

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

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

Through the intervening 45 years, assessment law and practice in Canada and elsewhere have tested a diversity of forms, and provided a rich base for learning how to do better. For Canadian applications the key lessons for law reform have been summarized in depictions of regime design elements for “next generation assessment”<sup>1</sup>

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

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

### ***The basic requirements for sustainability in next generation assessment***

For sustainability-enhancing purposes, the federal law should require every approved undertaking to make a positive contribution to sustainability. To do this, the law must incorporate sustainability-based purposes, and decision rules to

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

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<sup>1</sup> Robert B. Gibson, Meinhard Doelle and A. John Sinclair, “Fulfilling the promise: basic components of next generation environmental assessment,” *Journal of Environmental Law and Practice* 27 (2016), pp.251-276. The associated monograph is available at <https://uwaterloo.ca/next-generation-environmental-assessment/research-contributions/dissertations-theses-monographs-and-major-reports>.

case;

- focus on identifying best options (rather than merely evaluate the “acceptability” of projects and undertakings as proposed by their proponents); and
- discourage trade-offs and instead aim to deliver to the extent possible multiple, mutually reinforcing, fairly distributed and lasting gains, while avoiding significant adverse effects.

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

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

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

<b>Next generation requirement</b>	<b>Evaluation of the provisions in the proposed Act</b>
Positive contribution to sustainability as central test for each assessed undertaking	Yes, but needs clarification and support: included in purposes, factors for consideration and factors for decisions, but could be undermined by absence of criteria and other limitations (see below)
Core sustainability-based criteria in law	Missing: could be provided under general regulation making provision, but no requirements or expressed intent to do so
Criteria to be specified for the context in each assessment	Missing: could be required, but application would be difficult and inconsistent without core criteria for application in all cases

Avoidance of adverse effects	Yes, but could be undermined by absence of trade-off guidance
Trade-off guidance	Missing: not mentioned, could be provided under general regulation making provision, but no requirements or expressed intent to do so
Broad scope covering all key sustainability-related effects	Yes, mostly: explicitly covers direct, indirect and cumulative, positive and adverse effects, but should also explicitly require attention to inter-generational effects
Application to projects and regional and strategic level undertakings important in transition to lasting wellbeing	Limited, but possibly important improvements if clarified: (i) Projects – maybe some improvement: major ones in Designated Projects regulation, but even they may be screened out in the planning phase; no explicit provision for application to smaller projects, even those with cumulative effects (except for some categories of smaller government projects covered by a non-transparent internal process) (ii) Regional undertakings – maybe some improvement: opening provided but with emphasis on regional studies of cumulative effects; no mention of assessment of possible responses to identified issues (e.g., regional plans based on alternative scenarios); no requirement for response to or decision on report produced (iii) Strategic undertakings – yes but needs clarification: opening and potentially broad ambit provided, but process ill-defined; no requirement for response to report produced; may be rarely used though welcome assessment of implications of climate commitments promised
Comparative evaluation of alternatives in light of context-specified sustainability criteria	Uncertain: alternatives to and alternative means both listed as mandatory considerations in assessments, but no explicit requirement for assessment to do comparative evaluation of project and alternatives
Meaningful public engagement	Uncertain, needs clarification: opportunities mandatory except in non-transparent process for smaller projects; specifics mostly missing (i) little elaboration in planning phase, (ii) Agency reviews not required to report on public comments (iii) panel reviews required to report on public comments, but assessment process not specified (iv) both regional and strategic assessments required to provide opportunity for public participation, but processes unclear

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

***Overall evaluation of the Impact Assessment Act as introduced***

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

As proposed the Act offers

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

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