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Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment

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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.

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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.1 Focused on the effects of individual projects, they have been poorly equipped to deal with cumulative and strategic effects and broad alternatives.2 No two Canadian assessment regimes are the same and none represents a consistently high standard.3 And with modest

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3 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://reecn.ca/caucus/environmental-planning-and-assessment/resources>; PJ Fitzpatrick & AJ Sinclair, “Multi-jurisdiction-
exceptions, assessment has not evolved well to address changing global and
domestic conditions. 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.

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.

(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 unavoid-
able, they will acceptable only in the last resort and under clearly
delineated rules.

(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 assess-
ment 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

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4 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.

5 A John Sinclair & Meinhard Doelle, “Environmental assessment in Canada: Encoura-
ging decisions for sustainability” in Bruce Mitchell, ed, Resource and Environmental

6 Robert B Gibson, Selma Hassan, Susan Holtz, James Tansey and Graham Whitelaw,

7 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,8 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

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 sustain-
  ability-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 appro-
  riate purposes and options (alternatives) to final deliberations on
  renewal, closure, decommissioning and continued management.
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. They encourage enhancement of multiple, mutually reinforcing, fairly distributed and lasting benefits in addition to avoidance or mitigation of significant negative effects. 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. Specifying the criteria for individual applications would be through informed choices by authorities and stakeholders, without compromising any of the generic requirements. 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

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9 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.

10 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.

11 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/>.

12 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.  

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

13 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;\textsuperscript{14}
- 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.

(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. 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.

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15 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. 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.

\[16\] 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;\(^{17}\) 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.

\(^{17}\) 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.18

(h) Participation

Participatory processes in next generation assessment regimes need to incorporate the insights of deliberative democracy, collaborative rationality and environmental justice.19 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.20 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.21 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.22

20 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.
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.\(^\text{23}\) 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


\(^{23}\) 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 and OEER Association.


(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. Follow-up properly includes monitoring, response to monitoring findings in environmental management, communication, and learning. 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.

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 compliance.

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.29 Relying on assessment case evidence,
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. 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.

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. 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. If made available to

32 Ibid.
33 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 collaboratons 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. 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

34 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.
Robert. B. Gibson
Presentation on November 9, 2016
in Toronto
Supporting Document #2
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.

Robert. B. Gibson
Presentation on November 9, 2016
in Toronto
Supporting Document #3
Generic sustainability assessment criteria and tradeoff rules

Appendix 3
The Basic Sustainability Assessment Decision Criteria

**Socio-ecological system integrity**
Build human-ecological relations that establish and maintain the long term integrity of socio-biophysical systems and protect the irreplaceable life support functions upon which human as well as ecological well-being depends.

**Livelihood sufficiency and opportunity**
Ensure that everyone and every community has enough for a decent life and opportunities to seek improvements in ways that do not compromise future generations' possibilities for sufficiency and opportunity.

**Intragenerational equity**
Ensure that sufficiency and effective choices for all are pursued in ways that reduce dangerous gaps in sufficiency and opportunity (and health, security, social recognition, political influence, etc.) between the rich and the poor.

**Intergenerational equity**
Favour present options and actions that are most likely to preserve or enhance the opportunities and capabilities of future generations to live sustainably.

**Resource maintenance and efficiency**
Provide a larger base for ensuring sustainable livelihoods for all while reducing threats to the long term integrity of socio-ecological systems by reducing extractive damage, avoiding waste and cutting overall material and energy use per unit of benefit.

**Socio-ecological civility and democratic governance**
Build the capacity, motivation and habitual inclination of individuals, communities and other collective decision-making bodies to apply sustainability principles through more open and better informed deliberations, greater attention to fostering reciprocal awareness and collective responsibility, and more integrated use of administrative, market, customary, collective and personal decision-making practices.

**Precaution and adaptation**
Respect uncertainty, avoid even poorly understood risks of serious or irreversible damage to the foundations for sustainability, plan to learn, design for surprise and manage for adaptation.

**Immediate and long term integration**
Attempt to meet all requirements for sustainability together as a set of interdependent parts, seeking mutually supportive benefits.
Appendix 4  
The Basic Sustainability Assessment Trade-off Rules

**Maximum net gains**  
Any acceptable trade-off or set of trade-offs must deliver net progress towards meeting the requirements for sustainability; it must seek mutually reinforcing, cumulative and lasting contributions and must favour achievement of the most positive feasible overall result, while avoiding significant adverse effects.

**Burden of argument on trade-off proponent**  
Trade-off compromises that involve acceptance of adverse effects in sustainability-related areas are undesirable unless proven (or reasonably established) otherwise; the burden of justification falls on the proponent of the trade-off.

**Avoidance of significant adverse effects**  
No trade-off that involves a significant adverse effect on any sustainability requirement area (for example, any effect that might undermine the integrity of a viable socio-ecological system) can be justified unless the alternative is acceptance of an even more significant adverse effect.

- Generally, then, no compromise or trade-off is acceptable if it entails further decline or risk of decline in a major area of existing concern (for example, as set out in official international, national or other sustainability strategies or accords or as identified in open public processes at the local level), or if it endangers prospects for resolving problems properly identified as global, national and/or local priorities.

- Similarly, no trade-off is acceptable if it deepens problems in any requirement area (integrity, equity, etc.) where further decline in the existing situation may imperil the long term viability of the whole, even if compensations of other kinds, or in other places are offered (for example, if inequities are already deep, there may be no ecological rehabilitation or efficiency compensation for introduction of significantly greater inequities).

- No enhancement can be permitted as an acceptable trade-off against incomplete mitigation of significant adverse effects if stronger mitigation efforts are feasible.

**Protection of the future**  
No displacement of a significant adverse effect from the present to the future can be justified unless the alternative is displacement of an even more significant negative effect from the present to the future.

**Explicit justification**  
All trade-offs must be accompanied by an explicit justification based on openly identified, context specific priorities as well as the sustainability decision criteria and the general trade-off rules.
• Justifications will be assisted by the presence of clarifying guides (sustainability policies, priority statements, plans based on analyses of existing stresses and desirable futures, guides to the evaluation of ‘significance’, etc.) that have been developed in processes as open and participative as those expected for sustainability assessments.

Open process
Proposed compromises and trade-offs must be addressed and justified through processes that include open and effective involvement of all stakeholders.

• Relevant stakeholders include those representing sustainability-relevant positions (for example, community elders speaking for future generations) as well as those directly affected.

• While application of specialized expertise and technical tools can be very helpful, the decisions to be made are essentially and unavoidably value-laden and a public role is crucial.
Robert. B. Gibson
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Supporting Document #4
7  Processes

Designing Sustainability Assessment Regimes

How versus what

There is very little rocket science in sustainability assessment. Sometimes it may be necessary to roll out complex equations for impact prediction and perhaps a few aspects of the desired trajectory for change can be illuminated through direct application of the laws of physics. But most of sustainability assessment is less precise and more difficult than rocket science calculations. As we have seen, there is a short list of common decision criteria and trade-off rules that can serve as the generally applicable laws of sustainability assessment physics. In the practical world of assessment, however, every case also faces multiplicities of factors, layers of uncertainty and realms of case-specific peculiarities. The pursuit of sustainability is therefore always as much about context as it is about common goals and guidance.

Sustainability assessment processes inherit from environmental assessment the great advantages as well as the bracing challenges of case-specific adjustment. Environmental assessment is an advance beyond conventional regulation in part because it provides a means of pushing better environmental behaviour through broader and more open decision making. Conventional environmental assessment imposes a standard substantive test centred on avoiding or mitigating significant adverse effects. But it is a test subject to interpretation given the particulars of the circumstances involved. Environmental assessment sets out a step by step process for identifying case-specific purposes and alternatives, describing the relevant environment, determining what is most important in the context, predicting the effects of particular options on particular environments, and so forth. The genius of environmental assessment lies mostly in how the decision making proceeds, not in what is decided (Farrell et al, 2001; Lawrence, 2003a).
Sustainability assessment just takes this further. The scope is broader, the hurdle is higher, and both of these are crucial. But the focus on process remains. Moving from theory to practice in sustainability assessment therefore depends heavily on designing assessment regimes that get the processes right. And there are multitudes of process components and applications to get right.

If sustainability assessment is essentially about adopting decision criteria based on the requirements for sustainability and being open and explicit in making trade-off choices, then sustainability assessment in some form – applied through some process – is needed wherever serious, future-affecting decisions are made. Municipalities deciding what to do with brownfield redevelopment sites, manufacturers choosing among competing suppliers, health authorities facing threats of new epidemics, bankers judging investment opportunities, educators designing new curricula, finance ministers drafting national budgets, even individual consumers deciding what groceries to buy – all of these and countless others should be paying attention to the implications for sustainability. All should be looking to make a positive overall contribution, to achieve multiple gains, to minimize regrettable losses. All should be addressing the full suite of sustainability criteria, applying the basic trade-off rules with due sensitivity to their particular circumstances.

Some decision makers may already have more or less sufficient incentives and available capacity for sustainability assessment. But the practice is rare. As we saw in Chapter 2, the evolution of environmental assessment requirements is pushing some decision makers closer to sustainability-centred decision making. And as we saw in Chapter 4, a few exemplary innovators have found practical reasons and workable ways to apply admirably broad conceptions of sustainability. The vast bulk of decision makers and decision-making processes, however, remain narrowly focused, secretive, myopic or otherwise deficient.

Correcting this is a task that demands much more than the delineation of workable sustainability assessment processes. Great sweeping issues of motivation and mandate are involved. New frames of understanding and rejuvenated capacities for innovation are required. All we hope to do here is sketch out an illustrative portion of the way forward.

The focus of this chapter is how to expand and redesign environmental assessment processes to establish an effective foundation for sustainability assessments. While sustainability requirements can and should be applied in many different ways, assessment processes that apply explicit evaluation criteria in the preparation, evaluation, approval and implementation of policies, plans, programmes and projects are particularly well suited as vehicles for the pursuit of sustainability. While that agenda falls well short of covering all the decision making that ought to be sustainability-centred, it does include a wide range of public and private sector undertakings, large and small. Moreover, the basics of transformed environmental assessment processes can be translated without much difficulty into other venues – land use planning processes, resource management decision making regimes, development aid programming, even corporate strategy development.
As we saw in Chapter 2, environmental assessment in various forms has already spread far beyond the confines of formal environmental assessment law. The reach of sustainability-based environmental assessment should be even greater, especially because it requires recognition of a larger context and greater attention to systemic linkages. Moreover, lessons from adoption of ‘contribution to sustainability’ as the central test in environmental assessment can be expected to provide valuable guidance for applications beyond assessment regimes. So while we should not imagine that a transformation of environmental assessment processes into sustainability assessment processes would be sufficient, we can expect it to illuminate much of the path.

**Basic process principles**

Rough versions of sustainability assessment can be built on the general model of advanced environmental assessment regimes without much difficulty. Indeed this has been done already. And as Chapter 1 illustrated, the starting point does not have to be particularly elaborate. We can get a long way simply by insisting on the basic sustainability test introduced by the Voisey’s Bay mine panel – requiring that the undertaking being assessed will ‘make a positive overall contribution towards the attainment of ecological and community sustainability, both at the local and regional levels’ (Voisey’s Bay Panel, 1997, s3.3). The rest, arguably, is detail.

Unfortunately, the details are crucial if we wish to move from individual experiments to regular application. One of the firm lessons of environmental assessment experience has been that while flexibility is valuable, fuzziness about expectations and obligations is fatal. In advanced environmental assessments, the key details include matters of purpose, application, scope, streaming, transparency, participation, authority and follow-up. In sustainability assessment the list is just a little longer.

Specifying the sustainability test is especially important. A hefty portion of this book has been devoted to careful examination of the requirements for progress towards sustainability and the implications for decision criteria, including trade-off rules. The particular wording and categorizations of the criteria and trade-off rules are debatable and must in any event be adapted and elaborated for specific contexts. But effective sustainability assessment must have decision criteria based on a comprehensive and well integrated understanding of the key requirements for sustainability. It must have clear, sustainability-based rationales for trade-off choices. And it must include means of specifying and elaborating these decision guides for particular contexts and applications through informed choices by the relevant parties (stakeholders).

Sustainability assessment then applies these insights in the full set of process elements recognized in advanced environmental assessment processes, including

- identifying appropriate purposes and options for new or continuing undertakings;
• assessing purposes, options, impacts, mitigation and enhancement possibilities, design implications, implementation plans, etc.;
• choosing (or advising decision makers on) what should (or should not) be approved and done, and under what conditions;
• monitoring, learning from the results and making suitable adjustments; and
• integrating the whole package, including linked strategic and project level processes, into a broader regime that evaluates the status of efforts to move towards sustainability, identifies emerging challenges and opportunities, sets priorities and reviews progress.

The main components of basic and advanced environmental assessment processes were identified in Chapter 2 (see Box 2.1). If we combine these and add clear commitment to sustainability objectives, elaboration and application of decision criteria based on sustainability requirements and attention to the rules for trade-off choices, the result is the basic set of design features presented in Box 7.1.

**Box 7.1**  **Best practice design principles for sustainability assessment processes**

A best practice sustainability assessment process, built on the foundation of advanced environmental assessment regimes,

• begins with explicit commitment to sustainability objectives and to application of sustainability-based decision criteria and trade-off rules;
• incorporates means of specifying and integrating the general sustainability decision criteria and trade-off rules for local and broader context of particular cases;
• covers all potentially significant initiatives, at the strategic as well as project level, in a way that connects work at the two levels;
• ensures that proponents of undertakings and responsible authorities are aware of their assessment obligations before they begin planning and that they have effective motivations (legal requirements or the equivalent) to meet these obligations;
• focuses attention on the most significant undertakings or combinations of undertakings (at the strategic and project levels) and on work that will have the greatest beneficial influence;
• is transparent and ensures open and effective involvement of local residents, potentially affected communities, and other parties with important knowledge and concerns to consider and an interest in ensuring properly rigorous assessment;
• takes special steps to ensure representation of important interests and considerations not otherwise effectively included (for example, disadvantaged populations, future generations, broader socio-ecological relations);
• is initiated at the outset of policy, programme and project deliberations when problems and/or opportunities are identified;
• requires critical examination of purposes and comparative evaluation of alternatives in light of the sustainability-based decision criteria;
• addresses positive as well as negative, indirect as well as direct, and cumulative as well as immediate effects;
• recognizes uncertainties and requires estimates of confidence in effects predictions;
• seeks to identify alternatives that offer the greatest overall benefits and that avoid undesirable trade-offs;
• emphasizes enhancement of multiple, mutually reinforcing benefits as well as avoidance or mitigation of negative effects;
• specifies and applies explicit trade-off rules, including requirements for explicit rationales for trade-off decisions;
• favours options that reflect a precautionary approach to significant risks and incorporate adaptive design, and requires preparation for continuous learning and adaptive implementation;
• is enshrined in law, with effective means of ensuring compliance with process requirements and decisions;
• includes means of enforcing terms and conditions of approval, monitoring implementation and effects, and ensuring appropriate response to identified problems and opportunities through the full lifecycle of assessed undertakings;
• facilitates efficient implementation; and
• is integrated into a more complete framework that links strategic and project level assessment and places both as contributors to and beneficiaries of a larger regime for the pursuit of durable and desirable futures.

With some tweaking, these principles could be applied in a host of jurisdictions, for many kinds of undertakings at various levels of strategic breadth and project ambition. Differences in resource availability, institutional and public capacity, urgency, scale and significance would affect the nature of application. Some aspects – sophistication of criteria elaboration, range of alternatives, depth of analysis, extent of consultation, detail of design – might be constrained without serious loss in particular circumstances. But all of the principles should apply in all cases.

In the interests of broad application, the process design principles are necessarily general. For a clearer understanding of how actual process requirements might be specified, we could consider what would be involved in drafting a sustainability assessment law.

**Components of a sustainability assessment law**

Experience with conventional environmental assessment has taught that the process must be enshrined in law and compliance with requirements and decisions must be legally enforceable. Certainly some proponents do not need to be driven by law. They find sufficient motivation in commitment to public responsibility or enlightened self interest to embrace good assessment practice. But the demonstrated inclination of many
proponents has been to avoid some or all assessment responsibilities. Sustainability assessment, at least in some of its forms, will need statutory foundations as well.

There can be no single correct model for sustainability assessment law. As we have seen, environmental assessment is now entrenched in laws of many kinds – covering review of capital projects, sectoral activities (mining, nuclear power generation, forest management, etc.), urban plans, development assistance, parks establishment and sensitive lands protection. Sustainability assessment, covering all these areas and more, might well need similarly diverse statutory foundations.

The following discussion imagines construction of a generic sustainability assessment law. Only the main components are explored and these broadly. Actual laws would be much more detailed and would have special provisions designed to fit particular legal traditions, institutional structures, constitutional mandates, political possibilities and stakeholder expectations. Here the objective is merely to illustrate the process design principles in application, to sketch out the nature and intent of the key provisions, and to note where significant choices emerge. As will be evident, there are devils even without many details in sustainability assessment process design.

Our generic sustainability assessment law has twelve main components: purposes, decision criteria, application rules, streams, hierarchies and tiers, scope, participation, evaluations, approvals, administration, linkages beyond assessment, and efficiencies. In practice such a law would also have sections on definitions and regulation-making powers. It would set out in some detail the requirements of and steps in different streams or levels of assessment, listing for example the expected points of notice, contents of reports and decision options in the identified assessment streams. It would make provision for reviews including hearings, conflict resolution mechanisms including mediation, and the appointment of authorities including hearing panel members. And it would be careful to define relations with other decisions and decision-making authorities within and beyond the legislating jurisdiction. The following discussion of the twelve core components should nevertheless provide a good indication of what is involved.

**Purposes**

All laws have purposes and some of them, wisely, make these explicit. There are two standard options. Often the law will have a preface of some sort to explain the legislators’ intent. Sometimes, however, the purposes are set out more authoritatively in the body of the law itself. This is preferable when there are disputes over interpretation and lawyers and/or the courts are drawn into the fray. Laws, like most things in life, are open to different readings. The details of assessment laws – content requirements, procedural fairness provisions, obligations to establish the ‘significance’ of things, and other such items – are especially vulnerable. Where different inclinations lead to different interpretations, it is often helpful to have the big picture of the legal intent clearly drawn and authoritatively included in the law.
Clarity of purpose does have drawbacks. Laws must evolve. They must reflect (and sometimes resist and other times foster) the shifts in understandings, priorities and tolerance that typify all modern cultures. Fuzzy goals may therefore be useful if they allow room for progressively sliding interpretation. Certainly this has been important in the history of sustainability where the ‘creative ambiguity’ of the concept has facilitated its spread into the mainstream of official commitments. However, the situation is different now that the commitments are largely in place. Vagueness and ambiguity are less valuable for the transition from commitments to applications. While legal flexibility remains important, sustainability assessment must now help us to move a few steps in the direction of firm obligations, clear criteria and practical tests.

In any event, there is little potential for precision in statements of legislative purpose. Like the laws themselves, the purposes mostly provide a framework upon which more specific guidance can be built through the more detailed provisions of the law and through accompanying regulations, guidance documents and precedents set through particular case decisions.

For sustainability assessment law, an appropriate general statement of purposes would include the following:

1. The purposes of sustainability assessment are
   • to improve decision making on all undertakings that may, individually or in combination, have a significant effect on progress towards sustainability;
   • to ensure comprehensive and integrated attention to all factors affecting long term as well as immediate desirability and durability;
   • to provide the core framework (the main structure, criteria and process) for deliberations and decisions on significant undertakings (in contrast to environmental assessment’s usual role as one among many contributions to a broader decision-making process);
   • to encourage overall consistency and efficiency in decision making from policy and programme design to post-approval project implementation and monitoring (through application of a common set of fundamental requirements), while also favouring flexibility and decentralization by respecting uncertainty and context, working iteratively with the relevant stakeholders, and adapting to different ecosystems and communities, new understandings, and emerging challenges and opportunities;
   • to encourage effective public engagement in the conception, planning, approval and implementation of undertakings that may have a significant effect on progress towards sustainability; and
   • to foster and facilitate creative innovation as well as just transitions to more sustainable practices.

Decision criteria
Sustainability assessment is distinguished from conventional environmental assessment chiefly in its adoption of a broader purpose and a more ambitious basic test. Instead of aiming to avoid or mitigate significant adverse effects, it aims for durable gains. More
than that, it seeks multiple, reinforcing benefits covering the full suite of requirements for progress towards sustainability, and it demands careful, open and explicit evaluation of unavoidable trade-offs.

As will be discussed below (in the section on evaluations), successful pursuit of reinforcing benefits requires good, sustainability-oriented decisions throughout the process from initial conception to final closure. A multitude of individual decisions is involved. Certainly a great deal depends on whether these decisions are guided by a consistent set of decision criteria, and whether the criteria are properly comprehensive, well integrated, and duly elaborated for the case at hand.

The decision-making provisions in a sustainability assessment law might set out the general criteria and trade-off rules as discussed in Chapters 5 and 6 and collected in Appendices 3 and 4 (or their equivalent adjusted for the particular jurisdiction). Alternatively, the law itself could just present the sustainability purposes to be served and leave presentation of the decision criteria to regulations. The latter approach is suggested below. In either case, the general criteria and trade-off rules must be open for case specific elaboration and specification.

Broadly, then, the decision criteria requirements for sustainability assessment could be set out as follows:

2. The evaluations, choices, trade-offs and other decisions made in the sustainability assessment process must
   • focus on maximum gains for sustainability, aim for selection of the best option (rather than merely judge the ‘acceptability’ of proposed undertakings) and seek enhancement of multiple, reinforcing sustainability benefits in addition to avoidance or mitigation of significant negative effects;
   • apply the sustainability-based decision criteria (concerning socio-ecological system integrity, livelihood sufficiency and opportunity, intragenerational equity, intergenerational equity, efficiency, socio-ecological civility and democratic governance, precaution and adaptation, and immediate and long term integration) and the trade-off rules (concerning net gains, burden of argument, avoidance of significant adverse effects, protection of the future, explicit justification, and open process) set out in the regulations (as in Appendices 3 and 4);
   • also take into account any specification of these criteria and trade-off rules – and associated values, objectives and criteria – for particular undertakings in specific contexts, made through informed choices by the relevant parties (stakeholders); and
   • maximize the transparency and accountability of the deliberations and facilitate open engagement of interested and affected parties.

Application rules
The basic application rule for effective assessment regimes is self-evident. Suitably rigorous assessment requirements should apply to all undertakings that may have significant effects and implications for sustainability within the influence of the
legislating jurisdiction. It should also be apparent that proponents of such undertakings must know about their assessment obligations from the very beginning of their deliberations. In environmental assessment regimes where the application decision comes only after an undertaking has been planned and proposed for approval, the key initial decisions on purposes and alternatives will already have been made and must be uncritically accepted or inefficiently revisited. Neither is acceptable in sustainability assessment.

Application determinations must therefore be clear and anticipatory. Pre-established assessment requirements must be in place for all predictable kinds of undertakings so that the potential proponents know to address their assessment obligations from the outset of planning. For uncertain cases in the grey zone between undertakings that clearly merit formal assessment and ones that clearly do not, it is much better to include them in the mandatory assessment list. That way, the proponents begin planning with sustainability in mind, at least to the extent necessary to prepare a persuasive request for exemption from assessment requirements. The alternative would let them steam along to a proposal in a narrowly focused way with the risk that a late screening decision will force them back to the beginning. Generally, the application rules should tend towards assumed inclusion (with provisions for exemptions and less onerous process application) rather than assumed exclusion (with provisions for designation or bump-up to more onerous process application).

The kinds of undertakings that deserve to be covered include strategic as well as project level initiatives, and private as well as public sector proponents. These involve intersecting complexities. Projects from public sector proponents are most familiar and least challenging. Compared with policies, plans and programmes, projects are quite well defined subjects for assessment. And compared with private companies, capable public governments typically have broader agendas, mandates and motivations. They are often, therefore, better equipped to consider and act on a range of alternatives for sustainability. However, the answer to private proponent limitations is not to sacrifice sustainability objectives, but to find other ways of ensuring properly broad assessment.

Often when project level proponents, public or private, are pushed to address options that are beyond their reasonable limits, it is time for strategic level assessment. This is the case, for example, when doubts about the desirability of a thermal power project suggest need for a policy level assessment of electricity demand and supply options. Or when questions about the cumulative effects of successive aquaculture projects suggest need for an assessment of aquaculture promotion policy or regional shoreline development planning. In both instances, a good strategic level assessment can examine the broad purposes and alternatives more effectively and help to streamline subsequent project level deliberations.

Assessments at the strategic level do present challenges. Because the need for them often emerges from problems encountered in project level assessments, as in the cases above, they are difficult to anticipate. They are also hard to pre-define, in part because there are so many strategic tools, forms and purposes in common use. For example, while policies
on important issues may be generally worthy of assessment, not all government
documents that are labeled as ‘policies’ are intended for serious application. Some are
merely symbolic or cynically diversionary. Moreover, assessment obligations at the
strategic level can be easy to avoid by simple re-labelling. For example, if policies and
plans must be assessed, a government agency may choose to operate with draft policies,
or to substitute ‘guidelines’ for plans.

Sustainability assessment law must therefore be clear about what usual kinds of policies,
programmes and plans are covered (for example, by requiring strategic level assessment
of all ministerial or cabinet level strategic undertakings that may have significant
sustainability effects), while being flexible enough to deal with legitimate secrecy needs
(for example, in national budget preparations). And it must also provide means to
encourage or require strategic level assessments where their desirability becomes evident
(for example, where project level assessment has uncovered key issues that lie beyond the
proper scope and authority of the project level participants, or where agencies are
avoiding assessment of evidently significant strategic positions).

3a. Sustainability assessment requirements apply
• generally to all undertakings, including policies, programmes and plans as well as
capital projects and physical activities, that might have significant effects on prospects
for sustainability; and more specifically
  • to undertakings in all categories identified in regulations made under the law;
  • to significant policies, programmes and plans that require ministerial approval;
  • to cases where need for strategic level initiatives has been identified in the course of a
    project level assessment and is recognized by the relevant authorities; and
  (v) to any other cases where the government chooses to require an assessment in
    response to public concern or its own recognition of issues of significance for
    sustainability.

3b. Requests for exemption from sustainability assessment requirements
• may be sought from the assessment authority;
• must be accompanied by reasonable argument and evidence that the potential for
  sustainability effects has been carefully considered and no such effects are likely; and
• must be open for public review and comment before a decision is made.

Hierarchies and tiers
An important advantage of an assessment regime that incorporates both strategic and
project level applications is the opportunity for clarity and efficiency in a linked hierarchy
of tiered assessments. As we have seen, deliberations at the project level can uncover
needs for strategic level initiatives to address the broader issues. Similarly, strategic level
assessments can provide guidance for project assessments, in part by resolving these
broader issues. For example, a strategic assessment that leads to a well considered
regional waste management master plan would provide the foundation for much more
focused assessment of the desirable individual projects (landfill expansions, composting
facilities, etc.) anticipated by the plan. In the same way, an assessed national policy on
international trade liberalization could guide deliberations on options for a particular bilateral agreement, and an assessed provincial programme of support for domestic agriculture could guide design of particular initiatives to assist organic growers or to subsidize habitat preservation on small farms.

Linked hierarchies have long been used in urban and countryside planning where a comprehensive but minimally detailed regional plan sets out the framework for more specific local or community plans. If the plans at both tiers are developed through public processes and aim to serve sustainability objectives, these already represent a hierarchy of applied sustainability assessments. A roughly parallel approach is used in some environmental assessment regimes wherein a generic assessment, perhaps based on one typical case in a closely defined category, is used as a template for subsequent assessments of similar undertakings, with adjustments made for site specific differences.

In tiered assessments, there can be debate about whether the upper level conclusions should be imposed firmly or flexibly at the lower level. Since circumstances very, no single answer is likely to serve well. Flexibility will often be necessary to accommodate exceptional circumstances and recent changes in important factors. But permissive willingness to reopen broad scale debates at the project level will nullify the advantages of a linked hierarchy. Perhaps the best general solution is simply to shift the burden of argument to those who wish to reject some or all of the high level guidance.

4. Strategic level policies, programmes and plans that have been approved after sustainability assessment
   • may be used to guide the substantive scope of and/or the process for consequential assessments at the more specific programme, plan or project levels;
   • may, in particular, be used to focus the lower level assessment on a more limited range of options than would be required in the absence of the broader level assessment; and
   • may be reconsidered at the more specific programme, plan or project levels only where the parties seeking reconsideration can justify this on the grounds of exceptional circumstances or recent changes in important factors.

Streams
Even in the most advantaged jurisdictions, there will never be enough time, resources or human capacity to do carefully rigorous sustainability assessments of all undertakings that may deserve them. Inevitably, a sort of triage is needed. Efforts must be concentrated on the cases (or groups of cases where cumulative effects are involved) that threaten the worst losses if assessment is weak and promise the greatest gains if assessment is given full attention. Less significant cases can be left to a generic process with less supervision, so long as someone is keeping a careful lookout for surprises. And the cases that appear to be inconsequential (or beyond positive influence) must be left largely to their own devices.

Some of this triage is properly achieved through judicious decisions about what undertakings should be subject to the application of the process. However, streaming is a
no less important tool. In broadly applied conventional environmental assessments regimes, only a tiny minority of cases get the full treatment with detailed assessment requirements and public hearings. The rest follow a shorter, less rigorous and often less open path. Or perhaps they just take a first step into a screening mechanism and are excused from further obligations if no serious issues emerge.

In principle, most cases should be expeditious. The practice, however, is often undermined by administrative routinization, exclusion of the potentially affected public, unduly narrow scoping, and inadequate procedures for identifying and dealing with the significant exceptions. While none of these limitations is surprising, given the usual temptations of institutions seeking efficiencies, none is acceptable or necessary.

In best practice environmental assessments, it has been possible to combine breadth, openness and expeditious deliberation. The quicker streams usually feature more concise documentation and a more modest level of public and institutional review, but they retain the full range of basic requirements (for example, to assess purposes and alternatives as well as the preferred option, in light of potential social, economic and cultural as well as biophysical effects), and ensure public notice and comment opportunities. To address exceptions, they usually also include a ‘bump-up’ mechanism for moving particularly difficult or controversial cases from the streamlined stream to the more intensive review category. Similar arrangements are desirable and realistic for effective sustainability assessment.

5. Cases subject to sustainability assessment may be allocated to different, more or less demanding assessment streams, as set out in the law,
   • to ensure detailed substantive evaluation and rigorous public and institutional review of the most significant and potentially worrisome undertakings; and
   • to permit more expeditious assessment review of less significant and worrisome undertakings;
   • so long as in every case, the assessment provisions
     - apply the full set of sustainability criteria and trade-off rules,
     - address the full range of basic requirements (see the provisions under ‘scope’, below), except where a narrowing has been justified by a higher tier assessment (see provisions under ‘hierarchies and tiers’, above);
     - include timely opportunities for public notice and comment;
     - include a mechanism for open consideration of applications (from a proponent, or the public or any other interested party) to bump-up an exceptionally significant or controversial case to more intensive review or to bump-down an exceptionally benign or insignificant case to less intensive review; and
   • with schedules providing, to the extent possible, clear early guidance and procedures for determining more specifically the stream of assessment and review required in all categories of reasonably anticipated undertakings.
Scope
Because the objectives of sustainability assessment are ambitious, the proper general scope of the assessment process is very broad. The aim is undertakings that are, of all the practical options, the most positive responses to well considered problems or opportunities. The process, therefore, must ensure attention to the full set of intertwined factors affecting prospects for sustainability and the entire lifecycle of an undertaking – from the initial consideration of purposes and alternatives to eventual cancellation, replacement or decommissioning. This is crucial, indeed it is a defining characteristic of sustainability assessment processes.

At the same time, no practical process can hope to cover everything that might be relevant. In usual environmental assessment parlance, scoping also includes setting boundaries for particular assessments and focusing attention on the most important issues and options. Both are also necessary in sustainability assessments, for effectiveness as much as for efficiency. But both are open to abuse. Proponents are generally inclined to limit their obligations and to exclude matters that may pose difficulties. In Canada, we have seen logging road assessment boundaries set to consider only the right of way and not the forest to be harvested, and mining assessment boundaries set as a tidy rectangle around a proposed mine site that is located in a sensitive watershed and in the migratory path of a large caribou herd. Scoping must therefore be an open, participative exercise that gives close attention to the complex systems in which assessments and undertakings proceed.

6a. The scope of all assessments must cover
• the full suite of considerations relevant to specifying and applying the decision criteria including social, economic and biophysical aspects recognized as components of complex and dynamic systems;
• the full lifecycle of the undertakings; and
• all key openings for critical examination and innovation, including requirements in every case
  - to establish the need(s) and/or justify the purpose(s) to be served,
  - to identify the reasonable alternatives, including different general approaches as well as different designs, for serving the purpose, and
  - to integrate consideration of related undertakings and cumulative effects of existing, proposed, consequential and reasonably anticipated undertakings, except insofar as these matters have been addressed at least as thoroughly and openly in a broader strategic assessment whose conclusions have not been superceded by subsequent developments.

6b. The particular scope of an assessment must be specified through public process in ways that
• focus attention on the most significant alternatives, socio-ecological system components, and effects, and
• match the level of assessment effort to the significance of the case, with significance in all cases determined through application of the sustainability-based decision criteria.
Participation
Ensuring effective public involvement in sustainability assessment is crucial for at least four reasons. First, and perhaps most obvious, is the legitimate interest of local citizens as the most likely recipients of the resulting gains and losses. This is particularly significant because of the unavoidable importance of public choice. Especially in sustainability assessments, which accept complexity, uncertainty and value-laden preferences as unavoidable aspects of the decisions to be made, simple reliance on expertise cannot be justified.

Second, along with interest, many public participants bring valuable knowledge to the assessment table. In some places, especially where government authorities have very limited internal capacity and few resources for outside expertise, local knowledge can be the main source of key information. This was the case in the Lutsel K’e example discussed in Chapter 4 and has been well documented in a recent study in Ghana (Appiah-Opoku, 2005).

The third, and perhaps most practically important reason for emphasis on public involvement combines balance and credibility. Public participants are the stakeholders with the most reliably broad and powerful motivations to counter the biases of proponents and to demand thorough assessment. Since assessment requirements are intended to force and facilitate the incorporation of sustainability factors in the planning of undertakings, those doing the planning must be given the main responsibility for assessment work. But most proponents have narrow interests, restricted mandates or dominant incentives that do not encourage devotion to the full set of sustainability requirements. Able critics are therefore indispensable. Government reviewers can serve well. Typically, however, they are too constrained by narrow mandates, competing demands and/or political delicacies to offer comprehensive and forthright comments. Public interest organizations, potentially affected residents and other civil society stakeholders also have limitations, but taken together and provided with timely information, early and repeated opportunities for engagement, modest support and complementary work by government experts, they can do much to raise the standard as well as the legitimacy of sustainability assessment.

Finally, sustainability assessment is not just about making better decisions. It is also about institutional and public learning (Parson and Clark, 1995; Diduck, 2001; Connor and Dovers, 2004). The sustainability-based decision criteria recognize the value of socio-ecological civility and the need to deepen its roots in shared understanding and enriched capacity for civic deliberation. Assessment processes, as much as the undertakings that result, should be designed to build this understanding and capacity.

7. Transparency, accountability and effective engagement of participants must be provided throughout the sustainability assessment process, in all streams,

• to mobilize public knowledge as well as specialized technical expertise,
• to encourage all participants to look beyond their particular interests, mandates and expertise to recognize broader implications where trade-offs or positive reinforcements may be involved;
• to ensure effective public as well as technical notification and consultation at key points throughout the proposal development and assessment process including
  - the initial identification of need(s), purpose(s) and potential alternatives;
  - the scoping of an assessment and the identification of valued system components;
  - the selection of the preferred alternative;
  - the application for approval; and
  - implementation monitoring and adaptation;
• with support, including resources, for important participants who would not otherwise be able play an effective role in key steps through the process, including early deliberations and post-approval monitoring;
• with convenient and open access to assessment documentation; and
• with arrangements for public hearings on cases of particular public interest and significance for sustainability.

Evaluations
Laws establishing processes for the assessment (or planning or management) of undertakings involve decisions of many kinds. The usual focus in conventional environmental assessments is on the approval (or rejection) decision – the ruling on whether the assessed undertaking should proceed and, if so, under what conditions. This is understandable, although in many assessment regimes these rulings are just recommendations for consideration by the actual approval authorities. Even recommendation making involves important choices and, in a properly open and credible process, the recommendations can be powerful. But these are not the only, or always the most influential decisions.

In many cases, the key decisions will be about the purposes to be served and the alternatives to be examined. We have, for example, seen many cases where a municipal landfill is reaching the limits of its capacity and the relevant authorities have proposed an assessment in which they define their purpose as finding a new dump site. Accordingly they frame their inquiry around the evaluation of alternative landfill technologies or perhaps alternative locations. Where assessment law has permitted participation in and critical review of such decisions, citizens groups have often forced a broader approach – defining the purpose as waste management and framing the assessment around evaluation of waste reduction, reuse and recycling opportunities as well as disposal options. In these and other such cases, it is easy to see how initial conception decisions might be key determinants of prospects for sustainability-directed innovation.

Much the same can be said about the choices made at other steps in the process. Between initial conception and eventual approval (or rejection), and indeed on through implementation monitoring and final review, assessments involve multitudes of other decisions. Individually, many of these decisions will be unremarkable. Together, however, they can determine much of the assessment’s direction and many of its
conclusions. To ensure consistently guided and informed assessments and to maintain openings for iterative learning, sustainability-based decision criteria must be applied in evaluations and decisions throughout the full deliberative process.

8. Open application of sustainability-based decision criteria (as specified for case-particular context) is required throughout the entire process, including in evaluations and other decision making in
   • selecting appropriate purposes and reasonable options for consideration in particular cases;
   • scoping assessment work, including through the identification of valued system components by the stakeholders as well as relevant experts;
   • identifying means of enhancing positive effects as well as avoiding or mitigating negative effects;
   • judging the nature and significance of uncertainties (about effect predictions, mitigation and enhancement effectiveness, etc.) and associated risks;
   • determining the relative merits of the reasonable alternatives and justifying the selection of the preferred alternative as the proposed undertaking;
   • clarifying and, where possible, resolving conflicts;
   • approving (or rejecting) a proposed undertaking and identifying appropriate conditions of approval;
   • designing and implementing post-decision follow-up, including monitoring, adjustment and, where relevant, closure and/or replacement; and
   • in tiered assessments, elaborating substantive and/or process guidance for subsequent undertakings.

Approvals and authority
While decisions throughout the process are important, approval decisions retain their special place in sustainability assessment. Indeed, they become much more important insofar as sustainability assessment becomes the core framework for developing new undertakings.

Here the key process design issues centre on questions of authority. Do the sustainability assessment conclusions themselves become the go/no-go decision, or are they instead incorporated into some other decision vehicle? In either case, are there adequate tools and capacities for enforcement of the decision and the associated commitments and terms of approval? Who is to make the decision? Should it be the public officials who supervised the deliberations, or an independent body of government assigned to review the evidence, or elected and therefore more democratically accountable authorities, or perhaps even the relevant stakeholders who might, in some cases, reach a consensus agreement? And where should this authority be located? Is this a matter for an environment ministry, given the origins in environmental assessment; or a central agency, given the more comprehensive sustainability agenda; or a more independent authority reporting directly to the legislature?
There are few universally suitable answers to these questions. Arrangements that work well for one jurisdiction will fail in another with different governmental structures and traditions. Even within a single assessment regime, project and strategic assessment approvals, and major and minor cases may need to be handled differently. We can nevertheless set out some general requirements:

9. Approval decisions must
• be explicitly and openly justified in light of the process purposes including case specific elaborations of the decision criteria and trade-off rules (see above);
• include effectively enforceable obligations for implementation, based on assessment commitments and approval conditions (obligations for monitoring, review, adaptation, correction and, where appropriate, replacement or closure);
• include requirements and provisions for comparing actual effects with predicted effects (to allow adaptive management and to enhance learning from experience) through the full life of the undertaking; and
• in the case of strategic level assessments, provide clear substantive and process guidance for subsequent undertakings covered by the assessed policy, plan or programme.

Administration

Just as there are many possibilities for the assignment of final decision-making authority, there are many ways of designing and locating process administration. Some of the desired characteristics are also similar. To the extent possible, both administration and final authority should be transparent, located at or near the centre of decision making, and minimally vulnerable to the pressures of immediate political expediency. In most cases, however, it will be best to separate the two functions.

The location of administration and decision making raises important questions about substantive emphasis. Most conventional environmental assessment processes have been attached to, or have reported through, resource and/or environmental management ministries with typically junior status in government. This has had the advantage of focus on environmental issues but the disadvantage of political marginalization. The broader integrative agenda of sustainability assessments is better suited to a position in, or reporting to, central authority. The risk, however, is dissipation of the hard-won and still limited attention to environmental issues that was built up over the past few decades. This issue will be examined further in the final section of this chapter. For now it is important just to recognize the problem and to recommend firm emphasis on application of the full set of sustainability criteria.

Assessment process administration typically also involves the development of guidance documents and regulations. Both of these can be powerfully influential and regulations, being enforceable in law, are of particular importance. When the basic assessment legislation provides few details about implementation, regulations often carry the main weight of clarifying what is required. While actual regulation making is typically the responsibility of elected officials, the development of regulatory proposals – the
background research, evaluation of options and specification of contents – and the preparation of associated explanatory material may be left to the process administrators. Because the regulation and other guidance documents play key roles in assessment process elaboration and function, it is crucial that they be developed in a credible, open and consultative process.  

10. Process administration must
• be directed by an impartial authority that serves, but is at arm’s length from, the centre of decision making;
• be responsible for ensuring fair process, including opportunity for effective public participation in and critical review of assessment work and of the development of regulations, policies and other process guidance;
• insist on, and provide guidance for, full and fair application of all the core sustainability decision criteria and trade-off rules; and
• be subject to independent auditing with public reporting.

Linkages beyond assessment
Sustainability assessment is just one tool. It will not deliver sustainability by itself, and it is much more likely to be effective within its own realm if it is linked into other complementary initiatives – that, for example, help define and focus the task, clarify the criteria and monitor progress. Ideally, sustainability assessment would be just one contributor to (and beneficiary of) a larger complex system of sustainability-oriented activities. These include work to report current conditions and trends, identify priority concerns and opportunities, select useful indicators of change, delineate and debate future scenarios, plot alternative possible routes to desired futures, evaluate their feasibility, propose suitable strategies for change, monitor new and continuing activities, and propose adaptations and innovations, at every scale from the local to the global, all somehow linked and mutually responsive, flexible and adaptive, dynamic and open-ended.

We have many of the pieces now. Any capable internet search engine will find thousands of initiatives in most of these categories. In some areas (sustainability indicators, for example) there is an impressive array of near duplicates. Organization into firm links of communication and influence has been slower to emerge.

At the same time, sustainability assessment processes are entering a world already heavily populated by legislated planning, review and approval requirements. These requirements are evidently insufficient for essential sustainability purposes – they are generally too narrowly focused, too short term in vision and too fragmented in application to serve sustainability purposes effectively. Still, most if not all of them play some useful role. And few jurisdictions can manage addition of yet more requirements on top of the existing ones.

A sustainability assessment law must therefore both add and subtract. It must encourage the interweaving of innovative sustainability initiatives into more viable whole systems,
and it must clarify, coordinate, harmonize and sometimes supplant relationships with existing regulatory and administrative requirements.

11. To strengthen the effectiveness and efficiency of the larger set of policy-making, planning, regulatory and reporting process in which it operates, the sustainability assessment process must

- make best use of credible broader sustainability initiatives (such as the development of national or regional sustainability strategies, indicator lists or monitoring protocols) where these can help clarify application of the sustainability decision criteria;
- encourage and facilitate cooperative application with other affected jurisdictions, following the principle of upward harmonization to ensure application of the highest standard of sustainability assessment;
- organize its decision making and reporting to facilitate subsequent regulatory deliberations; and
- facilitate other initiatives to situate sustainability assessment in a larger system in which
  - broad sustainability needs, goals and indicators are identified, in part for sustainability assessment application, and
  - sustainability assessment findings, including monitoring results, are used in continuous review and adjustment of the identified needs, goals and indicators.

Efficiencies
Ensuring process efficiency is a major challenge for sustainability assessment. It is also an absolute requirement. Inefficiency is not just wasteful, it is also a gift to the opposition. Because sustainability assessment is a vehicle for substantial change, it will always have enemies and they will be pleased to complain of waste and delay, should the opportunity arise.

Confident authorities may be able to ignore such resistance, but it is a short term strategy at best. The longer term objective for sustainability assessment is proponents who automatically think, plan and act with sustainability imperatives in mind. This can only be achieved if proponents accept the process as legitimate, necessary and at least in some ways valuable. A process typified by unnecessary burdens, uncertainties, inconsistencies and delays cannot win such acceptance.

Assessment process efficiency relies as much on capable administration as on the design of the law. But the legal provisions can play a major role and make efficient administration much more likely. Much depends on the combination of firmness and flexibility. Clear application rules with provisions for exempting or bumping-up exceptional cases, basic content requirements with provisions for issue scoping, and standard decision criteria with provisions for local elaboration – all these establish certainty about the fundamentals while still allowing means of adjustment.

More specific openings for efficient administration include the application, streaming and scoping provisions that match assessment effort to case or issue significance. These are
already common in advanced environmental assessments. Important additional efficiencies are promised by sustainability assessment processes that encourage the tiering of assessments so that strategic level work can streamline assessment at the more specific plan or project level.

Perhaps the most visible efficiencies emerge when properly designed and applied sustainability assessments replace and/or coordinate and guide the multiplicity of fragmentary and independent approval processes that proponents typically face. Because proper sustainability assessment should deliver better integrated and more broadly supported approvals, the results should also include greater legitimacy, less institutional resistance and quicker implementation.

Finally, though probably not immediately, broader efficiencies are promised if sustainability assessment fosters construction of a more coherent and adaptive larger system linking the setting of overall sustainability objectives to the management and monitoring of ongoing activities, as discussed above.

12. Efficiencies in and beyond the sustainability assessment process must be facilitated by
• legal language that is firm on the application of fundamental components (including application of the general decision criteria, attention to purposes and alternatives, etc.) but flexible in case elaboration, and accompanied by clear procedures for seeking exceptions;
• application, streaming and scoping provisions that match assessment effort with the significance of the cases and issues involved;
• tiered assessment provisions that allow use of strategic assessment results to streamline subsequent assessments;
• provisions that allow sustainability assessments and resulting approvals to replace less comprehensive and ill-coordinated existing process or permitting requirements, and to guide other more specific licensing processes; and
• linkages between the sustainability assessment process and a coherent larger system of sustainability analyses and initiatives.

At best, this list of twelve components provides a rough guide for sustainability assessment process legislators. The drafting of specific provisions would have to take into account many more complex issues and options than have been recognized here. And the necessary adjustments to context and application would have significant effects on the resulting law. An actual statute for sustainability assessment in Namibia would be quite different from one designed for Norway. There would also be differences if we were instead drafting a sustainability-based urban planning statute, or legislation governing fisheries management.

The core considerations would apply, nonetheless. Indeed, many of the core considerations would apply if the objective were a non-legislated process, meant for internal adoption by a development assistance bank evaluating funding proposals, or a
civil society organization engaged in fair trade certification. While the points here focus on sustainability assessment law, the main intent is to help frame the broader discussion.

**Transitions**

In the event that all this still seems simpler than rocket science, we should remember that there is no fixed target here. Nor is there a standard beginning point, or an elegantly drawn arc for travel from start to finish. Therefore we should not imagine that there is a single proper vehicle design that can be directly imposed. The design principles and illustrative legal components sketched out here are unavoidably general not just because they are meant for application to different kinds of undertakings in different jurisdictions, but because the situation everywhere is fluid.

Sustainability assessment is by its origins and intent part of a larger transition. As we saw in Chapter 2, environmental assessment has been evolving, erratically but visibly, in the direction of sustainability assessment for many years. Similarly in Chapters 3 and 5, we saw that debates about the concept of sustainability have been moving slowly towards common identification of key requirements. And these are just two topics among many of at least equal significance where things have been changing, though not always in a promising direction.

The core assumption behind sustainability assessment is that we can exert some intentional positive influence over the direction and character of change. There is little hubris involved. Complexity and uncertainty are respected. The rational and comprehensive structure of sustainability assessment process design is well battered and bent by participation, precaution, iteration and doubt. Still, the idea is to make the world a little better – to adopt some basic criteria, consider our purposes and options with care, and try to make a difference, through the cumulative effects of better decisions on projects and strategic undertakings.

That sounds innocent enough. But it means that we are planning to apply sustainability assessment in a world that we hope to change as we go. And that has some interesting implications for process design and application.

Consider, for example, what may be the biggest worry for advocates of sustainability assessment implementation today: what happens to the environment? The problem is that a poorly conceived shift to sustainability-based assessment could reduce the attention given to ecological considerations. Environmental assessment law, indeed environmental law generally, has struggled for decades to force serious attention to ecological concerns and that battle is not yet won. Even in the greenest jurisdictions there remain business, political and bureaucratic proponents of narrowly conceived economic development who would welcome an opening to slide back to the good old days of unfettered entrepreneurialism and environmental disregard.
Would it then be better to delay introduction of sustainability assessment process requirements? Would it be wise to spend a few more years (or decades) strengthening environmentally-focused assessment, arguing for better appreciation of ecosystem services, educating people about health threats from environmental neglect?

We could reject that option on the grounds that environmental concerns may never be widely enough embraced so long as they are treated as an alternative to economic priorities. We could argue that integrated sustainability-based approaches promise more effective attention to the contributing causes of environmental degradation. Certainly, rigorous sustainability-based assessment would be no friend of narrow economic priorities. Moreover, its place is at the core of decision making. While the current forms of environmental assessment may give concentrated, public attention to ecological issues, they frequently play a marginal end role, making recommendations to closed, economically driven approval processes.

Proper sustainability-based assessment would force public attention to the full suite of social/economic/ecological interdependences. It would demand open evaluation of the trade-offs and compromises often proposed in conventional environmental assessment processes, and apply a higher test for identifying and measuring durable benefits. If such were achieved, the effective influence of ecological considerations would be considerably enhanced.

But while all this is well and fine, it depends on ensuring that sustainability assessment is designed well, implemented effectively, and situated to be powerful. Weak sustainability assessment could be a step backward. It could undermine some of the limited environmental gains of the past 30 years, though perhaps not for long without stirring public disgust. In some circumstances, at least, it would be better to push the gradual evolution of advanced environmental assessment a little further.

The key lies in recognizing the place and role of sustainability assessment in a transition. As presented in this chapter, sustainability assessment design is general and in some ways primitive, but it is fully conceived. It is a complete, integrated package. And there may be few opportunities to apply that complete package in the near future. Often there will at least be pressures for compromise. Like the evolution of environmental assessment the transition to sustainability assessment may have to be gradual and hesitant in the face of resistance and confusion.

The matter of transitions moves us from desirable models to dirty-under-the-fingernails strategies for implementation. Sustainability assessment is a tool for change. But it is also at this stage mostly a possibility. It has been attempted in various forms and contexts, and its proper basic characteristics and design are easy to delineate. The tricky part is judging how best to push it forward and for that there are no simple solutions. What adoption and evolution strategies will work best will depend on the context, on the particular openings and perils that emerge in transitions that will be a little different from one jurisdiction and application to the next. The advantage of having a fully conceived sustainability
assessment process in mind is that the various transitional paths may all be designed to point in roughly the same direction. That is as close to rocketry as we are likely to get.

**Notes**

1  One common model for the latter approach is represented by the Ontario Planning Act (1990), which is the key legal foundation for municipal planning in the Canadian province (Ontario, 2001). The Act requires municipal planning decisions to be ‘consistent with’ provincial policy statements. These statements must be prepared in a consultative manner but are issued, like regulations, without going through the full legislative process and therefore are more flexible tools.

2  An imperfect but illustrative example is the class environmental assessment process used under the Ontario provincial Environmental Assessment Act. See discussion in Byer et al (1992).

3  The Canadian federal government uses a multi-stakeholder Regulatory Advisory Committee to help guide and review the preparation of new or amended regulations under the Canadian Environmental Assessment Act. The committee includes representatives of other federal agencies, provincial authorities, Aboriginal organizations, industry associations and non-government public interest groups.
Robert. B. Gibson
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Supporting Document #5
Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options

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

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1. INTRODUCTION

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

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

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quirements.\textsuperscript{3} Internal reviews that have given more attention to effectiveness considerations have apparently also found serious deficiencies.\textsuperscript{4}

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

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

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


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

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


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

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

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

2. REASONS FOR STRENGTHENING SEA IN CANADA

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

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

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

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

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

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

3. INTERNATIONAL EXPERTISE AND EXPERIENCE WITH STRATEGIC ENVIRONMENTAL ASSESSMENT

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

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

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

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

4. CANADIAN SEA EXPERIENCE AND PARTICULAR CANADIAN CHALLENGES

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

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

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12 Thomas R. Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, Vol. 1 (Ottawa: Supply and Services Canada, 1977). This case was initiated as a project-centred assessment but, as the report title indicates, the inquiry and the result were effectively devoted to an examination of alternative future options, and associated policy and planning issues, for a large region.
ronmental assessment panel established under the Federal Environmental Assessment Review Process Guidelines Order; a public review of salmon aquaculture regulatory options under British Columbia’s Environmental Assessment Act; the independent federal-provincial panel review of the Georges Bank hydrocarbon drilling moratorium under the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Acts; the Royal Society’s Expert Panel review on the regulation of food biotechnology in the context of uncertainty, and the SEA of in-stream tidal energy technologies and policy options for the Bay of Fundy, commissioned by the Nova Scotia Department of Energy. This experience generally supports and reinforces the international observations outlined above. However, the record consists mostly of ad hoc initiatives and a federal SEA that is too secretive to be credible. Bram Noble has concluded from his recent review of Canadian SEA experience that it includes some admirable efforts and provides valuable lessons but falls well short of expectations for best practice in SEA.

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

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

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

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

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

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

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19 Since SEA is not yet well entrenched, most attention has been paid to multi-jurisdictional harmonization of project level assessment processes. See for example, David Lawrence, “Multi-Jurisdictional Environmental Assessments,” a paper prepared for the Canadian Environmental Assessment Agency (August 1999); Patricia Fitzpatrick & John Sinclair, “Multi-jurisdictional Environmental Impact Assessment: Canadian Experiences” (2009) 29 Environmental Impact Assessment Review 252–60; and Robyn
narrowly focused on a few limited objectives and considerations rather than the full suite of sustainability issues that need attention in SEA.

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

5. ALTERNATIVE MECHANISMS FOR SEA

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

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

(a) Legal Instruments

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

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20 At the federal level, the options include new law, new provisions in CEAA, adjustment of other existing legislation (e.g., the Inquiries Act, R.S.C., c. I-13) or some combination. For a general discussion of options under CEAA, see Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham: LexisNexis Butterworths, 2008) at 192–239.
stances are diverse and fluid. Clearly, any SEA law would need to be designed to accommodate a wide variety of applications and allow for exceptions and adaptations that respect the fundamental SEA principles. Application of legal obligations to government bodies can be more difficult than conventional application of law to actors outside government. Complementary efforts to enhance other motivations for compliance (e.g. in performance reviews) are likely to be needed along with a range of effective and respected means of resolving conflicts over matters of authority and interpretation.

(b) Policy Instruments

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

(c) Law and Policy Combinations

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

6. EVALUATION OF THE THREE OPTIONS

The relative merits of the three basic SEA regime and process design options — legal instruments, policy instruments and a combination of the two — are examined below in light of 18 criteria, which represent a consolidation of findings from the international assessment literature and reviews of Canadian and international SEA experience about what the key requirements for an effective and worka-
The criteria are framed with attention to the special challenges of the Canadian context. While the focus here is on strengthening federal SEA, the criteria anticipate federal participation in multi-jurisdictional SEAs and are meant to be applicable nationally to SEAs in all Canadian jurisdictions.

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

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

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

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

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

22 See Gibson et al., supra note 21, for one consolidation of established understandings of sustainability requirements for assessment purposes.
Finally, the sustainability-based process design must retain emphasis on biophysical and ecological concerns, and specific environmental effects research, while ensuring that these matters are drawn into the centre of deliberations. The sustainability-centred approach is favoured because of the need for effective and transparent integration, which is generally lacking where biophysical assessments are done separately from economic, technical and socio-political evaluation and planning.

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

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

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

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

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

To ensure that PPP development deliberations and final PPP decisions are informed by environmental and sustainability-focused assessments, SEA must be deeply integrated into the development of PPPs from the outset. The logical advan-
tages of such integration have been confirmed by SEA experience. Effective integration into decision-making has, however, not been a characteristic of Canadian EA so far. As Noble concludes, “in Canadian practice . . . environmental assessment has long been an add-on process or yardstick against which the acceptability of proposals is measured, rather than an integrated decision support tool to develop better ones.”

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

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

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

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

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

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

24 Ibid.

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

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

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

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

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

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


28 A practical example of this SEA function is the case of the Ontario class environmental assessment of forest management. See Robert B. Gibson, “Ontario’s class assessments: lessons for application to policies, plans and programs” in Steven A. Kennett, ed., Law and Process in Environmental Management (Calgary: Canadian Institute of Resources Law, 1994) at 84–100.
4. Sufficient variety and flexibility of process streams (or allowable substitutions of equivalent processes) to cover different sorts of strategic assessment needs — broadly influential policies and programs, multi-tier PPPs, regional and sectoral undertakings, etc.

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

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

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

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

In all these cases, adjustments would be required to ensure consistent application of the core substantive and procedural requirements of sustainability-focused SEA — application of comprehensive sustainability criteria, comparative evaluation of alternatives, process transparency, early and ongoing opportunities for public/stakeholder engagement, explicit rationales for decisions including acceptance of any trade-offs, and follow-up monitoring and enforcement. The most significant cases should require public hearings. Other elements (e.g. specifics on public involvement, including participant funding) should be required at a level consistent with the significance of the case. (See criterion 8 below, dealing with proportional-
ity generally.) Additional provisions will be needed to facilitate cooperative SEA work with other jurisdictions, including foreign governments and international bodies as well as other authorities within Canada.

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

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

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

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

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

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

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

For similar reasons, the SEA regime should include mandatory consideration of both alternative fundamental approaches and alternative means of delivering the purposes of each assessed PPP. In the review of proposed purposes and in the com-
parative evaluation of alternatives, application of the mandatory “positive contribution to sustainability” test plays a central role. For alternatives, the objective is not to find a merely acceptable option, but the one that is most likely to deliver sustainability-enhancing benefits, preferably multiple, mutually reinforcing and lasting benefits, while avoiding risk of significant adverse effects, especially persistent ones that will be a damaging legacy to future generations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A separate, arm’s-length tribunal would be needed to adjudicate on appeals and disputed decisions and appeals (as also discussed under criterion 2 above and
10. Openings for collaboration and/or consolidation with other processes with equivalent objectives and approaches, including those in other jurisdictions.

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

11. Opportunities for meaningful participation in open deliberations.

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

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

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

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


33 See, for example, Regulatory Advisory Committee, Subcommittee on Public Participation, Final Report to RAC from the Subcommittee on Public Participation in Screenings (23 April 2007).
tice and opportunity to comment on an initial statement of proposed purposes of
and alternatives to be considered, and notice and opportunity to review a draft as-
essment document, all with sufficient time allowed for effective engagement. Sim-
ilar provisions may be required for other significant stages in the assessment, in
order to keep all participants equally informed throughout.

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

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

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

Regular monitoring of the strategic assessment regime by the Auditor General
and the Commissioner of the Environment and Sustainable Development, and re-
porting on the results, should be required in order to open further debate on and
allow for improvement of the regime. The Auditor General Act and relevant sched-
ules of the Financial Administration Act may need to be amended in order to clar-
ify this added responsibility for the Commissioner.

12. Transparent and accountable decision-making.

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

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34 Pierre André et al., International Association for Impact Assessment, “Public Participa-
tion: International Best Practice Principles” (Fargo: IAIA, 2006), online:
<http://www.iaia.org/publications>;; David Lawrence, Environmental Impact Assess-
ment: Practical Solution to Recurrent Problems (Hoboken: Wiley, 2003), esp. at
306ff.; Gustavo Vicente & Maria Partidário, “SEA: Enhancing communication for bet-
ter environmental decisions” (2006) 26 Environmental Impact Assessment Review
696–706.
Explicit generic criteria for comparative evaluation of alternatives and for deciding on the acceptability of trade-offs should be written directly into the legal and/or policy instruments, or presented in guidance material, or set out by the independent body charged with making the ultimate recommendation or decision in the assessment process. Early clarity about the criteria to be applied is likely to be valuable for all participants.

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

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

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

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

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

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

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35 “Binding” direction could involve a range of possibilities from highly specific obligations and conditions, to broad requirements to comply or be consistent with stated principles, generic terms of reference, streaming and associated process requirements. In cases of intersecting and joint federal-provincial SEA application, federal PPP directions could be effectively complemented by firm provincial PPP directions where the provinces have legally specified SEAs or SEA equivalents.
14. Opportunity for appeal where SEA principles or prescribed requirements seem not to have been satisfied.

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

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

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

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

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

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

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

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

16. Impartial administration.

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

17. Adequate resources and motivations.

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

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

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

37 Action under other legislation is a possible trigger — for example, the notification under the Canadian Environmental Protection Act, 1999, of a New Substance pursuant to the New Substances Notification Regulations or of reintroduction or new use of an existing substance under the Significant New Activity provisions might trigger SEA application.
proper conduct of the regime would be provided by means of the review/appeal provisions outlined above.

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

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

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

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

(a) The Preferred Mechanism

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

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

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

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

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

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

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

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

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

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

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

Route 1. A government proponent beginning work on a PPP undertaking that may have important environmental effects and may require approval from a Cabi-
net minister, issues a public notice, with the contents described above. The approach to determining the need for a SEA would build upon practice under the current Cabinet Directive but with clear reference to sustainability considerations in judging the potential importance of effects and the appropriateness of initiating a SEA.

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

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

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

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

Where a PPP/SEA is initiated in response to a request from the project level, a decision will be needed on what happens with the project assessment while the
PPP/SEA is underway. It seems likely that different cases will merit different treatments. Some project assessments might be able to continue, perhaps with interim strategic guidance. Others might have to be suspended until the strategic issue is resolved. It is not entirely clear where to best assign responsibility for the case-by-case decisions. One option would be to give the task to the SEA authority.

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

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

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

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Figure 1: Five basic routes to initiating a strategic assessment

1. Federal proponent initiates PPP requiring SEA
   - Mandatory public notice
   - Federal authority agrees to initiate PPP/SEA?
     - Yes: SEA authority decides on allocation to legally specified or policy-directed process stream (see Figure 2)
     - No: Notice with reasons

2. Other jurisdiction proposes joint PPP requiring SEA
   - Mandatory public notice
   - Enters policy-directed stream

3. Non-government body requests PPP requiring SEA
   - Mandatory public notice
   - Enters legally specified stream

4. Project EA panel or other participant requests PPP requiring SEA
   - Mandatory public notice
   - If the federal authority refuses a request from a project assessment, PPP issues return to be addressed at project level

5. Federal proponent initiates special major PPP/SEA
   - Mandatory public notice
(b) Decision-making on Assigning PPP Cases to the Law or Policy-guided Route

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

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

PPP requiring SEA is identified in mandatory public notice
(outlining the purpose and initial options, key issues, scope of the anticipated PPP, proposed stream for SEA)

Stakeholder and public comments solicited

Proponent chooses to proceed, gives notice of any changes to PPP’s purpose, etc.

Federal proponent reviews comments

Proponent chooses not to undertake PPP, provides public rationale

Allocation to a policy-guided or legally specified stream is proposed by the proponent, and confirmed or revised by SEA authority in light of the following questions:

* is the PPP intended to provide authoritative direction for lower-tier PPPs and/or projects? or
* was the PPP requested by a CEAA panel or other project-level participant?
* is the PPP on automatic designation list for legally specified stream? or
* does the PPP meet other criteria for allocation to the legally specified SEA process?

No

PPP is subject to SEA stream guided by policy

PPP continues in policy-guided stream

PPP assignment decision may be revised on appeal, or due to change of PPP substance, or by choice of proponent to move PPP from policy to legally specified stream

Yes

PPP is subject to SEA stream specified in law

PPP continues in legally specified stream
(c) Possible Means of Organizing the Policy-guided and Legally Specified Streams

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

Figure 3: The policy-guided stream
(d) Allocation of Responsibility and Authority

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

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

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

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

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

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

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

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

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

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

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

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

• matters of application — the basic rules and process to be used for determining when some form of SEA process is to be initiated, including provisions for the five routes discussed above and for public notice when a PPP/SEA process is initiated;

• matters of assessment scope and criteria — the generic scope and sustainability criteria and trade-off rules for SEAs; required comparison of alternatives; development of case-specific PPP/SEA evaluation and decision criteria and criteria for determining assigning PPP initiatives to the policy-guided or legally specified SEA stream; and requirements for public notice when a PPP/SEA process is initiated; and

• matters of authority and administration — including decision-making responsibilities, establishment of the SEA authority and SEA Registry; provisions for joint PPP/SEAs with non-federal jurisdictions and for cooperative implementation; provisions for monitoring and reporting of PPP effects; and provisions for monitoring and review of the SEA regime.

Provisions of the SEA law setting out the legally specified stream (see Figure 4) would ensure mandatory application of the standard requirements including core
purposes and generic criteria for PPP/SEAs, aiming at positive contributions to sustainability. The main focus, however, would be on the legally specified process responsibilities, components and options. The law would establish:

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

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

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

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

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

8. CONCLUSIONS, RESIDUAL ISSUES AND FUTURE PROSPECTS

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

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

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

The complexities of regime design are, however, not the most significant challenges in strengthening SEA in Canada. The big barriers are the continuing resi-
tancy of governments to open up their strategic decision-making and the engrained habit of treating assessment as an approval hoop rather than a route to better decisions. The rapid expansion of SEA practice internationally suggests that these barriers are crumbling in many jurisdictions. As the imperatives for more sustainable behaviour become more obvious and pressing, Canadian authorities too should recognize the positive promise of SEA as a means of integrating long-term objectives and providing better guidance for more specific undertakings.

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