high-level nuclear waste by an envi-

12 Thomas R. Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, Vol. 1 (Ottawa: Supply and Services Canada, 1977). This case was initiated as a project-centred assessment but, as the report title indicates, the inquiry and the result were effectively devoted to an examination of alternative future options, and associated policy and planning issues, for a large region.

ronmental assessment panel established under the Federal Environmental Assessment Review Process Guidelines Order;[13] a public review of salmon aquaculture regulatory options under British Columbia's *Environmental Assessment Act*;[14] the independent federal-provincial panel review of the Georges Bank hydrocarbon drilling moratorium under the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Acts*;[15] the Royal Society's Expert Panel review on the regulation of food biotechnology in the context of uncertainty,[16] and the SEA of in-stream tidal energy technologies and policy options for the Bay of Fundy, commissioned by the Nova Scotia Department of Energy.[17] This experience generally supports and reinforces the international observations outlined above. However, the record consists mostly of *ad hoc* initiatives and a federal SEA that is too secretive to be credible. Bram Noble has concluded from his recent review of Canadian SEA experience that it includes some admirable efforts and provides valuable lessons but falls well short of expectations for best practice in SEA.[18]

Reasons for the generally disappointing performance include incentives favouring narrow agendas and short-term perspectives and the general reticence of governments to subject their strategic efforts, or areas of strategic neglect, to greater public scrutiny and higher expectations. In addition, the Canadian context poses special challenges. Perhaps chief among these is the multi-jurisdictional fact of the Canadian federal system, with provincial and territorial governments having jurisdictional responsibilities for matters that complement and intersect with federal responsibilities. Responsibility for environmental and sustainability issues is shared

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13 Blair Seaborn, Chair, *Report of the Nuclear Fuel Waste Management and Disposal Concept Environmental Assessment Panel* (Ottawa: FEARO, February 1998).

14 Salmon Aquaculture Review, *The Salmon Aquaculture Review: Report of the Environmental Assessment Office*, Vol. 1 (Victoria: Province of British Columbia, August 1997).

15 John Mullally, Susan Holtz & Ronald H. Loucks, *Georges Bank Review Panel Report* (Natural Resources Canada and Nova Scotia Petroleum Directorate, 1999), online: <http://www.cnsopb.ns.ca/pdfs/georgesbankreport.pdf>.

16 Royal Society of Canada Expert Panel on the Future of Food Biotechnology, Conrad G. Brunk & Brian Ellis, Co-chairs, *Elements of Precaution: Recommendations for the Regulation of Food Biotechnology in Canada*, prepared at the request of Health Canada, Canadian Food Inspection Agency and Environment Canada (Ottawa: Royal Society of Canada, 2001).

17 Offshore Energy Environmental Research Association, *Fundy Tidal Energy Strategic Environmental Assessment: Final Report*, prepared for the Nova Scotia Department of Energy (Halifax: April 2008), online: <http://www.oreg.ca/docs/Fundy_SEA.pdf>. See also Meinhard Doelle, "The Role of Strategic Environmental Assessments in Energy Governance: A Case Study of Tidal Energy in Nova Scotia's Bay of Fundy" (2009) 27 Journal of Energy and Natural Resources Law 12–44.

18 Bram F. Noble, "Promise and Dismay: the State of Strategic Environmental Assessment Systems and Practices in Canada" (2009) 29 Environmental Impact Assessment Review 66–75 [Noble], based on Bram F. Noble & Julia Bronson, *Models of Strategic Environmental Assessment in Canada*, a report prepared for the Minister of Environment's Regional Advisory Committee, Subcommittee on Strategic Environmental Assessment (Ottawa: 2007) [Noble & Bronson].

under the Canadian Constitution and in established practice, not just between federal and provincial authorities, but also in arrangements involving Aboriginal authorities, municipal and regional governments, multi-government and multi-stakeholder bodies. Coordination needs are especially common where matters of federal and national concern intersect with provincial responsibility for lands and resources.

All of the provinces and territories have environmental assessment regimes, which, in some cases, may address strategic as well as project-level undertakings. Various Aboriginal land claims agreements include recognition of special authority for conducting environmental assessments. Many regional and municipal governments have their own assessment requirements, typically linked into their planning processes. These assessment regimes differ significantly in design and application. Moreover, they are accompanied by a host of requirements and practices under other legislation (*e.g.* laws governing land use planning, activities in particular sectors, and public inquiries) that introduce other assessment obligations and opportunities. Additional complexities are raised in cases with international implications, including development assistance programs and other Canadian initiatives meant to be undertaken outside Canada. These cases invariably also involve other sovereign jurisdictions (recipient countries and other donors).

Every assessment regime faces strategic issues — either directly in applying assessment requirements to PPPs or indirectly by leaving such issues to be addressed in project-level deliberations — and, in many cases, the strategic issues include matters of federal, provincial, Aboriginal and/or other nations' authority and responsibility. Any potentially effective strategic assessment regime needs to take into account these layers, intersections and overlaps of responsibility.

Another significant feature of the Canadian context is constitutionally entrenched Aboriginal rights. Gradually expanding recognition of Aboriginal rights in recent years has clarified obligations of federal and other decision-makers — especially the duty to consult meaningfully with Aboriginal people and to accommodate their concerns where anticipated actions could have adverse effects on practices, customs and traditions. Practical applications of the duty to consult have received more attention at the project level than at the strategic level so far. But, because development of PPPs typically offers broader and earlier opportunities for consultation, SEAs may be increasingly attractive as vehicles for more comprehensive and timely deliberations, with fewer options foreclosed, more time for clarification of concerns and possible responses, and less risk of surprise, conflict and delay at the project stage.

Although there have been many *ad hoc* efforts to share expertise, link approaches and harmonize procedures between and among jurisdictions, in Canada and beyond, the results remain fragmentary and fragile.[19] Moreover, they are often

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19 Since SEA is not yet well entrenched, most attention has been paid to multi-jurisdictional harmonization of project level assessment processes. See for example, David Lawrence, "Multi-Jurisdictional Environmental Assessments," a paper prepared for the Canadian Environmental Assessment Agency (August 1999); Patricia Fitzpatrick & John Sinclair, "Multi-jurisdictional Environmental Impact Assessment: Canadian Experiences" (2009) 29 Environmental Impact Assessment Review 252–60; and Robyn

narrowly focused on a few limited objectives and considerations rather than the full suite of sustainability issues that need attention in SEA.

Ideally, a strengthened strategic assessment regime in Canada would facilitate active (and where possible cooperative) engagement of the multiplicity of potentially relevant authorities and stakeholders, help to integrate and make suitable use of the range of existing decision-making processes, and spread the practice of early attention to sustainability considerations throughout decision-making on strategic initiatives within and beyond the federal realm. The desired result is better planning and decisions that avoid social, ecological and economic damage, deliver multiple, mutually-reinforcing benefits, and generally enhance progress to greater overall sustainability, not just at the federal level, but at all levels of decision-making.

5. ALTERNATIVE MECHANISMS FOR SEA

International experience and the lessons from the diverse set of Canadian efforts so far give us a reasonable basis for identifying the key requirements for a stronger federal regime. But there remain uncertainties about what specific approaches and provisions will be most effective. The following discussion recognizes the importance of being as clear as possible about SEA expectations and requirements, while retaining the flexibility and discretion needed to accommodate special cases and encourage further learning and adjustment. Key considerations, inevitably, will be how to ensure that the flexibility and discretion are used in the service of more effective SEA, and that the relevant authority is vested in bodies least likely to be distracted by narrower objectives.

Three basic alternative mechanisms for a strategic assessment regime are available for evaluation in light of the lessons from international and Canadian experience discussed above and the design requirements discussed below. The three mechanisms rely on legal instruments, (non-legislated) policy instruments, or a combination of the two. The three options, with brief elaborations on their implications, are as follows:

(a) Legal Instruments

The legal instruments would set out the core requirements for federal strategic assessment in legislation.[20] Legal instruments offer some certainty about the rules and expectations. They also have the advantage of independent enforceability, which can provide an effective motivation for implementation, especially if the law includes transparency provisions that facilitate public accountability and mobilize associated public pressures for capable performance. Law-based requirements are generally less flexible and adjustable than policy-based approaches — a strength where clear and firm obligations are needed, but a disadvantage where circum-

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Hollander, "Rethinking overlap and duplication: federalism and environmental assessment in Australia" (2010) 40 Publius: The Journal of Federalism 136–70.

20 At the federal level, the options include new law, new provisions in CEAA, adjustment of other existing legislation (*e.g.*, the *Inquiries Act*, R.S.C., c. I-13) or some combination. For a general discussion of options under CEAA, see Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham: LexisNexis Butterworths, 2008) at 192–239.

stances are diverse and fluid. Clearly, any SEA law would need to be designed to accommodate a wide variety of applications and allow for exceptions and adaptations that respect the fundamental SEA principles. Application of legal obligations to government bodies can be more difficult than conventional application of law to actors outside government. Complementary efforts to enhance other motivations for compliance (*e.g.* in performance reviews) are likely to be needed along with a range of effective and respected means of resolving conflicts over matters of authority and interpretation.

(b) Policy Instruments

The current (2004) *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* is a non-legislated policy instrument with application dependent on political and administrative commitment, rather than legal obligation. The current Directive could be strengthened to address some of the deficiencies identified in past reviews of the Directive, and some of the lessons from experience noted above. The Directive could, for example, be revised to enhance transparency and public accountability. Alternatively, a different policy instrument containing these improvements could be developed and implemented, replacing the current Directive. Policy instruments are usually more flexible and adjustable than legislated requirements. The price, however, is a less reliable base of motivation for effective implementation.

(c) Law and Policy Combinations

At least some of the limitations of pure law and pure policy instrument approaches may be addressed by a combined law and policy solution. While legislative obligations may succeed in forcing actors to meet procedural obligations, they may not anticipate all needs for SEA application or provide sufficient flexibility for all applications. At the same time, policy instruments relying on Cabinet commitment and enforcement may not ensure that SEAs are done consistently or that the work is capable and credible. Moreover, the policy-based approach may not provide sufficiently authoritative guidance for subsequent legally specified project-level assessments. A combination of measures could provide multiple tools and motivations and help foster an overall cultural change in strategic level decision-making. In a combined law and policy regime, the core process and substantive requirements of federal strategic assessment could be set out in legislation, with more flexible additional requirements and expectations, as well as supporting guidance material, provided through one or more policy instruments.

6. EVALUATION OF THE THREE OPTIONS

The relative merits of the three basic SEA regime and process design options — legal instruments, policy instruments and a combination of the two — are examined below in light of 18 criteria, which represent a consolidation of findings from the international assessment literature and reviews of Canadian and international SEA experience about what the key requirements for an effective and worka-

ble SEA regime.[21] The criteria are framed with attention to the special challenges of the Canadian context. While the focus here is on strengthening federal SEA, the criteria anticipate federal participation in multi-jurisdictional SEAs and are meant to be applicable nationally to SEAs in all Canadian jurisdictions.

1. Clear statement of process purposes, centred on commitment to sustainable development or the equivalent, with appropriate evaluation and decision criteria established in order to ensure that PPPs meet the criteria.

The process must incorporate and consistently reflect a statement of purposes that clarifies the essential expectations. Given current conditions and commitments, a sustainability-centred purpose is well justified. Beyond the encouragements to recognize long-term as well as short-term effects and to address the interrelations among socio-economic and biophysical factors, the "positive contribution to sustainability" purpose confirms that proposed PPPs are to be selected and designed to provide clearly positive overall lasting effects, without entailing or raising risks of serious lasting damages. This demands careful assessment of beneficial as well as negative effects, provides a positive basis for comparison of PPP options, and demands careful attention to trade-offs.

The statement of purposes must be included in the legal or policy instrument, or a combination. The positive contribution to sustainability test should also be set out explicitly in the operative sections of the instrument(s). To accommodate this purpose, the regime must apply a broad definition of "environment" and "effects" (including biophysical, social, cultural and economic factors and their interrelations) and require critical examination of PPP purposes and comparative evaluation of the main alternative approaches to serving these purposes.

Because "sustainable development" or "sustainability" is typically defined only very generally (*e.g.* in the new *Federal Sustainable Development Act*), the chosen instrument(s) must provide guidance on generic sustainability-centred criteria for application in SEA evaluations and decision-making[22] and on how these may be elaborated and specified for application in particular cases and contexts. The regime must require that attention to positive as well as negative effects, and to cumulative as well as immediate effects. It must also require explicit justification of trade-offs, commitment to precaution, and emphasis on adaptive design as well as adaptive management.

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21 The list of criteria is based on four main sources: the findings of the international literature review summarized above; the performance criteria developed by members of the International Association of Impact Assessment, *Strategic Environmental Assessment Performance Criteria* (International Association for Impact Assessment, 2002), online: <http://www.iaia.org/publicdocuments/special-publications/sp1.pdf>; the principles for designing sustainability assessment regimes set out in Robert B. Gibson *et al., Sustainability Assessment: Criteria and Processes*, c. 7 (London, UK: Earthscan, 2005) [Gibson *et al.*]; and the criteria for strategic environmental assessment in Canada set out in Noble & Bronson, *supra* note 18 at 8. For a detailed discussion and further sources see our full report, Benevides *et al.*, *supra* note 8, Appendix 1.

22 See Gibson *et al.*, *supra* note 21, for one consolidation of established understandings of sustainability requirements for assessment purposes.

Finally, the sustainability-based process design must retain emphasis on biophysical and ecological concerns, and specific environmental effects research, while ensuring that these matters are drawn into the centre of deliberations. The sustainability-centred approach is favoured because of the need for effective and transparent integration, which is generally lacking where biophysical assessments are done separately from economic, technical and socio-political evaluation and planning.

These requirements can be met by any of the three options. Entrenchment in law would serve to make application somewhat more likely, or at least would provide potentially more effective means of correcting poor performance.

2. Application provisions and rules are designed to ensure that

- *all significant cases are covered*,
- *PPP development deliberations and final decisions are informed by environmental and sustainability-focused assessments, and*
- *assessments are initiated early enough to address initial purposes and alternatives (or, in a review of an existing PPP, early enough to guide the initial conception of the review).*

A key feature of good SEA regime and process design is a set of application rules that place greatest emphasis on the most influential PPPs and ensure that the potential proponents know from the outset of their deliberations whether and what SEA requirements apply. The current Cabinet Directive trigger — all PPPs that may require Ministerial or Cabinet approval need to be assessed, at least to determine the potential for important effects — is a useful starting place. But, it does not ensure integration of SEA in PPP development and does not provide any open means of recognizing and responding to new PPP needs.

Being more specific about which PPPs need SEA and which ones should be assigned to more and less demanding SEA streams, is not simple, in part, because the nature and potential implications of new PPPs often cannot be anticipated. Experience suggests that judgements about "importance" or "significance" vary and are not always best left to proponents. A good basic principle in application decision-making is to favour initial inclusion (all in unless exempted out, rather than all out unless designated in) and supplement this by identifying the categories, fields and characteristics of new and ongoing PPPs for which SEAs are automatically required and providing a transparent and impartial exemption process.

In addition, it would be desirable to provide for a variety of approaches to identifying PPP/SEA needs, focusing on strategic areas covering the most unsustainable prevailing practices. Relevant mechanisms include referrals from project-level assessments where larger PPP issues have emerged, proposals from other governments (*e.g.* provinces proposing collaborative PPP/SEAs), requests from non-government bodies, and a process for initiating special major PPP/SEAs. These are discussed below in section 8 and illustrated in Figure 1.

To ensure that PPP development deliberations and final PPP decisions are informed by environmental and sustainability-focused assessments, SEA must be deeply integrated into the development of PPPs from the outset. The logical advan-

tages of such integration have been confirmed by SEA experience.[23] Effective integration into decision-making has, however, not been a characteristic of Canadian EA so far. As Noble concludes, "in Canadian practice . . . environmental assessment has long been an add-on process or yardstick against which the acceptability of proposals is measured, rather than an integrated decision support tool to develop better ones."[24]

Ensuring that SEA is an integral organizing feature for PPP development from the outset depends on early initiation of SEA work as well as on firm enforcement of mandatory comparison of alternatives and use of the broad "contribution to sustainability" test. Early initiation and integration are clearly impossible if the decision to require SEA is made only after a PPP is developed and proposed.

Both legally specified and policy-based regimes can incorporate clear rules and processes for decisions on the application of SEA requirements. A combined law and policy regime would assign some PPPs to a SEA stream with requirements specified in law and others to a stream with expectations set out in policy (*e.g.* a Cabinet directive). Choice between these streams could be based on a variety of factors, including the significance of the PPP undertakings involved and the adequacy of non-legislated motivations for implementation. A key consideration is that the consistency, rigour and credibility of the legally specified SEA stream is advantageous where the intent of the PPP is to provide authoritative direction to subsequent lower-tier decision-making and is needed.[25] This is discussed under the following criterion.

3. Defined linkages between PPP/SEAs and the development, review and approval of related lower-tier strategic or project initiatives, with clear delineation of whether the PPP can give authoritative direction to subsequent undertakings or merely discretionary guidance.

The international literature and Canadian experience both point to the need to strengthen linkages between PPP assessments and project planning and assessment, as well as among strategic levels. Part of what makes strategic assessment "strategic" is that their conclusions can provide useful foundations for lower level strategic assessments and for project-level assessments.[26]

Useful information and guidance can come from a wide variety of strategic level initiatives, even ones not tied to specific PPPs. Regional cumulative effects studies, broad scenario building and comparing exercises and retrospective evaluations of sectoral PPP experiences, for example, can all make important educational contributions, and produce valuable insights and data sets for project as well as

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23 Noble, *supra* note 18 at 74, has reported, "where SEA has demonstrated at least some success it [has] unfolded as an integrated process with PPP development."

24 *Ibid.*

25 In some cases, it may not be possible to determine at the outset whether binding direction is desirable and, hence, whether the law-based or policy-based process is most appropriate. It will, therefore, be important to retain flexibility for moving cases from one stream to another.

26 Maria Partidário, "Scales and Associated Data — What is Enough for SEA Needs?" (2007) 27 Environmental Impact Assessment Review 460–78.

strategic level undertakings. Such SEAs or SEA support initiatives could also help to streamline some assessment tasks at the project level.

For many proponents and other participants in assessments at the project level, however, a main attraction and expectation of SEA is the prospect of properly assessed PPPs resolving larger scale issues and removing these issues, and associated conflicts and delays, from project-level EA deliberations.[27] The results could include specified terms of reference and detailed process requirements for subsequent project-level assessments under the PPP.[28] This is most defensible, and, perhaps, practically feasible, only where the SEA is designed to produce firm guidance or direction for lower-tier and project-level assessments and where the SEA process is also legally specified with core qualities (*e.g.* scope, openness and rigour) that are at least equivalent to those provided for project-level assessment. Accordingly, where a PPP is intended to direct planning and assessment of undertakings subject to project-level assessment under CEAA, the PPP/SEA must use a legally specified SEA process stream. Here, the principle underlying the relationship between SEA and project EA is "law to law."

At the same time, limits must be placed on the authority of strategic level decisions to rule over lower-tier assessments and decisions. Where there are important uncertainties, highly diverse applications, fluid conditions, conflicting priorities, rapidly evolving understandings or rising technological possibilities, firm strategic direction to lower tiers is likely to be inappropriate. In any event, directions from strategic assessments should be time-limited. They should be open to earlier review if new information or changed factors emerge and tempered by provisions for adjustments to accommodate particular circumstances not anticipated in the SEA.

Upward learning and guidance should also be facilitated. One possibility is the "off-ramp" mechanism discussed earlier, where a project assessment raises significant new concerns and considerations that merit strategic-level review. More generally, project-level assessment participants could be encouraged to identify important needs for new or updated PPP initiatives to address policy gaps, emerging cumulative assessment questions, new developments that change the context for old PPPs, etc.

Project-level assessments may not be well-suited to address strategic level considerations, but they have been among our most important means of identifying new strategic issues, recognizing inadequacies in existing PPPs, and promoting attention to strategic alternatives. It will be important for project-level assessments to retain those roles, even in a new SEA regime with provisions for firm direction from the strategic level.

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27 See, for example, Celesa L. Horvath & Jeffrey L. Barnes, "Applying a Regional Strategic Environmental Assessment Approach to the Management of Offshore Oil and Gas Development" in Proceedings of the Annual Conference of the International Association for Impact Assessment, Vancouver, British Columbia, Canada (24–31 April 2004).

28 A practical example of this SEA function is the case of the Ontario class environmental assessment of forest management. See Robert B. Gibson, "Ontario's class assessments: lessons for application to policies, plans and programs" in Steven A. Kennett, ed., *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1994) at 84–100.

4. Sufficient variety and flexibility of process streams (or allowable substitutions of equivalent processes) to cover different sorts of strategic assessment needs — broadly influential policies and programs, multi-tier PPPs, regional and sectoral undertakings, etc.

The chosen regime must be designed to ensure and permit a wide variety of strategic undertakings to be assessed. One of the major challenges of SEA is the great range of strategic-level concerns that merit attention and the diversity of possible strategic responses. This has implications for decisions on application of SEA requirements (discussed above) and for provision of suitable process streams for SEAs of greater and lesser scope, authority and potential effects on progress towards sustainability.

Project-level assessment regimes typically have multiple process streams, including rapid screening for minor undertakings, standardized procedures and conditions for categories or classes of common small projects, more comprehensive study and review requirements for major undertakings, and provisions for mediation and hearings in more significant and difficult cases. Processes for moving particular undertakings from one stream to another are also common, though often problematic in application. For each of these, the regime must specify criteria, processes and authorities for allocating undertakings generally to the various streams and for dealing with the exceptional cases. A sound SEA regime will need a roughly similar set of streams and adjustment mechanisms.

Not all of the options here involve new processes. A few kinds of PPPs are already subject to established procedures for open development, review and approval. In such cases, the more effective and efficient course may be to consolidate SEA with existing requirements and processes (*e.g.* by providing for joint processes and/or expanding current processes to incorporate SEA obligations).

Once a foundation of SEA experience is built and normal expectations are established in the SEA process itself and in consolidated joint processes, process substitutions may be feasible and attractive. Substitutions could include referral to federal inquiries, to processes conducted by other administrative tribunals such as the National Energy Board (if their capacities and mandates are expanded to deal effectively with the scope of sustainability-based assessments), to multi-stakeholder mechanisms that otherwise meet the requirements of the regime, and/or to relevant planning and/or assessment regimes that already have multiple tiers built in, such as the Canadian International Development Agency's plan-program-project tiers for preparing for activities in a country, or the development of National Park Management Plans that must comply with the rules and standards established by the *Canada National Parks Act*.

In all these cases, adjustments would be required to ensure consistent application of the core substantive and procedural requirements of sustainability-focused SEA — application of comprehensive sustainability criteria, comparative evaluation of alternatives, process transparency, early and ongoing opportunities for public/stakeholder engagement, explicit rationales for decisions including acceptance of any trade-offs, and follow-up monitoring and enforcement. The most significant cases should require public hearings. Other elements (*e.g.* specifics on public involvement, including participant funding) should be required at a level consistent with the significance of the case. (See criterion 8 below, dealing with proportional-

ity generally.) Additional provisions will be needed to facilitate cooperative SEA work with other jurisdictions, including foreign governments and international bodies as well as other authorities within Canada.

All three options can provide for multiple streams. The combination option offers firmness for consistent requirements plus flexibility in diverse applications.

5. Means of ensuring particular applications of the process learn from, and/or are coordinated or consolidated with, related strategic work, including that of other jurisdictions.

One of the biggest challenges in a federation such as Canada, with several jurisdictional layers and levels, is ensuring that a federal regime can be integrated with provincial, territorial, Aboriginal and municipal processes and requirements.

A key principle is that cooperative and integrated SEA must not compromise any of the core requirements of the federal SEA regime and must not compromise federal responsibilities and jurisdiction. Meeting federal obligations is likely to be most effective with a legal instrument rather than a policy. But, there should be wide scope for, and considerable effort to facilitate, collaborations on a host of strategic matters that involve shared jurisdiction, interest and need. To be effective, the chosen regime must allow for mutual guidance and cooperation between and among different types of strategic assessments, such as regional program and plan assessments and sectoral policy assessments of activities with regional effects. The process must be sufficiently flexible to allow for this type of cooperation and integration.

6. Critical evaluation of the purposes of the anticipated PPP and comparative evaluation of potentially reasonable alternatives for serving these purposes in light of sustainability criteria with the aim of identifying and developing the best option (most positive mutually reinforcing benefits, least risk of significant adverse effects).

The fundamental aim of the desired regime is to foster strategic decision-making approaches and results that move us towards sustainability. This is a government-wide aim, broader than the mandates of individual authorities. SEA, with this aim, is a vehicle for ensuring that authorities developing strategic undertakings do so with the broader agenda firmly in mind. To ensure SEA effectiveness, the most crucial components of the SEA regime include the requirements concerning purposes, alternatives and criteria for evaluations and decisions.

The purposes of a PPP set the grounds for identifying the options to be considered as potential approaches to meeting the strategic objectives. If the purposes are defined in an unduly narrow way, possible options are limited and the potential for innovation is lost. The SEA regime must, therefore, ensure that purposes are framed broadly enough to facilitate identification of options that might serve sustainability objectives more effectively than conventional practice. Success in this is more likely if the fundamental purposes are set in law and if specifying the purposes in particular cases is open to broad participation and review by interested parties.

For similar reasons, the SEA regime should include mandatory consideration of both alternative fundamental approaches and alternative means of delivering the purposes of each assessed PPP. In the review of proposed purposes and in the com-

parative evaluation of alternatives, application of the mandatory "positive contribution to sustainability" test plays a central role. For alternatives, the objective is not to find a merely acceptable option, but the one that is most likely to deliver sustainability-enhancing benefits, preferably multiple, mutually reinforcing and lasting benefits, while avoiding risk of significant adverse effects, especially persistent ones that will be a damaging legacy to future generations.

Requirements for critical review of purposes and for comparative assessment of alternatives in light of sustainability criteria can and should be incorporated in policy and law- based processes. Experience with legislated and non-legislated obligations at the project level, however, suggests that a legislated obligation is likely to be taken more seriously.

As noted above in the discussion of purposes and criteria, it will be important to set out the basic sustainability-based evaluation and decision criteria to be applied in all SEAs, and to provide for context specific elaborations in individual cases. While the fundamentals can and probably should be set in law, further policy guidance on criteria elaboration and application is likely to be valuable for all SEAs.

7. Attention to cumulative effects, life cycle issues and intergenerational implications

As at the project level, all strategic assessments need to consider cumulative and indirect effects of PPPs as well as their immediate and direct effects. In all assessments, commitment to sustainability clearly entails attention to intergenerational implications. The larger overall effects are, in the end, most important.

One of the strengths of CEAA is that it requires consideration of cumulative effects in project assessments. The project level is, however, a far from ideal venue for assessing cumulative effects and is even less well-suited for identifying and mobilizing appropriate responses, in part because only one contributing project and proponent is typically involved.[29] Attention to life cycle effects at the project level is similarly useful but also constrained by the limited scope and agenda of project assessments.

Because of increased concern about sustainability effects, consideration of intergenerational implications, including the legacy effects of mines and other limited term projects, has been given more emphasis in some project assessments. This would be appropriate and could be more influential at the strategic level where there is more scope for identification, evaluation and pursuit of different future scenarios and other broad alternatives.

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29 See, for example, Peter Duinker & Lorne Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006) 37 Environmental Management 153–61; L. Davey *et al.*, "Addressing cumulative environmental effects: sectoral and regional environmental assessment" in A.J. Kennedy, ed., *Cumulative Environmental Effects Management: Tools and Approaches* (Calgary: Alberta Society of Professional Biologists, 2002) at 187–206 [Kennedy]; S. Kennett, *Towards a New Paradigm for Cumulative Effects Management*, Occasional Paper #8, Calgary: Canadian Institute of Resources Law, University of Calgary, 1999); and S. Kennett, "Lessons from Cheviot: Redefining Government's Role in Cumulative Effects Assessment" in Kennedy, *supra* at 17–29.

Strategic level assessments have the advantage of being at the scale needed for effective consideration of cumulative effects, life cycle issues and other large concerns, and for identification and evaluation of potentially effective responses to these concerns. Cumulative effects, technology life cycles, alternative regional futures, and similar broad impact issues are likely to be the direct subjects of some PPP/SEA initiatives. Cumulative effects, life cycle analysis and attention to intergenerational implications should, however, be required elements of all SEAs, regardless of assessment stream or application through policy or law.

8. Matching of assessment effort to the significance of the case (use of more and less onerous streams of assessment, focusing assessment on most crucial issues, etc.).

For obvious reasons of efficiency in resource allocation, assessment effort should be proportional to the significance of the case. This is the principle underlying provisions for various more and less demanding streams of assessment (discussed above in under criterion 4). Similarly, a legal instrument is probably best suited for the most significant cases, and a policy instrument for the less significant cases, although proportionality of effort should be built into the applications of both instruments.

Sufficient flexibility is needed to allow particular cases to be bumped down to a less demanding process or bumped up to a more demanding one. Requests for such moves would need to be considered by an arm's-length, independent body having the resources, capacity and jurisdiction to decide the matter. This too seems likely to be a matter of efficiency as well as impartiality, given what we know about the prospects for delay when such decisions are made by authorities that are more vulnerable to political and administrative sensitivities.

9. Clear delineation of assessment roles and responsibilities, with evident mechanisms to ensure credible independence of assessment review.

The law and/or policy instrument needs to set out the respective roles and responsibilities of the various parties involved in assessments. As an integrated aspect of the PPP development process, SEAs would have to be undertaken by the proponent departments or agencies, but subject to broader review requirements set out for the various streams and administered by an independent authority.

The administrative authority for the overall process would provide general support and guidance in many areas but also make many key decisions about the application of the process (*e.g.* about assignment of uncertain cases to more and less demanding assessment streams, responses to bump-up requests, and exceptions to the application of strategic level guidance to a lower level undertakings), the functioning of reviews and the adequacy of SEA work.

For credibility and effectiveness, the SEA authority would need sufficient powers, skills and resources plus clear independence from proponent departments and agencies. It would also need to be accountable to elected authority without being overly influenced by the partisan leadership of the day. Options include reporting to the public through Parliament or through Cabinet via one of the central agencies of government (*e.g.* the Privy Council Office).

A separate, arm's-length tribunal would be needed to adjudicate on appeals and disputed decisions and appeals (as also discussed under criterion 2 above and

14 below). The tribunal would need to be insulated from operations of the administering authority, while at the same time able to benefit from the latter's expertise and resources without duplicating effort unnecessarily.[30]

Some of these matters, including establishment of a new authority and tribunal, would require legislated change.

10. Openings for collaboration and/or consolidation with other processes with equivalent objectives and approaches, including those in other jurisdictions.

Either a legal or policy instrument, or both, would specify the criteria for processes that qualified for joint processes or, in more limited cases, for substitution of the process established in the instrument(s). The criteria for collaboration or consolidation would need to address the circumstances allowing cooperation; ensure equivalency of scope, objectives, evaluation criteria, fairness (including participant funding) and authority; and guide decision-making on particular joint or substituted steps, such as joint or substituted public reviews and/or hearings, and the processes to be followed.

11. Opportunities for meaningful participation in open deliberations.

A role for the public as well as particular stakeholders in the process is essential in order to achieve public confidence and democratic soundness. Regardless of whether a law or policy instrument is used, mandatory public notice of each strategic-level initiative potentially requiring assessment is required at the very earliest feasible opportunity. The notice should include information on the purposes of the anticipated undertaking, the options initially identified for consideration, the key issues and the expected participation opportunities. Such early notice is well-established and demonstrably valuable in many advanced strategic processes for regional and urban land use planning and for forest and other resource management. Ontario's Environmental Registry is an example of a public notice vehicle currently used to provide early open notice of proposals for new strategic initiatives or changes to existing ones, including laws and regulations.[31] The U.S. Federal Register, which among other roles provides "advanced notification of proposed rule making," is another rough model.[32]

More significant initiatives require a greater degree of public involvement. All cases, however, merit steps to ensure transparency and opportunity for public/stakeholder engagement.[33] Among the suggested specific requirements are no-

30 Models that could be considered for this division of responsibilities include the federal and provincial human rights commissions and their respective tribunals, and the federal Competition Bureau and the Competition Tribunal.

31 Government of Ontario, "Environmental Registry: What's on the Registry?", online: <http://www.environet.lrc.gov.on.ca/ERS-WEB-External/content/about.jsp?f0=aboutTheRegistry.info&menuIndex=0_1>.

32 United States Government Printing Office, The Federal Register. Online: <http://www.gpoaccess.gov/fr/index.html>.

33 See, for example, Regulatory Advisory Committee, Subcommittee on Public Participation, *Final Report to RAC from the Subcommittee on Public Participation in Screenings* (23 April 2007).

tice and opportunity to comment on an initial statement of proposed purposes of and alternatives to be considered, and notice and opportunity to review a draft assessment document, all with sufficient time allowed for effective engagement. Similar provisions may be required for other significant stages in the assessment, in order to keep all participants equally informed throughout.

As noted above, open processes are needed for a host of other key deliberations. These include determining which categories of cases are to be subject to particular SEA streams, which individual cases should be moved from one stream to another, which strategic issues identified in project assessments should be put on the off-ramp for strategic initiatives, and which cases should involve public hearings. Provisions and requirements for the necessary participative openings must be included in any legal and/or policy instrument.

Intervenor funding should be available for public interest participants in the process, including all stages described in the above paragraphs including but not limited to public hearings. The fund should be maintained at a level that is appropriate to ensuring that the interested public can participate effectively. Decisions about allocating intervenor funding ought to be made by a panel (either the panel reviewing the assessment itself, or a separate panel), whose members are independent and at arm's-length from all interested parties including governments.

In addition to open processes for individual assessments and other key decisions, the regime should encourage broad engagement in establishing and resolving administrative, policy and regulatory issues. A mechanism such as the Regulatory Advisory Committee, which currently reports to the federal Minister of the Environment through the Canadian Environmental Assessment Agency, could be used for this purpose. As noted above with regard to overall process administration, reporting to Parliament or a central authority may be more suitable than reporting to the Minister of the Environment.

Regular monitoring of the strategic assessment regime by the Auditor General and the Commissioner of the Environment and Sustainable Development, and reporting on the results, should be required in order to open further debate on and allow for improvement of the regime. The *Auditor General Act* and relevant schedules of the *Financial Administration Act* may need to be amended in order to clarify this added responsibility for the Commissioner.

12. Transparent and accountable decision-making.

Accountability, public trust, good governance and other benefits are the likely results of an open regime that facilitates effective public involvement.[34] Openness in individual assessments begins with mandatory notice that the PPP is under consideration, of the availability of documents, and at other key stages.

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34 Pierre André *et al.*, International Association for Impact Assessment, "Public Participation: International Best Practice Principles" (Fargo: IAIA, 2006), online: <http://www.iaia.org/publications/>; David Lawrence, *Environmental Impact Assessment: Practical Solution to Recurrent Problems* (Hoboken: Wiley, 2003), esp. at 306ff.; Gustavo Vicente & Maria Partidário, "SEA: Enhancing communication for better environmental decisions" (2006) 26 Environmental Impact Assessment Review 696–706.

Explicit generic criteria for comparative evaluation of alternatives and for deciding on the acceptability of trade-offs should be written directly into the legal and/or policy instruments, or presented in guidance material, or set out by the independent body charged with making the ultimate recommendation or decision in the assessment process. Early clarity about the criteria to be applied is likely to be valuable for all participants.

In keeping with administrative law standards of fairness and natural justice, explicit reasons for decisions should be required for the statement of purposes, the selection among alternatives and the acceptance of any significant trade-offs. The reasons should be in light of explicit sustainability-focused criteria and trade-off rules. Administrative law principles also require transparency, unbiased decision-makers, expertise of decision-makers, the right to appeal decisions, and accountability for decisions made, among others.

13. Authoritative decisions within the process, or other clear means of ensuring that (and showing how) the process guides SEA decision-making, the integration of SEA findings in PPP decisions, and implementation of PPP/SEA results.

There are two main issues here: the firmness of SEA requirements generally, and the authority of PPP decisions in the development of lower-tier PPPs and the planning and approval of specific projects.

Concerning the first issue, the legal instrument offers at least the potential for effective enforceability and, consequently, promises to be a more powerful vehicle for motivating compliance with SEA obligations. Canada's many years of experience with the policy-based approach to SEA have demonstrated very weak motivations for implementation, despite the pressures from soft compliance oversight by the Auditor General and Commissioner of the Environment and Sustainable Development.

The legally specified approach also promises greater firmness in guidance for lower-tier PPP and project-level decision-making (see criterion 3, above). Under the legal instrument option, the process could provide for a final decision document that specifies directions for the conduct of lower-tier strategic undertakings and/or projects. Any mandatory components would need to be enforceable. The result would be binding direction for the development of lower-tier PPP and project-level undertakings, reducing the burdens and delays resulting from policy uncertainties.[35] Additional process design needs would include means of ensuring the PPP directions are time limited and/or updated regularly, and means of dealing with exceptional circumstances.

If the regime were set out in a policy instrument only, completed PPPs could provide guidance for lower-tier PPPs and even for legally specified project assessments, but the guidance would lack legal authority and the associated issues would remain open to debate in project-level deliberations and decision-making.

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35 "Binding" direction could involve a range of possibilities from highly specific obligations and conditions, to broad requirements to comply or be consistent with stated principles, generic terms of reference, streaming and associated process requirements. In cases of intersecting and joint federal-provincial SEA application, federal PPP directions could be effectively complemented by firm provincial PPP directions where the provinces have legally specified SEAs or SEA equivalents.

14. Opportunity for appeal where SEA principles or prescribed requirements seem not to have been satisfied.

In order to ensure the soundness of the regime and decisions made under it, a number of these decisions would be open to review and/or appeal. Key questions that could be subject to review/appeal include the following:

- whether the assessment result meets the "positive contribution to sustainability" test;
- whether the purpose of the initiative, alternatives to it, alternative means of carrying it out, and/or other requirements of the regime were properly considered and applied;
- whether an anticipated new PPP, or an existing one that has not been assessed or that is due for renewal or replacement, ought to be subject to SEA requirements;
- whether authoritative guidance from an SEA-based PPP decision was applied appropriately to a lower-tier strategic assessment or to a project assessment;
- whether or not a request for transfer of an SEA from a policy-guided stream to a legally specified stream should be approved; and
- whether a PPP/SEA decision reflects due process as set out in the SEA requirements.

Depending on the circumstances, an appeal or request for review could be, at least initially, to an independent, quasi-judicial arm's-length tribunal established under the strategic assessment legislation (see criterion 9, above). While immediate judicial review application to the Federal Court may be suitable in some cases, provision of an administrative mechanism would reduce the need for and number of judicial review applications to the courts.

15. Procedures for monitoring, review, iterative learning and identification of needs for corrective action and implementation.

As noted by Maria Partidário, an assessment process needs to be designed in such a way that allows for lessons learned through experience to be incorporated in improvements.[36] Regular, independent monitoring by the federal Commissioner of the Environment and Sustainable Development and by other, third-party reviewers, as well as review by participants, and public reporting on the results, must be regular, open and robust.

Provisions for regular public review of the regime as a whole are becoming more common in new laws and policies. In a legal SEA instrument, a regular review every five to seven years as in existing federal environmental legislation (CEAA; *Canadian Environmental Protection Act, 1999*; *Species at Risk Act*) is suggested. A policy-based regime, or regime component, could include a similar review provision. In a mixed law and policy regime, reviews of the legal and policy

36 Maria Partidário, "Elements of an SEA Framework: Improving the Added-value of SEA," (2000) 20 Environmental Impact Assessment Review 647–63.

instruments should occur in parallel, perhaps also in parallel with the legislative review of CEAA.

Monitoring and review of individual PPP decisions is also desirable. Consistent application of SEA monitoring would focus on the accuracy of the SEA predictions of benefits, costs and risks, and the lessons to be learned from unexpected errors and successes. Particular attention should be paid to guidance that PPPs provide for lower-tier and project-level undertakings. To ensure that the guidance is responsive to changing circumstances and new understanding, PPP/SEAs should be time-limited and subject to earlier reconsideration where appropriate. Especially for more significant cases and/or those subject to a legislated regime, the development, implementation and monitoring of follow-up plans should be mandatory. New circumstances (such as new technologies, new concerns about adverse effects, and similar considerations) should trigger review and updating of strategic approvals.[37]

16. Impartial administration.

As indicated under criterion 9 above, an independent authority at arm's-length from vested interests and government departments, should have overall responsibility for the strategic assessment regime. A quasi-judicial tribunal, independent from the administrative authority, would perform the review/appeal functions identified under criterion 14 above.

17. Adequate resources and motivations.

Resources adequate to the tasks of carrying out the strategic assessment, for evaluating performance of assessments at arm's-length, for providing intervenor funding, and for meeting the requirements of other functions identified here, would need to be provided through the necessary parliamentary appropriations.

The introduction of strengthened SEA should be treated as an opportunity for enhanced decision-making efficiency rather than a new layer of obligation. While new obligations are certainly involved, the intent and the design should focus on integration of SEA approaches into the strategic development process. Moreover, the objective should be effective early attention to big issues that would, otherwise, become costly problems and lead to more numerous conflicts that cannot be addressed effectively or efficiently in project-level processes. The overall effect of the SEA regime should be more efficient allocation of resources as well as achievement of a broader range of lasting benefits.

Anticipation of greater benefits from PPP initiatives may by itself provide some effective motivation for strengthened SEA. A legal instrument that requires SEAs to be conducted and establishes the authority of properly assessed strategic initiatives would also provide valuable guidance for and efficiencies in project-level assessments falling under these strategic initiatives. Additional motivation for

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37 Action under other legislation is a possible trigger — for example, the notification under the *Canadian Environmental Protection Act, 1999*, of a New Substance pursuant to the *New Substances Notification Regulations* or of reintroduction or new use of an existing substance under the Significant New Activity provisions might trigger SEA application.

proper conduct of the regime would be provided by means of the review/appeal provisions outlined above.

18. Links to the broader strategic context — overall objective setting, indicator development, etc.

The SEA regime, whether it is based in law or policy or some combination, will need to be clear about its sustainability objectives and the general sustainability criteria to be applied in SEA evaluations and decisions. In particular applications, these criteria will need to be specified to recognize the particulars of case and context. While these basics can be set out in SEA law and/or policy, guidance from other sources should also be sought and developed.

Other potential means of establishing suitable sustainability-focused criteria for SEAs and other applications include development of a comprehensive sustainability strategy for the federal government. Such a strategy might be helpful to ensure consistent overall guidance for strategic assessment decisions taken in the absence of strategic assessment legislation. Implementation of the new *Federal Sustainable Development Act*[38] could be a step in this direction, especially if its focus in implementation extends beyond narrowly defined environmental indicators to adopt a comprehensive sustainability agenda.

SEA regime design and implementation must also pay attention to Canada's international commitments and obligations, including through international conventions such as the Convention on Biological Diversity.

(a) The Preferred Mechanism

The discussion above reveals that an SEA regime combining law and policy would be most likely to satisfy the core requirements, expectations and application needs for SEA at the federal level in Canada. It would provide fundamental authority and consistency with flexibility in implementation, enhance strategic level decision-making and provide authoritative guidance for assessments at the project level.

Essentially, the combined mechanisms approach would use legal specification for core requirements, for application to the most significant strategic initiatives and for cases where authoritative guidance for lower-tier and project-level deliberations is desired. A more flexible policy-guided stream would be used for a wide range of less ambitious applications. New SEA law (possibly incorporated in an expanded and revised CEAA) would be needed to establish the combined regime. It would, among other things, define the sustainability-centred purpose and scope of federal SEA; set out the mandatory aspects applying to all PPPs; provide for the policy-guided stream and set out the essentials of the legally specified stream; clarify relations between PPP/SEAs and project-level cases; and establish the relevant administrative and decision making bodies and responsibilities.

More specific regime design considerations and the reasoning behind them — concerning matters of application, scope, evaluation and decision criteria, participation, administrative and decision-making responsibility, etc. — are provided above and are illustrated below in section 7.

38 S.C. 2008, c. 33.

7. AN ILLUSTRATIVE APPROACH TO AN INTEGRATED LAW AND POLICY-BASED SEA REGIME

The following discussion outlines how an integrated law and policy-based SEA regime could be structured to satisfy the criteria set out above. This illustration is just a first step. Much more detailed elaboration is required for many of the key components, and the elaborations could point to needs for important structural revisions.

The main considerations addressed in the illustration are how SEAs could be initiated and assigned to streams with policy-guided or legally specified requirements, how each of the streams could be structured, how authority and responsibility in the process could be allocated, and how legally specified and policy-guided) components could be linked and distinguished. Responses are integrated and depicted in four flow chart figures depicting:

- five basic routes to initiating a strategic assessment (Figure 1),
- decision-making on assigning PPPs to a policy-guided or legally specified stream (Figure 2),
- the policy-guided stream (Figure 3), and
- the legally specified stream, including comprehensive study and panel-type hearing sub-streams (Figure 4).

(a) Possible Means of Initiating a Strategic Assessment under a Combined Law-policy Regime

The first formal and publicly visible step in initiating an SEA would be mandatory public/stakeholder notice of the PPP/SEA initiative. The notice would set out proposed terms of reference identifying the purpose(s) of the undertaking, the initially identified options to be considered, and/or the range of regional or sectoral effects and related concerns to be addressed. The notice would also indicate whether or not the anticipated PPP was intended to provide authoritative direction for lower-tier PPPs and/or project, and should propose the SEA stream to be used. It would seem reasonable to make such notice mandatory in SEA law, and to cover all PPPs possibly deserving SEA, though only some SEAs would proceed through one of the process streams enforceable in law.

The mandatory notice would serve two purposes: to ensure that assessment actually begins at the outset of deliberations, and to begin PPP development in an open and participative manner. As noted above, there are plenty of existing models demonstrating the practicality of such notice at the strategic level.[39] The notice would be posted in a public registry, with encouragement to proponents also to provide more direct notice to stakeholders (including relevant other jurisdictions) and particular publics.

As depicted in Figure 1, a PPP/SEA could be initiated in any one of five basic ways:

Route 1. A government proponent beginning work on a PPP undertaking that may have important environmental effects and may require approval from a Cabi-

39 See notes 30 and 31 above.

net minister, issues a public notice, with the contents described above. The approach to determining the need for a SEA would build upon practice under the current Cabinet Directive but with clear reference to sustainability considerations in judging the potential importance of effects and the appropriateness of initiating a SEA.

Route 2. One or more other Canadian jurisdiction (*e.g.* a provincial, territorial, Aboriginal or municipal authority) requests initiation of a collaborative SEA on a PPP undertaking that may have important environmental effects and may require approval from a Cabinet minister. The relevant federal authority or authorities would be responsible for providing public notice of the proposal as outlined above. The federal authority(ies) would either indicate willingness to proceed with the PPP/SEA, at least in an exploratory way, and provide initial terms of reference, or provide notice and seek public/stakeholder comment before a decision on whether to proceed.

Collaborative PPP/SEAs would involve challenges but are obviously appropriate to the Canadian reality of over-lapping jurisdiction. They could be valuable means of building long overdue cooperation in many areas and might, in the longer term, help to foster some practical upward harmonization of assessment at the strategic level.

Route 3. One or more non-government body(ies) requests the initiation of a federal or joint inter-jurisdictional PPP undertaking that may have important environmental effects and may require approval from a Cabinet minister. In this case, the relevant federal authority (the potential developer and official proponent of the PPP) would be responsible for providing public notice of the proposal. As with proposals from other jurisdictions, the federal authority(ies) would either indicate willingness to proceed with the PPP/SEA, at least in an exploratory way, and provide initial terms of reference, or merely provide notice and seek broader public/stakeholder comment before a decision on whether to proceed. Alternatively, the request could be submitted to a central federal SEA authority, which would post notice and refer the request to the relevant potential proponent department(s) or agency(ies).

Route 4. A participant in a project-level assessment under CEAA — including the panel (or joint panel under CEAA and other authority) or mediator, as well as the responsible authority, the proponent or an intervenor — identifies one or more PPP/SEA issues in the course of a project-centred EA and requests the initiation of a federal or joint inter-jurisdictional PPP/SEA that would provide authoritative direction for the project assessment under review and/or for subsequent projects and lower-tier PPP/SEAs. The requestor would be responsible for providing the relevant information on the nature, purposes and proposed scope of the proposed PPP/SEA. Public notice of the request would be published immediately, and the relevant federal authority/proponent would be responsible for providing timely public response indicating that it agrees to proceed, or providing reasons for unwillingness to proceed. Where the federal proponent is unwilling to proceed, the issue would return to project-level process, and the relevant authorities or the panel would have to address the matter within the capabilities of assessment at the project level.

Where a PPP/SEA is initiated in response to a request from the project level, a decision will be needed on what happens with the project assessment while the

PPP/SEA is underway. It seems likely that different cases will merit different treatments. Some project assessments might be able to continue, perhaps with interim strategic guidance. Others might have to be suspended until the strategic issue is resolved. It is not entirely clear where to best assign responsibility for the case-by-case decisions. One option would be to give the task to the SEA authority.

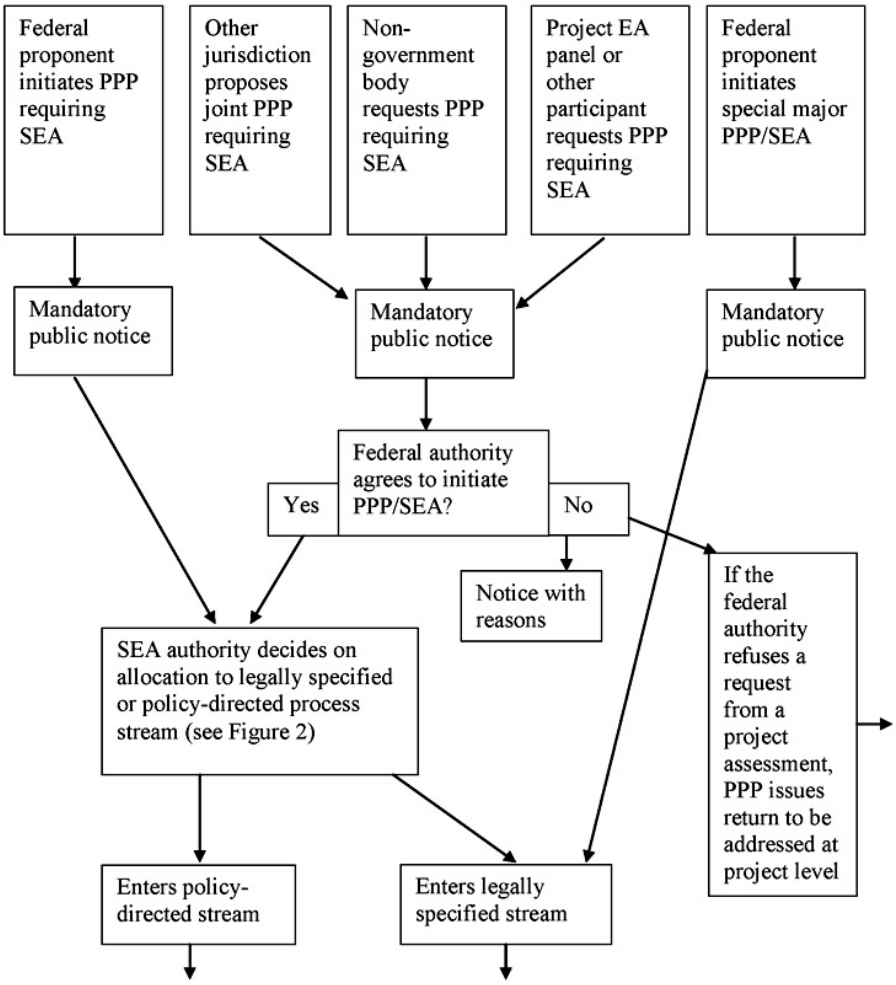
This "off-ramp" mechanism would respond to the frustration of project proponents and project-level assessment participants who find significant strategic level issues (*e.g.* concerning cumulative effects, broad policy implications, needs for new or updated programs or plans) arising in project assessment processes that are not adequately mandated or otherwise equipped to deal with these matters.[40]

Route 5. The law might require the federal government to initiate each year a minimum of two (or some specified larger number) special major PPP/SEAs on matters of national importance on which federal policy, plans and/or programs are lacking or obsolete. Processes for identifying and selecting among candidate topics should be transparent and participative. Process possibilities include a public/stakeholder call for recommendations, solicitation of proposals from provincial, territorial and aboriginal governments, and use of the Parliamentary Committee on Environment and Sustainable Development. The chosen process might begin by developing a prioritized list of current PPPs and existing or emerging areas meriting federal attention in PPP/SEAs.

A schematic of the options is provided in Figure 1. The legitimacy and basic structure of all of these options would need to be established in the SEA law. The initial notice requirement would be mandatory, as would post-decision release of the PPP, decision rationale and final SEA document (see Figures 3 and 4), even though only some of the PPP/SEAs would be undertaken under the legally specified process.

40 Meinhard Doelle & A. John Sinclair, "Time for a New Approach to Environmental Assessments: Promoting Cooperation and Consensus for Sustainability" (2006) 26 Environmental Impact Assessment Review 185–205.

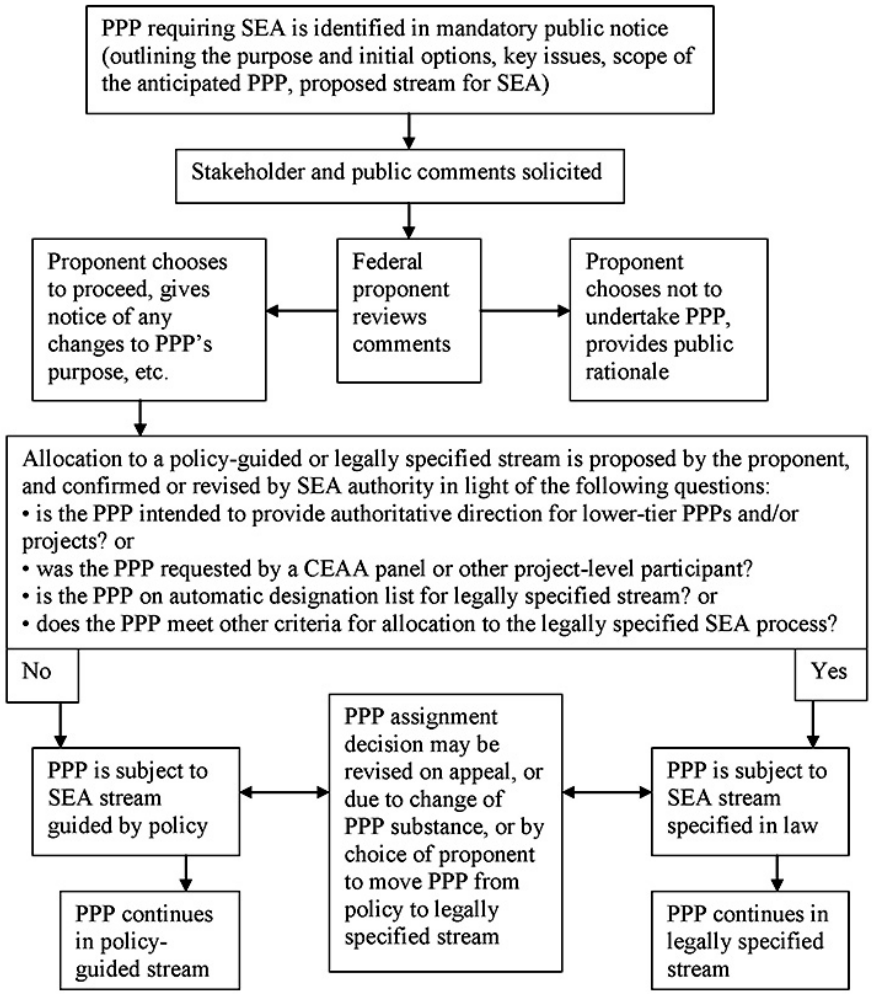
Figure 1: Five basic routes to initiating a strategic assessment



(b) Decision-making on Assigning PPP Cases to the Law or Policy-guided Route

The schematic in Figure 2 outlines a possible general approach to determining which PPP/SEAs are undertaken through the mandatory process steps set out in the SEA law and which ones are undertaken under the process guided only by policy.

Figure 2: Decision- making on assigning PPPs to a policy-guided or legally specified stream



(c) Possible Means of Organizing the Policy-guided and Legally Specified Streams

The essential substantive requirements for SEAs would be the same in the policy-guided and legally specified streams. All PPP/SEAs would begin with the mandatory notice with standard contents as discussed above. All would involve identification of appropriate purposes and options, application of explicit sustainability criteria, consideration of trade-offs and justification of the selection of the preferred options or alternatives in light of the comparative evaluation. All would include transparency requirements and participation opportunities. The policy-guided stream, depicted in Figure 3, would leave more discretion in the hands of the proponent than the legally specified one in Figure 4. The policy-guided stream could have two sub-streams with one requiring more detailed analysis and more public/stakeholder consultation than the other.

Figure 3: The policy-guided stream

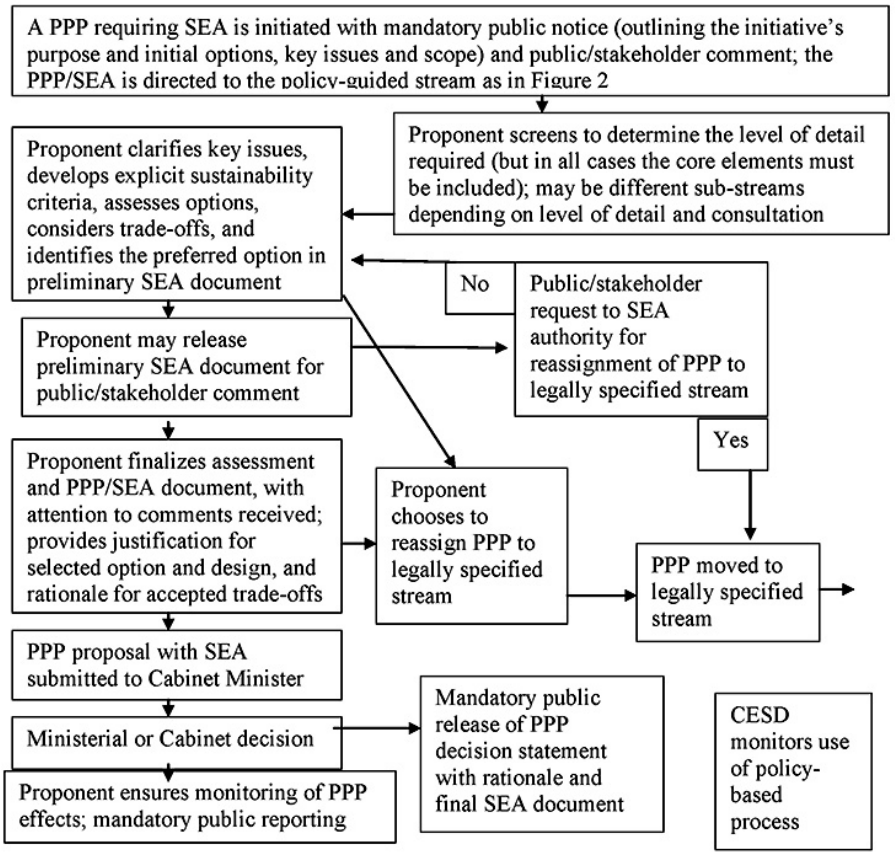
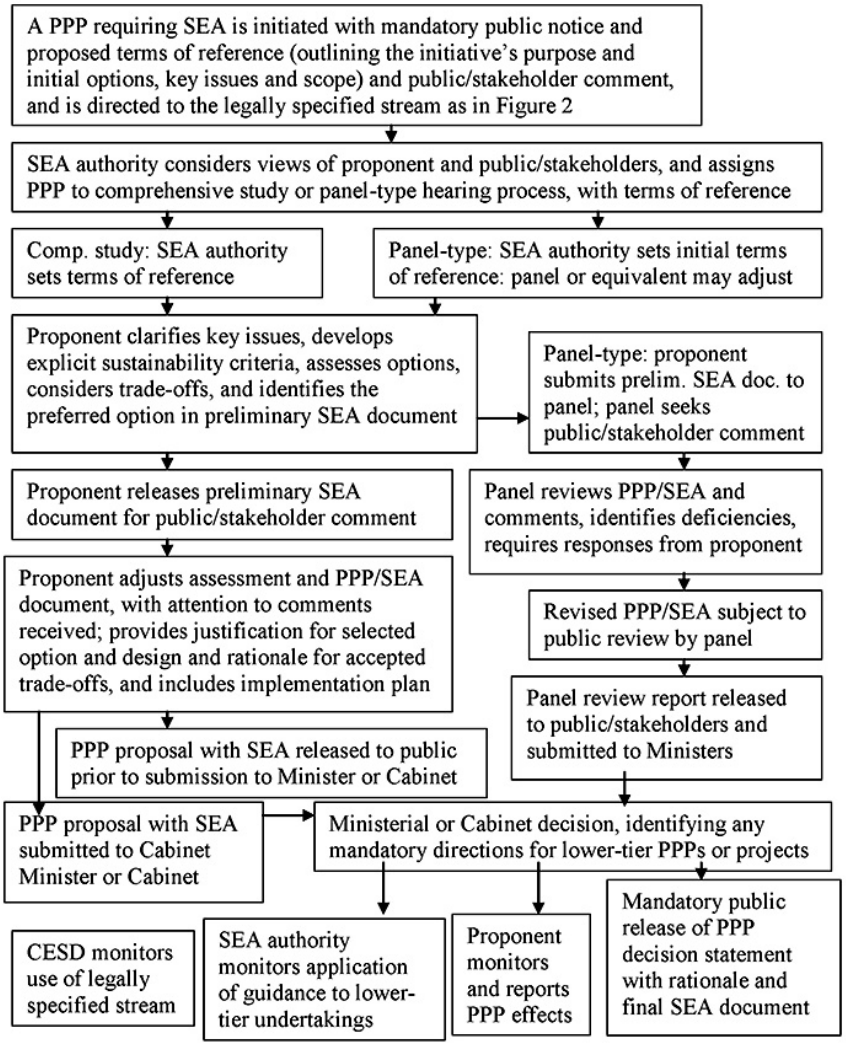


Figure 4: The legally specified stream (including comprehensive study and panel-type hearing sub-streams)



(d) Allocation of Responsibility and Authority

The illustrative approach outlined here presumes that ultimate responsibility for PPP decisions rests with Ministers and/or Cabinet. That applies to decisions on PPPs that proceed through the legally specified SEA stream as well as those that proceed through the policy-guided stream.

The law would establish enforceable requirements concerning SEA obligations and process steps, especially for PPPs in the legally specified stream. Non-compliance with these requirements could lead to cases before proposed adminis-

trative tribunal, and, if necessary, to the courts, and the threat of such enforcement would be expected to play an important role in encouraging much more serious attention to SEA implementation than has been evident over the past 20 years.

Responsibility for developing PPPs would remain with the proponent departments and agencies. The proposed emphasis on pursuit of multiple, mutually reinforcing and lasting benefits could lead to more cases of PPPs developed collaboratively between and among federal proponents. Further attention to collaborative PPP/SEA opportunities would be encouraged by the provisions for PPP initiation requests from outside the federal government (see Figure 1, above), especially where other jurisdictions are the requestors. While proponency and co-proponency would be limited to government bodies, cooperative SEA work engaging private sector and civil society organizations would be possible. It may be that especially where the SEA regime facilitates federal/provincial and other interjurisdictional PPP collaboration, the result would be enhanced willingness on the part of private sector and other interests to contribute to SEA work.

Regional effects assessment is an area of particular interest and potential for collaboration between and among government jurisdictions but also involving non-government participants.[41] Governments and others may choose to do regional cumulative effects studies outside the PPP/SEA process to develop baseline data sets or generally to foster better understanding of ecological and community capacities and vulnerabilities. Often, however, the objective of regional effects studies will be to inform the preparation of new or revised regional plans or other formal PPP guidance for anticipated projects. Where the guidance is to be authoritative, the collaborative regional PPP/SEA work would need to be undertaken under the federal legally specified process stream and the provincial/territorial/Aboriginal equivalents. While extensive collaboration could be involved, responsibility for PPP development would remain with the relevant proponent departments and agencies.

Responsibility for doing the SEA — from initial conception through to effects monitoring — would also remain with the proponent(s) since the core idea is to ensure effective integration of SEA approaches and findings into the conception and development of PPPs. In this, proponents would be required (by law and/or policy depending on the case) to follow the standard general requirements on scope and criteria. In the legally specified process, the core requirements would be enforceable in law, and more participative opportunities for public/stakeholders would be assured. Also the proponents would not have the final word on the SEA terms of reference.

The proposed SEA authority would have limited but key responsibilities as a body independent of any proponent department or agency, able to see across the full range of federal mandate and capacities with arm's-length credibility. The authority would have two especially important responsibilities — to assign particular PPP/SEAs to the policy-guided or legally specified stream (see Figure 2) by applying specified criteria in reviewing proponent proposals and, in the legally specified

41 Canadian Council of Ministers of the Environment, Regional Strategic Environmental Assessment in Canada: Principles and Guidance (Winnipeg: CCME, July 2009), online: <http://www.ccme.ca/ourwork/environment.html?category_id=135>.

stream, to set SEA terms of reference, assigning PPP/SEAs to comprehensive study or panel-type hearing process, and, in the case of the panel-type route, determining what alternative bodies or mechanisms would be suitable substitutes for panels.

Just where this SEA authority should be located is open to debate. Location within a department or reporting to a minister with sectoral responsibilities would not be suitable. A position at the centre of government, such as with the Privy Council Office, would be preferable. Greater arm's-length credibility would be gained if the authority were to report to Parliament, rather than to the Government, but location within the conventional public service structure would facilitate closer familiarity with the range of emerging initiatives and associated opportunities (*e.g.* for recognizing beneficial components to include in terms of reference).

A variety of administrative functions would also need a home. These would include managing the public registry, supporting panel processes and certain other tasks now assigned to CEAA for project-level assessments.

Finally, responsibilities for monitoring would need to be specified. Leaving most monitoring tasks in the hands of the PPP proponent would be consistent with the expectation that PPPs are often long-lasting and in need of continued review for adjustment, renewal, replacement or termination. Some effects monitoring would, however, be best done by agencies with more relevant expertise, and/or by stakeholders with suitable proximity and strong motivations to ensure positive PPP results. Overall monitoring of at least some aspects of compliance with SEA requirement would remain appropriately with the Commissioner for Environment and Sustainable Development.

(e) What is Mandatory and What is Guided by Policy

To provide a consistent basis for the legally specified and policy-guided streams, the SEA law would need to provide the overall framework for the federal SEA regime as well as set out the particular mandatory requirements for PPP/SEAs undertaken in the legally specified stream.

The key basic framework contents for the SEA law would cover:

- matters of application — the basic rules and process to be used for determining when some form of SEA process is to be initiated, including provisions for the five routes discussed above and for public notice when a PPP/SEA process is initiated;
- matters of assessment scope and criteria — the generic scope and sustainability criteria and trade-off rules for SEAs; required comparison of alternatives; development of case-specific PPP/SEA evaluation and decision criteria and criteria for determining assigning PPP initiatives to the policy-guided or legally specified SEA stream; and requirements for public notice when a PPP/SEA process is initiated; and
- matters of authority and administration — including decision-making responsibilities, establishment of the SEA authority and SEA Registry; provisions for joint PPP/SEAs with non-federal jurisdictions and for cooperative implementation; provisions for monitoring and reporting of PPP effects; and provisions for monitoring and review of the SEA regime.

Provisions of the SEA law setting out the legally specified stream (see Figure 4) would ensure mandatory application of the standard requirements including core

purposes and generic criteria for PPP/SEAs, aiming at positive contributions to sustainability. The main focus, however, would be on the legally specified process responsibilities, components and options. The law would establish:

- SEA authority responsibilities and rules for setting SEA terms of reference, assigning legally specified process PPPs to comprehensive study or panel-type hearing process, and, in the case of the panel-type route, determining what alternative bodies or mechanisms would be suitable substitutes for panels;
- procedures for comprehensive study and panel-type processes;
- specification of mandatory information release and opportunities for public comment at various stages in the comprehensive study and panel-type processes;
- provisions for participant funding; and
- procedures for panel appointment and substitution of equivalent mechanisms including multi-jurisdictional joint panels and the equivalent.

The law would also set out the essentials for SEA documentation and decision-making, including:

- requirements for initial notice of the commencement of PPP development;
- requirements preparing, reviewing and adjusting a preliminary SEA document in each case providing specified sustainability-focused evaluation criteria, comparative evaluation of the alternatives in light of the criteria, justification for the selection of the preferred option and the proposed PPP design, and rationale for trade-offs to be accepted;
- establishment of a PPP/SEA decision with contents binding on the development and review of subsequent undertakings (lower-tier PPPs and projects), with limitations on the duration of the binding requirements and provisions for exceptions (*e.g.* due to unanticipated and changed circumstances);
- requirements for the basic contents for PPP/SEA decision documents including the rationale for PPP selection and design in light of sustainability criteria, and justification for any accepted trade-offs,
- requirements for public release of the final SEA document;
- monitoring responsibilities; and
- right of appeal of key decisions.

The policy-guided stream (see Figure 3) would be set out in a new Cabinet Directive or an equivalent mechanism that would require adoption of the standard core purposes, scope and criteria for PPP/SEAs, aiming at positive contributions to sustainability, comparison of alternatives, etc. The guidance would provide the policy stream equivalent of the legal stream's requirements for the contents of the preliminary SEA document, for transparency and public/stakeholder participation, for the contents of PPP decision statements, and for allocation of monitoring responsibilities. It would also provide details on process step expectations, from proponent screening to determine the level of detail required in each case, to required contents

of PPP decision statements. And, it would establish the process for transfer of a PPP from the policy-guided stream to the legally specified stream.

Detailed policy guidance would also be needed for many aspects of the legally specified process.

8. CONCLUSIONS, RESIDUAL ISSUES AND FUTURE PROSPECTS

The analysis above in section 6 finds that a combined law and policy regime would be preferable to a purely legal or policy-based approach to SEA in Canada. The combined approach would apply lessons from the international literature while respecting Canadian context and experience. It would provide a consistent framework for effective integration of key ecological, social and economic concerns and attention to sustainability objectives, combined with great flexibility in implementation. It would also provide considerably strengthened motivation, a foundation for binding direction for lower-tier PPP and project-level undertakings, and a means of enhancing credibility and transparency at the strategic level while reducing burdens at the project level.

The rough sketch of a combined law and policy regime for SEA in Canada in section 7 indicates that such a regime can be depicted quite easily. Many significant design questions remain, however. For example, what should be the core criteria for judgments on assignment of initiated PPPs to the policy or legally specified SEA process? What arrangements can be made to facilitate joint federal-provincial SEAs in the legally specified stream where the provincial partner does not have a parallel legal foundation? What mechanisms should be provided in the various SEA streams to ensure meaningful consultation, mediation where suitable, and impartial dispute response where consensus is not achievable? How can process design ensure that PPP/SEAs are sufficiently detailed to justify binding direction for project-level planning and approvals? How should responsibility for funding various aspects of SEAs (*e.g.* cumulative effects research, panel reviews, participant funding, and effects monitoring) be allocated among government agencies, other participating jurisdictions and relevant private sector players? How best can public/stakeholder consultation and more general process transparency and accountability priorities be reconciled with legitimate needs for Cabinet confidentiality? How best can PPP/SEAs be used to enhance early and effective consultation with Aboriginal groups and accommodation of their interests? What process adjustments are needed for application to PPPs implemented beyond Canada, including development assistance programs prepared in cooperation with other donors? And aside from establishment of a legislated foundation for SEA, what are the most promising ways of enhancing the motivations of PPP proponents and other participants to adopt SEA principles and practices?

These questions are difficult. But all of them involve more or less familiar issues in the development of new areas of law and policy, and, for most of them, there is a long record of experience from which to draw. They are included here to provide a somewhat more complete indication of what is needed to strengthen federal SEA in Canada, and to recognize that the task involves careful attention to the details as well as adoption of the proper founding principles.

The complexities of regime design are, however, not the most significant challenges in strengthening SEA in Canada. The big barriers are the continuing hesi-

tancy of governments to open up their strategic decision-making and the engrained habit of treating assessment as an approval hoop rather than a route to better decisions. The rapid expansion of SEA practice internationally suggests that these barriers are crumbling in many jurisdictions. As the imperatives for more sustainable behaviour become more obvious and pressing, Canadian authorities too should recognize the positive promise of SEA as a means of integrating long-term objectives and providing better guidance for more specific undertakings.

While more work is needed, the analysis reveals plenty of potential for strengthened SEA to improve strategic decision-making in Canada — to make it more integrated, far sighted, open, efficient, credible and defensible, and, most importantly, more likely to bring consistent delivery of lasting benefits from strategic initiatives.