

## **Sustainability foundations for new federal assessment law**

A submission to the Government of Canada's Environmental and Regulatory Reviews Process

Robert B. Gibson  
School of Environment, Resources and Sustainability  
University of Waterloo  
28 August 2017

This submission is a package of interrelated and somewhat overlapping documents offering guidance for the assessment law reform exercise. Most have been circulated in draft to various participants in the assessment reform process, including those inside government and members of the Minister's Multi-Interest Advisory Committee. The contents owe much to the resulting discussions.

The documents included are as follows:

- *Options and particulars for incorporating sustainability in the new assessment statute, regulations and policy guidance*, a brief analysis (12pp.) which addresses key sections of the statute for establishing and delineating sustainability considerations
- *Sustainability-based assessment requirements, including criteria, for new federal assessment law and process*, a revised and expanded paper (18pp.) based on "Sustainability Assessment," the discussion paper for session 5 of the Federal Environmental Assessment Reform Summit II, Ottawa 7-9 June 2017, also posted at <http://www.envirolawsmatter.ca/easummit2>
- *Statutory Provisions on Sustainability-based Purpose, Scope and Criteria*, a one-page summary of the key provisions
- *Still a long way to go: an analysis of the federal assessment processes* Discussion Paper in light of next generation assessment requirements, a detailed examination (30 pp.) of the assessment process portion of the government's Discussion Paper
- *The core components of next generation environmental assessment for federal application in Canada*, a summary (6pp.) of the overall set of components needed for reform of assessment law to reflect learning over the past 40 years, originally prepared for submission to the Expert Panel on assessment law reform
- *Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment*, a paper published in the *Journal of Environmental Law and Practice*, volume 27 (2016), with the more complete presentation of the core components summarized in the document above.

## ***Credentials***

Robert Gibson is a professor in the School of Environment, Resources and Sustainability at the University of Waterloo, where he has taught since 1981. He has been involved in EA related work since early 1970s and has experience in process design, review and/or application in most Canadian jurisdictions and countless cases.

Dr. Gibson was lead author of the “Next generation environmental assessment” monograph and paper,<sup>1</sup> as well as two books on sustainability assessment,<sup>2</sup> and many other papers, commissioned reports, and formal submissions to earlier proceedings on these topics (selected materials are provided in the supplementary materials). He is currently a member of the Minister’s Multi-Interest Advisory Committee (MIAC) on this environmental assessment review.

---

<sup>1</sup> See 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; available at <https://uwaterloo.ca/next-generation-environmental-assessment/research-contributions/published-papers>.

<sup>2</sup> Robert B. Gibson, with Selma Hassan, Susan Holtz, James Tansey and Graham Whitelaw, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), 254pp. and Robert B. Gibson, editor, *Sustainability Assessment: Applications and Opportunities* (London: Routledge/Earthscan, 2017 [released September 2016]), 264pp.

## Contents

Options and particulars for incorporating sustainability in the new assessment statute, regulations and policy guidance.....	4
Sustainability-based assessment requirements, including criteria, for new federal assessment law and process.....	16
Statutory Provisions on Sustainability-based Purpose, Scope and Criteria .....	34
Still a long way to go: ..... an analysis of the federal assessment processes <i>Discussion Paper</i> in light of next generation assessment requirements .....	35 35
The core components of next generation environmental assessment for federal application in Canada.....	65
Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment.....	71

## **Options and particulars for incorporating sustainability in the new assessment statute, regulations and policy guidance**

***Robert B. Gibson***

***SERS, University of Waterloo***

***11 August 2017, revised 26 August 2017***

### ***Starting point***

The federal government has indicated an inclination to move from the current core assessment test of “no significant adverse environmental effects unless justified in the (undefined) circumstances” to a more comprehensive and positive “in the public interest” test.

It has also been advised by its Expert Panel on assessment reform and its Multi-Interest Advisory Committee to adopt a sustainability-based approach to assessment law and process.

The two are highly compatible. Sustainability-based assessment is, essentially, a comprehensive approach to enhancing lasting as well as more immediate wellbeing through decision making on undertakings subject to assessment law. Any responsible interpretation of the public interest must be virtually identical.

The following discussion uses sustainability language, mostly because it has been better elaborated for assessment purposes. Using the specifics here to define and apply a public interest test would entail only some tweaking of the language and some additional efforts to ensure that principles inherent in “sustainability” are made explicit if other language is used. Three key principles are involved:

- (i) sustainability is in the inter-generational as well as immediate public interest; and
- (ii) progress towards sustainability demands mutually supporting economic, social, ecological and other gains, not “balancing” these as competing objectives (it recognizes that trade-offs may often be necessary, but aims to avoid them to the extent possible);
- (iii) sustainability depends on learning, especially building the capacities of all participants to understand the issues and options and to work together towards solutions.

### ***Key components that need to be designed to facilitate public interest sustainability***

1. purposes and principles
2. scope and substance of requirements for information and analysis
3. transparent, participative and impartial public process for application, case planning, impact assessment, assessment review, decision making and follow-up
4. decision test, with associated criteria

- plus transparency, impartiality, timeliness, combination of flexibility and predictability, respect for Indigenous rights and interests, cooperation with other jurisdictions

***Key sections of the statute for establishing and delineating sustainability considerations***

1. purposes (core aims, implying applications, requirements, basic test, criteria, ...)
2. definitions and scope (clarifying concepts, scope and principles)
3. factors for consideration in assessments
4. preparation of assessment plan, including case-specific guidance, for each case
5. decision making (test, criteria, transparency,...)
6. provisions for making regulations to specify the statutory requirements
7. provisions for policy guidance (e.g., on specifying the key issues and associated criteria in individual cases

- all of which are interdependent and need to be conceived and developed as a package.

***Particular sections***

*1. The purposes*

This section should incorporate two categories of purposes:

- (i) the core purpose that underlies the public interest test in decision making on undertakings subject to this law:
  - positive contribution to sustainability defined as enhancement of both lasting and more immediate wellbeing, while avoiding or mitigating adverse effects, especially significant ones, to the extent feasible given the reasonable alternatives
  - identification of best option (requires comparative evaluation of reasonable alternatives), including the null option
- (ii) other purposes that underlie the substance of the Act or particular components of it, for example:
  - promoting and facilitating inter-jurisdictional cooperation in assessment,
  - respecting Aboriginal and treaty rights and interests
  - ensuring opportunities for meaningful public participation

[see CEAA 2012 s.4]

*2. Sections on the factors for consideration and the test and criteria.*

The scope of assessment considerations is introduced by the purposes and elaborated in several sections including

- the initial definitions section;
- possible sections on key concepts (e.g., CEAA 2012, s.5 defining the scope and substance of the effects to be considered);

- the section setting out the factors for consideration in impact assessments and reviews (e.g., CEAA 2012, s.19);
- sections setting out the core test for proposed undertakings reviewed under the Act, and providing initial elaborations of the principles and criteria to be applied; and
- plus sections setting out the regulation making powers, some of which may involve details on the test, principles and criteria for decisions and associated requirements for information and analysis in impact assessment documents and reviews.

The section on factors for consideration is most direct in setting out the requirements that reflect the scope and purpose of assessments.

The section on the core test and criteria should also be reasonably well developed, especially because the public interest/contribution to sustainability test is new in federal assessment law and the implications need to be clear, though the details are properly left for regulations and policies.

*(i) Factors for consideration*

Federal assessment law should apply to strategic and regional as well as project-level undertakings. For the purposes of illustration here, the discussion will focus on factors for consideration in project-level assessments. Factors for consideration in regional and strategic-level assessments will be similar but not identical.

Two documents are attached as appendices to this note to illustrate how a public interest/sustainability-based could be incorporated in the statute:<sup>3</sup>

- Appendix 1: a revised version of CEAA 2012 s19, which is the current section on factors for consideration;
- Appendix 2: a complementary presentation of the same general approach but organized by application to the comparative assessment of the project options.

*(ii) Basic decision criteria*

The basic test in decisions about proposed undertakings in light of their assessments and review findings is essentially what is entailed by the core purpose of the Act, as set out above:

- will the proposed project (or strategic undertaking) deliver an overall positive contribution to the public interest/sustainability, defined as enhancement of both lasting and more immediate wellbeing, while avoiding or mitigating adverse

---

<sup>3</sup> Both of these documents are my versions of working pieces prepared by several authors in the process of developing a forthcoming submission from Martin Olszinski and others, including me, on what should be in the new law. What will be in the final submission is likely to be different from what is here. The other authors deserve credit for many of the good ideas but are not responsible for these versions.

effects, especially significant ones, to the extent feasible given the reasonable alternatives?

- does it represent the best option, given the public interest purpose of the undertaking and in light of a comparative evaluation of the reasonable alternatives, including the null option?

This core test should be accompanied in the statute by very basic principles defining the public interest/sustainability test, including trade off rules. That would involve

- provision of core criteria, including criteria for trade-off evaluations, in the statute;
- provisions for more specific criteria in regulations and policy;
- provisions for more specific trade-off guidance;
- requirements for application of the test and criteria and trade-off guidance in statute and as elaborated in regulation and policy;
- application of criteria guidance in development of policy documents;
- application of guidance for trade-off rule specification in policy documents; and
- provision/requirements for case-specific criteria and trade-off rules for particular cases, recognizing key issues and associated priorities of the case and context.

The decision criteria imply criteria for assessment evaluations and will need to be aligned with the section on the factors to be considered in assessments.

The requirements for comparative evaluation of reasonable alternatives need to

- be tied to public purpose(s) of the undertaking, also consideration of the proponent's interest/capacities if a private sector undertaking;
- include alternatives to and alternative means as appropriate;
- provide for the reasonable alternatives to be determined case-by-case in the development by the Agency of an initial assessment plan in the early engagement and planning phase;
- provide for regulatory and/or policy guidance (e.g. sectoral) on usually relevant reasonable alternatives;
- provide for case-by-case identification of what alternatives are to be considered by the proponent and what broader alternatives are to be addressed by government bodies participating in the assessment;
- provide for development of case-specific criteria and trade-off rules for particular cases; and
- provide for development of guidance in policy documents on the specification of criteria and trade-off rules in individual assessments.

### 3. Details on the generic criteria for evaluation of effects, alternatives and trade-offs<sup>4</sup>

For ease of understanding, consistency of application and credibility of justifications for decisions, the basic sustainability-based public interest test and associated requirements set out above need to be clarified through provision of

- generic criteria in the statute;
- further broadly applicable explanation in regulations and/or policies; and
- specification for the case and context in individual applications to undertakings subject to assessment requirements under the Act.

Generic sustainability-based criteria for evaluation of effects, alternatives and trade-offs should be included in the statute. Three sets of statutory criteria are presented below:

- statutory criteria based on generic requirements for progress toward sustainability;
- special criteria recognizing key Canadian priorities; and
- criteria for particular application in trade-off evaluations and decisions.

In each case the structure of the criteria list may not be appropriate for direct adoption in law. However, the points should serve well enough to convey the substance to be included.<sup>5</sup>

#### *(i) Statutory criteria based on generic requirements for progress towards sustainability*

In the following list, the criteria are expressed as positive expectations that may or may not be met by a proposed undertaking or alternative. Note also that these are broad criteria that also serve as categories for more detailed expectations. They will need elaboration to recognize the particular concerns and opportunities, etc. of individual cases and contexts:

- Ecosystems and human-environment relations
  - maintain, restore or enhance the lasting viability of biophysical systems and socio-ecological systems to maintain life-support services (such as those related to climate stability, flood attenuation, sustainable food systems)
- Livelihoods and health
  - increase lasting opportunities for everyone to have the fundamentals for a decent, healthy life and rewarding livelihood
- Intragenerational equity

---

<sup>4</sup> Further details on these matters are provided in a companion document, “Sustainability-based assessment requirements, including criteria, for new federal assessment law and process”

<sup>5</sup> Here and elsewhere in this document, the focus is on setting out the crucial content for the new law. While some of the language may be directly suitable for adoption in legislative drafting, the intent here is not to draft law. Anna Johnston, with assistance from others, has been preparing a document outlining recommended legislative language for the sustainability criteria and trade-off rules. While the content of that document may differ in some specifics from the content here, the approach taken is likely to provide a suitable model for translating the material here into legislative language.

- ensure fairness in the distribution of benefits and costs, opportunities and risks, recognizing needs to reduce existing inequities (such as those related to gender, economic status, Indigenous heritage, etc.)
- Intergenerational equity
  - favour options that are most likely to preserve or enhance the opportunities and capabilities of future generations to live sustainably
- Resource maintenance and efficiency
  - reduce extractive damage and waste, and cut overall material and energy use per unit of benefit to a level that is sustainable in the long run
- Understanding, participating and governing
  - enhance sustainability-based understanding, opportunities and capacities for individuals and communities to participate meaningfully in collective deliberations and decision making
- Uncertainty
  - incorporate respect for the limits of present knowledge, the likelihood of surprises and the need for precautionary and adaptive approaches
- Integration
  - attempt to meet all requirements for sustainability together as a set of interdependent parts, seeking mutually supportive gains

*(ii) Special criteria recognizing key Canadian priorities*

- Indigenous rights and reconciliation
  - facilitate and enhance the meaningful exercise of Aboriginal and treaty rights and community health
- Climate change
  - contribute to Canada's efforts and ability to meet its international commitments on climate change (currently the *Paris Agreement*)
- ...

*(iii) Criteria for particular application in trade-off evaluations and decisions*

The following trade-off rules are to be applied where there is a need to determine

- whether the proposed undertaking or an alternative would make an overall contribution to sustainability in spite of having predicted adverse effects in one or more of the criteria categories; and/or
- whether an undertaking or alternative could be approved despite entailing a significant adverse effect in any criteria category.

An undertaking that entails such a trade-off shall be permitted only where *all* of the following conditions are met:

- The undertaking would deliver overall progress towards meeting the requirements for sustainability.
- The proponent has met the burden of demonstrating in light of the legislated sustainability-based criteria that the undertaking with the proposed trade-off(s) represents the best option for delivering mutually reinforcing, fairly distributed and

lasting cumulative contributions, and achieving the most positive feasible overall result with the least adverse effects, in comparison with the reasonable alternatives.

- The undertaking entails no trade-off that involves a significant adverse effect on any sustainability criterion area, unless the alternative is acceptance of an even more significant adverse effect, recognizing that
  - no compromise or trade-off is acceptable if it entails further decline or risk of decline in a major area of existing concern or if it endangers prospects for resolving problems identified as global, national and/or local priorities.
  - no trade-off is acceptable if it deepens problems in any requirement area where further adverse effects may imperil the long-term wellbeing, even if compensations of other kinds, or in other places, are offered.
  - no enhancement can be permitted as an acceptable trade-off against incomplete mitigation of significant adverse effects if stronger mitigation efforts are feasible.
- The undertaking involves no displacement of a significant adverse effect from the present to the future except where the alternative is displacement of a more significant negative effect from the present to the future.
- All proposed trade-offs have been accompanied by an explicit justification based on openly identified, context-specific priorities as well as the sustainability-based decision criteria and the general trade-off rules.
- All proposed trade-offs have been examined and justified through processes that include open and effective involvement of all stakeholders.

## Appendix 1

### Factors to be considered in project-level assessments presented as a revision of s.19 in CEAA 2012

*- a similar section would be needed for factors to be considered in strategic-level assessments, including regional assessments*

X.1) The impact assessment of a designated project must contain a rigorous and comprehensive assessment of the following factors:

- (a) the individual and cumulative effects<sup>6</sup> of the designated project, including
- effects on environmental, social, economic, health, and cultural matters or any combination of these
  - positive and adverse effects
  - direct and indirect effects (e.g., upstream and downstream);
  - near term and long term effects (including through the lifetime of the project and any lasting legacy effects);
  - the range of possible effects recognizing uncertainties, including the effects of malfunctions or accidents that may occur in connection with the designated project;
  - interactions between and among effects;
  - the distribution of positive and adverse effects, including analysis of gender equity effects and effects on Indigenous rights, interests and communities
  - cumulative effects that are likely to result from the effects of the designated project in combination with other factors including physical works and activities that have been or are being carried out or are reasonably anticipated;<sup>7</sup>
- (b) the extent to which the effects referred to in paragraph (a) do or do not make positive contributions to sustainability, while avoiding significant adverse effects
- (b2) assessment principles and criteria established under this Act
- (c) comments from the public that are received in accordance with this Act,
- (d) mitigation measures that are technically and economically feasible and that would mitigate the adverse effects]of the designated project;
- (e) the requirements of the follow-up program in respect of the designated project;

---

<sup>6</sup> Cumulative effects are included here as well as below because most independent impact assessment experts (especially the ecosystem science types such as Duinker and Greig) argue that the core focus should be on cumulative effects since these are always what matters in reality. Also assessments that cover project effects and then add a chapter on cumulative effects are usually based on indefensible methodology (neglect the cumulative contributions of modest project effects) and reach misleading conclusions.

<sup>7</sup> “Reasonably anticipated” is language from current CEAA guidance. It avoids conflicts over the potential narrow interpretations of the ambiguous phrase “will be carried out.”

- (f) the public-interest purposes of the designated project over its full lifecycle;
  - (g) the effects and relative merits of reasonable<sup>8</sup> alternatives to and alternative means of carrying out]the designated project that are technically and economically feasible, including the null alternative;
  - (h) any change or risks to the designated project that may be caused by the environment;
  - (i) the results of any relevant regional studies, regional assessments or strategic assessments;
  - (j) Indigenous knowledge about the project and its context and effects;
  - (j2) effects on Aboriginal and treaty rights and interests;
  - (j3) trade-offs and any rationales for accepting or rejecting them; and
  - (k) any other matter relevant to the environmental assessment that the Agency/Commission, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.
- (2) The scope of the factors to be taken into account within the categories of factors identified under paragraphs (1)(a), (b), (d), (e), (g), (h) and (j) is determined by the Agency or a review panel, as the case may be.
- (3) In determining the scope of factors pursuant to section 2, the Agency or Review Panel must have regard to the purposes of the Act and their duties pursuant to section 4.

---

<sup>8</sup> The “reasonable alternatives” language has been favoured in MIAC because it can be specified to recognize the different capacities of private and public sector proponents to consider alternatives to.

## **Appendix 2**

### **Requirements for an impact assessment of a designated project in comparison with reasonable alternatives and the null alternative**

The impact assessment of a designated project must include comprehensive consideration and explanation of the following:

#### ***Designated project***

- (a) the public interest purpose(s) of the designated project over its full lifecycle;
- (b) the positive and negative effects of the designated project over its full lifecycle and the lifetime of any lasting legacy effects, including the direct, indirect, short term and long term, and cumulative effects that are likely to result from the designated project, with recognition of uncertainties and their implications, in light of the purpose of the Act, the scope of the interrelated environmental, economic, social, cultural, and health aspects of sustainability, and considering the sustainability-based criteria set out in the Act and the specification of those criteria for the case, with particular attention to
  - (i) the foreseeable interactions among the project's effects on the *Canadian Impact Assessment Act's* requirements for progress towards sustainability;
  - (ii) the distribution of positive and adverse effects, including analysis of gender equity effects and effects on Indigenous rights, interests and communities;and
  - (iii) any foreseeable trade-offs among the positive and adverse effects on the requirements necessary for progress towards sustainability;

#### ***Reasonable alternatives***<sup>9</sup>

---

<sup>9</sup> In MIAC, we have been relying on the concept of “reasonable alternatives”, the range of which is likely to vary from case to case and to be best specified in the early engagement and planning phase of assessment. The reasonable alternatives for a public sector proponent would normally be broader than those for a private sector proponent. Also locational alternatives would be more constrained for a mine than for a linear transportation project.

Also there will be project-level cases where a credible assessment would need to consider strategic alternatives (and cumulative effects and broad policy issues) that are beyond the potential capacity and authority of the proponent. So the agenda for the early engagement and planning phase would need to include identification of what alternatives the proponent should address and what (broader) alternatives should be addressed by the relevant government authorities.

(c) the positive and negative effects of reasonable alternatives to the project as proposed that are capable of achieving the purpose(s) of the designated project, including the effects of alternatives in project components and design and the more general approach or character of the project, including the direct, indirect, and cumulative effects that are likely to result from the alternatives over their full lifecycles, in light of the purpose of the Act, the scope of the interrelated environmental, economic, social, cultural, and health aspects of sustainability, and considering the sustainability-based criteria set out in the Act and the specification of those criteria for the case, with particular attention to

(i) the foreseeable interactions among the alternatives' effects on the requirements for progress towards sustainability over their full lifecycles;

(ii) the distribution of positive and adverse effects, including analysis of gender equity effects and effects on Indigenous rights, interests and communities;  
and

(iii) any foreseeable trade-offs among the positive and adverse effects on the requirements necessary for progress towards sustainability;

***Null alternative***

(d) the positive and negative effects of the null alternative (the future in which neither the designated project nor any alternative means is approved), including the direct, indirect, and cumulative effects that are likely to result from the null alternative, in light of the purpose of the Act, the scope of the interrelated environmental, economic, social, cultural, and health aspects of sustainability, and considering the sustainability-based criteria set out in the Act and the specification of those criteria for the case, with particular attention to

(i) the foreseeable interactions among the null alternative's effects on the requirements for progress towards sustainability;

(ii) the distribution of positive and adverse effects, including analysis of gender equity effects and effects on Indigenous rights, interests and communities;  
and

(iii) any foreseeable trade-offs among the positive and adverse effects on the requirements necessary for progress towards sustainability;

***Public participation***

(e) comments from the public, including local residents, potentially affected communities, parties with knowledge relevant to the designated project, its alternatives, and/or the impact assessment process itself, and any otherwise interested parties;

***Peer-reviewed evidence and Indigenous knowledge***

(f) comments, including but not limited to any peer-reviewed analysis, from internal governmental scientific secretariats, advisory committees, independent experts or other government bodies;

***Comprehensive and integrated comparative assessment***

(g) whether, based on a comprehensive and integrated comparative analysis of all of the above factors in light of explicit sustainability-based criteria, the project as proposed is preferable to

(i) the reasonable alternatives for fulfilling the purpose(s) of the designated project; and

(ii) the null alternative

in terms of an overall contribution to sustainability.

## **Sustainability-based assessment requirements, including criteria, for new federal assessment law and process**

*A revised and expanded paper based on “Sustainability Assessment,” the discussion paper for session 5 of the **Federal Environmental Assessment Reform Summit II**, Ottawa 7-9 June 2017. Posted at <http://www.envirolawsmatter.ca/easummit2>*

Robert B. Gibson  
School of Environment, Resources and Sustainability, University of Waterloo

Meinhard Doelle  
Schulich Law School, Dalhousie University

and

A. John Sinclair  
Natural Resources Institute, University of Manitoba).

### ***Preface***

Sustainability assessment embraces a range of processes that aim to integrate sustainability objectives into decision making and make more transparent the information and criteria on which those decisions are made. A sustainability-based approach to assessment has enjoyed widespread support in the deliberations on federal assessment law reform. Sustainability-based assessment has been recommended by the Expert Panel for the Review of Federal Environmental Assessment Processes (The Panel), supported by the Minister’s Multi-Interest Advisory Committee, and taken for granted in the recent report Expert Panel on the Modernization of the National Energy Board.

The premise of this session is that sustainability-based purposes will be adopted as a foundation for the new federal assessment law and process.

### ***Agenda***

Smooth adoption of a sustainability-based approach to assessment will require reasonably clear and consistent basic requirements and provisions for more detailed elaboration. This note attempts to identify

- the main elements for entrenchment and elaboration of a sustainability-based approach in federal assessment law;
- a suitable framework for sustainability-based decision criteria and trade-off rules;
- the substance of core criteria and trade-off rules that should be included in the statute;

- the related, broadly applicable essentials that should be addressed in regulations, including elaborations of the criteria;
- the matters to be addressed in policy guidance, especially on more specific criteria-related issues and methods, and how to specify the criteria for application in individual assessments; and
- the requirements for the specification of the criteria and trade-off rules in individual assessments.

Most of the governance implications for associated responsibilities and decision making are left for other sessions.

### ***Initial assumptions***

In addition to the initial premise that the new federal assessment law and process will be built on a sustainability-based foundation, the following five further assumptions represent the starting point for the discussion:

- (i) The basic *purpose* of the reformed law and process will be to deliver positive contributions to sustainability while avoiding significant adverse effects.
- (ii) The *scope* of reformed federal assessment will feature two key considerations:
  - The range of issues and effects to be addressed will extend across the five sustainability “pillars” recommended by the Expert Panel (environmental, health, social, cultural, and economic)<sup>10</sup> recognizing the interdependence of the pillar areas and the interactions among issues and effects in these areas.
  - In keeping with the essence of sustainability considerations, the scope will cover inter-generational as well as intra-generational effects, with emphasis on prospects for lasting wellbeing.
- (iii) *Generally applicable sustainability-based criteria and trade-off rules* will be needed to clarify obligations and expectations for evaluations and decision making in assessments with this purpose and scope.
  - Broad generic criteria to guide evaluations and decision making will need to be provided in the statute, with elaboration in regulations provided for in the statute.
  - Similarly legislated generic rules will be needed to guide decision making on trade-offs, where these are involved in undertakings proposed for approval.
  - Beyond the broad criteria and trade-off rules in law, more detailed guidance will be needed in particular criteria areas or concerning particular trade-off issues that

---

<sup>10</sup> Expert Panel for the Review of Federal Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Canada: MECC, 2017), p.4.

should be recognized and addressed consistently in assessments (e.g., expectations for and suitable approaches to carrying out gender equity analysis).

(iv) The law will need to emphasize application of the criteria and trade-off rules to the *comparative assessment of alternatives*.<sup>11</sup> The nature and range of alternatives reasonably open to consideration by proponents and others in an assessment will depend on various factors including the capacities of the proponent and the character of the undertaking (project, regional or strategic). However, some range of alternatives (including the null option) is always available in assessments and sustainability assessment will aim to identify the most desirable options in light of the criteria and trade-off rules.

(v) *Case specification of the sustainability criteria and trade-off rules* will be required for particular case applications (assessments of proposed projects and regional and strategic undertakings to which the law applies). That is because the characteristics of the case and context always affect the nature of the most relevant issues, options, vulnerabilities, opportunities and priorities. Also, proponents and other participants in individual assessments will need more specific guidance than generic Canada-wide criteria can provide.

### ***Basic elements for entrenchment and elaboration of a sustainability-based approach in federal assessment law***

The Expert Panel proposed overall recognition of sustainability goals and the formal inclusion of the full range of environmental, social, economic, health and cultural considerations. These would facilitate a shift from environmental to sustainability assessment and from a focus on mitigating adverse effects to *delivering positive contributions to lasting wellbeing while also avoiding significant adverse effects*.

To require and facilitate sustainability-based assessment, the statute and regulations must entrench the five key components identified in the assumptions listed above. They must establish suitable purposes, scope, criteria and trade-off rules, comparison of alternatives, and specification of the generic criteria for application in particular cases and contexts

Crucial contents for sustainability-based legislation include that the statute must

- establish that the purpose of assessment is to ensure that approved projects, plans, programs and policies contribute to overall lasting benefits *and* avoid significant adverse effects, including cumulative effects;

---

<sup>11</sup> The need for comparative evaluation of alternatives arises in principle because sustainability-based assessments seek best options for contributing to sustainability while avoiding significant adverse effects. However, the practical experience in assessments is that comparative evaluation of options is typically at the core of the planning of projects and other undertakings, and is often a central expectation of other stakeholders, including those potentially affected by the undertaking.

- require consideration of long- as well as nearer-term effects across the scope of the five pillars of sustainability in all assessments;
- reiterate commitments (as well as Constitutional obligations) to respect treaty and Indigenous rights, engage on a nation-to-nation basis with Indigenous peoples and implement the United Nations Declaration on the Rights of Indigenous Peoples;
- define the scope of assessments with explicit emphasis on the interdependencies of the five “pillars” and how they are linked by interactive effects and cross-pillar factors (such as needs for fair and capable democratic governance, imperatives for climate change mitigation and gender equity, etc.);
- set out, and provide for the elaboration of, generic criteria based on the general requirements for progress towards sustainability, and associated trade-off rules;
- provide for specification of the criteria and trade-off rules in individual assessments to recognize the particulars of the case and context;
- require comparative evaluation of the range of alternatives (including the null option) that can reasonably be addressed in the case;
- ensure due attention to the sustainability-related issues raised by assessed undertakings, including the cumulative effects, broad alternatives and consequential policy issues that are raised by individual proposals but are beyond the authority and capacity of proponents);
- require documented application of the criteria and trade-off rules in key decisions and justifications for decisions;
- maintain the sustainability-based approach through post-approval follow-up; and
- facilitate meaningful public participation and incorporate a commitment to transparency and accountability in decision making throughout the process.

***The basic structure for setting out sustainability assessment criteria and trade-off rules***

In order to be effective, sustainability-centred purposes and sustainability criteria need to be addressed in any new statute at four levels:

- a basic set of generic Canada-wide criteria and trade-off rules presented in the statute,
- statutory provisions for elaboration of the basic criteria and trade-off rules in regulations
- policy guidance for on key more specific issues and approaches for general application and for particular categories of anticipated cases or contexts; and
- statutory provision for case-specific criteria (expanding on the core ones in law) and trade-off rules to be developed to guide each individual strategic, regional, and project assessment.

### ***Core principles and general options for the generic criteria to be incorporated in law***

The generic criteria for application under Canadian federal assessment law (in the statute and associated regulations) must

- be broadly applicable,
- be understandable,
- cover all major factors affecting the sustainability effects of undertakings subject to assessment,
- recognize the interactions among factors and effects,
- respect uncertainties, and
- provide a useful basis for specification for particular case and context applications.

#### *Options for framing generic criteria sets*

There are (at least) two basic options for framing generally applicable criteria for assessment evaluations and decisions:

- the requirements for sustainability option: an integrated set of generic criteria based on the broad requirements for progress towards sustainability;<sup>12</sup> and
- the pillars-based option: a set of generic criteria directly tied to the substantive considerations of the individual “pillars” of sustainability.

In both options, the criteria set is a package. All of the components are crucial for progress towards lasting wellbeing. Also, as noted above, both options need to be accompanied by trade-off rules.

The two criteria set options are in some ways similar. Hybrid criteria sets with some pillar-oriented components are also possible. Indeed any useful pillar-based approach would need to be expanded to incorporate attention to inter-pillar concerns and opportunities and to the longer-term considerations that are central to the notion of sustainability.

The distinctions between the two approaches are nonetheless significant.

#### *Strengths and limitations of the two options*

Criteria based on the broad requirements for progress towards sustainability are directly tied to basic sustainability issues. They reflect the interactions among institutions, issues, effects and response options as well as the overlaps among the five pillar categories. While none of the generic criteria fits tidily into any one of the pillar areas, the criteria are accordingly less vulnerable to “siloeing” and better suited to recognize linkages and facilitate integrated evaluations.

---

<sup>12</sup> An existing set of generic sustainability assessment criteria is attached as appendix 2. It was designed for global application and represents a synthesis of information on requirements for sustainability and a diversity of other criteria packages available at the time of writing. It was used as a basis for the elaboration of a Canadian version below.

The pillars-based option relies on established categories of institutional organization and fits better with established bodies of data, expertise and mandate in the western tradition (though generally not with Indigenous knowledge traditions). While the familiarity of the pillars bring advantages, they also tend to reinforce inattention to interactive effects, including opportunities for mutually supporting gains as well as potential for mutually worsening adverse effects. As noted above, the pillar categories by themselves do not recognize needs to respect the interests of future generations. They also fit easily with tendencies to see assessment as an approach to identifying and dealing with trade-offs, rather than as a means of identifying pathways to mutually supporting gains.

#### The Expert Panel's recommendation

In its vision of sustainability-based assessment, the Expert Panel did not provide details on the nature and role of assessment and decision criteria to be used for evaluations and decisions. The Panel identified the five pillars as fundamental considerations and markers of the scope of sustainability based assessment. For criteria, however, the Panel advocated starting with the questions used by the Joint Review Panel for the proposed Kemess North mine:

- “Is adequate protection provided though all phases of the project or plan?
- Are net benefits provided locally, regionally and nationally?
- Is there a net contribution to the well-being of potentially affected people and to their interests and aspirations?
- Are the benefits and costs fairly distributed?
- Are benefits provided now, without compromising the ability of future generations to benefit?”<sup>13</sup>

These questions do not refer to any of the individual sustainability pillar areas but are consistent with their scope and can be elaborated with little difficulty to cover the usually recognized requirements for process towards sustainability. The non-pillar approach is also consistent with existing approaches in jurisdictions, such as Québec,<sup>14</sup> with legislated sustainability principles (which tend not to be pillar-based, or at least include non-pillar items).

The following discussion therefore focuses the approach based on the requirements for sustainability. However, adoption of largely pillars-based criteria is also possible. Appendix 1 outlines an illustrative set of pillar-based criteria. Adoption of the pillars-based option with such criteria would not entail major departures from the approach to legislation explored below.

---

<sup>13</sup> Expert Panel, *Building Common Ground*, p.21.

<sup>14</sup> Québec's *Sustainable Development Act* sets out 16 principles to guide decision making by departments and agencies of the government of Québec. See [http://www.mddelcc.gouv.qc.ca/developpement/principes\\_en.htm](http://www.mddelcc.gouv.qc.ca/developpement/principes_en.htm). In Québec's assessment regime, the principles have been applied in the deliberations of the Bureau d'audiences publiques sur l'environnement (BAPE) since 2008.

### ***Establishment of core generic criteria based on the broad requirements for progress towards sustainability***

Generic sustainability-based criteria for evaluations and decisions should be identified and incorporated in reformed Canadian assessment law and practice. There can be debate about how much detail should be included in the statute and in regulations under the statute, and what must be left for elaboration in policy guidance, and specification for application in particular cases and contexts. But the statute should at least set out the main criteria categories and the regulations should provide enough detail to clarify the legislative intent.

The discussion below outlines an approach to translating basic global requirements for progress toward sustainability into core generic sustainability assessment criteria for Canadian application. It considers how these criteria can be incorporated in the statute, expanded and clarified in regulation, and elaborated further in more detailed policy guidance. The result would be roughly similar to the criteria set adopted by the Kemess North Joint Review Panel, but would address additional sustainability considerations and, especially with the regulatory and policy contributions the expectations and approaches involved would be much more clearly detailed.

The essentials are discussed below in the form of recommendations for the statute, regulations, further elaboration in policy, and specification for application in particular cases and contexts. The recommendations cover both criteria for evaluations and decisions and more specific rules for decision making involving trade-offs.

The approach taken has four main components:

- a short statement of each of core criteria in the statute;
- important clarifying expansion in regulations;
- further elaboration in policy guidance; and
- more specific criteria developed in each individual assessment, based on the criteria in law and guided by policy but also recognizing the particulars of case and context.

### ***The core criteria for inclusion in the statute***

Box 1, below, presents out a candidate set of core sustainability-based criteria for inclusion in the statute and elaboration in regulation, policy guidance and particular assessments. The criteria are organized into eight categories, each with a brief statement of the broad criterion. The essentials are a rough simplification of a set of globally generic sustainability assessment criteria that represent a synthesis from many sources.<sup>15</sup> They may well need adjustment for legislative purposes, but indicate the level of comprehensiveness and generality suitable for inclusion in the statute.

---

<sup>15</sup> See Robert B. Gibson, et al., *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), pp.88-121 and 235-236.

For clarification of expectations, the constituent aspects and implications of these generic criteria need to be set out more specifically in regulation, policy guidance and individual case elaboration.

***Box 1 Core statutory criteria based on generic requirements for progress toward sustainability***

- Ecosystems and human-environment relations
  - maintain, restore or enhance the lasting viability of biophysical systems and socio-ecological systems to maintain life-support services (such as those related to climate stability, flood attenuation, sustainable food systems).
- Livelihoods and health
  - increase lasting opportunities for everyone to have the fundamentals for a decent, healthy life and rewarding livelihood.
- Intragenerational equity
  - ensure fairness in the distribution of benefits and costs, opportunities and risks, recognizing needs to reduce existing inequities (such as those related to gender, economic status, Indigenous heritage, etc.)
- Intergenerational equity
  - favour options that are most likely to preserve or enhance the opportunities and capabilities of future generations to live sustainably.
- Resource maintenance and efficiency
  - reduce extractive damage and waste, and cut overall material and energy use per unit of benefit to a level that is sustainable in the long run.
- Understanding, participating and governing
  - enhance sustainability-based understanding, opportunities and capacities for individuals and communities to participate meaningfully in collective deliberations and decision making.
- Uncertainty
  - incorporate respect for the limits of present knowledge, the likelihood of surprises and the need for precautionary and adaptive approaches.
- Integration
  - attempt to meet all requirements for sustainability together as a set of interdependent parts, seeking mutually supportive gains.

***Criteria-related sustainability assessment requirements in the statute***

In addition to the criteria in Box 1, the statute will need a suite of other components to require and facilitate practical application of the criteria in deliberations and decision making under the Act. The following provisions will be crucial:

- *the contribution to sustainability purpose*: A central purpose of the law must be to ensure that undertakings assessed under the Act make positive overall contributions

to sustainability and avoid significant adverse effects to the extent reasonably achievable and justifiable in the circumstances.

- *the sustainability test:* A proposed undertakings shall be approved only where the undertaking, with implementation of any conditions of approval, will
  - has been assessed in light of the criteria established in the Act and regulations (as well as higher level obligations including Constitutionally entrenched Aboriginal and treaty rights);
  - has been assessed in comparison with the alternatives, including the null alternative, that are reasonably considered in the circumstances;
  - will make a more positive overall contribution to sustainability in all criteria categories, and be more likely to avoid significant adverse effects, than any other practicable alternative (including the null option); and
  - will entail no trade-off that cannot be justified through application of the trade-off rules established under the Act and regulations.
- *the comparative evaluation of alternatives:* Assessments and decisions under the law must apply the legislated criteria and trade-off rules to the comparative assessment of alternatives. The requirement must recognize that the nature and range of alternatives reasonably open to consideration by proponents and others in an assessment will depend on various factors including the capacities of the proponent and the character of the undertaking (project, regional or strategic). However, some range of alternatives (including the null option) is always available in assessments and sustainability assessment will aim to identify the most desirable options in light of the criteria and trade-off rules.
- *the sustainability-based criteria for evaluations and decisions:* The core criteria to be established in the Act are (or would be equivalent to) the criteria in Box 1, based on generic requirements for progress toward sustainability. Suitable elaboration and specification of these criteria would need to be required and enabled by three sets of provisions in the statute:
  - provisions for development and application of regulatory requirements that clarify the substantive content and implications of the core criteria in the statute;
  - provisions for development and application of policy guidance issued under the authority of the Minister providing further elaboration of the criteria, major consequential considerations to be addressed, appropriate methods of inquiry for each criterion in policy guidance, and approaches for specification and application of criteria in individual applications; and
  - provisions for development and application more specific criteria developed in each individual assessment, to be based on the criteria in law and to be guided by policy but also to recognize the particulars of case and context.
- *the trade-off rules:* The trade-off rules to be set out in the Act are (or would be equivalent to) the generic trade-off rules in Box 3, below. They too would require elaboration and specification in regulation, policy and individual assessments. Further statutory provisions would therefore be needed:
  - provisions for development and application of regulatory requirements that clarify the substantive content and implications of the generic trade-off rules in the statute;

- provisions for development and application of policy guidance issued under the authority of the Minister providing further elaboration of the trade-off rules, major consequential considerations to be addressed, appropriate methods, and approaches to specification and application of trade-off rules in individual applications; and
- provisions for development and application more specific trade-off rules in each individual assessment, to be based on the trade-off rules in law and to be guided by policy but also to recognize the particulars of case and context.
- *transparency and accountability*: The Act would need to require that all major decisions (e.g., concerning whether or not a proposed undertaking is approved and, if so, under what conditions) are accompanied by explicit rationales based on the criteria and trade-off rules established in the Act. Timely public release of the decisions and rationales would also be mandatory under the Act.

***Clarification of the core sustainability-based criteria in regulations and elaboration of the criteria and their application in policy guidance***

The core criteria to be incorporated in the statute are necessarily broad. They leave much to be clarified in regulation and supplemented by policy guidance. In addition to many topics for elaboration, there could be multiple levels of detail – from information for application in most cases to guidance for particular sectors, regions, jurisdictions, socio-economic or ecological circumstances – with clear links from the statute, through regulation and policy to case-specification. See Box 2 for an example.

***Box 2 An illustrative example: criteria elaboration concerning gender equity***

The core criterion requiring consideration of intragenerational equity effects would include obligations to consider many different aspects and forms of equity effects. A particularly important example is gender equity. Obligations to assess gender equity effects and their implications would be only implicit in the core criterion in the statute, but would be established directly and elaborated in two ways:

- A regulation to clarify the substantive content and implications of the core intragenerational equity criterion would provide basic guidance for obligatory attention to gender equity effects.
- Policy developed under the Act would provide more detailed guidance on how to assess whether a proposed undertaking, in comparison with the alternatives, would enhance the protection of women’s rights, reduce gender discrimination in the workplace and in the community, and enhance the equal distribution of costs, risks, benefits and opportunities.

In individual applications, case-specific criteria development would provide direction for particular studies of relevant gender equity issues and options for achieving positive gender equity results.

Together the criteria in the statute and regulation, plus the guidance from policy, would establish reasonable clarity about expectations and approaches for the individual applications. However, because of the differences in cases and contexts, for individual applications, case-specific criteria development would be needed to provide direction for particular studies of relevant gender equity issues and options for achieving positive gender equity results.

The range of possible needs for regulatory and/or policy guidance is indicated by the following list:

- identification of the major generic issue areas under each of the core criteria, with guidance on how each of these may be addressed;
- identification of key issues and considerations specific to particular
  - Constitutional responsibilities (e.g., Aboriginal and treaty rights),
  - areas of major policy concern (e.g., greenhouse gas emissions and climate change commitment implications),
  - ecological and/or socio-economic regions (e.g., coastal waters, remote communities),
  - jurisdictions and/or territories (e.g., provincial crown land, Indigenous traditional territories),
  - sectors (e.g., non-renewable resource extraction),
  - international agreements and commitments (e.g., UNDRIP), and
  - multi-jurisdictional cases,with guidance on how each of these may be addressed;
- interim requirements and guidance on how to consider
  - cumulative effects that are beyond the authority and capacities of proponents to assess or influence adequately,
  - broad alternatives that are beyond the authority and capacities of proponents to undertake or assess adequately,
  - big policy issues that may be raised by a proposed undertaking but are until these matters have been addressed adequately in undertakings subject to regional or strategic assessment;
- perhaps integration of guidance from credible development regional or strategic undertakings that have implications for project planning and assessment; and
- guidance for proponents and other participants in assessments on how to develop case-specific criteria. That guidance should include information on how to specify the generic criteria in the statute to recognize the key sustainability-related considerations in the case and its context.

At both the regulatory and policy levels, the credibility, practical authority and educational value of the guidance provided will depend heavily how the priority topics are selected and how the substance is developed. Ensuring transparency and public engagement opportunities in the determination of priorities and the development of content will be crucial. Those too will be matters for statutory attention.

### *Statutory provisions for case-specific criteria*

Case-specific sustainability criteria are needed for particular assessments. They must incorporate the core criteria in the statute and the associated regulatory elaborations, but also will recognize the considerations key to the case and context.

The result may be in the form of assessment-specific questions. For example,

- are the biophysical systems and ecological integrity of wetland complex X adequately protected throughout all phases of development, construction, operation, and decommissioning?
- will the undertaking's effects contribute equitably to community and social well-being of the smaller and more remote communities in the region in comparison with regional centre Y? and
- will the undertaking and its predicted effects after mitigation and enhancement measures increase prospects for livelihood opportunities beyond the lifetime of project Z?)

The case-specific criteria will inform deliberations from the early planning through assessment, review, decision and implementation of approved undertakings.

Development of the case-specific criteria should begin as early as possible in the planning stage of assessment so that the criteria can guide early identification of issues, opportunities and alternative options for design of the anticipated undertaking. Initial working criteria will, however, have to be revised iteratively as understanding of the issues, opportunities and options evolves.

The statute will need to establish the basic means of and processes for developing and applying the case-specific criteria. Details may be left for clarification in regulations.

Key components for the statute and regulatory clarification include the following:

- provisions requiring case-specified criteria for each undertaking subject to assessment, with clarification that the criteria must be consistent with the core criteria and elaborations of those criteria in regulation, and that they reflect consideration of relevant policy guidance;
- provisions establishing a participative early planning phase for assessments, in which one component is development of a working initial set of case-specified criteria;
- provisions permitting iterative improvement of the case-specified criteria through the assessment process;
- provisions setting out how the criteria specification is to be done, including the assignment of authoritative responsibility for criteria specification, and determination of what and how authorities and stakeholders in addition to the proponent(s) are to be involved meaningfully;

- provisions requiring that effects related to each of the case-specified sustainability criteria and their interactions be considered; and
- provisions assigning review and decision making responsibilities for determining whether the criteria specified for an individual assessment fully incorporate attention to the core generic criteria in the law, and whether the specified criteria have been applied in good faith in the assessment.

These components would supplement provisions of broader application, including those that require relevant authorities to provide reasons for their decisions based on the application of the sustainability criteria.

### *Legislated provision of trade-off rules*

One of the Expert Panel's important recommendations was that trade-offs be described, explained and justified. Because all the requirements for moving towards sustainability are important and interdependent, successful efforts to move toward sustainability will rely on mutually supporting and lasting gains in all the requirement areas. Consequently, trade-offs between as well as within the criteria areas are to be avoided to the extent possible. A key reason for insisting on comparison of potentially reasonable alternatives (as appropriate to the case) is to facilitate the search for ways to minimize or avoid trade-offs. However, significant trade-offs will not always be avoidable.

Guidance for avoiding trade-offs and for making decisions when trade-offs seem unavoidable is therefore likely to be necessary. A basic set of trade-off rules established in law would help to guide consideration of options throughout the assessment process, but could be especially crucial in decision making at the centre of assessments – about whether the proposed undertaking should be approved (and if so, under what terms and conditions) or not. Trade-off rule application would be required in cases presenting a need to determine

- whether the proposed undertaking would make an overall contribution to sustainability in spite of having predicted adverse effects in one or more of the criteria categories; and/or
- whether an undertaking that would entail a significant adverse effect in any criteria category could be approved.

As with the criteria for evaluations and decisions, the core generic trade-off rules should be set out in the Act, perhaps with elaborations on interpretation and application in regulations and policy guidance. More specific trade-off rules may often need to be developed for particular cases since the potential severity and avoidability of a trade-off will often depend on the nature of the stresses, opportunities and other factors particular to the case and context involved.

Box 3, below, provides a set of generic assessment criteria for inclusion in revised Canadian assessment law. Like the generic assessment criteria in Box 1, these trade-off rules are based on globally generic sustainability assessment criteria that represent a

synthesis from many sources.<sup>16</sup> The core trade-off rules may be elaborated, as appropriate, through regulation and/or policy guidance issued under the authority of the Minister.

### ***Box 3 Core statutory trade-off rules***

The following trade-off rules are to be applied where there is a need to determine

- whether the proposed undertaking (or an alternative) would make an overall contribution to sustainability in spite of having predicted adverse effects in one or more of the criteria categories; and/or
- whether an undertaking could be approved despite entailing a significant adverse effect in any criteria category.

An undertaking that entails such a trade-off shall be permitted only where *all* of the following conditions are met:

- The undertaking would deliver overall progress towards meeting the requirements for sustainability.
- The proponent has met the burden of demonstrating in light of the legislated sustainability-based criteria that the undertaking with the proposed trade-off(s) represents the best option for delivering mutually reinforcing, fairly distributed and lasting cumulative contributions, and achieving the most positive feasible overall result with the least adverse effects, in comparison with the reasonable alternatives.
- The undertaking entails no trade-off that involves a significant adverse effect on any sustainability criterion area, unless the alternative is acceptance of an even more significant adverse effect, recognizing that
  - no compromise or trade-off is acceptable if it entails further decline or risk of decline in a major area of existing concern or if it endangers prospects for resolving problems identified as global, national and/or local priorities.
  - no trade-off is acceptable if it deepens problems in any requirement area where further adverse effects may imperil the long-term wellbeing, even if compensations of other kinds, or in other places, are offered.
  - no enhancement can be permitted as an acceptable trade-off against incomplete mitigation of significant adverse effects if stronger mitigation efforts are feasible.
- The undertaking involves no displacement of a significant adverse effect from the present to the future except where the alternative is displacement of a more significant negative effect from the present to the future.
- All proposed trade-offs have been accompanied by an explicit justification based on openly identified, context-specific priorities as well as the sustainability-

---

<sup>16</sup> See Robert B. Gibson, et al., *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), pp.122-141 and 237-238.

based decision criteria and the general trade-off rules.

- All proposed trade-offs have been examined and justified through processes that include open and effective involvement of all stakeholders.

For adequate entrenchment of the trade-off rules and their application, the statute would need to

- set out the core trade-off rules;
- require application of these rules in every case where there is a need to determine
  - whether the proposed undertaking would make an overall contribution to sustainability in spite of having predicted adverse effects in one or more of the criteria categories; and/or
  - whether an undertaking that would entail a significant adverse effect in any criteria category could be approved;
- provide for the development and application of regulatory requirements that clarify the substantive content and implications of the core trade-off rules in the statute;
- provide for development and application of policy guidance issued under the authority of the Minister with further elaboration of the trade-off rules and how to apply them, major consequential considerations to be addressed, appropriate methods to be used, and approaches to specification of the core trade-off rules in individual applications; and
- provide for specification of the trade-off rules for individual assessments, to be based on the trade-off rules in law and to be guided by policy but also to recognize the particulars of case and context, including the particular circumstances (e.g., existing stresses and available capacities) and associated priorities that may affect how trade-offs should be evaluated.

### ***Three further considerations***

#### *Elaboration of the criteria and trade-off rules*

The criteria and trade-off rules play central roles in sustainability-based assessments. Clear statement and elaboration of these criteria and trade-off rules are particularly important because of the potential for confusion and inconsistency in sustainability-based assessment applications. While the basic requirements for progress towards sustainability are quite well established and most if not all of the key considerations have already been applied in assessments, diversely limited versions of the concept of sustainability have been used over the years. All assessment participants will need guidance that clarifies the expectations involved.

Because the criteria and trade-off rules are important, the processes for establishing, clarifying and elaborating them merit careful attention. The basic criteria and trade-off rules to be established in law will be subject to the public processes (the anticipated discussion paper, the steps in introducing and reviewing legislation, etc.). The further

elaboration of the criteria and rules, however, will also need transparent and credible public processes.

#### *Comparative evaluation of alternatives*

If assessment deliberations and decisions are to foster strongly positive contributions to sustainability and avoid trade-offs to the extent realistic, the assessment process must require and encourage comparative assessment of alternatives in a way that can effectively identify best options. One key challenge is that the proponents of undertakings subject to assessment often do not have the authority or capability to assess broad alternatives. This is particularly the case where the proponents are private sector entities and where options for addressing cumulative effects and big policy issues are involved.

In many cases, the best solution may be timely strategic and/or regional initiatives that are subject to or integrated in assessment processes. Where this solution is not available, responsibility for identification and assessment of broader alternatives would seem to fall to government bodies. If so, the result might often be a proposal that includes a version of the private sector undertaking and a set of government initiatives that, together, would deliver the most positive contributions to sustainability and avoid significant adverse effects.

That prospect is not new. Assessments have often led to project approvals accompanied both by government commitments and conditions to be met by the proponent. However, integration of proponent assessment work with government responses to matters beyond the proponent's authority and capacity has not commonly been done well in the course of assessments prior to final decision making. How such integration would best be organized and delivered is not immediately obvious. Further thinking is needed to determine the appropriate requirements and provisions for assigning the relevant responsibilities, for integrating the results into the proponent's planning and assessment immediate proposal, and for designing decision making on the proposed undertaking so that it can ensure that government bodies as well as the proponent will satisfy their portion of the conditions of approval.

#### *Learning and adjusting*

For many reasons extending beyond the complexities of introducing a sustainability-based approach to assessment, the statute should require regular mandatory review. However, special provisions are likely needed for updating the sustainability-based criteria and trade-off rules, and the preparation, review and improvement of associated guidance should be continuous. Development of the criteria, rules and guidance will be in any event gradual, but it will also benefit from experience and regular review.

## **Appendix 1**

### **Pillar-based sustainability criteria**

The set of sustainability criteria presented below adopts the five pillars that define the scope of sustainability-based assessment as recommended by the Expert Panel. The criteria categories are tied to the five pillars but are complemented by a sixth category to capture interactive or cross-cutting considerations.

The illustrative points under each category title illustrate key sustainability imperatives to be addressed. These imperatives reflect the key requirements for progress towards sustainability, which are incorporated somewhat more directly in the requirements-based generic criteria set discussed above.

All of the criteria are meant to incorporate emphasis on long term as well as more immediate objectives. The substance needs further consideration and is presented here for illustrative purposes.

- Environmental sustainability
  - protect and enhance the lasting viability of biophysical and socio-ecological systems upon which human and other life depends
  - reduce cumulative stresses on environmental components (e.g., biodiversity) and linkages (e.g., food webs and hydrological systems)
  - restore or rehabilitate degraded ecological and socio-ecological systems
- Health sustainability
  - protect and enhance the long term as well as more immediate environmental, social, economic and cultural conditions for healthy lives and lasting wellbeing
  - emphasize health promotion and maintenance as well as treatment and community as well as individual health
  - reduce potential exposures to contaminants, diseases, unsafe conditions and practices, insecurity and other threats to physical and mental health, with particular attention to those most vulnerable
- Social sustainability
  - enhance equitable opportunities for individual and community understanding, expression, advancement and security
  - strengthen structures, tools, skills and habits of mutual awareness, inclusion and assistance, trust, conviviality and civility
  - build individual and community capacities and opportunities for informed and meaningful engagement in collective deliberations and democratic decision making
- Cultural sustainability
  - maintain and strengthen cultural vitality and diversity
  - respect Indigenous rights and foster reconciliation
  - protect and preserve valued cultural heritage
  - retain and expand opportunities for creative expression
- Economic sustainability
  - improve prospects for everyone to enjoy a base of material sufficiency and security
  - build lasting opportunities for productive employment and other livelihood options

- enhance efficiencies and the lasting availability of resources by reducing extractive damage and waste and cutting overall material and energy use per unit of benefit to a level that is sustainable in the long run
- emphasize fairness in the distribution of benefits and costs, opportunities and risks
- Integrated sustainability
  - interpret all of the individual components above in ways that recognize the interdependencies of gains in all the pillar categories (and the risks of interactive losses among the categories)
  - favour present options and actions that are most likely to preserve or enhance the opportunities and capabilities of future generations to live sustainably.
  - respect the limits of present knowledge, the likelihood of surprises and the need for precautionary and adaptive approaches
  - foster learning

## Statutory Provisions on Sustainability-based Purpose, Scope and Criteria

Robert B. Gibson, SERS, University of Waterloo  
18 August 2017

The following outlines statutory provisions to establish the sustainability-based purpose of the new law and assessment process, and the basics of scope and criteria that need also to be in the statute. Most of the details regarding can be provided for in regulations and policy guidance. The following aspects are those that should be specifically addressed in Statute.

*Preface:* Sustainability-based assessment is the most responsible way of setting out the public interest purpose and test for assessment law. It provides a comprehensive approach to enhancing lasting as well as near term wellbeing through decision making on projects and strategic undertakings subject to assessment law.

Three key principles are involved:

- (i) sustainability is in the inter-generational as well as immediate public interest; and
- (ii) progress towards sustainability demands mutually supporting economic, social, ecological and other gains, not “balancing” these as competing objectives (it recognizes that trade-offs may often be necessary, but aims to avoid them to the extent possible);
- (iii) sustainability depends on learning, especially building the capacities of all participants to understand the issues and options and to work together towards solutions.

### *Key components in the statute*

- (i) the core purpose that underlies the basic public interest test in decision making under the Act:
  - will the proposed project (or strategic undertaking) deliver an overall positive contribution to the public interest/sustainability, defined as enhancement of both lasting and more immediate wellbeing, while avoiding or mitigating adverse effects, especially significant ones, to the extent feasible given the reasonable alternatives?
  - does it represent the best option, given the public interest purpose of the undertaking and in light of a comparative evaluation of the reasonable alternatives, including the null option?
- (ii) scope and substance of requirements for information and analysis, set out in
  - the definitions and factors for consideration sections,
  - basic sustainability-based criteria and trade-off rules,
  - provisions for elaboration in regulations and policy and for case-specific guidance for each assessed undertaking;
- (iii) transparent, participative and impartial public process for adherence to the legislated sustainability-based purposes, criteria and test in engagement and decision making on application/triggering of the process, early planning, impact assessment, assessment review, decision making and follow-up; and
- (iv) associated provisions for impartiality of administration and decision, timeliness, combination of flexibility and predictability, respect for Indigenous rights and interests, and cooperation with other jurisdictions.

**Still a long way to go:  
an analysis of the federal assessment processes *Discussion Paper* in light of next  
generation assessment requirements**

Robert B. Gibson  
School of Environment, Resources and Sustainability  
University of Waterloo  
8 July 2017

This note provides an initial analysis of the following document:

Government of Canada, *Environmental and Regulatory Reviews Discussion Paper*  
(June 2017),

<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>

en français:

<https://www.canada.ca/fr/services/environnement/conservation/evaluation/examens-environnementaux/faites-connaître-vos-opinions/approche-proposée.html>

***Capsule summary***

The contents of the *Discussion Paper (DP)* can be interpreted as a glass half full or a glass half empty. Either way, a large gap remains between what is proposed and what is needed for the fundamentals of potentially effective next generation assessment.

The half full perspective rests on the importance of the major substantive categories of concerns addressed in the document and the promise indicated by some of the initial proposals in these areas, however incomplete and tentative they may be. Certainly the frequent references to co-decision making with Indigenous governments, greater transparency of process, early engagement and planning, and better attention to cumulative effects are welcome signs of next generation intent.

The half empty aspects concern key omissions and the weakness of proposed steps in the positive areas that do receive attention. Among these are the following:

- The DP promises some of the foundations for a sustainability-based approach to assessment, which has been widely recommended, but does not ensure attention to inter-generational effects, or mention a “contribution to sustainability test” for determining whether assessed undertakings are in the public interest.
- The DP emphasizes use of strategic and regional assessments to address cumulative effects, but does not include provisions for regional and strategic assessments in the proposed legislative changes, or outline basic process components for strategic and regional assessments.
- The DP recognizes needs for strategic and regional assessments to address larger matters that are not addressed well in project-centred assessments, but does not consider

how these matters will be addressed in project assessments when strategic and regional assessments are not available.

- The DP proposes greater transparency and public engagement, but signals continuing reliance on non-legislated assessment processes for many project and strategic level undertakings, with no indication of steps to ensure transparency and other fundamental process qualities (except for transparency for assessments of projects on federal lands).

Other key matters not addressed include

- comparative evaluation of reasonable alternatives in assessments;
- explicit criteria and trade-off rules for decision making;
- streaming or scaling of assessment requirements so the process can apply suitably to a range of different undertakings;
- application of the legislated process to projects of federal bodies, on federal lands and/or with federal funding;
- application of the legislated process to strategic undertakings now covered by the non-legislated and non-transparent Cabinet Directive process;
- steps to ensure transparency and other fundamental process qualities in assessments of strategic undertakings and projects outside the legislated process(es) established in law;
- application of strategic and regional assessment to consideration of broad alternatives and big policy issues;
- the timing of early in the new early engagement and planning phase;
- effective attention to uncertainties in impact predication and other deliberations;
- the nature of assessment review processes, including when and how panel reviews would be organized and empowered;
- provision for appeals of decisions; and
- assignment of monitoring, enforcement and follow-up responsibilities; and
- means of avoiding interest conflicts given the multiple roles of the proposed single agency in the assessment process.

The DP represents a useful beginning both by identifying key themes for attention in law and process reform and by providing a timely opportunity to identify what major components most need clarification and elaboration and what neglected considerations now require attention.

### ***Introduction to the analysis: matters addressed and neglected***

The *Discussion Paper (DP)* is devoted largely to assessment law and process reform, plus brief sections on the future of the National Energy Board, protection of navigable waters and protection of fish and fish habitat. The following analysis focuses on the assessment law and process reform components.

The organization of the substantive portions on assessment law and process in the DP indicates major issue areas and assessment process components that are recognized by the government as priorities for attention changes in assessment law and process reform.

*The structure of the Discussion Paper*

Process:

A depiction of the anticipated impact assessment process and how it aligns with regulatory processes for non-designated projects

Seven topic areas:

Addressing Cumulative Effects

Early Engagement and Planning

Transparency and Public Participation

Science, Evidence and Indigenous Knowledge

Impact Assessment

Partnering with Indigenous Peoples

Cooperation with Jurisdictions

Proposed program and legislative changes

While some of these categories include attention to considerations beyond what these subtitles suggest, the categories are not comprehensive of all the key issues areas or needed components for next generation assessment reform. Moreover, the paper's contents are at a high level of generality and for many of the identified directions for change, crucial specifics are needed before the potential adequacy, or even desirability, of the changes can be judged.

The following analysis is therefore structured differently – it considers the DP contents in light of key requirements for establishment of a next generation federal assessment law and process.

*The assessment law issues and components addressed in this analysis*

Purpose

Scope, criteria and alternatives

Application and triggering – project level

Application and triggering – regional/strategic level

Tiers

Streams

Cumulative effects, broad alternatives and big policy issues

Decision making responsibilities – the assessment stage

Decision making responsibilities – the review stage

Decision making responsibilities – approval (or not) stage

Early engagement and planning

Post-decision monitoring and follow-up

Transparency and participation

Information and uncertainty

Learning

Administration and guidance

Partnering and co-governance with Indigenous authorities and processes

Cooperation with provincial and territorial authorities and processes

Each section will report the position taken in the DP, provide analytical comments and identify what revisions and/or elaborations are needed to meet next generation expectations.

As noted above, the DP is a short document written mostly at a high level of generality as a first step towards legislative drafting. That is to be expected. At this stage in the reform process it is not possible to determine what omissions are oversights, signals of intention not to include, matters not yet decided, or details judged unsuitable for attention in an initial indication of directions. The comments below that identify matters neglected or not addressed sufficiently in the DP are meant to guide next steps rather than to be criticisms of the DP.

### *Purpose*

#### *DP:*

- The DP includes an early statement reiterating the initial purpose of the reform exercise (as set out before any of the consultations began): “regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous peoples, ensure good projects go ahead, and resources get to market” (p.3).
- The purpose of the assessment law and process is not discussed directly.
- At least at the project level, the broad test to be applied in decision making is to be based on “whether the project is in the public interest” (p.18).
- There is no mention of avoiding or mitigating significant adverse environmental effects, which are the focus of the current law.

#### *Comment:*

- The Minister in a pre-release briefing for the Multi-Interest Advisory Committee stated that the intent of the reforms was “all about taking a sustainability approach.” That intent is not conveyed explicitly in the DP.
- As presented in the DP, scope of assessment includes effects within the usual components of sustainability but includes no reference to their interactions and interdependencies, or inter-generational considerations and lasting effects, or overall sustainability. The DP makes no mention of trade-offs or the need for rules to guide trade-off decisions.
- Absent inter-generation concerns, interdependences and interactions and trade-off guidance, the broader scope of considerations in assessments would facilitate emphasis on near term effects and short-sighted trade-offs between perceived immediate economic imperatives and social and ecological considerations. The result would be retrograde. Without a clear sustainability-based purpose, the new legislation would be a step backward. Retention of the current narrow focus on significant adverse environmental effects would be preferable.
- The current and previous versions of the *Canadian Environmental Assessment Act* have included a purposes section with multiple objectives, including contribution to sustainable development. The core design of the current law and process, however, has centred on

identification and mitigation of significant adverse environmental effects, unless “justified in the (undefined) circumstances.”

- The DP proposes expanding the basic *scope* of assessment to encompass social, economic, health and environmental effects, positive and negative (p.13). While that is consistent with a sustainability agenda, the DP is silent on the overall purpose of the legislation. DP proposes decision making “in the public interest” (p.13), without further elaboration. It does not identify any more specific test to be applied to assessed undertakings and does not mention attention to significant adverse effects.
- Despite expressed commitments to greater clarity and predictability, the DP is not clear whether proposed undertaking are expected to make overall positive contributions to sustainability (or “lasting wellbeing”), or to avoid significant adverse effects, or to do both? or in some other way to be “acceptable” in the public interest, however the decision makers may choose to define it at the time.
- The Expert Panel on assessment process reform, the Multi-Interest Advisory Committee and many other participants in the reform process so far have advocated a core purpose of making “positive contributions to sustainability.” That test would be the appropriate basis for determining whether the project (in comparison with the reasonable alternatives including the null option) is “in the public interest,” since contribution to sustainability is essentially contribution to the lasting public interest.

*Upshot:*

The next steps in elaboration will need to

- establish “contribution to sustainability” (or the equivalent in other words) explicitly as the core purpose of the law and process;
- include avoidance of adverse effects, especially avoidance of significant ones, as a subsidiary purpose;
- require consideration of interdependencies and interactions among social, economic, environmental and health considerations;
- require attention to long term as well as more immediate effects within the broad scope of assessment proposed in the DP to ensure that assessments serve the lasting public interest; and
- establish the “contribution to sustainability” test (or the equivalent in other words) as the fundamental basis for evaluations and decision making, consistent with the purpose of the legislation.

[See also the following section.]

***Scope, criteria and alternatives***

*DP:*

- As noted above, the DP proposes to expand the basic scope of federal assessments to encompass positive and negative social, economic, health and environmental effects (p.13), but does not include commitment to sustainability, explicit attention to interactions or lasting inter-generational effects, or means of discouraging trade-offs.
- Unlike the Expert Panel, the DP does not include cultural effects explicitly in the scope of assessments.

- Assessment of effects on Indigenous peoples would be required as would use of Gender-Based Analysis Plus (p.13).
- The DP also emphasizes needs for transparency and clearly communicated reasons for assessment and regulatory decisions (p.11).
- The DP proposes to develop and apply criteria for revising the Project List and designating or exempting projects (pp. 13-14) and criteria for substitution of Indigenous government processes (p.17), but does not mention criteria for evaluations and decision making in assessments of projects or strategic or regional undertakings.
- The DP does not provide direction on how alternatives will be included in the scope of assessments, though it does recognize alternatives as one matter that merits better early attention than provided under the current federal assessment process (p.11).
- The DP does not address the need for guidance in evaluating and making trade-offs.

*Comment:*

- The scope of considerations would be generally appropriate for sustainability-based assessment if explicit attention to cross-pillar interactions, inter-generational interests and lasting effects, and trade-off rules were added.
- The omission of cultural effects is problematic unless specific requirements are added to ensure attention to effects on Indigenous culture.
- For clarity of expectations and consistency of decision making, explicit criteria and early guidance on specification of criteria for particular applications will be crucial.
- These criteria are especially important as foundations for consistency and accountability in evaluations and decisions, and necessary for credible justification of decisions by the Minister and/or Cabinet.
- Clear attention to how alternatives are to be addressed in assessments is also important for two main reasons:
  - The key question in assessments has been evolving from the old regulatory tradition of judging whether a proposed project is “acceptable” to determining whether the project is the “best option” among reasonable alternatives, including the null option (the project does not go ahead). The acceptability approach presumes an identifiable line between acceptable and unacceptable, which is more plausible in narrow regulatory rulings that turn on technical issues than in broader assessments. The “best option” approach relies on comparative evaluation of potentially reasonable alternatives, and is better suited to applications where many broad public interest considerations are taken into account.
  - While all project planning involves the identification and weighing of various options, the range of possible alternatives is potentially wide. Determining which are potentially reasonable and merit careful comparative assessment is important and not always easy. The answers depend, for example, on the capacities of the proponent (private sector proponents often have more limited options than public sector ones), the nature of the undertaking (mining projects may involve various infrastructure and process options but the orebody is not moveable; in contrast, alternatives for highway projects may often include evaluation of different locations).

Some portion of individual assessment cases are likely also to involve reasons to examine broader alternatives that lie beyond the interests and capacities of the project proponent.

Often, these broader alternatives would be addressed more effectively and efficiently through a regional or strategic assessment, but where this is not feasible, provisions will be needed to ensure attention to these broad alternatives by government participants in project assessments (see the section below on “cumulative effects, broad alternatives and big policy issues”).

- Rules to guide trade-off decision making are crucial. Progress towards sustainability, which would seem to be the objective underlying service to the public interest, depends on recognizing
  - the interdependence of social, economic, health and environmental aspects of sustainability; and
  - the consequent need for multiple, mutually supporting gains in all of these areas.

The assessment process must therefore be designed to avoid trade-offs, to the extent possible. Requiring comparative evaluation of reasonable alternatives will help. Also needed are trade-off rules that favour avoidance of trade-offs and pursuit of mutually reinforcing gains.

*Upshot:*

The next steps in elaboration will need to

- establish in law suitable sustainability-based assessment criteria for use in assessments, including in decision making on proposed undertakings (see above re purposes);
- include legislated provisions for developing and setting out more detailed criteria and guidance on their application in regulations and policy;
- establish processes for specification of the criteria for particular case applications, beginning at the early planning stage;
- require comparative evaluation of reasonable alternatives;
- require use of the criteria (as well as respect for Indigenous and treaty rights, and other constitutional and statutory obligations) as the basis for evaluating impacts, comparing alternatives, drafting recommendations, and making and justifying decisions; and
- incorporate trade-off rules that favour options that avoid sacrifices to important aspects of sustainability and protect the interests of future generations.

***Application and triggering – project level***

*DP:*

- Application to project level undertakings is to be determined through use of
  - a Project List, which would be subject to “periodic review” guided by “clear criteria” in a “transparent process” (p.13); and
  - processes for designation and exclusion (exemption), “based on clear criteria and a transparent process” (p.14).
- The DP suggests that some non-designated projects and perhaps other undertakings would be subject of an “assessment” process or processes different from the process established for designated projects:
  - The DP proposes that “assessment of non-designated projects” be done by the lifecycle regulators – the National Energy Board, the Canadian Nuclear Safety Commission and the Offshore Boards (p.18). No specifics about this “assessment”

process are provided.

- As well, the DP proposes “[e]nhancing transparency and requirements for the assessment of projects on federal lands” (p.19). The proposal does not refer directly to this being an “assessment” process for non-designated undertakings, but it is not likely that this particular category of undertakings would need specially enhanced transparency and other requirements in the process for designated undertakings.

*Comment:*

- The proposals for project level assessments provide little indication of what sorts of projects will be designated as subject to assessment under the new law. The proposal for “clear criteria” and a “transparent process” for development of the designated projects list (p.13) is welcome, but much will depend on the substance of the criteria, the particulars of the process.
- Also so far undefined and important is the range of the project list categories that could be developed. In addition to categories centred on particular project types and sizes (e.g., hydropower projects with generating capacity above a specified level and/or reservoirs beyond a certain volume), potential categories could and should include
  - some sets of projects that would have been captured under earlier versions of the federal law (e.g., potentially consequential projects of federal bodies, on federal lands, relying on federal funding, or requiring specified federal permits or licences); and
  - categories projects that be conflict with strategies to reduce GHG emissions or that may impair carbon sinks.
- As noted above, two of the DP’s proposals point to a separate assessment process (or processes) for certain categories of non-designated projects:
  - “assessment of non-designated projects” by the lifecycle regulators (p.18); and
  - “assessment of projects on federal lands” with enhanced “transparency and requirements” that would not be needed for designated projects.

The DP does not otherwise propose or discuss assessment processes for non-designated projects. The DP provides no information on

- the nature of “assessments” for non-designated undertakings;
- what categories of non-designated undertakings would be subject to assessment of some kind;
- how such assessments would be triggered; or
- what requirements, processes and participants would be involved.

All of these matters merit direct attention, clarification of intent and specifics, and assessment of the implications for assessment of designated projects and other undertakings.

- The DP includes no evident preparations for application to a range of projects with more and less potential for serious consequences, controversy and/or complexity more or less demanding assessment requirements. In particular, the DP is silent about needs for different assessment streams or for scaling individual assessment requirements according to the potential severity of their consequences. That silence may simply indicate that streaming and scaling issues and options had not yet been addressed sufficiently within government to be addressed in the DP. Or it may signal an expectation that the project list will be limited as it is now to a few major projects.

- Some indicators suggest a related assumption that few government projects will be designated:
  - At many points in the document, the language of the DP assumes that the proponents of designated projects will be in the private sector. Concerning the early planning and engagement phase, for example, the DP emphasizes case-specific guidance “to industry” (rather than to proponents, including government bodies) on matters of scoping, information requirements, etc. (p.10). Also provision of easy-on-line access is proposed to help Canadians “track companies’ progress as they address the conditions required to advance their project” (p.11).
  - The reference to a separate “assessment” process for non-designated projects noted above would provide a vehicle for assigning federal projects to a less defined and demanding process. Use of this vehicle for some government projects seems lie behind the proposal for “[e]nhancing transparency and requirements for the assessment of projects on federal lands” (p.19), which is comprehensible only if a process for non-designated projects is being enhanced.

Reliance on non-legislated “assessment” processes has a long and sorry history at the federal level in Canada. Justification for extending that history is not apparent.

- The promised criteria for project list development and for designations and exemptions will be crucial. So will provisions for streaming and/or case-specific scaling (see below re streams) to provide a basis for application of legislated assessment requirements to a range of projects (and other undertakings).

*Upshot:*

The next steps in elaboration will need to include

- specification of the “clear criteria” and “transparent process” for development of the designated projects list and for application in designation and exemption decision making;
- clarification of when and how the legislated assessment process will apply to government projects and other undertakings, including
  - projects of the federal government (alone or with partners)
  - projects on federal lands
  - projects with federal funding
  - federal activities that are not physical works but may have important consequences for sustainability;
- delineation of project assessment process options in the form of pre-established process streams for categories of projects covered by the law list, or for selection and adjustment as appropriate in the case-by-case determination of particular assessment process requirements in early planning;
- clarification of what is meant by “assessment of non-designated projects,” including
  - the nature of “assessments” for non-designated undertakings;
  - what categories non-designated undertakings would be subject to assessment of some kind;
  - how such assessments would be triggered;
  - what basic requirements, processes and participants would be involved; and
  - what justification there is for reliance on a non-legislated assessment process.

## *Application and triggering – regional/strategic level*

### *DP:*

- The DP anticipates strategic and regional assessments as well as project level assessments, but provides specifics about the legislated process only for project level assessments.
- The DP emphasizes use of strategic/regional level assessments to address cumulative effects and provide related guidance for project level assessments (p.9). Other reasons for strategic assessments are not mentioned.
- For strategic assessments, the DP proposes a structure that includes developing national environmental frameworks in key areas and then conducting strategic assessments to clarify the implications of particular frameworks for project level assessments (p.9). The proposed process for conducting these strategic assessments is not presented. Nor it is clear whether these strategic assessments involve a strategic undertaking (a policy, plan or program).
- Means by which strategic and regional assessments would be triggered are not addressed, but the DP does seek suggestions on priority needs for regional assessments (p.9).
- Legislated provisions for strategic and regional assessments are not listed in the DP's summary section on proposed program and legislative changes (pp.18-19).
- The DP is silent on the future of the *Cabinet Directive on the Environmental Assessment of Policy Plan and Program Proposals* and the potential application of the new law to some or all of these proposals.

### *Comment:*

- On application at the strategic/regional level, the DP emphasizes cumulative effects guidance for project level assessments and recognizes the need for collaborative processes with other authorities and stakeholders. It does not address other commonly identified strategic level assessment needs beyond cumulative effects delineation, or mention legislated provisions for strategic and regional assessments, or specify the processes for strategic and regional assessment by the federal government alone or in collaboration with other authorities.
- Missing strategic assessment applications include two big classes of strategic assessments to assist project level assessments – those that would provide
  - comparative evaluation of broad options, beyond what is feasible at the project level (e.g., alternative approaches to protecting coastal waters and resources from the effects of shipping and other human activities); and
  - resolution of big policy issues that have become controversial at the project level (e.g., whether it would ever be in the public interest to approve a new non-renewable resource extraction project in the mining or hydrocarbon sectors that would entail post-closure care in perpetuity).
- Application of legislated assessment requirements to the development of policies, plans and programs now subject to the Cabinet Directive is not mentioned. This is a major omission given that
  - the Cabinet Directive has been the federal government's main vehicle for strategic assessments for a quarter century;
  - its non-transparent process precludes credibility and clearly offends the first

guiding principle behind the federal assessment reform initiative (“fair, predictable and transparent” (p.7)); and

- reviews by the Commissioner for Environment and Sustainable Development have consistently found unsatisfactory compliance with the policy-based requirements.

While only some strategic undertakings that have been subject to the Cabinet Directive many have direct implications for projects subject to assessment. Most of these strategic undertakings could have important sustainability-related effects and some would be at least as deserving of rigorous and transparent assessment as projects.

- The DP is not clear on whether or when “regional assessments” are being conceived as regional studies rather than assessments of regional undertakings (e.g., assessments built into regional planning or regional program development). While regional studies may often be useful, they are less likely than regional plans and programs to provide firm guidance for project planning and assessment (e.g., just as regional urban studies are less likely to provide clear guidance than regional urban plans that set basic rules for urban project developments).
- The DP does not mention establishment of a legislated base for strategic and regional assessments. It does not describe a mechanism for designation or other triggering of strategic or regional assessments, or for identifying appropriate proponents where need for a new strategic or regional initiative is recognized. Nor does it outline the basics of a process (or different process streams) for strategic and regional assessments under the law. All are needed.

*Upshot:*

The next steps in elaboration will need to include

- the substance of a legislated base and essential process components for strategic and regional assessments;
- transparent and participative law-based processes for triggering strategic and regional assessments, with clear provisions for
  - strategic assessment of undertakings that address broad options and big policy issues as well as means of dealing with existing and anticipated cumulative effects that are beyond the capacity and authority of project level assessments;
  - regional assessments (often inter- or multi-jurisdictional) of undertakings such as plans and programs that address broad regional issues and opportunities and provide firm guidance for project level assessments and project planning and approval outside the assessment process;
  - law-based strategic assessments of other strategic undertakings that may have important sustainability-related effects (including relevant strategic undertakings now subject to the Cabinet Directive); and
- provisions for assignment of proponent responsibilities to initiate strategic and regional undertakings to address recognized emerging needs.

## ***Tiers***

### *DP:*

- As noted above, the DP presents strategic and regional assessments as means of addressing cumulative effects (p.9). The implication is that strategic and regional assessments are meant to provide credible and authoritative guidance for project level assessments in a tiered structure. In other words, the assessed strategic undertaking (policy, plan or program) would provide a framework for project planning and assessment (and, in turn, the project assessments and monitoring would provide further information for review of the strategic undertaking).
- The DP anticipates use of collaborative processes involving other relevant authorities and stakeholders for the strategic assessments, and therefore anticipates broader value from strategic assessment deliberations and guidance (p.9).
- The DP does not set out how authoritative tiering would be established in law or provide details on how collaborative processes would be structured.
- The DP anticipates post-approval follow-up (p.8), which could provide feedback loop information for updating of strategic and regional undertakings.

### *Comment:*

- Effective tiering of strategic and regional assessments, and the process efficiencies that result, are not likely unless the strategic and regional processes are as authoritative (law-based) and credible (broadly scoped, open, participative) as the project level processes. Suitable provisions for triggering strategic and regional assessments and for establishing duly open and rigorous processes for strategic and regional undertakings are therefore crucial.

### *Upshot:*

The next steps in elaboration will need to include

- legislated provisions for triggering strategic and regional assessments and for establishing duly open and rigorous processes for strategic and regional undertakings;
- legislated provisions for negotiating inter- and multi-jurisdictional agreements for strategic and regional assessments, ensuring that the core components of credible and authoritative federal assessments are not compromised; and
- requirements and processes for post-approval monitoring findings feeding back into reviews of strategic and regional undertakings.

## ***Streams***

### *DP:*

- The DP does not address whether or how assessment processes at the strategic/regional or project levels would be assigned to different (more and less demanding) streams in initial designation or other triggering.
- For project level assessments, however, the DP describes a new “early planning and engagement phase” that would develop clear early guidance for the proponent on “what will be assessed” (undefined: perhaps the scope of the project and associated assessment

requirements), key issues, information requirements, means of attending to relevant interests and authorities, expected timelines, and “the scale of assessment required” (p.10). The latter implies that case-by-case streaming is anticipated.

*Comment:*

- Whether or not pre-defined assessment streams are needed at the project and strategic levels is open to debate, but there is reason for concern that the absence of pre-defined streams for moderately significant undertakings will lead to an inclination to include only the most obviously major undertakings in the Project List of undertakings automatically subject to assessment.
- The DP does anticipate determination of case-specific “scale of assessment” needs in early planning for individual cases. While this is useful, it does not provide any pre-planning process clarity for proponents.
- Both for anticipatory streaming and for case-by-case determination of “scale of assessment,” clear rules will be needed to clarify which process components can be adjusted, and which ones are non-negotiable.

*Upshot:*

The next steps in elaboration will need to include

- legislated provisions for defining more and less demanding streams for assessment at the project and strategic/regional levels;
- rules to clarify which process components can be adjusted (e.g., the range of alternatives to be examined), and which ones (e.g., the sustainability-based test and effective opportunities for meaningful public engagement) apply in all cases without exception; and
- associated rules on how properly assessed strategic and regional undertakings, used in a tiered approach to assessment, may influence “scale of assessment” decision making at the project level.

***Cumulative effects, broad alternatives and big policy issues***

*Background:*

- Cumulative effects, broad alternatives and big policy issues have been three major areas of difficulty in project level assessments. The issues involved often underlie concerns about the potential effects of proposed undertakings, but project assessments are typically ill-equipped to deal with them. The issues sit uncomfortably in the scope of project level assessments and project proponents who carry assessment responsibilities typically lack the authority to respond to the concerns and opportunities involved.

*DP:*

- As noted above, the DP recognizes needs to address cumulative effects and proposes use of regional and strategic assessments as the appropriate vehicles.
- The DP does not mention similar, and often overlapping issues involving broad alternatives and big policy matters that lie beyond effective treatment in typical project assessments, though regional and strategic undertakings and assessments could also be effective mechanisms for dealing with these issues too.

- The DP does not consider how cumulative effects, broad alternatives and big policy issues are to be addressed in project assessments where these matters are important for project level decision making but strategic or regional assessments are not available.

*Comment:*

- Cumulative effects, broad alternatives and big policy issues will continue to arise as major concerns in project level assessments. Poor attention to them will continue to be a source of frustration and potential conflict.
- Two response options are available
  - use of strategic and regional assessments to address these matters, and
  - anticipatory arrangements for the relevant government authorities to address these issues in project assessments where no strategic or regional assessment has been undertaken (or can be completed within the project assessment window).
- Because not all such issues can be anticipated and because strategic and regional assessments will be available in only some circumstances, both response options will be needed.
- In its section on early engagement and planning (p.10), the DP refers to an important role for “clear direction from government.” The second response option above can be considered an extension of this role.

*Upshot:*

The next steps in elaboration will need to include

- legislated provisions for use of strategic and regional assessments as means to address broad alternatives and big policy issues as well as cumulative effects that cannot be addressed efficiently and effectively in project assessments; and
- legislated responsibility for the relevant government authorities to address cumulative effects, broad alternatives and big policy issues that arise in project assessments and have not been resolved in credible and authoritative strategic and/or regional assessments.

***Decision making responsibilities – the assessment stage***

*DP:*

- The DP proposes to leave lead responsibility for assessment in the hands of the project proponent (p.10).
- Government(s) would continue to have a role in providing “clear direction,” but the direction would come earlier and be informed by broader engagement of stakeholders and other authorities, including efforts to gain consensus (p.10). The clear direction to the proponent would cover “what will be assessed,” information requirements, attention to stakeholder interests and Indigenous rights and interests, and timelines (p.10).
- In some cases, the process, including early planning and engagement, would be guided cooperatively by federal and Indigenous and/or provincial/territorial authorities (p.13).

*Comment:*

- The proposal to leave assessment responsibility with proponents signals rejection of the Expert Panel’s recommendation to shift this responsibility to an independent commission

supported by a multi-authority/interest project committee and an expert committee, beginning at the early planning phase. The Expert Panel's recommendation was aimed at addressing widely-reported concerns about bias in proponent-led assessment work. The DP's approach seems not to address these concerns, except insofar as multi-interest involvement in the early planning and engagement phase (p.10), modest strengthening of public participation capacities (p.11), and the proposal for "peer review of science and evidence" (p.12) may lead to substantial changes in practice and perception.

- Giving the proponent the central role in the assessment stage is consistent with ensuring the proponent can integrate project planning and assessment work iteratively, so that assessment findings affect project planning and vice versa. But assessments led by proponents with evident interests in the nature of the findings are unlikely to favour prospects for consensus. The situation more often calls for countervailing expertise in a more or less adversarial process.

*Upshot:*

- The proposed changes by themselves do not provide potentially satisfactory responses to the identified problems.

- While leaving lead responsibility for assessment in the hands of proponents may be necessary because of the need to integrate assessment work and project planning, the reality of proponent bias remains and much more specific provisions for limiting and offsetting that bias are needed than are provided in the DP. The needed provisions (in addition to the early engagement, public participation support and peer review ideas already in the DP) include

- development of case-specified sustainability criteria for decision making, with open engagement of relevant interests, authorities and experts;
- identification and comparative evaluation of potentially reasonable alternatives;
- clear provisions for effective early engagement of relevant interests and experts as well as authorities in developing the assessment agenda for individual cases, including review of the methods to be used;
- more effective and unfettered involvement of government experts in reviews of key assessment plans and products; and
- stronger support for intervenors to undertake or commission capable critical reviews of proponent work.

- While some of these requirements will have to be scaled to the demands of more and less consequential cases and assessment streams, the concerns to be addressed are likely to be present in most if not all cases.

- The decision to leave the proponent with core assessment stage responsibility will not eliminate the potential for more consensus oriented assessment processes, but some serious rethinking will be needed.

## *Decision making responsibilities – the review stage*

### *DP:*

- The review of proponent project proposals and supporting assessments would in non-energy cases be the responsibility of a “single government agency” (henceforth “the agency”) assigned to guide and conduct federal assessment reviews (pp.13, 18).
- Joint reviews would be undertaken
  - by the agency and the “life-cycle regulators” in cases where regulatory responsibilities lie with the National Energy Board, the Canadian Nuclear Safety Commission or one of the Offshore Boards (p.13)
  - the agency and Indigenous and/or provincial/territorial authorities in cases of collaborative inter- or multi-jurisdictional assessment.
- Beyond the points about joint reviews, the DP does not describe the anticipated nature of the review process, including decision making on whether and when there would be public hearings, how Panels would be appointed, what powers they would have, and how their conclusions (presumably in the form of recommendations) would be treated.

### *Comment:*

- Assigning responsibility for federal assessment reviews to a single government agency is likely to facilitate greater consistency in reviews and offers better prospects for process credibility than is possible with the current reliance on the lifecycle regulators for project reviews within their mandate areas.
- The credibility of assessment reviews by this agency will depend heavily on the integrity of its arm’s length status and the capacities of its staff.
- The absence of information concerning the review process (e.g., with and without public hearings) leaves important matters for further elaboration.
- The proposal to retain roles for the lifecycle regulators in assessment reviews and (presumably) recommendation making rejects the Expert Panel’s advice. The Expert’s Panel concerns, supported by the weight of the public submissions it received, centred on the regulators’ lack of a suitable planning culture and the widely-shared perception that they have long been unduly close to the industries they regulate. Some of those concerns are recognized in the DP section on “Modern Energy Regulation” (p.20) and the proposed changes to the National Energy Board could alleviate some of the problems. But entrenched regulatory mindsets are not easily transformed and in any event the proposed changes apply to only one of the three regulators.
- There would seem to be room for useful specification of what the DP means by “jointly conduct impact assessments as part of a single, integrated review process” (p.18). Assessment roles for the regulatory authorities could be defensible if “jointly conduct” were specified to establish
  - that the regulatory agencies take the lead role in reviewing the technical aspects of submitted project assessments in their regulatory areas, while the agency retains responsibility for the overall review and takes the lead role for the range of topics beyond the regulators’ expertise;
  - that in cases with public hearings, the regulatory authorities would contribute technical expertise, help to ensure consistency of information requirements for overlapping assessment and regulatory purposes, and help to prepare for integration

- of regulatory monitoring and follow-up with other monitoring and follow-up activities in relevant cases; and
  - that the regulatory authorities would not appoint panel members and would not provide the secretariat for the panels.
- Any greater roles for the regulatory authorities would not be justified until there is evidence from experience that
  - the culture of the National Energy Board has been transformed by the currently proposed changes; and
  - the same has been achieved by the other lifecycle regulators.

*Upshot:*

- Locating assessment review responsibility in a single agency is generally desirable. However, important questions remain about
  - the arm's length independence of the anticipated single agency; and
  - nature of the review process, including how reviews with and without public hearings will be undertaken, and when and how review panels would be organized and empowered.
- Assigning joint assessment roles to the lifecycle regulators may be justified only if the roles of the regulators are clearly delineated and limited to
  - technical matters within their expertise;
  - means of coordinating assessment and regulatory information requirements; and
  - preparations for integrated monitoring and follow-up.
- Moves to any larger "joint review" roles for the regulators must await evidence from experience that the regulators have achieved the necessary cultural shift from technical regulation to public interest assessment and have demonstrated critical independence from the industries they regulate.

***Decision making responsibilities – approval (or not) stage***

*DP:*

- Reviews would lead to recommendations for decision by the Minister or Ministers or Cabinet, plus other such authorities in inter- or multi-jurisdictional assessments (p.13).
- The DP does not clarify when or why some decisions would be made by Cabinet instead of the Minister(s).
- Beyond considering the public interest, the DP does not mention what the Minister(s) or Cabinet would need to take into account or whether any public rationale would be required (e.g., for departing from the recommendations from the assessment review).
- The DP does not address the potential for or means of receiving and adjudicating appeals to decisions.

*Comment:*

- The proposal to place decision making in the hands of the Minister(s) or Cabinet is rationalized as ensuring "accountable government" without attention to the obscuring cloak of Cabinet secrecy or the vulnerability of political decision makers to short term imperatives. If those problems are not to undermine process credibility and predictability,

the government will need to establish clear sustainability-based criteria for assessment decision making and construct a tradition of providing reasons for all assessment decisions based on those criteria.

- Appeals of decisions have been common and are unlikely to disappear even with a much improved law and process. Consideration of best mechanisms for dealing with appeals is needed.

*Upshot:*

- Placing decision making authority in the hands of Ministers or Cabinet can be justified only if accompanied by unwavering commitments to adherence to the purposes of the legislation, application of explicit sustainability-based criteria for assessment decisions, and public provision of reasons clearly based on those criteria for all assessment decisions.
- Despite best efforts to build consensus, apply a credible process and make well justified decisions, dissatisfactions and appeals of decisions are likely. The next steps in elaboration will need to include attention to the preferable mechanism(s) for directing and hearing appeals.

### ***Early engagement and planning***

*DP:*

- The DP proposes introduction of a new early engagement and planning phase for assessments, with provisions for government-to-government discussions with potentially affected Indigenous peoples, and for some public role in identifying key assessment issues.
- The underlying conception of “early” is not defined.
- The anticipated product of this phase is presented as  
“clear guidance ... on [w]hat will be assessed and how, including the scale of assessment, ... information required ... [h]ow to incorporate the interests of multiple stakeholders and consider Indigenous rights and interests, [and an e]xpected timeline for getting to a decision” (p.10).
- The nature of public engagement is not described consistently. The DP’s most direct reference is to “[m]aking public and seeking feedback on an initial list of issues to consider in an assessment” (p.10). However, the DP also mentions intent to “seek consensus on the project assessment process,” and the probable intent to include multiple interests as well as government bodies in the consensus is supported by a boxed quote favouring such an approach (p.10).
- As presented in the DP, the early engagement and planning phase has been conceived as a process step for project level assessments. The DP does not mention application in assessments of strategic undertakings, and is generally silent on the nature of strategic assessment processes.

*Comment:*

- The DP has adopted the new early engagement and planning phase idea from the Expert Panel, though with important revisions. As noted above, the DP rejects the Expert Panel’s recommendation to remove assessment responsibility from the proponent. Also there is no reference to the Panel’s recommended early planning committees (a project committee of

multiple authorities and interests and an expert committee), though that may be a specific component that is not addressed at the general level of the DP.

- Clarity about what “early” means is needed. Because the advantages of the new early phase turn on the opportunity for authorities, stakeholders and other interests to influence project planning and assessment before major study and design trajectories are set, the legislation and associated guidance will need to require initial information from proponents at a stage where there is reasonable confidence in project visibility but key options remain open.
- The provisions for an early deliberative process phase need elaboration that is consistent with the objective of effective multi-interest engagement. Merely seeking public feedback on an initial list of issues would not be meaningful engagement. Especially if the list were drafted by the proponent, as seems likely in proponent-led processes, the potential for process credibility would be negligible.
- An “early” phase that awaits detailed project information and then proceeds by seeking public feedback on an initial list of issues would be no different from current practice. It would also lack potential for developing consensus on the key process issues (scope, priority considerations, criteria, process steps and timelines, etc.) or enhancing process credibility.
- Much greater clarity is also needed on the substance of the guidance to be drafted in the early engagement and planning phase. The core contents of a project assessment plan are likely to include
  - the scope of the project being assessed, including the general nature of potentially reasonable alternatives to be considered (recognizing that further options may emerge);
  - the major issues likely to require particular attention (recognizing the full generic scope of considerations and criteria set out in law and other guidance), including any immediately evident strategic issues (larger cumulative effects, broad alternatives and big policy issues) that are beyond the reasonable capacity of the proponent to address and would have to be the responsibility of government(s) through strategic assessments or within the project assessment
  - an initial set of case-specified evaluation and decision criteria based on the sustainability-based criteria set out in the law and other guidance;
  - assignment other roles and responsibilities;
  - initial specifics on information requirements (recognizing the earliness of this phase in the process), methods;
  - initial plans for further consultations and engagement of government bodies (federal, Indigenous, federal/territorial, municipal, as appropriate), the proponent(s), stakeholders and other interests;
  - particular requirements and responsibilities for the engagement of Indigenous people;
  - expected timelines; and
  - provisions for adjustment of the plan as the assessment proceeds.
- It will be important to recognize
  - that preparing the project assessment plan would be the responsibility of government (the agency or the agency with their equivalents from collaborating other jurisdictions), not a matter to be delegated to the proponent;

- that the project assessment plan would be directed not only to the proponents but also to the collaborating governments and other participants; and
- that with the level of information available at a truly early phase, the guidance on most of the matters listed above would be tentative and subject to iterative improvement.
- The level of ambition reflected in individual project assessment plans would need to be scaled to the potential consequences of the project. As with other process matters, the legislation must ensure clarity about what aspects of early engagement and planning are fundamental and what aspects can be condensed or set aside in individual cases or in less onerous process streams.
- Given the nature of what is to be presented credibly and with consensus (to the extent possible), much greater clarity is also needed on the nature of engagement, including
  - the key role of the agency (not the proponent) in facilitating the engagement leading to the project assessment plan;
  - the means by which consensus is to be sought, among whom and on what; and
  - how non-consensus items are to be addressed (e.g., possible roles for dispute resolution mechanisms).
- Maintaining agency credibility in the process will be a challenge. In the early engagement and planning phase alone, the agency will have multiple potentially conflicting roles as a facilitator, participant and authority responsible for important decisions (especially about the contents of the initial project assessment plan and the level of flexibility to adjust this plan as new issues and opportunities arise). Because the approach taken depends heavily on the credibility of the agency, the legislated provisions and accompanying guidance and administrative practices will need to include mechanisms for maintaining effective and visible impartiality.

*Upshot:*

The next steps in elaboration will need to include clarification of

- the early timing of this new planning stage and the nature of the initial information required of proponents;
- the mandatory contents of the project assessment plan to be prepared in each case;
- the process steps, expected participants, and assignment of responsibilities;
- what components of substance and process are and are not open to abbreviation for the purposes of generic streaming or case-specific scaling of requirements;
- provisions for adjusting the initial project assessment plan as more is learned in the course of the assessment; and
- means to maintain agency credibility in the process in light of its multiple, potentially conflicting roles.

As well, the next steps will need also to address early engagement and planning, and other process components for strategic and regional assessments.

## *Post-decision monitoring and follow-up*

### *DP:*

- The DP includes retention of enforceable approval conditions and proposes to “explore” means of amending these conditions to facilitate adaptive management and adoption of technological advances (pp.14, 19).
- The DP also proposes enhanced compliance and enforcement activities by regulatory authorities and inclusion of other authorities and stakeholders, in particular “Indigenous peoples, communities and landowners” (pp.16, 19).
- Monitoring would also benefit from provisions for incorporation of Indigenous knowledge, more open science and data accessibility (p.12).

### *Comment:*

- Better monitoring, enforcement and follow-up have been promised repeatedly over the years. The main barriers to effective action appear to have been failures to assign responsibility and resources, and inadequate links between assessment and regulatory decision making.
  - The DP recognizes the latter problem, though its responses are limited to continued integration with the lifecycle regulatory bodies on enforcement matters within their mandate areas (p.19) and another promise of enhanced compliance and enforcement by other relevant government regulators.
  - The DP is largely silent about legislated responsibilities even though clearly legislated responsibilities are typically a pre-requisite for any serious prospect of adequate resources.
  - The most promising new component is the DP’s proposal for inclusion of Indigenous authorities and local people (communities and landowners) in monitoring. While local people may not have existing expertise in monitoring protocols, they are likely to have the strongest incentives for careful and timely monitoring and pressure for effective responses to identified issues.
- The proposed peer reviews of science and evidence that are presented as contributions to the assessment phase (p.12) could also be used to strengthen monitoring and follow-up work.
- The steps to facilitate adaptive management are welcome, but are not accompanied by recognition of needs also to favour adaptable design in approved undertakings.

### *Upshot:*

The next steps in elaboration should include

- legislated provision for clear assignment of monitoring, enforcement and follow-up responsibilities;
- details about how Indigenous people and other local residents are to be mobilized in effective monitoring;
- extension of the proposal for peer reviews to post-decision monitoring; and
- incorporation of emphasis on adaptable design in sustainability-based assessment criteria to facilitate adaptive management in response to monitoring findings.

## *Transparency and participation*

### *DP:*

- The DP devotes a section to transparency and participation (p.11). It lists a set of directions centred generally on reasons for decisions and responses to public input, greater on-line access, improved participant funding programs, and opportunities in monitoring and compliance activities.
- Some of the proposed changes are positive but undefined. These include
  - “open opportunities for meaningful public participation in assessments and regulatory reviews” (p.11); and
  - “clearer transparency requirements for more projects (e.g. assessments of projects on federal lands, notice of proposed works on navigable waters)” (p.11).

The implications for assessment law reform are uncertain because of the vagueness of the proposals and because some aspects (e.g., opportunities in regulatory reviews) appear to lie outside the usual ambit of assessment law.

- Additional gains for participation and transparency seem likely to arise from introduction of the early engagement and planning phase, though as noted above the nature of public participation at that phase is not elaborated well (see above).
- The DP’s coverage of transparency and participation focuses on assessment of projects. Similar treatment of strategic and regional assessments may be assumed but is not mentioned.

### *Comment:*

- Attention to transparency and participation in the DP is welcome and the direction of the proposed changes is positive. The specifics, however, are mostly modest or missing.
- The most important proposals may be those for the early engagement and planning phase, public involvement in monitoring and compliance, and transparency on reasons for decisions and how public input was considered. In each of these areas, however, the potential for substantial improvement will depend on further elaboration of the changes to be made in law and practice.

### *Upshot:*

The next steps in elaboration should include

- clarification of participants’ roles in the early engagement and planning phase and in monitoring and compliance activities (also see above);
- explicit commitment to extending the participant funding program through all phases of the assessment process, including monitoring and follow-up;
- requirements tying the reasons for decisions to explicit sustainability-based criteria;
- particulars on the provision of “open opportunities for meaningful participation” and “transparency requirements for more projects;”
- commitments to transparency and participation in regional and strategic level assessments and in any continued project level “assessments” outside the legislated process for designated projects.

## *Information and uncertainty*

### *DP:*

- The DP includes a section devoted to: “science, evidence and Indigenous knowledge” (p.12), which offers four proposals (p.12):
  - to establish an “open science and data platform” incorporating information related to all three of the overlapping topics recognized in the section title;
  - to incorporate Indigenous knowledge “alongside other sources of evidence,” with recognition of needs to “co-develop” better means of achieving this while protecting confidentiality “where appropriate;”
  - to add “peer reviews of science and evidence in the assessment phase;” and
  - to provide “plain language summaries of the facts that support assessments.”
- Other DP contents related to information issues include proposals for early engagement and planning and for enhancement of transparency and participation (see above).
- The DP’s directions on assessment law reform do not mention uncertainty or precaution.

### *Comment:*

- The proposal for an open science and data platform (including Indigenous knowledge) is welcome, indeed long overdue. The difficult parts will include how best to ensure that the databank
  - is suitably accessible and searchable,
  - engages many partners,
  - respects its sources,
  - is consistently updated, and
  - is accompanied by effective means of facilitating research and other uses in the public interest.
- The proposal to strengthen inclusion of and respect for Indigenous knowledge in assessments appears to be a useful further step in what has been a slow process. As is the case with most DP proposals, much will depend on specifics (e.g., the what extent “Indigenous knowledge” is treated as something more than a source of more data to supplement data from prevailing forms of western science. But the opening is important, particularly in the context of the DP’s section on “partnering with Indigenous peoples” (pp.15-16), which includes broader commitments to “sharing an administrative authority and management responsibility” and “co-development of frameworks for collaboration” (p.15).
- Peer reviews of “science and evidence” should also be useful, though they cannot be a sufficient means of building impartiality and credibility into assessment work led by proponents with strong interests in gaining approvals for undertakings they have already determined to be to their advantage (see above re decision making responsibilities at the assessment stage). Important questions include
  - how and with whose input decisions will be made about priorities for peer review, and
  - how peer reviews will be treated as complementary to expert reviews commissioned by other participants in assessments and assessment reviews.
- Plain language summaries are not new or potentially sufficient. Many assessment summaries have been explicitly labelled as “plain language” or the equivalent, and many of

these have been as comprehensible and concise as can be expected, given the complexity of the issues, options and underlying concepts. The complexities will remain. What is needed for process credibility and effectiveness is much greater emphasis on capacity building and learning, achieved through a much more diverse and creative set of tools and initiatives than plain language summaries.

- The DP's sections on early engagement and planning, enhancement of transparency and participation, and partnering with Indigenous peoples provide more important openings for mobilization of more existing knowledge, understanding and commitment to learning. In each case the specifics of approaches taken will be crucial, but the potential for gains is substantial.
- Critiques of impact assessments and related decision making have often pointed to undue reliance on simplifying assumptions, inadequate attention to the behaviour of dynamic ecological and social systems, and poor recognition of uncertainties and their implications for judgements – all of them exacerbated by the long-standing weakness of post-decision effects monitoring and learning from experience. In this context, the DP's proposals to improve the quality of information gathering will need to be supplemented by steps to ensure more respect for and attention to complexity and uncertainty.

*Upshot:*

- The DP's proposals on information matters are positive and merit careful elaboration and/or extension (e.g., introducing peer reviews in monitoring studies as well as in the assessment stage).
- Needed further steps include ensuring greater respect for and attention to complexity and uncertainty and implications for attention to interactive effects and favouring of precautionary options.

## ***Learning***

*DP:*

- While the word “learning does not appear in the DP, various proposals in the document promise steps that could strengthen learning through assessment. These include
  - the expanded scope of assessment,
  - the new early engagement and planning phase and other expansions of openings for public participation,
  - expansion of the range of possible participants in monitoring and enforcement activities,
  - various proposals for greater transparency and openings for public participation,
  - the open science and data platform,
  - greater use of Indigenous knowledge,
  - peer reviews, and
  - appointment of advisory committees.

*Comment:*

- The DP provides important openings for increased learning from assessment.
- Beyond suitable expansion and elaboration of these openings, other needed steps include

- broad engagement in development of generic and case-specified criteria and trade-off rules for assessments;
- clear commitment to legislated strategic and regional assessments with transparency, public engagement and iterative review and renewal;
- processes at the assessment review stage that encourage and respect active and influential engagement and build capacity for such engagement;
- regular auditing of assessment performance under the new law; and
- specified dates for mandatory reviews of the legislation to identify and respond to needs for updating in light of lessons learned.

*Upshot:*

The learning gains from the DP proposals depend on further elaborations of proposals discussed elsewhere in this paper, and address the five additional matters raised in the comments above.

***Administration and guidance***

*DP:*

- The DP proposes assignment of most assessment responsibilities to a “single government agency” (p.18). The main exceptions are that
  - proponents retain core responsibility for impact assessments, subject to government direction (p.10);
  - the Minister(s) or Cabinet are to be the decision makers on approvals (or not) and conditions of approval for assessed proposals (p.18);
  - the agency’s responsibilities are shared with other jurisdictions in cases of co-governance with Indigenous, provincial and/or authorities and processes (pp.17, 19); and
  - some roles are to be shared with the lifecycle regulators for projects in their mandate areas (pp.13, 18).
- The DP recognizes some specific needs for clear guidance from government to proponents, beginning with the early planning phase (p.10). The proposed agency would seem to be the prime candidate for development and provision of much of this guidance, perhaps often in collaboration or co-governance with other bodies inside and beyond the federal government.
- The DP also includes provisions for establishing advisory committees “for indigenous peoples, stakeholders and experts” reporting to the Minister (p.18).

*Comments:*

- Consolidation of assessment review responsibilities in a single agency has important advantages, especially in light of the demonstrated limitations of the lifecycle regulators in assessment reviews. However, the number and diversity of role raises risks of potential conflict. As noted above (see the section on “early engagement and planning”), even at the outset of individual assessments, the agency is expected to be a facilitator,

participant in consensus-seeking discussions, and lead government authority for guiding proponents and making decisions on the assessment agenda, scope and process.

- The DP recognizes only a few of the many needs for guidance that would have to be met at least in part by the agency. In addition to the identified expectations for agency guidance to proponents in particular cases (concerning assessment scope, information requirements for proponents, consultation expectations and timelines, etc.), the agency would face needs for clear and credible guidance a host of broader matters, for example on

- project list interpretation;
- designation and exemption processes and criteria (p.14);
- strategic and regional assessment processes;
- impact assessment methods;
- approaches to cumulative effects assessment in project and regional/strategic-level assessments
- the scope of reasonable alternatives;
- incorporation of different forms of evidence based on different knowledge traditions and sources – including incorporation of Indigenous knowledge, with the guidance development relying heavily on the knowledge holders (p.12);
- the responsibility of government bodies to contribute to reviews of submitted proposals and assessments, and to address major cumulative effects, broad alternatives and big policy issues not covered by strategic or regional assessments;
- the authority of assessed strategic level undertakings (policies, plans, programs) in project planning and assessment;
- grounds for exceptions to timelines;
- evaluation and decision criteria;
- assignment of responsibilities for monitoring and follow-up; and
- acceptable forms of co-operation agreements with Indigenous governments and provincial/territorial governments.

- In addition to this guidance, the agency would have important responsibilities for negotiating and sharing co-governance relations with Indigenous, provincial and territorial authorities.

- All will be crucial for the clarity and consistency of assessment expectations and for the credibility and efficiency of assessment practice. And all of it will need to be developed through open processes with meaningful engagement.

*Upshot:*

- The multiple roles assigned to the agency entail risks of conflicting interest and impairment of credibility. Legislated provisions, guidance and administrative practices will need to include mechanisms for maintaining effective and visible impartiality.
- The agency's roles in individual assessments will be accompanied by no less substantial and delicate responsibilities in the development and delivery of guidance on a host of broader policy matters.
- Meeting these expectations will entail a very high level of administrative competence, creative innovations in open and collaborative policy development, and extraordinary discipline in ensuring that the weight of administrative responsibilities does not add to the usual biases in administrative decision making (e.g., to favour fewer and more narrowly scoped assessments, consultations and partnerships).

## ***Partnering and co-governance with Indigenous authorities and processes***

### *DP:*

- The DP notes that one of the initial purposes of the reform exercise was to “advance reconciliation with Indigenous peoples” (p.3) and reports that one of the guiding principles for the assessment law and process changes is  
    **“Participation of Indigenous peoples in all phases that advances the Government’s commitment to the United Nations Declaration on the Rights of Indigenous Peoples and reconciliation” (p.7).**
- The DP includes a section on “partnering with Indigenous peoples” (pp.15-16) as well as attention to Indigenous engagement, knowledge, rights and interests in other sections, including the one on “cooperation with jurisdictions” (p.16).
- The proposals in these various sections include the following:
  - “direct engagement between Crown representatives and Indigenous peoples” (p.10);
  - “improving participant funding programs for Indigenous peoples” (p.11);
  - “incorporating Indigenous knowledge” (p.12);
  - “enabl(ing) increased Indigenous involvement, including Indigenous-led assessments” (p.15);
  - “sharing of administrative authority and management responsibilities” (p.15);
  - “seeking to achieve free, prior and informed consent” (p.15);
  - “co-development of frameworks for collaboration” (p.15);
  - “specific working tables with Indigenous peoples” in individual assessments (p.15);
  - “Indigenous partnerships and co-development in monitoring” (p.16);
  - “build(ing) capacity and enabl(ing) their participation in assessments” (p.16);
  - process design or application to “better recognize Indigenous jurisdiction, laws, practices and governance systems” (p.17); and
  - enabling substitution of Indigenous assessment processes for the federal process (p.19).
- The DP includes a proposal for “(s)trengthening existing provisions that explicitly require assessment of impacts on Indigenous peoples” (p.18).
- In contrast to the Expert Panel, the DP proposes a scope of assessment that does not identify culture as one of the broad areas of consideration (p.13).

### *Comment:*

- As is the case with most proposals in the DP, the ones related to reconciliation with Indigenous peoples are general and depend heavily on specifics that have not yet been presented. How Indigenous people are engaged in government-to government processes for elaborating the specifics will be an important test of the commitments outlined in the DP.
- The DP reference to “seeking to achieve free, prior and informed consent” (p.15) would seem to far well short of commitment to obtaining free, prior and informed consent, despite **“the Government’s commitment to the United Nations Declaration on the Rights of Indigenous Peoples and reconciliation” (p.7).**

- The omission of culture from the list of broad categories of assessment considerations may be significant for Indigenous peoples. Attention to cultural impacts is not otherwise proposed in the DP, at least not directly. Cultural impacts may be covered by the general proposal to strengthen provisions that “require assessment of impacts on Indigenous peoples” (p.18). In the DP, most references to impacts involving Indigenous peoples focus on “rights and interests” (e.g., pp.9, 10). Even if cultural impacts would normally be included as effects on rights and interests, explicit references to cultural impacts in the legislation might be needed to support consistency of application.
- The DP anticipates three relationships between federal assessments and Indigenous processes:
  - joint assessments with shared “administrative authority and management responsibilities” and perhaps harmonized requirements (pp.15, 19);
  - Indigenous-led assessments (p.15); and
  - substitution of Indigenous processes for the federal process, and development of criteria to enable such substitutions (p.19).

None of these is yet accompanied by any indication of how they would work, including the nature of the processes and the criteria for determining when any of them would be used.

- Substitution of Indigenous processes may be reasonable in some circumstances. Substitution of provincial for federal assessment is undesirable for several reasons, some of which are tied to the Constitutional division of federal and provincial responsibilities (see the following section). The relationship between Indigenous and federal powers and responsibilities is different, in ways that make substitution of Indigenous processes more suitable where the relevant issues are within Indigenous authority. Here too the details will be crucial.

*Upshot:*

The apparent emphasis given to Indigenous peoples’ roles in assessment as well as to impacts on Indigenous rights and interests is positive, but the test of the DP proposals will be in the specification of details for legislation and application. In the crucial matter of “free, prior and informed consent” the proposal in the DP does not appear to match other less ambiguous commitments, and can be taken as an indicator of prospects for disappointing implementation.

***Cooperation with provincial and territorial authorities and processes***

*DP:*

- The DP indicates a desire for cooperation with other jurisdictions in project assessments, chiefly for efficiency in the form of “one project – one assessment” (p.17). For the provinces and territories, the DP proposes continuing to allow substitution of provincial or territorial assessment processes for the federal process “where there is alignment with federal standards” (p.17).
- Further inter- and multi-jurisdictional cooperation is proposed for “planning and management of cumulative effects” (pp.9, 17). The identified cooperative activities (p.9) include

- “developing and strengthening national environmental frameworks” (e.g., the Pan-Canadian Framework on climate change);
- “conducting strategic assessments” on the implications of the national environmental frameworks for “activities subject to federal oversight,” presumably including designated projects under federal assessment legislation;
- “regional assessments to guide planning and management of cumulative effects” (e.g. effects on biodiversity and species at risk); and
- populating the “integrated open science and data platform.”

*Comment:*

- Continued provision for substitution for provincial processes is favoured by some provinces and proponents. It is proposed in the DP “to promote greater efficiency.” But efficiency has no practical meaning or value unless it is tied to effectiveness, and there is little evidence that process substitution is likely to be more effective in delivering rigorous assessments and credible decisions than properly integrated joint assessments. The experience in British Columbia concerning the successive Prosperity Mine proposals is a relevant indicator.
- Unlike the proposal for substitution of Indigenous assessment processes, the proposal for continued substitution of provincial and territorial processes is not accompanied by a promise of explicit criteria for the substitution decision. For provincial and territorial substitutions, the DP offers only the vague proviso “where there is alignment with federal standards” (p.19).
- Process substitution could make sense
  - where the relevant authorities have nearly complete overlapping jurisdiction; and
  - where the assessment requirements and processes of the jurisdictions are effectively identical in strength if not specific form.

That is not the case for Canadian provincial and federal jurisdictions, whose areas of authority diverge as well as overlap, and whose assessment requirements and processes differ substantially. In such circumstances, the public interest is best served by cooperative joint applications that benefit from each jurisdiction’s attention and process strengths. A better case may be made for substitution of territorial processes insofar as full federal jurisdiction is covered.

- Inter- and multi-jurisdictional cooperation in regional and strategic assessments is desirable and likely often to be necessary if the assessments are to be sufficiently comprehensive of the issues and response options and if the conclusions are to be applied effectively.
- The greater problem with the proposals for regional and strategic assessments in the DP is that the proposals do not yet address
  - establishment of a legislated base;
  - clear focus on assessment of strategic undertakings (plans, programs, policies);
  - assignment of proponent responsibilities;
  - basic process components; or
  - grounds for credible and authoritative tiering to project assessments.

*Upshot:*

- The DP’s emphasis on cooperation with other jurisdictions is appropriate.

- The proposal for continued substitution of provincial assessment processes for federal assessments is not justified by experience or consistent with the reality of different federal and provincial responsibilities and processes.
- The proposal for inter- and multi-jurisdictional cooperation in regional and strategic assessments is, perhaps, the best aspect of the DP's treatment of regional and strategic assessments, which is so far almost entirely undeveloped.

## **The Next Generation Environmental Assessment Project**

<https://uwaterloo.ca/next-generation-environmental-assessment/>

### **The core components of next generation environmental assessment for federal application in Canada**

*Robert B. Gibson, SERS, University of Waterloo*

*2 November 2016*

The objectives, characteristics and key provisions of next generation environmental assessment are drawn from three main sources

- synthesis of findings from the academic and practitioner literatures and associated discussions among diverse participants on environmental assessment theory and practices, in Canada and elsewhere, over the past four decades;
- the implications of new understandings about social and ecological realities to be respected (especially regarding the functioning of complex systems) and the global and local challenges to be faced (especially regarding threats to sustainability and means of responding to them);
- experiments with alternative approaches (in particular jurisdictions and cases).

The following discussion summarizes the core components in 16 points. While each has individual significance, the set is best considered and treated as a package of interdependent parts.

#### *1. Purpose*

The purpose is to assist progress towards sustainability. More fully stated, it is to foster deliberations and decision making on new and renewed undertakings at the project and strategic (policies, plans and programs) levels foster proposal development, approvals and implementation that deliver the strongest feasible positive contributions to lasting wellbeing while avoiding significant adverse effects.

#### *2. Criteria*

Sustainability-based criteria are specified for each case and context

- to provide a comprehensive, credible and explicit base for evaluations and decisions throughout the assessment process, enhancing the transparency and accountability of the deliberations;
- to ensure a focus on achieving maximum gains for sustainability by aiming for the selection of the best option, rather than attempting to judge the “acceptability” of proposed undertakings;
- to encourage enhancement of multiple, mutually reinforcing, fairly distributed and lasting benefits in addition to avoidance or mitigation of significant negative effects; and
- to motivate innovation in creating options that eliminate or minimize invidious trade-offs.

### *3. Application*

Assessment requirements apply to all proposed undertakings – including policies, programs and plans as well as capital projects and physical activities – that might have significant effects on prospects for sustainability in and beyond the legislating jurisdiction.

### *4. Streams*

Each type of undertaking is clearly allocated to one of a range of streams including at least

- a demanding stream with detailed substantive evaluation and rigorous public and institutional review for the most significant undertakings with the greatest implications for ensuring and enhancing contributions to sustainability; and
- a more expeditious assessment stream for less significant undertakings.

Each stream would incorporate the core requirements for sustainability-based assessment but with greater or lesser expectations for details and extensive review.

### *5. Linked tiers*

Related assessments at different levels of breadth may be linked so that, for example, the results of law-based strategic assessments for policies, plans and programs that address big issues and opportunities, broad alternatives and cumulative effects can be used to provide authoritative guidance for project level planning and assessments that cannot cover these broad matters as effectively and efficiently.

### *6. Scope*

The scope of all assessments covers the full suite of considerations that affect the potential for progress towards sustainability, and facilitates identification of options, designs and implementation practices that deliver the best feasible undertakings in the long-term public interest. This scope includes attention to

- the public interest purposes of and need for the undertaking;
- potential reasonable alternatives;
- the full set of sustainability-related considerations and effects – biophysical and socio-economic (and their interactions), positive and negative, indirect and direct, interactive/cumulative and individual, lasting and immediate;
- the full life of options (alternatives to and alternative means of pursuing the preferred alternative), including the upstream and downstream life cycle plus legacy effects;
- cumulative effects;
- enhancement of positive effects as well as mitigation/avoidance of adverse effects;
- uncertainties and means of accommodating surprise; and
- monitoring of effects and compliance, and response to the findings.

### *7. Effects assessment*

Effects assessment throughout the process is meant to enhance understanding of the prospects for and actual delivery of positive and adverse effects. The specified sustainability criteria are applied in all effects assessment steps, including

- selecting alternatives to be compared;

- identifying the valued ecological, social and socio-ecological systems, characteristics and services to be examined most closely;
- predicting positive and adverse effects, with emphasis on cumulative effects and lasting implications;
- informing identification of best means of enhancing positive effects, avoiding or minimizing adverse effects, and evaluating potential trade-offs;
- choosing methodologies and setting priorities for effects predictions and monitoring; and
- evaluating the significance of predicted and monitored individual and cumulative effects and uncertainties.

To the extent possible, the requirements should be pre-defined, so that all participants in the assessment process know from the outset the expectations, obligations and openings to contribute.

#### *8. Participation*

Deliberations through the process are designed to facilitate active and informed engagement of members of the public, stakeholders, relevant authorities and proponents to enhance the quality and credibility of assessment decision making and to capture associated learning and capacity building benefits. Provisions for meaningful participation ensure adequate public notice, timely and convenient access to information, participant assistance (especially to enable representation of important interests and considerations not otherwise effectively included), opportunities for public comment, public hearings, and deliberative forums. The provisions apply to law and policy development as well as throughout the process of individual assessments from early deliberations on purposes/needs, alternatives, criteria specification, and main consultant selection, to development and implementation of monitoring programs with reviews of findings and response plans.

#### *9. Review and decision-making processes*

Credible review and decision making on submitted assessment documents and proposals for undertakings is ensured by mandatory development and application of explicit sustainability-based criteria, specified for the context of the case at hand. The review process is transparent and open to effective government, stakeholder and public engagement from the beginning of the deliberations, with the extent, nature and formality of requirements scaled to the significance of opportunities to avoid adverse effects and/or enhance positive ones and the potential for public concern, conflict or consensus. Within these parameters a variety of process options is available.

#### *10. Decisions*

Influential decisions at all stages of assessment processes aim to expand understanding and illuminate application of the “contribution to sustainability” test to the proposal and alternatives at hand. Approval decisions, in particular, ensure that the earlier studies, deliberations and choices have delivered a proposed undertaking that represents the best option in the public interest, will deliver multiple mutually reinforcing gains and avoid significant adverse effects. Each approval decision must

- be supported by persuasive evidence reflecting application of the context-specified sustainability criteria;
- identify the main uncertainties must be identified;
- justify unavoidable trade-offs with reasons based on the sustainability criteria and following explicit trade-off rules;
- be practically enforceable; and
- be vested in credible and accountable hands combining impartial decision makers who have been closely engaged in the deliberations and evidence and elected officials who are accountable to the electorate.

### *11. Monitoring of effects and compliance, and response to findings*

Adaptive capacity is applied as a criterion for design of approvable undertakings and implementation plans. Mandatory follow-up monitoring, with pre-assigned responsibilities, provides an information base for

- enforcement of the terms and conditions of approvals;
- quick recognition of and response to unexpected effects and opportunities; and
- identifying and documenting the lessons to learned.

The results are collected in an open and searchable public registry for broad use in enabling better predictions, more reliable assessments, and better decision making in the future.

### *12. Learning*

The whole assessment process is designed as a means to broad-based individual and social (including institutional) learning to enable transitions to sustainability. It is meant to build understandings, capacities and motivations in all sectors and among all players. Learning is encouraged in regulation and policy making as well as individual case applications in many ways including opportunities for multi-stakeholder collaboration, deliberative forums with scenario building and visioning, use of alternative dispute resolution, facilitation of public interest advocacy and provision of searchable databases on assessment experience including monitoring findings.

### *13. Authoritative requirements in legislation, regulation and guidance*

The process rests on enforceable requirements in law or regulation for obligations that those with assessment responsibilities may not be motivated to carry out on their own. These requirements provide clarity and facilitate consistency and authority in the application of fundamental requirements. While flexibility is retained to accommodate differences in undertakings and context, and to permit progressive innovation, the law and regulations explicitly limit openings for discretionary avoidance or compromise.

Detailed rules (e.g., pre-identifying undertakings requiring assessment and establishing how strategic level assessments can help streamline project level assessments) are set in regulations and updated with experience. Application of these rules is assisted by non-binding policy and other guidance documents (e.g., on how to specify sustainability-based evaluation and decision criteria, implications for different sectors, regions and other circumstances, and emerging best practice methods for addressing interactive and cumulative effects and uncertainties in assessments).

#### *14. Process administration*

Key process supervision and management, and evaluative functions are assigned to an arms-length public authority. The authority has responsibilities for

- process elaboration and clarification (e.g., concerning detailed steps and procedures for strategic and project level assessment streams, and means of specifying and applying sustainability-based evaluation criteria and trade-off rules);
- case-related decision making (e.g., identifying project and strategic level undertakings that should be subject to assessment, specifying requirements for particular cases, ensuring appropriate intervenor funding for effective public participation, and carrying out formal reviews of proposed undertakings that are not assigned to review panels for public hearings);
- process supervision (e.g., of application successes and limitations, including strengths and deficiencies of impact predictions, public engagement, trade-off avoidance, and compliance and effects monitoring) and response to emerging needs and opportunities for process improvement; and
- collaboration with other assessment participants and coordination and consolidation with equivalent assessment processes and process components in other jurisdictions.

Decisions by the independent authority are subject to override by the elected government as represented by the Governor in Council (Cabinet), but any Cabinet override must be accompanied by an explicit public justification that respects the legislated purposes. The authority is also subject to mandatory transparency of reasons for decisions as well as regular independent auditing with public reporting of findings for continuous process improvement.

#### *15. Interjurisdictional collaboration and linkages beyond assessment*

Interjurisdictional government-to-government collaboration (federal, provincial Indigenous and territorial) is fostered for both strategic and project level assessment, and facilitated by initiatives to encourage upward process harmonization to next generation standards.

Environmental assessment is linked with governments' broader efforts to identify emerging challenges and opportunities for progress towards sustainability, and to set priorities, initiate responses, review progress and adjust accordingly. Key linkages include those with

- sustainability-related policy-making, including development of sustainability principles, criteria, targets and strategies, and use of complementary fiscal and regulatory tools;
- regional and sectoral planning regimes and initiatives;
- permitting and licensing; and
- sustainability reporting and other data banking that may inform assessment deliberations and benefit from assessment findings.

#### *16. Effectiveness, efficiency and fairness*

Effectiveness, efficiency and fairness are recognized to be interdependent and not candidates for trading off one for the other. In this context, effectiveness is centred on success in serving the purposes of sustainability-based environmental assessment, while efficiency is the achievement of maximum benefit from the use of resources to deliver effectiveness. Fairness includes substantive fairness (enhancement of equity in the

distribution of the positive and adverse effects of decisions, within and among generations) and process fairness (fairness in the distribution of opportunity for able and influential engagement in deliberations and impartiality in decision making).

All three are enhanced by early development and application of clear rules, consistent sustainability-based guidance, flexibility to recognize key contextual factors, emphasis on multiple benefits, transparency and collaboration.

– adapted from Robert B. Gibson, Meinhard Doelle, A. John Sinclair, “Fulfilling the promise: basic components of next generation environmental assessment,” *Journal of Environmental Law and Practice* 27 (2016), pp.251-276

**Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment**

[begins on next page]

# Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment

*Robert B. Gibson, Meinhard Doelle & A. John Sinclair\**

*This paper summarizes the working conclusions of a lengthy monograph, which also sets out the broad context and the background of experience with environmental assessment law and practice in Canada. Readers who find the premises behind the conclusions here unclear or dubious may wish to consult the monograph. It is posted at <https://uwaterloo.ca/next-generation-environmental-assessment/research-contributions/dissertations-theses-monographs-and-major-reports>.*

- 
- I. INTRODUCTION
  - II. COMPONENTS OF A FRAMEWORK FOR NEXT GENERATION ENVIRONMENTAL ASSESSMENT
    - (a) The purpose of environmental assessment
    - (b) Sustainability-based criteria for evaluations and decision making
    - (c) Application rules
    - (d) Assessment streams
    - (e) Linked tiers
    - (f) Scope of assessment requirements
    - (g) Effects assessment
    - (h) Participation
    - (i) Review and decision-making processes
    - (j) Decisions
    - (k) Monitoring of effects and compliance, and response to findings
    - (l) Learning
    - (m) Authoritative requirements in legislation, regulation and guidance
    - (n) Process administration
    - (o) Linkages beyond assessment
    - (p) Effectiveness, efficiency and fairness considerations
  - III. CONCLUSIONS AND WAYS FORWARD

---

\* Robert B. Gibson (rbgibson@uwaterloo.ca) is a professor in the School of Environment, Resources and Sustainability at the University of Waterloo.

Meinhard Doelle (mdoelle@dal.ca) is professor of law, director of the Marine and Environmental Law Institute and associate dean for research at the Schulich School of Law, Dalhousie University in Halifax.

A. John Sinclair (john.sinclair@umanitoba.ca) is a professor in the Natural Resources Institute at the University of Manitoba in Winnipeg.

## I. INTRODUCTION

Canada has been practicing environmental assessment for over 40 years. You might think we would be good at it by now. But we are not. The history of Canadian environmental assessment has been a race between accomplishment and disappointment. Today, assessment deliberations are characterized by tensions between needs for improvement and pressures for faster, easier and cheaper approvals.

Probably that was predictable. From the outset, environmental assessment laws demanded change and stirred resistance. They required proponents of major undertakings to incorporate environmental factors (variously defined) alongside financial, technical and political considerations in their planning because many proponents were not motivated to do so voluntarily. Moreover, given Canadian constitutional arrangements, the laws needed to be designed and applied cooperatively by the many Canadian jurisdictions (federal, provincial, territorial and Aboriginal) with environmental responsibilities—evidently also something for which existing motivations would prove to be insufficient.

Canada's first generation environmental assessment regimes have made important contributions. They have won greater attention to environmental considerations. They have opened some significant decision making to public scrutiny. In their brightest moments, they have been instrumental in forcing re-examination of prevailing priorities and practices. But environmental assessment laws and practices in Canada have not achieved the initially desired transformation in proponent and associated decision-maker culture to integrate habitual attention to environmental concerns. And they have not yet moved effectively to take on new understandings and imperatives—especially growing recognition of complex interactions in socio-ecological systems and increasingly pressing needs to ensure progress towards sustainability.

Centred on applications for project approvals and focused on mitigation of adverse effects, Canadian assessment processes have usually aimed for less bad projects rather than best service to the public interest.<sup>1</sup> Focused on the effects of individual projects, they have been poorly equipped to deal with cumulative and strategic effects and broad alternatives.<sup>2</sup> No two Canadian assessment regimes are the same and none represents a consistently high standard.<sup>3</sup> And with modest

---

<sup>1</sup> Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, ON: LexisNexis, 2008) [Doelle, *Federal Assessment Process*].

<sup>2</sup> PN Duinker & LA Greig, "The impotence of cumulative effects assessment in Canada: ailments and ideas for redeployment" (2006) 37:2 *Environmental Management* 153; BF Noble, "Promise and dismay: The state of strategic environmental assessment systems and practices in Canada" (2009) 29:1 *Environmental Impact Assessment Rev* 66.

<sup>3</sup> Environmental Planning and Assessment Caucus, *Inter-jurisdictional Coordination of EA: Challenges and opportunities arising from differences among provincial and territorial assessment requirements and processes*, by Deborah Carver et al (Canadian Environmental Network, 20 November 2010) online: <<http://rcen.ca/caucus/environmental-planning-and-assessment/resources>>; PJ Fitzpatrick & AJ Sinclair, "Multi-jurisdic-

exceptions, assessment has not evolved well to address changing global and domestic conditions.<sup>4</sup> Mostly, environmental assessment in Canada has struggled to be much more than a slightly earlier, more open and better integrated process for environmental licensing of conventional projects, and even then it has been criticized for slowing approvals.<sup>5</sup>

Next generation environmental assessment will have to aim higher. Five main transitions are involved:

(i) In contrast to the prevailing focus on mitigating significant adverse effects, next generation environmental assessment would expect proposals to represent the best option for delivery of lasting wellbeing, preferably through multiple, mutually reinforcing and fairly distributed benefits, while also avoiding adverse effects.<sup>6</sup>

(ii) In contrast to the common notion that economic, ecological and social objectives are inherently in conflict, can be addressed separately and will be accommodated through trade-offs that are “acceptable in the circumstances,” next generation environmental assessment would recognize that sustainability-enhancing economic, ecological and social objectives are interdependent. While some trade-offs will be unavoidable, they will be acceptable only in the last resort and under clearly delineated rules.<sup>7</sup>

(iii) In contrast to the assumption that effectiveness, efficiency and fairness are competing objectives, next generation environmental assessment would see that they too are logically and practically interdependent. Efficiencies would be sought by emphasizing assessment requirements where they can be most effective, especially through assessment in the development of policies, programmes and plans that are best suited to addressing cumulative effects and broad alternatives and to providing efficient guidance for projects and other more specific

tional environmental assessment” in KS Hanna, ed, *Environmental Impact Assessment Process and Practices in Canada*, 3rd ed (Toronto: OUP) [forthcoming].

<sup>4</sup> The key new global and domestic conditions for assessment work include deepening unsustainability, greater understanding of complexity and its implications for interactive effects and precautionary approaches, links between financial and ecological debt, skepticism about the capability and credibility of governments and other authorities, and rising public expectations to be actively involved in decision making on important matters including beyond the project level.

<sup>5</sup> A John Sinclair & Meinhard Doelle, “Environmental assessment in Canada: Encouraging decisions for sustainability” in Bruce Mitchell, ed, *Resource and Environmental Management in Canada: Addressing Conflict and Uncertainty*, 5th ed (Toronto: OUP, 2015) 462, [Sinclair & Doelle, “Environmental assessment”].

<sup>6</sup> Robert B Gibson, Selma Hassan, Susan Holtz, James Tansey and Graham Whitelaw, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005).

<sup>7</sup> See Robert B Gibson, “Avoiding sustainability trade-offs in environmental assessment” (2013) 31:1 *Impact Assessment Project Appraisal* 2; Angus Morrison-Saunders & Jenny Pope, “Conceptualising and managing trade-offs in sustainability assessment” (2013) 38 *Environmental Impact Assessment Rev* 54.

initiatives,<sup>8</sup> and by fostering upward harmonization of the disparate assessment regimes (and associated regulatory permitting and post-approval monitoring) across Canada to compatible versions of a high next generation standard.

(iv) In contrast to environmental assessment being one, unusually open contribution to the broader set of largely inaccessible decision-making processes affecting individual projects, next generation environmental assessment would be the main public vehicle for deliberations and decisions on significant undertakings. It would adopt comprehensive sustainability-based purposes and their elaboration in criteria and it would apply to strategic level policies, plans and programmes as well as projects. In effect, environmental assessment would evolve into a tiered and integrated sustainability governance process.

(v) In contrast to treating assessment as hoops for proponents to jump through to gain project approval, next generation environmental assessment would be centred on learning, building a culture of sustainability and serving the long as well as short term public interest.

The following sections sketch out an initial framework of interrelated next generation components for environmental assessment regimes in Canada at the federal, provincial and territorial levels. The substance may be largely relevant to federal jurisdictions beyond Canada and to Canadian assessment regimes established through Aboriginal land claim agreements. There is no assumption here that a next generation regime would rely entirely on environmental assessment law. Useful roles are, for example, likely for strategic processes in regional planning, sectoral policy and regulation, and municipal decision making. Insofar as Canadian jurisdictions may be persuaded to adopt the basic assessment regime components presented here (with adjustments for their own circumstances), the results should deliver beneficial upward harmonization of environmental assessment in Canada.

## **II. COMPONENTS OF A FRAMEWORK FOR NEXT GENERATION ENVIRONMENTAL ASSESSMENT**

The basic components proposed for next generation environmental assessment are outlined below in categories that reflect the conventional steps of environmental assessment deliberations from purposes and application rules to follow-up monitoring and enforcement, plus design considerations that affect the whole process.

### **(a) The purpose of environmental assessment**

The core purpose of next generation environmental assessment is to ensure that deliberations and decision making on new and renewed undertakings at the

---

<sup>8</sup> Robert B Gibson et al, “Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options” (2010) 20:3 JELP 175 [Gibson, “Strengthening Strategic Environmental Assessment”].

project and strategic (policies, plans and programmes) levels foster proposal development, approvals and implementation that deliver the strongest feasible positive contributions to lasting wellbeing while avoiding significant adverse effects. More generally, the objective is to protect and enhance the resilience of desirable biophysical, socio-ecological and human systems and to foster and facilitate creative innovation and just transitions to more sustainable practices.

Serving this core purpose would entail adoption of corollary purposes concerning process and substantive requirements. Because transition to sustainable structures, cultures and behaviour is a long-term venture, next generation assessment must aim to establish deliberative decision-making processes that foster mutual learning among all interested participants to build understanding and capacities for effective engagement in governance for lasting wellbeing. To do that, it would need to facilitate collaboration with other authorities and meaningful public engagement from the conception through to the end of potential effects from undertakings that may have significant implications for progress towards sustainability.

For very practical purposes, assessment regimes would need to be structured to strengthen consistency and efficiency in decision making—from policy making, planning and programme design to post-approval project implementation and monitoring—through process linking and application of a common set of fundamental requirements. They would also need to favour flexibility and decentralization by respecting uncertainty and context, work iteratively with relevant stakeholders, and emphasize capacity to adapt to different ecosystems and communities, new understandings, and emerging challenges and opportunities.

Entrenchment of these purposes in next generation assessment law would begin with an explicit overall legislated objective tied to seeking progress towards sustainability. But the purposes would also need to be incorporated in the substance of all legislated provisions. Crucial components would include requirements for

- development and application of broad but comprehensive sustainability-based criteria for evaluations and decisions (see next section);
- emphasis on comprehensive and integrated attention to all factors affecting the long term as well as immediate desirability and durability of effects;
- comparative evaluation of potentially reasonable alternatives to identify best options for each undertaking, to move cumulatively to more sustainable practice; and
- application of case-specified sustainability-based purposes and criteria as the main structure for deliberations and decisions at all process stages for subject undertakings from initial identification of appropriate purposes and options (alternatives) to final deliberations on renewal, closure, decommissioning and continued management.

### (b) Sustainability-based criteria for evaluations and decision making

In next generation environmental assessment, explicit sustainability-based criteria play several crucial roles. They provide a comprehensive, credible and explicit base for choices and decisions throughout the assessment process, enhancing the transparency and accountability of the deliberations. In the public interest, they ensure a focus on achieving maximum gains for sustainability by aiming for the selection of the best option, rather than attempting to judge the “acceptability” of proposed undertakings.<sup>9</sup> They encourage enhancement of multiple, mutually reinforcing, fairly distributed and lasting benefits in addition to avoidance or mitigation of significant negative effects.<sup>10</sup> And they motivate innovation in creating options that eliminate or minimize invidious trade-offs.

The legislation would need to establish the generic criteria for assessment decision making and provide for specification of these criteria for application to particular cases and contexts. The generic criteria would cover all core requirements for progress towards sustainability and their interactions.<sup>11</sup> Specifying the criteria for individual applications would be through informed choices by authorities and stakeholders, without compromising any of the generic requirements.<sup>12</sup> In particular cases, the criteria could evolve as new considerations and understandings arise, but they would provide the essential framework for evaluations and decisions through all stages of the assessment process.

In addition, next generation assessment law should establish explicit rules for evaluating trade-offs, and provide for case and context-specific elaboration of them. Trade-off rules would provide guidance on expectations for net

---

<sup>9</sup> Effective attention to broader options or alternatives (and associated cumulative effects) will often be more feasible at the strategic level than at the project level. Accordingly, application rules and process design would emphasize assessment of strategic level initiatives that guide alternatives selection at the project level.

<sup>10</sup> In some cases, overall sustainability gains will be elusive. Best efforts to deal with residual stockpiles of high-level radioactive wastes, for example, may deliver only least bad solutions. However, some unsustainable undertakings, such as ones based on the exploitation of non-renewable hydrocarbon fields or mineral orebodies, can make a positive contribution to sustainability if designed and used (e.g. through investment of associated revenues and other opportunities) as bridges to more sustainable livelihood activities.

<sup>11</sup> Despite widespread inconsistencies and obfuscation even in professional references to sustainability, the core requirements for progress towards more sustainable futures are well established and supported. For one synthesis now well tested in practice, see Robert B Gibson et al, *Sustainability Assessment: Criteria and Processes* (Routledge, 2005), ch 5 [Gibson, *Sustainability Assessment*]. Some Canadian jurisdictions already have reasonably comprehensive sets of legislatively-grounded sustainability principles and guidelines. See e.g. those of the province of Manitoba at <<http://www.gov.mb.ca/conservation/susresmb/sd/>>.

<sup>12</sup> In some cases, strategic level assessments covering sectoral or regional issues could contribute a framework of specified criteria for deliberations on individual projects or more particular strategic undertakings in the sector or region.

sustainability gains, avoidance of significant adverse effects, allocation of the burden of argument, protection of unrepresented future generations, explicit justification, and open process.<sup>13</sup>

This emphasis on specified criteria and trade-off rules is meant to ensure attention to all key considerations for lasting wellbeing, including openings for multiple, mutually reinforcing benefits. But it also facilitates more open discussion of the otherwise often hidden, obscure and/or confused grounds for important decisions. Because such criteria will have significant influence, their adoption and case specification may become a focus for controversy and conflict. Such tensions are common in assessment processes now and are inevitable in any process of transition. Centring the tensions on explicit grounds for decision making seems to be a sensible option. Moreover, the difficulties should be accompanied and slowly mitigated by incremental learning and gradual enhancement of capacities for discursive problem solving. Nevertheless, the potential for discord adds to reasons for insistence on fair process.

Key additional needs associated with sustainability-based criteria include requirements for

- defining the public interest purpose of each assessed undertaking;
- identifying and comparing alternatives with selection of the most desirable option in light of the criteria;
- providing reasons based on application of the criteria for all assessment decisions;
- explicit identification and justification of trade-offs in light of explicit trade-off criteria; and
- precautionary recognition of uncertainties, with preference for low risk options and adaptive design as well as implementation.

**(c) Application rules**

A fundamental aim of the assessment regime is to ensure sustainability-based assessments are carried out for all proposed undertakings—including policies, programmes and plans as well as capital projects and physical activities—that might have significant effects on prospects for sustainability in and beyond the legislating jurisdiction. This includes undertakings that have potential for significant adverse effects, on their own and cumulatively. It also includes proposed undertakings that could foreclose other initiatives that would make a more positive contribution, and undertakings that warrant careful consideration of the manner in which the undertaking should be carried out to maximize benefits and minimize harm.

Meeting this aim requires, as much as possible, the anticipation and pre-identification of categories or characteristics of undertakings that are, or are likely to be, subject to assessment requirements. This will allow proponents and

---

<sup>13</sup> Gibson, *Sustainability Assessment*, *supra* note 6 at ch. 6.

other potential participants to begin deliberations knowing their obligations and incorporating them from the outset.

Application decisions, which determine what undertakings are subject to formal assessment requirements and the particular streams of assessment required, will be critical for the success of a next generation regime. To be predictable and accountable, all application decisions will need to be guided by the legislated purposes, principles and criteria, and to be fully transparent. Decisions need to be justified in written reasons demonstrating consistency with the general purposes of the process and the specific principles, rules and criteria developed for application decisions, in combination with an opportunity to challenge decisions that are not. At the same time, flexibility is needed to recognize unanticipated cases and exceptional situations.

The general scope of application should respect three core considerations. First, the process should apply to undertakings at the project and strategic levels with appropriate streams for different categories of undertakings. Second, it should apply to new undertakings as well as continuing undertakings that merit periodic review, or that are to be revised, renewed or replaced. And third, it should apply to undertakings that are not in active development but have been identified as desirable, such as a new strategic initiative to address a pressing or anticipated issue raised in a project level assessment.

Specific rules of application should be designed to ensure the following:

- automatic application to undertakings in pre-identified categories set out in regulations made under the law to ensure early recognition of assessment obligations on the part of proponents and other interests;
- effective mechanisms to ensure early application to other undertakings with potentially significant effects, with clear rules, principles and criteria to maximize clarity and accountability;
- application to significant policies, programmes and plans that require ministerial approval, again with clear rules, principles and criteria to maximize clarity and accountability;
- application to new strategic level initiatives where the need for strategic level clarification has been identified in the course of a project level assessment;<sup>14</sup>
- application in other cases where the government chooses to require an assessment in response to public concern, through a transparent and accountable petition process set out in legislation, or on its own initiative in recognition of issues of significance for sustainability; and
- ability to make adjustments to application requirements in accordance with clearly established rules, principles and criteria and in a transparent and accountable manner.

---

<sup>14</sup> See A John Sinclair & Meinhard Doelle, “Using law as a tool to ensure meaningful public participation in environmental assessment” (2003) 12:1 JELP 27-54. See also Gibson, “Strengthening Strategic Environmental Assessment”, *supra* note 8.

**(d) Assessment streams**

To be effective, efficient, and fair, assessment processes must be suitable for the size and nature of the undertaking, the potential magnitude of adverse effects and benefits, and the level of public interest and concern. To this end, each type of undertaking should be clearly allocated to an appropriate assessment stream. The assessment process therefore needs to provide a range of specified streams. The number and particular characteristics of these streams might vary considerably among jurisdictions, but would include at least

- a demanding stream with detailed substantive evaluation and rigorous public and institutional review for the most significant undertakings with the greatest implications for ensuring and enhancing contributions to sustainability; and
- a more expeditious assessment stream for less significant undertakings.

While particular requirements for the scope of the assessment and the extent of public engagement will vary from stream to stream, all streams must meet a minimum standard of assessment. Each stream needs to apply the full set of sustainability criteria and trade-off rules, and include timely public notice and opportunities for public comment. Each stream must also meet the minimum scope requirements set out below, except where a narrower scope is established in the conclusions of a higher tier assessment. Each stream will have to include a mechanism for shifting exceptional cases to a more appropriate stream with clear rules, transparency and accountability for streaming decisions.

**(e) Linked tiers**

Tiers in assessment processes recognize that the design, approval and implementation of most undertakings that have important socio-economic and ecological implications are influenced by decisions at different levels, ranging from broad policy making to regulatory licensing, and that much can be gained by linking the decision making at all of these levels.

The main tiering idea links the project and strategic levels and has two parts—to use law-based strategic assessments for policies, plans and programmes to address big issues and opportunities, broad alternatives and cumulative effects that cannot be covered as effectively and efficiently at the project level, and to use the strategic level findings as authoritative guidance for project planning and assessment.<sup>15</sup> Examples of strategic undertakings that would likely produce useful guidance for subsequent project planning and assessment include planning initiatives that explore desirable and feasible futures for a region, and policy development efforts that examine the characteristics and potential cumulative effects of alternative ways of meeting a societal need.

---

<sup>15</sup> Such tiered arrangements are already common internationally (e.g. in linked strategic and project assessment processes in the European Union) and in related fields in Canada, including urban and regional planning and forest management.

Policies, plans and programmes that have been subjected to or are based on sustainability-based next generation assessments may guide specific scoping, stream selection and other process decisions for assessments at the project level. They may help to focus the lower level assessment on a more limited range of alternatives than would be required in the absence of the broader level assessment. Findings at the strategic level about potential cumulative effects and their implications, and about appropriate means of avoiding adverse cumulative effects and enhancing positive ones, should also make project level assessments more efficient, effective and fair. In turn, project level assessments may often identify strategic assessment needs, opportunities, issues and options.

To facilitate such tiering, next generation assessment law would need to ensure application of assessment requirements to strategic level undertakings (see the discussion of application rules, above), provide for authoritative guidance from the strategic to project level and clarify the extent of, and limits to, this authority (e.g. through sunset provisions and renewal requirements). Legislative provisions would also establish equivalency rules for other sustainability-based and participative processes that develop and assess policies, plans or programmes that could provide legitimately authoritative guidance for projects planning and assessment.

For tiering links from the project to strategic level, next generation law should establish a mechanism for project level assessment processes to identify needs for strategic level consideration and response.<sup>16</sup> Normally, resulting strategic level assessments would be carried out concurrently with the continuing project assessment, but some cases may require suspension of the project assessment to ensure the strategic assessment findings can be integrated fully into the project assessment. The law could provide for earlier consideration of requests for amendments to existing policies, plans or programmes in light of problems or opportunities at the project level, but only through open processes applying specified, sustainability-based criteria. Parties seeking an amendment would have to justify it on the grounds of exceptional circumstances or recent changes in important factors.

Tiering links that identify, clarify and coordinate the relationship between project assessments and regulatory licensing have similarly great potential. For example, next generation assessment legislative provisions as well as administrative changes will be needed to clarify the level of detail required at each level, enhance the compatibility of requirements (e.g. documentation expectations and effects prediction methodologies), establish procedures for reconsideration of assessment findings in light of new information at the regulatory licensing level, and integrate assessment monitoring and follow-up into the regulatory process.

---

<sup>16</sup> *Ibid.*

**(f) Scope of assessment requirements**

The overriding driver of scope determinations should be to allow environmental assessments to serve the sustainability-based purposes set out above. That entails ensuring the scope of all assessments covers the full suite of considerations that affect the potential for progress towards sustainability and facilitates identification of options, designs and implementation practices that deliver the best, most feasible undertakings in the long-term public interest. Efficiencies are gained by addressing appropriate issues at higher assessment tiers and using the results to shape project level decisions, not by artificially or arbitrarily limiting the scope of any assessment.

The assessment process should provide for a core legislated scope for all assessments (project and strategic levels) requiring attention to

- the purposes of and need for the undertaking (with both purposes and need related to the lasting public interest);
- potential reasonable alternatives;
- the full set of sustainability-related considerations and effects—bio-physical and socio-economic (and their interactions), positive and negative, indirect and direct, interactive/cumulative and individual, lasting and immediate;
- the full life of options (alternatives to and alternative means of pursuing the preferred alternative), including the upstream and downstream life cycle plus legacy effects;
- cumulative effects;
- enhancement of positive effects as well as mitigation/avoidance of adverse effects;
- uncertainties and means of accommodating surprise; and
- monitoring of effects and compliance, and response to the findings.

The process should ensure application of the core scope to all levels and streams of assessment and to requirements for equivalency in tiering links with undertakings prepared and assessed under other processes and regimes. It should clearly set out the more specific scope requirements for different applications, including assessments at different levels and in different streams, as well as ways to adjust and finalize the scope for individual assessments.

**(g) Effects assessment**

Next generation assessment regimes need to be carefully designed to ensure reliable effects assessment. The prediction and evaluation of effects is a central process component. It is crucial to understanding the prospects for positive and adverse sustainability effects, illuminating the comparison of alternatives, identifying best means of enhancing positive effects and avoiding or minimizing adverse effects, and evaluating potential trade-offs. It also provides the basis for decision making concerning approvals or rejections, conditions of approval, and monitoring requirements.

To minimize process uncertainties and delays, effects assessment requirements should be pre-defined to the extent possible, so that all participants in the assessment process know the expectations and their obligations and openings to contribute. The key general requirement is that all effects assessment is to be guided by application of the sustainability criteria specified for the case, and must recognize and document uncertainties (in study design as well as in effects prediction). Consequently, the requirements for effects assessment must be tied directly to application of the legislated purposes, the more specific decision making rules and the sustainability-based criteria. In addition to requirements discussed elsewhere, the mandatory obligations in law should include application of the sustainability criteria in all steps of effects assessment, including selecting alternatives to be compared; identifying most valued ecological, social and socio-ecological systems, characteristics and services to be examined most closely;<sup>17</sup> choosing methodologies and setting priorities for effects predictions and monitoring; and evaluating the significance of individual and cumulative effects and uncertainties (at the prediction and monitoring stages).

The assessment process should provide for early and open engagement of authorities, including Aboriginal governments, and stakeholders in criteria specification and application in the effects assessment steps above. Such engagement is also needed in discussions to clarify effects assessment scope and priorities (including identification of valued components), to review proposed methods, and to develop other case-specific guidance for design and implementation of effects studies and assessments. A final key topic for early and open engagement is the selection of consultants, which needs to be done in a way that will reduce conflicts associated with consultant dependency on and ties to proponent interest.

Beyond individual cases, it will be important to offer advanced general guidance materials on key aspects of sustainability-based effects assessment, including attention to positive sustainability effects and their enhancement, long term and legacy effects, and interactive and cumulative effects. General guidance should be complemented with more specific sectoral, regional and other guidance for assessment work relevant to categories of anticipated undertakings. In some cases, strategic level assessments will serve to develop such guidance.

---

<sup>17</sup> Note that we refer here to valued systems, characteristics and services rather than to key indicators. Environmental assessment practice has sometimes demonstrated a tendency to restrict consideration to a few key indicators that may have insufficient ability to represent the status of or trends affecting larger systems. While the enormous complexity of potentially affected systems makes reliance of selected indicators inevitable, the objective must always be to build a reliable understanding of interactive effects. See, for the original work, GE Beanlands & PN Duinker, *An Ecological Framework for Environmental Impact Assessment in Canada* (Halifax: Institute for Resource and Environmental Studies, Dalhousie University & Hull: Federal Environmental Assessment Review Office, 1983).

Finally, effects assessment requirements need to ensure an emphasis on cumulative effects, and fully utilize the critical role of strategic level assessments for effective and efficient attention to cumulative effects predictions, implications and response options.<sup>18</sup>

### **(h) Participation**

Participatory processes in next generation assessment regimes need to incorporate the insights of deliberative democracy, collaborative rationality and environmental justice.<sup>19</sup> By participation we mean encouraging and facilitating the active involvement of members of the public, stakeholders, relevant authorities and proponents in environmental assessment with the aim to enhance the quality and credibility of assessment decision making and to ensure associated learning and capacity building benefits are captured.<sup>20</sup> To ensure the basic legitimacy of next generation assessment, participatory processes also need to be meaningful by incorporating the basic components of participation into environmental assessment.

The basic components of meaningful participation have been well documented in the literature.<sup>21</sup> They include provisions to ensure adequate public notice, timely and convenient access to information, participant assistance, opportunities for public comment, public hearings, deliberative forums and early and ongoing participation throughout the process stages, including

- early deliberations on purposes/needs and alternatives, criteria specification, main consultant selection, and determination of effects assessment priorities and design of effects studies;
- review of initial effects findings and conclusions concerning the relative merits of alternatives;
- formal review of submitted proposals for approval, including environmental impact statements (or the equivalent in sustainability-based assessments), as appropriate draft review recommendations and decisions by the responsible authorities; and
- design of and participation in monitoring programmes and review of findings and response plans.<sup>22</sup>

<sup>18</sup> AJ Sinclair, P Duinker & M Doelle, “Looking Up, Down, and Sideways: Reconceiving Cumulative Effects Assessment as a Mindset,” *Environmental Impact Assessment Rev* [forthcoming in 2015].

<sup>19</sup> Richard K Morgan, “Environmental impact assessment: the state of the art” (2012) 30:1 *Impact Assessment and Project Appraisal* 5.

<sup>20</sup> In participation provisions, and in regime design generally, it will be important to recognize Aboriginal and treaty rights and need to ensure special efforts to facilitate their effective engagement as relevant authorities, not mere stakeholders.

<sup>21</sup> Robert B Gibson, “Environmental assessment design: lessons from the Canadian Experience” (1993) 15 *The Environmental Professional* 12; David P Lawrence, *Impact Assessment: Practical Solutions to Recurrent Problems and Contemporary Challenges*, 2nd ed (New Jersey: John Wiley and Son, 2013).

While each of these basic components enjoys some recognition in assessment practice in Canada, special and renewed attention needs to be given to providing the capacity and funding necessary to enable representation of important interests and considerations not otherwise effectively included (for example, disadvantaged populations, future generations, broader socio-ecological relations). This will be a significant step given that only two jurisdictions in Canada currently offer some level of support to participants. Provisions for public hearings on cases of particular public interest and significance for sustainability will also have to include explicit detailed criteria for determining when public hearings are necessary and the establishment of an arm's-length body for advising on contested cases.

Initiating deliberative forums as an integral component of participation also requires new attention. Proponents, who most often lead participatory activities, frequently use open houses (and similar consultation methods), while government officials occasionally convene hearings, with the result that dialogic participation techniques are rarely used in Canadian assessment processes. As Sinclair and Diduck have noted, effective techniques for assessment participation use vehicles such as multi-stakeholder advisory committees and task forces, mediation and non-adversarial negotiation, and community boards to facilitate ongoing dialogue and communication among project proponents, environmental assessment officials, and civic organizations, and serve important mutual learning, relationship building, and conflict resolution functions.<sup>23</sup> Such approaches also anticipate the re-engagement of public officials and experts as well as stakeholders and members of the public in the participatory process.

Beyond specific provisions for involvement, next generation assessment also requires the establishment of a multi-stakeholder advisory body for open deliberations on issues and options for regulatory attention and other key matters of process implementation.

Also needed are mandatory requirements for regular and open public reviews of assessment regime performance, including consideration of potential improvements to participatory processes.

#### **(i) Review and decision-making processes**

Thorough review of environment assessment documentation through credible and transparent decision-making processes is another essential component of next generation assessment. A basic aim in this regard is to ensure consistent efforts to serve the objectives of assessment to advance prospects for lasting wellbeing in all key decision making—not only about proponent assessments, but also about proposed assessment policies, guidance

---

<sup>22</sup> AJ Sinclair & AP Diduck, “Public participation in Canadian environmental assessment: enduring challenges and future directions” in KS Hanna, ed, *Environmental Impact Assessment Process and Practices in Canada*, 3rd ed (Toronto: OUP) [forthcoming].

<sup>23</sup> *Ibid.*

and other matters concerning regime implementation. Next generation assessment must also enhance the quality and credibility of assessment decision making, including by guarding against bias in public proceedings where the more narrowly motivated proponent leads proposal development and assessment.

As outlined above, more credible decision making will require mandatory development and application of explicit sustainability-based criteria, specified for the context of the case at hand. Evaluations of effects predictions, comparison of options and other key assessment review matters need to be based on the application of the explicit sustainability-based criteria developed. The review process also must be transparent and open to effective government, stakeholder and public engagement from the beginning of the deliberations. Regulation must allow the extent, nature and formality of requirements scaled to the significance of opportunities to avoid adverse effects and/or enhance positive ones, the level or potential for public concern and the potential for conflict or consensus.

Ensuring rigorous and open reviews will require multiple review process options that recognize differences among assessment streams, between strategic and project level undertakings, between single and multi-jurisdictional cases, and between cases promising conflict or consensus. Potentially desirable options include

- semi-formal public discussions with impartial facilitation where feasible and reasonable;
- reviews led by a credible government review body receiving open comments, and issuing draft findings, conclusions and recommendations for public review before finalization;
- informal hearings by an independent panel with members appointed in light of explicit selection criteria;
- opportunities for negotiation, arbitration or mediation (perhaps only on certain elements of a review);
- formal hearings, including consolidated hearings of two or more agencies and/or jurisdictions; and
- reviews with public deliberations led by independent experts with public review experience, such as those by the Royal Society<sup>24</sup> and OEER Association.<sup>25</sup>

---

<sup>24</sup> Royal Society of Canada, *Elements of Precaution: Recommendations for the Regulation of Food Biotechnology in Canada* by Conrad Brunk & Brian Ellis (Ottawa: Royal Society of Canada, 2001).

<sup>25</sup> Nova Scotia Department of Energy, *Fundy Tidal Energy Strategic Environment Assessment* by OEER Association (April 2008), online: <<http://www.marinerenewables.ca/wp-content/uploads/2012/11/Fundy-Tidal-Energy-Strategic-Environmental-Assessment-Final-Report.pdf>>.

**(j) Decisions**

While the decision to approve a proposed undertaking attracts most attention, influential decisions are made at all stages of assessment processes. Many key decisions are made by or for the private or public sector proponents of undertakings subject to assessment requirements. Much of assessment law is aimed at guiding these proponent decisions, both directly by setting out assessment requirements and indirectly by establishing review, approval and other tests to ensure the requirements are met. Next generation environmental assessment must aim to ensure that all of these decisions are credible and sustainability-enhancing.

To be aligned with the purposes of next generation assessment, all decisions should aim to expand understanding and illuminate application of the “contribution to sustainability” test to the proposal and alternatives at hand. Approval decisions, in particular, play the gatekeeping role of ensuring that the earlier studies, deliberations and choices have delivered a proposed undertaking that represents the best option in the public interest, will deliver multiple mutually reinforcing gains and avoid significant adverse effects. Each approval decision must be supported by persuasive evidence reflecting application of the context-specified sustainability criteria. The main uncertainties must be identified. And where trade-offs are unavoidable, approval decisions must be accompanied by reasons based on the sustainability criteria and following explicit trade-off rules.

Next generation assessment law will also need provisions to ensure that decisions and conditions of approval (which may include meeting commitments made by the proponent in the proceedings) are practically enforceable. This will entail specification of enforcement and penalty powers; expectations for clear delineation of commitments and conditions of approval; and explicit allocation and provision of resources for, compliance monitoring and enforcement responsibilities.

Throughout all assessment decision making, the preference is for participative and, to the extent possible, consensus-based approaches, subject to adherence to the sustainability-based criteria. Over time, key next generation features, including insistence on public interest purposes and results, should increase prospects for consensus in assessment processes. Significant conflicts in aims and interests are, however, likely to characterize many future assessment cases. While integration of conflict management capacities in assessment deliberations may mitigate some tensions, assessment processes must continue to emphasize provisions not only for effective engagement (see “participation,” above) but also for fair adjudication.

Consequently, decision-making responsibility and authority must be vested in credible and accountable hands. Credibility is most likely for impartial decision makers who have been closely engaged in the deliberations and evidence and accountability is most likely for elected officials. In the circumstances, the best option is likely to be reliant on approval decision making initially by the

impartial government authority (in government but at arms length from particular departmental mandates or partisan pressures) that considered the evidence, with ultimate ministerial/Cabinet(s) authority within a specified period following the initial ruling to reverse, revise, or require reconsideration or new review. These arrangements would need to be accompanied by provisions for quasi-judicial appeals of the initial decision and judicial review of the ultimate political decision. The appeal should be based on a standard of correctness, whereas the judicial review could be based on reasonableness. Both avenues would consider whether the decision was adequately justified, based on and consistent with the sustainability-based criteria, and whether the decision-making process was fair.

**(k) Monitoring of effects and compliance, and response to findings**

Sound environmental assessment requires follow-up, yet it is most often done poorly, when it is done at all.<sup>26</sup> Follow-up properly includes monitoring, response to monitoring findings in environmental management, communication, and learning.<sup>27</sup> Monitoring programmes must aim to identify unanticipated positive and adverse effects, as well as other unpredicted pressures, opportunities and changes that may require interventions to correct or pursue. Monitoring also needs to provide an information base for ensuring that the terms and conditions of approvals are met, and commitments are fulfilled. Throughout implementation and after completion of an undertaking, those responsible for environmental management must be able to act adaptively to address problems and new opportunities identified by monitoring work. There must also be communication with regulators and the interested public and commitment to learn from the experience to enable better predictions, more reliable assessments, and better decision making in the future.<sup>28</sup>

Achieving these aims will depend on provisions for mandatory effects and compliance monitoring, scaled to the potential significance of the effects and contraventions, integrated into the regulatory framework of next generation assessment processes. The regulatory framework should also include powers to set requirements for

- specific commitments and conditions of approval (in part to facilitate effective monitoring of effects and compliance);
- anticipatory arrangements, and assignments of responsibility including for funding and public reporting, for monitoring of effects and

---

<sup>26</sup> Sinclair & Doelle, “Environmental assessment”, *supra* note 5; Bram F Noble & Sarah N Macharia, “Towards a working framework for ‘best’-practice EA follow-up: lessons from Canadian case studies” (2004) 7 *Prairie Perspectives* 209.

<sup>27</sup> Angus Morrison-Saunders, Jill Baker & Jos Arts, “Lessons From Practice: Towards Successful Follow-Up” (2003) 21 *Impact Assessment and Project Appraisal* 43.

<sup>28</sup> Jos Arts, Paula Caldwell & Angus Morrison-Saunders, “Environmental impact assessment follow-up: good practice and future directions” (2001) 19:3 *Impact Assessment and Project Appraisal* 175.

- compliance and for timely response to emerging problems and opportunities; and
- public reporting of effects monitoring findings, with particular efforts to foster application of insights from monitoring in future assessments.

Regime design should anticipate monitoring and response needs by recognizing adaptive capacity as a criterion for design of approvable undertakings and implementation plans, acknowledging that effective adaptive management depends on adaptive capacity including adaptable design. Best practice in effects monitoring implementation will entail emphasis on the engagement of local residents, who are often most motivated to undertake effective monitoring, best placed to do so regularly and efficiently and most likely to gain from the learning opportunity. Best practice expectations also affect monitoring priorities. In particular, they suggest a focus on debatable predictions, untried mitigation and enhancement measures, as well as potential effects on vulnerable people, communities, species, and ecological relationships. And they encourage particular efforts in early identification of emerging problems and opportunities and response options. These monitoring and response obligations need to be treated as costs of the undertaking and not paid for from the public purse.

Compliance monitoring needs should also be anticipated in regime design. Effective compliance monitoring and response depends on ensuring that approval conditions and commitments are clear and specific enough to be monitored and that repercussions of non-compliance are well known. Rather than treating compliance monitoring findings as confidential business information, transparent public reporting should be emphasized. The findings could reward responsible proponents, shame non-compliers and contribute to monitoring of overall progress towards sustainability.

### **(I) Learning**

At least since 1995, participation in environmental assessment has been recognized as a means to broad-based individual and social learning that could enable the transition to sustainability.<sup>29</sup> Relying on assessment case evidence,

---

<sup>29</sup> Alan Diduck & Bruce Mitchell, “Learning, Public Involvement and Environmental Assessment: A Canadian Case Study” (2003) 5:3 *Environmental Assessment Policy & Management* 339; Patricia Fitzpatrick & A John Sinclair, “Learning through public involvement in environmental assessment hearings” (2003) 67:2 *J of Environmental Management* 161; JR Palerm, “An Empirical-Theoretical Analysis Framework for Public Participation in Environmental Impact Assessment” (2000) 43:5 *J of Environmental Planning and Management* 581; A John Sinclair & Alan P Diduck, “Public involvement in E.A. in Canada: a transformative learning perspective” (2001) 21:2 *Environmental Impact Assessment Rev* 113; Thomas Webler, Hans Kastenholtz & Ortwin Renn, “Public participation in impact assessment: a social learning perspective” (1995) 15:5 *Environmental Impact Assessment Rev* 443.

Sinclair et al. developed a conceptual framework related to learning about and through environmental assessment. The framework establishes the potential for individual and collective capacity building and other learning, including about how to maintain and strengthen prospects for lasting ecological, social and economic wellbeing.<sup>30</sup> In this regard, next generation assessment must build understandings, capacities and motivations in all sectors and among all players. Assessment would be a useful venue for increased research and practice aimed at shedding light on the factors and implications of learning-oriented approaches to participation.<sup>31</sup>

To capture the potential for learning, next generation assessment will need to establish contributions to mutual learning as a responsibility for all assessment participants. Relevant responsibilities include providing opportunities for and facilitation of deliberative multi-stakeholder collaboration using the full range of methods in the participation toolbox—including more deliberative forums that include scenario building and visioning, increased attention to alternative dispute resolution and increased advocacy for sustainability assessment by public interest interveners.<sup>32</sup> Where possible, contributions to mutual learning should occur in overall regime deliberations (for example, concerning regulation and policy development and revision) as well as in individual cases (for example, in specifying terms of reference, elaboration of sustainability-based evaluation and decision criteria for particular applications, and design and application of assessment methodologies, including in post-approval monitoring).

Especially important are strong linkages between improving the provisions, opportunities and support for public participation in next generation assessment development, review and monitoring, as outlined above, and the increased potential for mutual learning outcomes this will avail. Mandatory monitoring and public reporting of effects in comparison with effects predictions, and of the effectiveness of responses to emerging problems and opportunities, will be essential to encouraging learning outcomes that are lasting and applicable beyond a single case. In this regard, an important facilitating step will be the establishment of an easily accessed, well-organized and searchable electronic library (or linked set of libraries) of environmental assessment case materials, including documentation of impact predictions and monitoring findings, records of decisions and justifications, and associated cases in law.<sup>33</sup> If made available to

---

<sup>30</sup> For details see above and A John Sinclair, Alan Diduck & Patricia Fitzpatrick, “Conceptualizing learning for sustainability through environmental assessment: critical reflections on 15 years of research,”(2008) 28:7 *Environmental Impact Assessment Rev* 415.

<sup>31</sup> AJ Sinclair, AP Diduck & M Vespa, “Public participation in sustainability assessment: essential elements, practical challenges and emerging directions” in Angus Morrison-Saunders, Jenny Pope & Alan Bond, eds, *Handbook of Sustainability Assessment* (Cheltenham, UK: Edward Elgar) [forthcoming in September 2015].

<sup>32</sup> *Ibid.*

<sup>33</sup> LE Sanchez & A Morrison-Saunders, “Learning about knowledge management for

all, such a resource could be used by all parties in the assessment community to improve future project and strategic level assessments and decisions over time and to identify needs and opening for improvements to assessment law, regulation and policy. Regularly updating and upgrading guidance material and reviews of individual regime performance and progress towards upward harmonization within and across jurisdictions will also be required.

**(m) Authoritative requirements in legislation, regulation and guidance**

An effective assessment process should take full advantage of the different ways elements of the process can be established—in statute, in regulations, in binding policies, and in non-binding guidance. The objective should be to enshrine in statute the key elements and expectations that are not expected to change with experience and evolving circumstances. Elements that need to be open to regular and reasonably quick adjustment should not be included in statutes. Regulations offer a middle ground in that they are still legally binding, and require some process and scrutiny to be amended, but can be amended quickly and easily by governments.

Policies and guidelines can, in some circumstances still be binding on decision makers, but are generally not, and can be changed at will. They should therefore be seen as a vehicle for providing helpful information about how parties can best carry out the legal obligations set out in statutes and regulations. Enforceable requirements are needed for new obligations that those with assessment responsibilities may not be motivated to carry out on their own.

A key objective in deciding what to include in statute, regulations, policies and guidance is to provide clarity and facilitate consistency and authority in the application of fundamental requirements while retaining flexibility to accommodate differences in undertakings and context and to permit progressive innovation. The core elements of the assessment regime to be set out in the statute should include the following:

- a fundamental commitment to sustainability-based public interest purposes, principles and core criteria for decision making;
- basic components of the scope of assessment, including requirements for establishment of public interest based needs and purposes, comprehensive coverage of sustainability-related considerations, focus on cumulative effects, comparative evaluation of potentially reasonable alternatives;
- the essential characteristics of different streams of assessment for undertakings that merit more or less demanding expectations and review processes;
- central provisions guaranteeing and facilitating meaningful public engagement throughout the assessment process;

- core process elements and process alternatives (especially streams, see above) specified in law with explicitly limited openings for discretionary avoidance or compromise;
- application to strategic as well as project level undertakings and provisions for linking strategic and project level assessments;
- requirements for explicit development and application of case-specified sustainability-based criteria, elaborating the core criteria set in the law; and for application in decision making, including explicit justification of trade-offs;
- transparent, accountable and enforceable decisions and conditions;
- mandatory monitoring of effects and compliance, comparison of actual and predicted effects identification of response needs and options;
- provisions for effective enforcement of assessment requirements, including terms and conditions of approval;
- independent monitoring and regular review of the regime for continuous improvement; and
- provisions for coordination and consolidation with equivalent assessment processes and process components in other jurisdictions.

Core elements set out in statute should be elaborated upon in more easily amended regulations. For example, detailed rules of application of the assessment process with emphasis on pre-identification of undertakings requiring assessment should be set out in regulations and updated as needed. Rules on how strategic level assessments can help streamline project level assessments can similarly be set out in regulations and developed with experience.

Non-binding guidance should focus on issues such as suitable approaches to specifying sustainability-based evaluation and decision criteria, clarification of implications for different sectors, regions and other circumstances, and emerging best practice methods for effects identification and assessment, including methods of addressing interactive effects, cumulative effects and uncertainties in assessments.

#### **(n) Process administration**

Any credible assessment regime depends heavily on capable and impartial overall process application and management. While expectations for the body assigned to the task centre on administrative implementation of the requirements set out in the laws and regulations establishing the regime, they necessarily also extend into making important decisions that affect the quality of assessment processes and the substance of assessment rulings.

Obvious decision-making roles include those related to specifying requirements for particular cases and carrying out formal reviews of proposed undertakings that are not assigned to public review panels. Decision-making

responsibilities will also be involved in establishing the key details about process components and procedures (e.g. for each assessment stream), clarifying new provisions (e.g. for strategic level assessments and linked strategic and project level assessments) and requirements (e.g. for development and application of sustainability-based evaluation criteria and trade-off rules), and ensuring appropriate support for effective public participation (e.g. through intervenor funding programmes).

In addition, the administrative body would participate in assessment learning and regime evolution. The body would need to monitor application successes and limitations, including strengths and deficiencies of impact predictions, public engagement, trade-off avoidance, compliance and effects monitoring. It would be responsible for identifying emerging needs and opportunities; considering implications for revision of procedures and guidance (and possibly regulations and statutory requirements); and consulting on response options.

Beyond internal functions, the administrative body would have responsibilities to collaborate with others within and beyond the immediate jurisdiction. The roles would include collaboration with

- governments and other bodies engaged in the broader development and application of sustainability-based decision principles and guidance, including sustainable development strategies that could inform and be informed by strategic and project assessment findings;
- bodies with expertise needed in assessment design, review and monitoring;
- bodies with complementary mandates and authority for monitoring trends, enhancing positive sustainability effects and avoiding or mitigating damage and risk;
- agencies leading or administering the development and review of strategic level undertakings that could be or become equivalent to strategic level environmental assessments and be effectively linked into tiered assessment arrangements;
- regulatory licensing bodies with interests in harmonized information and process requirements;
- bodies in other jurisdictions that may be willing to engage in joint and coordinated assessments, establishment of inter-jurisdictional tiering arrangements, joint research and policy development, and more generally the advancement of upward harmonization of assessment processes and requirements; and
- leaders of other sustainability-based activities and initiatives within and beyond government.

The administrative body should be required and empowered to be broadly consultative in carrying out its mandate. An important vehicle for consultation would be a multi-stakeholder advisory body (or bodies) that is consulted generally on matters of regulation, policy and guidance development. Particular topics suitable for advisory body attention include guidance on application of

assessment requirements to strategic undertakings, tiering, means of enhancing participative engagement, best practice assessment methodologies, specification of sustainability criteria including for particular individual sectors and regions, application rules for different assessment streams and allocation of categories of undertakings to different streams.

Because of significance and delicacy of these roles and the comprehensive scope of the sustainability-based agenda, the location of the administrative body within government is important, as are arrangements for ensuring its credibility and impartiality. The matter of location is most difficult. Clearly the body should be situated at arm's length from particular departmental mandates and partisan political interests. Probably it should also be positioned near the centre of government authority, rather than assigned to report to government through the environment minister or equivalent, as is now common in federal and provincial arrangements. Regime design must, however, ensure that movement of next generation assessment to a more central reporting position is done only where firm sustainability commitments ensure no loss of emphasis on the biophysical foundations of wellbeing.

The independent decision-making authority of the administrative body should be subject to override by the elected government as represented by Cabinet. However, any Cabinet override must be accompanied by an explicit public justification that respects the legislated purposes. For broader accountability, the administrative body should also be subject to mandatory transparency of reasons for decisions as well as regular independent auditing (e.g. by an equivalent of the federal Commissioner of the Environment and Sustainable Development), with public reporting of findings.

#### **(o) Linkages beyond assessment**

Assessment that seeks best contributions to sustainability is considerably more ambitious than assessment that is satisfied with mitigating adverse effects. Nevertheless, it is only one of many means of pursuing lasting wellbeing. These means will need to be diverse, innovative and adaptable to opportunities. But the main initiatives of public government will be served better if coordinated and, where feasible, integrated. Accordingly, environmental assessment should be linked with governments' broader efforts to identify emerging challenges and opportunities, set priorities, initiate responses, review progress and adjust accordingly.

To facilitate desirable connections, next generation assessment needs legislative and policy provisions for collaborations with and other links to:

- sustainability-related policy-making, including development of sustainability principles, criteria and strategies;
- regional and sectoral planning regimes and *ad hoc* planning initiatives (especially where these may become assessment equivalents at the strategic level);
- regulatory permitting and licensing; and

- sustainability reporting and other data banking that may inform assessment deliberations and should be linked to assessment products including assessment and monitoring findings.

More broadly, assessment process interests should be involved in inquiries into the design and application of other complementary tools to strengthen motivations for shifts to more sustainability-enhancing undertakings, structures, behaviours—for example, through pricing (of carbon and ecological goods and services), pilot/demonstration projects, ecological tax reform, non-economic status enhancement, and shame-based mechanisms.

Assessment processes would also benefit from participation in multi-party efforts to clarify and rationalize relations between environmental assessment and negotiation of private agreements that may have significant implications for project effects. These include agreements between project proponents and Aboriginal authorities and/or other communities or regions, concerning matters such as the distribution of economic opportunities and revenues, the mitigation and enhancement of other effects, and/or provisions for monitoring and response.

**(p) Effectiveness, efficiency and fairness considerations**

The perceived trade-off between effectiveness and efficiency, at the expense of fairness, has dominated the implementation of environmental assessment since its inception.<sup>34</sup> In next generation sustainability-centred assessment applications, effectiveness, efficiency and fairness are recognized to be interdependent and not candidates for trading off one for the other. In this context, effectiveness is centred on success in serving the purposes of sustainability-based environmental assessment (see above), while efficiency is the achievement of maximum benefit from the use of resources to deliver effectiveness. Fairness includes substantive fairness (enhancement of equity in the distribution of the positive and adverse effects of decisions, within and among generations) and process fairness (fairness in effective opportunity for able and influential engagement in deliberations and impartiality in decision making).

Within a sustainability-based assessment regime, effectiveness, efficiency and fairness in the delivery of positive contributions to sustainability are most likely to be enhanced by: clear generic rules, maintained beyond discretionary avoidance or compromise; early application; consistent guidance (e.g. from the strategic level to project planning); flexibility to recognize key contextual factors; and, by placing assessment at the centre of decision making on assessed undertakings. Within a jurisdiction, application of these enhancements will most likely be improved further with a strong commitment to progress towards sustainability, that includes collaboration and linking of associated policy, planning/assessment regulatory licensing and monitoring processes. This will

---

<sup>34</sup> Sinclair & Doelle, “Environmental assessment”, *supra* note 5; Doelle, *Federal Assessment Process*, *supra* note 1.

require agencies within a jurisdiction to have shared sustainability-based purposes, shared information and expertise, equivalency of scope in policy, planning and assessment, equivalency of opportunity for effective public engagement, provisions for tiered guidance (for example, though law and policy to guide broad planning, in turn to guide project planning) and a focus on the collaborative implementation of associated policy, planning and regulatory licensing processes.

Across jurisdictions (federal/provincial/territorial/Aboriginal), effectiveness, efficiency and fairness in the delivery of positive contributions to sustainability are most likely to be enhanced by upward harmonization of assessment law and process to ensure equivalency in the key process components (purposes, scope, participative opportunities, etc.) as a foundation for linking associated policy, planning/assessment regulatory licensing and monitoring processes, and by sharing information and expertise. Such action should be guided by general law and process harmonization principles that include

- acceptance of process diversity within equivalency of fundamental process components;
- emphasis on broad engagement, sharing of expertise and learning (especially as governments reduce their in-house expertise in key areas of environmental assessment issues and applications); and,
- recognition that the greatest efficiency gains may require broader system changes that strengthen or expand motivations to incorporate attention to sustainability-related considerations (through carbon taxes, transparency in corporate reporting, requirements for free, prior and informed consent from affected communities, etc.).

Environmental assessment has always been about changing entrenched practices and next generation environmental assessment pushes this further. The transition to decision making that seeks positive contributions to sustainability, rather than only mitigation of significant adverse effects, is meant to bring lasting benefits and substantive fairness in relation to the distribution of the positive and adverse effects of decisions. Inevitably, however, this will cause disruptions and, despite best efforts, will involve trade-offs. In all change, risks are greatest for the sociologically and ecologically vulnerable. Next generation assessment must ensure consistent and committed attention to reduction of risks to the most vulnerable and fair distribution of the benefits. The likelihood of achieving this transition will be enhanced with provisions that at least ensure procedural fairness.

### **III. CONCLUSIONS AND WAYS FORWARD**

Next generation environmental assessment has been presented here as a key means of assisting a transition from broadly unsustainable trends to brighter prospects for lasting wellbeing. No such transition can be quick and easy. Establishing the new assessment regimes with the components sketched out here will demand much at all levels of government. Significant shifts in objectives,

structures and practices are involved and it is safe to assume that some of the needed changes will face serious resistance. But a future path without such changes is likely to be a good deal less comfortable. Environmental assessments in Canada are already venues for conflicts rooted in concerns about cumulative risks damages to lands, waters, traditional territories and climate. We consequently all have good reason to begin the learning process that will take us to next generation assessment.

Opportunities to implement what we have outlined above will arise at different times and in different ways in jurisdictions across Canada. In many cases, the opportunity will be to make incremental progress through adjustments at the legislative, regulatory or policy level. Other incremental improvements can be achieved through the application of particular tools, such as federal-provincial harmonization agreements, pilots to explore collaborative strategic environmental assessments, and experimental tiering of existing sustainability-based strategic planning with relevant project assessments. As has been done in some Canadian Environmental Assessment Agency panel reviews, the application of sustainability criteria and a net contribution to sustainability test can continue to be advanced on a case by case basis. In short, considerable progress can continue to be made within existing legislative structures.

In some jurisdictions, opportunities will arise to make a more fundamental shift towards the approach to environmental assessment that we have proposed. At the provincial level, this may occur as provinces feel the impact of the federal government's retreat from environmental assessment. At the federal level, opportunities for progress may await a change in government.

There are also many ways to initiate a broader discussion in Canada about the need for the kind of reform to environmental assessment we have outlined here. A multi-stakeholder process to develop and implement a next generation best practice standard for environmental assessment in Canada would be one way forward, with the promise of moving jurisdictions at all levels of government, including federal, aboriginal, provincial and municipal governments, towards the implementation of a sustainability-based assessment and decision-making approach that is integrated, transparent, and accountable.