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EA Expert Panel Report: Reflections on Canada's Proposed Next Generation Assessment Process

Meinhard Doelle¹, John Sinclair²

In this paper, we share our preliminary reflections on the Expert Panel Report on the reform of the federal environmental assessment process. The report, entitled: *Building Common Ground: A New Vision for Impact Assessment in Canada*, was released by Minister McKenna on April 5, 2017. The report is the result of an open and thorough public engagement process that heard from a large number of Canadians with a keen interest in EA. The Panel offered an impressive range of engagement opportunities, from formal presentations to workshops, special sessions for Indigenous communities, and opportunities for written submissions. It is clear from the report that participation was wide and varied, and that the Expert Panel gave careful consideration to the perspectives it heard.

The report ultimately recommends a fundamental overhaul of the current process under CEAA 2012.³ While quite comprehensive in the issues covered, many issues are covered at a fairly high level, without the detail needed to fully assess the effectiveness, efficiency and fairness of the proposed approach. The report is too high level, and the issues it raises too complex, for a comprehensive assessment at this early stage, so we have limited ourselves to preliminary comments on the following design elements of the proposed new assessment process:

1. Application & Triggering
2. Process & Institutions
3. Jurisdictional Cooperation
4. Use of Regional & Strategic Assessments
5. Scope of Assessment
6. Meaningful Public Participation
7. Learning Oriented Impact Assessment
8. Role of Indigenous Peoples
9. Post EA (Follow-up) Process

1. Application & Triggering

The Expert Panel has recommended the following approach to triggering of project assessments. First, the project list for CEAA 2012 is to be expanded to include all physical activities and undertakings that are likely to adversely impact matters of federal interest that are consequential for present and future generations. As

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³ For an assessment of CEAA 2012, see M. Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (available at <https://ssrn.com/abstract=2104336>).

discussed in more detail below, adverse impacts are to be considered from a sustainability perspective. Projects not on the list should be assessed on the same basis, namely whether they are likely to have a consequential impact on federal matters. The Expert Panel proposes a petition process for projects not listed, and suggests that the test should be a legal test with no discretion. The discretion on whether an assessment is actually required for projects that are listed or otherwise meet the triggering test is to be eliminated.

Overall, the proposed project triggering process seems workable. A key question will be the threshold for what is considered “consequential for present and future generations”. This will determine both what projects get added to the initial project list, and what projects not listed still require an assessment. The Expert Panel recommends a legal test for the application of the process to proposed projects without discretion. While this is appropriate, it will require a clear legal test, and does raise the question whether there should be an opportunity to appeal decisions to an independent appeal body, as the alternative could be lengthy delays as a result of court proceedings in the form of judicial review applications challenging the application of the legal test.

Another challenge with the implementation of the proposed triggering process will be how to make appropriate determinations about the consequence of a proposed project without the benefit of an impact assessment. The key will be to develop a meaningful legal test that can be applied based on information readily available at the early planning stages of a proposed project. To illustrate, the role of cumulative effects in making the triggering determination needs to be clear, particularly for determinations on projects not on the initial list. Do we consider the consequences of a proposed project in isolation of other activities and impacts, or will there be some consideration of cumulative effects in determining whether a proposed project’s impact is consequential for present and future generations? Does it matter whether a project would foreclose future development in the region because it uses up the remaining carrying capacity of the receiving environment?

There is somewhat limited guidance in the Expert Panel Report on the application of regional and strategic assessments. The basic approach for regional assessments is to focus on federal lands (including marine areas), as they do not offer jurisdictional challenges for federal decision makers. For regions outside federal land, the Expert Panel takes a very cautious approach, with a focus on cumulative effects on federal matters. The proposal for triggering of strategic assessment is largely reactive, with a focus on the review of existing and new policies, plans and programs to understand their impact on project assessments.

Our primary concern with the proposed approach to the application of regional assessments is that it does not offer much in terms of new inducements or incentives for provinces or other jurisdictions to cooperate in carrying out comprehensive regional assessments. Unfortunately, unless jurisdictions are motivated to participate in cooperative regional assessments, this may mean that

some of the regions in most need of regional assessments will be least likely to have one carried out. The new process should be clear that any region that is expected to encounter significant development in the foreseeable future (that are expected to require federal approval) should be a priority for a comprehensive regional assessment before the pressure to develop materializes.

With respect to strategic assessments, the proposed approach is useful, but incomplete. In addition to reviewing existing and new plans, programs and policies to understand their implications for project EAs, there is an urgent need for proactive SEAs that serve to fill policy gaps that become apparent during project assessments. The most obvious examples are sustainability policies for new industries, the need for policy changes in light of important scientific developments, and out-dated policies that are shown during a project assessment to be unworkable.

2. Process & Institutions

The Expert Panel has recommended a complete overhaul of the federal assessment process and the institutions responsible for carrying it out. An independent Assessment Authority is to oversee the process. Multi-interest, project specific committees are to be set up to plan the process and carry out the assessments. The Expert Panel proposes a focus on cooperation and on consensus-based decision making, with the Assessment Authority and Review Panels expected to step in to make decisions where consensus cannot be reached on important issues. A sustainability framework for the assessment and the project decision is to be developed for each project assessed, so that it is clear up front how the ultimate project determination (whether the project makes a net contribution to sustainability) is made. Final project decisions are to be made by the Assessment Authority or the Review Panel, with a limited right to appeal to cabinet. The preferred approach for project decision-making is a collaborative consent-based approach, with Indigenous peoples involved on par with other governments.

Other key elements of the new approach include the preparation of the Impact Statement (currently called environmental impact statements or EISs) by the Assessment Authority rather than by the proponent, and a focus on the rigour of the analysis in the Impact Statement, on a precautionary and evidence-based approach to analysis and decision making, on the use of traditional knowledge on par with western science, and on full transparency. The Expert Panel highlights the need to rebuild federal science capacity to properly support this approach to project assessments.

There are many aspects of this approach that are commendable. The focus on cooperation and consensus, the emphasis on science, precaution and transparency, and the efforts to de-politicise the process while leaving the ultimate decisions in the hands of elected officials, are all worthy of support. The key question is how to ensure the detailed design of the proposed institutions and processes results in an

effective, efficient and fair process. Proper legislative guidance to the Assessment Authority through clearly stated goals, principles, and decision-making criteria will be key. A clearly and narrowly defined right to appeal to cabinet on the basis of errors in the sustainability decision (meaning failure to properly apply the decision making criteria established at the outset of the process) will also be important for the functioning of the proposed approach.

A recurring question throughout the proposed process is whether there is a need for an independent appeal body, other than the limited right to appeal to cabinet and judicial review of decisions through the courts. There will be critical decisions at the triggering, scoping, process, and assessment stages. These all occur well before the final project decision, and would not be within the expertise of cabinet to review. In the absence of an independent appeal body, disputes over all these decisions will inevitably end up in the courts in the form of judicial review applications, especially in the early years of this new process. An independent appeals tribunal (potentially modeled on the Ontario Environmental Review Tribunal, or similar tribunals in other provinces) would offer an opportunity to have these issues resolved in a much more expedient manner. Such a tribunal would have more relevant expertise than a generalist court such as the Federal Court of Canada, which has demonstrated its reluctance to review environmental assessment decisions.

3. Jurisdictional Cooperation

The Expert Panel (the Panel) is clear in recognising and endorsing cooperative assessments involving all affected jurisdictions, Indigenous communities and other key interests (such as environmental groups and local communities) in the design and implementation of an assessment as the preferred approach to jurisdictional cooperation. Over 600 of the submissions to the Panel made reference in some way to multi-jurisdictional assessment and the vast majority of these noted the need for cooperation and the advantages of the “one project, one assessment” principle.

The Panel made two broad recommendations for achieving greater cooperation, the legislative implications of which we unpack below. It is important to note that in making these recommendations the Panel explicitly rejected the application of delegation, equivalency and separate parallel assessments, all of which it regards as unviable.

Panel Recommendation 1 on Jurisdictional Cooperation
Co-operation be the primary mechanism for co-ordination where multiple impact assessment (IA) processes apply⁴

⁴ *Building Common Ground*, at 3 and 24.

The Panel recommends cooperative arrangements among “all relevant jurisdictions” as the preferred method of jurisdictional cooperation. The Panel notes existing and past cooperative agreements between the federal government and many provinces as evidence that this is possible, but clearly prefers a focus on cooperation on an assessment-by-assessment basis for regional, strategic and project assessments.

It is clear that the success of joint review panels in the past is a significant driver for the Panel’s approach, recognizing that the cooperation achieved in joint review panels has served to produce the most efficient, effective and fair assessments under the current and previous legislation. Literature on this topic in the Canadian context also supports the notion of project-by-project agreements as being the most viable approach.

We agree with the notion of jurisdictional cooperation and for it to be successful any new statute would have to:

- Clearly establish cooperation as the default and preferred method of multi-jurisdictional assessment;
- Design the overall approach to create incentives for all jurisdictions to prefer a cooperative approach and to be motivated to participate effectively and constructively. It is our view that this is best achieved through legislative direction to pursue cooperative assessments involving all affected jurisdictions, in combination with clarity that in the absence of a cooperative approach, the federal government will proceed with its own assessment in a manner that ensures it has the information it requires to make an informed decision about a policy’s, plan’s, program’s, or project’s contribution to sustainability.
- The legislation should encourage general cooperation agreements between the federal government and all interested jurisdictions.
- The power to enter into these (presumably bilateral) general agreements should focus on establishing broad principles that can be used to focus individual assessment agreements, but should not predetermine or limit the ability of the multi-interest (MI) planning committee to reach agreement on a cooperative approach to any individual assessment.
- The legislation should leave it to the MI planning committee to work out the best way to implement a cooperative approach for the specific assessment, as this will be the best way to ensure all jurisdictions interested in the assessment have the opportunity to contribute to a consensus position on the design and implementation of a cooperative assessment. Otherwise, general bilateral agreements run the risk of predetermining the preferred arrangements between the federal government and a particular jurisdiction, rather than focusing on general principles and thus encouraging real cooperation among MI planning committee members. General bilateral agreements could thus undermine rather than support the goal of achieving

consensus among all affected jurisdictions on the best way to ensure a cooperative approach to a particular assessment.

- The legislation should establish the MI planning committee as the main vehicle for implementing the proposed cooperative approach. Its job would be to design the cooperative assessment process for a particular project, strategic or regional assessment. The basic idea is that for any assessment, each jurisdiction contributes to the collective understanding of the policy's, plan's, program's, or project's contribution to sustainability. The plan-, program- or project-specific cooperation agreement (which the Panel report suggests can take different forms) would be developed by the MI planning committee early in the process.
- A new assessment statute must establish the role and mandate of the MI planning committee to undertake these tasks and must also require that in reaching agreements, MI planning committees use any direction provided to implement meaningful participation in their processes (see Part 6, "Meaningful Public Participation," below). Key among these issues is the representation of other interests on the committee.
- Careful thought will have to be given to how to make a cooperative approach work for assessments of various scales and complexity, not just for large projects that are assessed by joint review panels.

Panel Recommendation 2 on Jurisdictional Cooperation

Substitution be available on the condition that the highest standard of IA would apply⁵

The retention of the substitution option is unfortunate, as it is clearly inferior to a cooperative approach. The cooperative approach, if effectively implemented, can be as efficient as a substituted process, with significant effectiveness and fairness gains due to the active engagement of decision makers and experts from all interested jurisdictions. We understand the political pressure from some provinces to keep the substitution option open, and we recognize that this may be key to bringing some provinces on board with the proposed new federal assessment process.

It is worth noting that most participants (save some provinces and industry representatives) in the Panel's review process were not in favour of substitution. We define substitution as the Panel does: "When an EA law or process of one jurisdiction (A) is substituted for an EA law or process of another jurisdiction (B). The process of jurisdiction A is applied to meet the obligations of jurisdiction B. Jurisdiction B makes its decisions based on the results of A's process."⁶

⁵ *Building Common Ground*, at 3 and 26.

⁶ *Building Common Ground*, at 23 (citing Professor Emerita Arlene Kwasniak).

In our view the new legislation needs to achieve the following with respect to substitution:

- Clarity that the need for substitution must be clearly articulated by those advocating for it. The arguments in favour must be transparent, and subject to public scrutiny. The basic principle enshrined in legislation should be that the default is multi-jurisdictional cooperation on a single assessment process. The burden of demonstrating that there are conditions where substitution is more efficient, effective and fair would then fall to those advocating for it;
- To ensure the basic principle is met the legislation must only permit substitution in cases where the MI planning committee reaches a consensus consistent with legislated principles that substitution is the preferred approach;
- The safeguards recommended by the Panel for the use of substitution⁷ must be included in the new statute and meaningful implementation criteria established for each requirement. In situations where an MI planning committee reaches a consensus that substitution is to be preferred to a cooperative assessment with active engagement of all interested jurisdictions, we do feel that these safeguards offer some protection against the misuse of substitution.

4. Use of Regional & Strategic Assessments

With respect to regional and strategic assessments, the Expert Panel endorses a tiered approach whereby regional and strategic assessments serve to inform project assessments, with the goal of improving the efficiency, effectiveness and fairness of project assessments and project decisions.⁸ Having established this as the overriding goal, the Panel then discusses the respective roles of and application of regional and strategic assessments.

The use of regional assessments is recommended primarily in case of cumulative effects on federal lands (including marine areas). Beyond federal lands, regional assessments are contemplated where there are cumulative effects on “many federal interests”. In such cases, the preferred approach is a cooperative approach with other jurisdictions. In the absence of a cooperative regional assessment, the proposed scope of the assessment would be quite limited. The Expert Panel

⁷ See “Substitution Criteria should include:” in *Building Common Ground*, at 25.

⁸ For a more detailed discussion of this approach and its role in improving cumulative effects assessments, see: M. Doelle, “Offshore Renewable Energy Governance in Nova Scotia: A Case Study of Tidal Energy in the Bay of Fundy” (available at <https://ssrn.com/abstract=2480346>), and J. Sinclair et al, “Looking Up, Down, and Sideways: Reconceiving Cumulative Effects Assessment as a Mindset” (available at: <https://ssrn.com/abstract=2774579>).

proposes a schedule for the development of regional assessments based on where they are most needed in light of current conditions and likely project proposals.

The approach to federal regional assessments proposed by the Expert Panel is helpful, but overly cautious when it comes to assessments beyond federal lands. This is unfortunate, as many of the regions of the country that are in desperate need of a regional assessment (with full consideration of future development scenarios, alternatives, and a full range of economic, social, environmental, health and cultural considerations) are outside federal lands.

While there are clearly limits on federal decision-making authority beyond federal lands, the Expert Panel seems to have failed to appreciate the value of and the clear federal jurisdiction over the information gathering function of regional assessments. In short, in order for federal decision makers to be able to make sound decisions at the project level about a project's contribution to sustainability (the proposed new test for project decisions), the results of a comprehensive regional assessment that is based on a reasonable range of future development scenarios, are invaluable. The issue is not whether the federal government has jurisdiction over all the information needed for a thorough regional assessment; rather, the issue is whether this information will be helpful for project decisions that are within federal jurisdiction. We fully recognize that there will be situations where the end result of a project assessment is that there are no or minimal impacts on areas of federal areas of jurisdiction, resulting in no federal decision making authority. However, this can only be determined once the information gathering process is complete. A comprehensive regional assessment can be very helpful in clarifying federal jurisdiction over particular projects.⁹

The proposed approach can be improved by ensuring that there are good incentives for provinces and other affected jurisdictions (such as municipalities and Indigenous communities) to carry out cooperative regional assessments with the federal government. Unfortunately, a federal approach that is as timid as proposed by the Expert Panel does little to incentivise provinces to participate in cooperative regional assessments. For example, retaining the option for the federal government to carry out a comprehensive regional assessment on its own, even outside federal lands, will be critical in making regional assessments a viable tool in the federal assessment toolkit.

There is also reason to be concerned about the proposed approach to strategic assessments, as it misses significant opportunities to use strategic assessments to make project assessments more efficient, effective and fair by resolving high level

⁹ For a discussion of federal jurisdiction on EA and the importance of separating the information gathering process from decision making, see J. MacLean et al, "Polyjural and Polycentric Sustainability Assessment: A Once-in-a-Generation Law Reform Opportunity" (available at: <https://ssrn.com/abstract=2839617>).

issues before specific projects are proposed and assessed. It is clear that the Panel intends strategic assessment to be used to link existing and new federal policies, plans and programs to project assessments, to help those engaged in project assessments understand the implications of federal policies, plans and programs for the projects being assessed. An example specifically addressed is the need for a strategic assessment of climate change, to determine how federal climate policies, plans and programs should factor into the assessment of projects and into project decisions.

While the proposed application of strategic assessments to existing policies, plans and programs is helpful, it is only one part of the overall value and importance of strategic assessments. Arguably as or more important is its potential for filling policy gaps, particularly gaps identified during the course of project assessments. Examples include out-dated policies, lack of federal policies on important issues, new industries that have not previously been considered, and new scientific developments that make the existing policy framework unworkable at the project level. Strategic assessment can also play an important role in updating regional assessments in light of new developments.¹⁰

5. Scope

With respect to the scope of assessments, the Expert Panel has recommended the completion of a transition that has been underway for a long time: it is a shift from a focus on biophysical effects to a comprehensive assessment of the full range of impacts, benefits, risks and uncertainties. The Expert Panel proposes the formal inclusion of the full range of environmental, social, economic, health and cultural considerations as a way to complete this shift from environmental to sustainability assessments. A logical extension of this approach is a project decision that considers whether the project will make a net positive contribution to sustainability. The Expert Panel also recommends improved consideration of alternatives and cumulative effects. This is to be achieved through the use of regional assessment, but also through improvements at the project level.

The proposed change in the scope of federal assessments toward sustainability is long overdue, and among the significant contributions of the Expert Panel to the reform of the federal assessment process. The recognition of the need to improve consideration of climate change, cumulative effects and alternatives is also commendable. To implement the Expert Panel's vision, further work is needed. Of course, much work has been done and is ready to be applied to make the sustainability approach proposed by the Expert Panel work.¹¹ It is important to keep

¹⁰ For proposals on possible triggers for strategic assessments, see H. Benevides et al, "Law and Policy Options for Strategic Environmental Assessment in Canada" (available at: <https://ssrn.com/abstract=1660403>).

¹¹ See, for example, the application of a sustainability approach in case of the Lower Churchill Project: M. Doelle, "The Lower Churchill Panel Review: Sustainability

in mind the need to develop project-specific sustainability criteria, as generic criteria will not work for all projects. The criteria suggested for Lower Churchill, for example, may not work for projects that do not have a realistic opportunity to offer environmental benefits, unless environmental offsets such as permanent land protection is considered as part of the analysis.

We consider the following to be essential elements of a sustainability approach:

- The overall goal is for every undertaking to make a positive contribution to sustainability;
- The assessment should seek multiple, mutually reinforcing, fairly distributed and lasting gains, while avoiding significant adverse effects;
- Trade-offs should be discouraged and only applied under clearly established rules;
- The assessment needs to go beyond assessing the proposed project to identify best options;
- Legislation should set out generic sustainability criteria but ultimately, the MI planning committee should develop explicit, context-specified sustainability criteria; and
- The project-specific sustainability criteria need to drive the process and the ultimate project decision.

On climate change, the recommendation for a strategic assessment will be key, as this process is needed to give appropriate direction to the project level on how to ensure individual projects contribute to the transition of the Canadian economy in line with our international commitments and national policies. This process will have to work out how Canada's international obligations and commitments can be effectively translated into sound analysis and decision making at the project level. Part of the challenge will be to decide whether to allocate Canada's mitigation commitments by province, by sector or in some other manner, and how to incorporate the Paris Agreement's recognition that current commitments are a floor, not a ceiling, into the assessment of long-term projects with significant emissions.

With respect to cumulative effects, the link between regional and project assessment requires further work, including how regional assessments can ensure appropriate cumulative effects assessments at the project level, and what happens at the project level where the results of a regional assessment are not available. Finally, more work is required on alternatives assessment, including the selection of appropriate alternatives, and the consideration of alternatives through the lens of societal needs, goals and objectives. This should be facilitated through the shift

Assessment Under Legislative Constraints” (available at: <https://ssrn.com/abstract=2480368>).

from proponent-centred assessments to having the Assessment Authority holding the pen.

6. Meaningful Public Participation

The Expert Panel (the Panel) clearly recognizes the important role of meaningful public participation in ensuring the legitimacy of the assessment process. The report highlights the need for early involvement, for the process to be open to all members of the public, and for meaningful engagement throughout the process. It stresses the need for transparency throughout the process, including analysis and decision-making, and the need for public access to information beyond what has been provided in the past, such as baseline data from previous assessments and monitoring results after project approval. The Panel's focus on collaboration and consensus is encouraging, as it provides opportunities for mutual learning and meaningful engagement. Finally, the Panel acknowledges that

Current practices in Canada situate public participation in federal EA in the "Inform" and "Consult" categories. Current engagement practices, while varied, lean toward information dissemination rather than mutual learning and inclusive dialogue, and information gathering rather than clear integration of this information into project design or approval requirements.¹²

To correct these shortcomings in how the public participates in Impact Assessment (IA), the Panel makes three recommendations. Each of these needs to be unpacked to understand how it can be specified in legislated language to reflect the ideas captured in the Panel report, the input that the Panel received and the extensive literature on public participation in IA. The following establishes some necessary legislative direction.

Panel Recommendation 1 on Meaningful Public Participation
*IA legislation require that IA provide early and ongoing public participation opportunities that are open to all. Results of public participation should have the potential to impact decisions.*¹³

Early and ongoing participation, as well as having the potential for participation to impact decisions, are key principles of meaningful engagement that the Panel has recognized. The first step to achieving these and other principles of meaningful participation suggested by the Multi-Interest Advisory Committee (MIAC) (Box 1 below) will be to enshrine them in the purposes and objectives sections of the law and/or in other appropriate parts of the Act.

¹² *Building Common Ground*, at 38.

¹³ *Building Common Ground*, at 4 and 39.

Doing so would provide a framework for the overall public participation system established in the new IA regime. At a minimum, meaningful participation needs to be defined in the statute and include early, ongoing engagement and potential to impact decision-making. Further work is needed on legislative provisions to ensure meaningful public participation.

Specific aspects of the principles will, of course, also require their own detailed legislative provisions that establish positive legal obligations (e.g., notice, formal hearing provisions). Such provisions will be vital to creating realistic prospects for achieving meaningful participation.

Our preliminary assessment is that the new legislation should include the following:

- Provision for the involvement of the public in the development of projects lists and the development of any list or criteria for the designation of regional and strategic assessments, as well as other means of determining the application of the Act. Action in this regard should specifically recognize the Panel's recommendation 'that federal IA should begin with a legislated Planning Phase that ... occurs early ... before design elements are finalized.¹⁴
- Direction regarding what constitutes early participation. The Panel has made suggestions in this regard, including “prior to large time and financial investments being made” and “before any benchmark decision is made”.¹⁵ “Early” requires a mandatory statutory foundation in the provision of opportunities for public involvement, including deliberative forums, at what is commonly referred to as the “scoping stage” of project IA.
- Establish that the Assessment Authority cannot engage with a proponent until the proponent provides public notice that it is proposing an activity or undertaking. Ideally, any federal regulator who has contact with a project proponent would apply the same principle and ask the proponent to contact the Assessment Authority at the time of initial contact. This would serve to encourage proponents to initiate the IA process early in the planning stages of their proposed projects.
- Require any proponent of a project that requires an IA, to notify the Assessment Authority who will then post notice as required under the Act. At this stage all that would be required of the proponent is a very basic project description (e.g. type of project, proposed location), not a detailed design. In the case of SEA and REA, early notice would also be provided by the Assessment Authority. The notice would include basic information on the policy, plan, program or region for which the IA will be undertaken. Additional work is needed to ensure proponents are sufficiently motivated to inform the Assessment Authority early.

¹⁴ *Building Common Ground*, at 19.

¹⁵ *Building Common Ground*, at 39.

Once notice has been given, the formal early planning phase recommended by the Panel would be initiated. This should involve a Multi-Interest Planning Committee (MIPC) that would include multiple interests including public interests, and potentially multiple authorities, participating in setting the assessment agenda, establishing a sustainability framework and scope including criteria and alternatives, and assigning study responsibilities. It will also be essential at this stage to initiate the development of a public involvement program. The type and character of the MIPC will not be the same for each stream of assessment in the case of project IA, or for each tier of assessment (RIA/SIA/PIA). In the case of project IA we recommend the proponent be an *ex-officio* member of the MIPC.

- Statutory provisions are needed that require opportunities for public participation, including deliberative fora, throughout any IA process and particularly including follow-up and monitoring on a scale appropriate to the circumstances, with full transparency in decision processes as a critical precondition.

The Panel acknowledges some of the issues that have occurred with participation such as a lack of focus on two-way dialogue and too much emphasis on “more formal, adversarial and intimidating processes than is needed.”¹⁶ The new statute should recognize and strongly encourage informal opportunities for participation that involve two-way dialogue and discussion. Achieving this also requires:

- A legislated system for mediation and other forms of alternative dispute resolution (ADR) to help participants work together to achieve mutually acceptable and collaborative solutions when participants need some assistance to come to consensus, as the Panel suggests. Strong provisions are needed in legislation so that the full array of ADR’s benefits can be realized.
- The establishment of an option for a public hearing that is smaller and less formal than the panel hearings currently mandated and practiced under CEAA 2012. This would include public meetings, structured roundtables, sharing circles or similar fora for non-adversarial discussion. The formality of current hearings has largely eliminated opportunities to discuss issues and solve problems during the hearing itself, as the Panel notes.
- Provision for hearings when necessary that follow the model that has been used under CEAA that constitutes a clear move away from those undertaken by the NEB and CNSC. The Panel suggests that the approaches to hearings used by the NEB and CNSC are particularly inappropriate. In particular, hearings should be designed to effectively engage those who are interested in participating. Formal cross-examination should be limited to technical experts, and legal representation should be the exception, not the norm, where the need is clearly demonstrated.

¹⁶ *Building Common Ground*, at 39-40.

- The design of culturally appropriate participatory processes. This could be achieved in part through the work of the MIPC at the start of each IA.
- Mandatory formation of an MIPC once notice of an SIA, RIA or PIA has been given. The success of the overall approach proposed by the panel rests in part on the MIPC, and the ability to start the MIPC's planning process much earlier than EAs have generally been commenced under CEAA. We feel that the MIPC is key to helping to solve a host of issues, including coordination. A central role of this committee will be the development of a program for public participation, and while the program should remain iterative, it is critical that the public play a role in its early development. An appropriate level of involvement of non-government organizations as members of the MIPC will be an important and complex design issue, and should be provided for in the Act. A particularly challenging design and implementation issue will be the selection of non-governmental members of the MIPC, and their status on the MIPC. The role of the proponent on the MIPC also needs to be clearly set out in legislation.
- The Assessment Authority will need to engage with stakeholders, rights holders, and public interest organizations to develop ongoing IA education and training programs, and to prepare and implement public participation plans. In regard to this last point, the legislated responsibility of the Assessment Authority to lead this effort is critical, thereby not leaving it to proponents to carry out participation plans.

The Panel underscored a host of capacity issues that impact meaningful participation, such as inaccessible information, lack of access to expertise and short timeframes. Enhancing capacity through greatly improved access to information (see below) and expertise are key to capacity enhancement. Other areas, such as learning and enhancing literacy of assessment processes should be recognized in regulation with the establishment of education and training programs that go beyond a basic introduction to the IA process and that are made widely accessible.

Capacity development will require the enactment of regulation and guidance documents that list and describe collaborative techniques available for use in IA and which support their implementation. A short list of such techniques includes advisory committees, consensus conferences, participatory open houses, mediation, sharing circles and workshops.

Discretion, to the extent that it is required for the functioning of legislative provisions for meaningful participation, should be bounded by a set of legislative principles against which specific decisions can be measured to ensure the appropriate exercise of such discretion. Such principles should include transparency in the decisions taken, reasons for key decisions based on the purposes and criteria of IA set in legislation, inclusive approaches to decision making, culturally sensitive and appropriate approaches, and recognition of the capacity and resources of participants.

Panel Recommendation 2 on Meaningful Public Participation
The participant funding program for IA be commensurate with the costs associated with meaningful participation in all phases of IA, including monitoring and follow-up.¹⁷

It is our preliminary assessment that implementation of this recommendation will necessitate:

- A legislated requirement that the Assessment Authority establish adequate participant assistance for major and complex proposals for regional, strategic and project assessment processes. Assistance should be discretionary for smaller proposals. In the case of project IA, the distinction should be implemented through a set of project assessment streams that are divided into large, medium and small-scale projects. The legislation should be clear that funding is available for stakeholders, rights-holders, and public interest intervenors to provide them with the opportunity to hire outside expertise and otherwise be prepared to engage effectively in deliberative fora.
- A participant assistance regulation that sets out the types of assessments to which the program applies, procedures for applying for assistance, decision criteria and similar operational essentials. The regulation should also establish the types of assistance typically needed, including hiring subject matter experts, hiring legal counsel, participating in the activities of the MIPC, organizing community meetings, participating in ADR, hearings, etc.

Regulatory provisions are needed to establish who will pay for the participatory programs undertaken during the assessment and throughout the life of an undertaking, including monitoring and decommissioning.

As the panel clearly states, meaningful involvement requires capacity development. Ways and means of enhancing capacity need to be established in regulation and in policy.

Panel Recommendation 3 on Meaningful Public Participation
IA legislation require that IA information be easily accessible, and permanently and publicly available.¹⁸

It is our preliminary assessment that implementation of this recommendation will necessitate:

- Provision for mandatory timely information sharing via a complete and accessible public registry for all Canadian assessment information. The Assessment Authority should be mandated to develop an easily accessed,

¹⁷ *Building Common Ground*, at 40.

¹⁸ *Building Common Ground*, at 4 and 42.

well-organized and searchable electronic library (or linked set of libraries) of IA case materials, including documentation of impact predictions and monitoring findings, records of decisions and justifications, and associated cases in law.

By making this available to all, such a resource could be used by all parties to inform deliberative involvement and ultimately improve future assessments and decisions over time. The provision should authorize consultations with other Canadian assessment jurisdictions to consolidate information in a national registry.

These suggested reforms apply to all tiers of IA recommended by the Panel, including strategic, regional and project IA, and to all associated stages from discussion of the need for and alternatives to the undertaking, through to the monitoring, follow-up and decommissioning stages. Meaningful participation needs to be operational at all tiers of assessment and in the ongoing review of the IA law, regulations and policies. A key element of effective implementation and continuous improvement will be a regular review of the new legislative provisions and the establishment of effective mechanisms for encouraging public involvement in this review (such as the establishment of a multi-interest advisory committee providing advice to the Assessment Authority and Minister).

Box 1: MIAC Principles for Meaningful Participation¹⁹

- Participation begins early in the decision process, is meaningful, and builds public confidence;
- Public input can influence or change the outcome/project being considered;
- Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;
- Formal processes of engagement, such as hearings and various fora of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;
- Adequate and appropriate notice is provided;
- Ready access to the information and the decisions at hand is available and in local languages spoken, read and understood in the area;
- Participant assistance and capacity building is available for informed dialogue and discussion;
- Participation programs are learning oriented to ensure outcomes for all participants, governments, and proponents;
- Programs recognize the knowledge and acumen of the public; and
- Processes need to be fair and open in order for the public to be able to accept a decision.

¹⁹ Submission of the Multi-Interest Advisory Committee to the Expert Panel on Environmental Assessment Processes (December 2016).

7. Learning Oriented Impact Assessment

The Expert Panel (the Panel) recognizes the importance of learning about and through impact assessment by linking learning to many of the key components of IA throughout their report. It supports, for example, the MIAC recommendation regarding the purpose of IA:

The two core purposes of federal EA law and associated processes are: to strengthen progress towards sustainability, including through positive contributions to lasting socio-economic and biophysical wellbeing, while avoiding and mitigating adverse environmental effects; and to enhance the capability, credibility and learning outcomes of EA-related deliberations and decision making.²⁰

Like some of the input it received, the Panel links mutual learning to effective and efficient participation and establishes participation as a “learning process”. It also establishes the importance of learning to quality assurance and underscores the importance of “interactive learning processes” as a part of follow-up and monitoring. While the Panel does not make specific recommendations regarding learning, it does provide direction for any new statute that needs to be specified in legislative language to ensure this direction is captured. We consider 4 areas below.

1. *Public Participation*

The Panel recognizes the need to “foster a culture of learning so that assessments become more effective and efficient over time”. The Panel notes further that “mutual learning and inclusive dialogue” are essential ingredients for this culture. It also clearly underscores the importance of participant funding (see Part 6: Meaningful Public Participation, above) to the generation of knowledge, building of capacity and effective and efficient IA processes. To achieve these ends and capture the potential for learning through participatory programs, the new assessment legislation will need to:

- Establish that contributing to mutual learning is a responsibility for all assessment participants – assessment authorities and related agencies, proponents and participants. All must participate actively and constructively;
- Detail in regulation all relevant responsibilities, including providing opportunities for, and facilitation of, deliberative multi-stakeholder collaboration using the full range of methods in the participation toolbox – including opportunities such as scenario building and visioning, increased attention to alternate dispute resolution and increased advocacy for sustainability assessment by public interest interveners (i.e., implement the

²⁰ Submission of the Multi-Interest Advisory Committee to the Expert Panel on Environmental Assessment Processes (December 2016).

legislative recommendations in relation to Part 6: Meaningful Public Participation);

- Implement a fair and clear process for all assessment types (SIA, RIA and PIA) and streams of PIA (see Part 6 on Meaningful Public Participation). The Panel noted in particular the importance of supporting learning through public participation “outside of project-specific contexts” to develop positive feedback cycles to other IA tiers.²¹
- Ensure strong linkages between improving the provisions, opportunities and support for public participation in project impact assessment, on the one hand, and monitoring and review, on the other; and,
- Build into the review process the time necessary for reflection on the implementation of other worldviews and processes in decision-making.

2. Knowledge Development

The Panel recognizes that impact assessment must place a heavy reliance on knowledge/“evidence” inputs of various kinds throughout almost all stages of the process. These inputs are critical to learning and understanding the veracity of the outcome decisions of any impact assessment process. The Panel recognizes that these inputs will come from a variety of sources including traditional Indigenous and non-Indigenous sources, and western science.

To reflect a learning orientation to generating knowledge, next-generation assessment law must:

- Require that knowledge/evidence inputs be gathered from diverse sources before decisions are made;
- Specifically recognize traditional and local knowledge as legitimate sources of information that must be taken into consideration;
- Guarantee that time is spent learning about community values and priorities through processes that are effective for this learning;
- Recognize that western science needs to be treated as just one source of knowledge/evidence, that the undertaking of science not just follow previously established templates, and that it involve both government and non-government scientists;
- Require that knowledge/evidence must be freely shared among all parties (see Part 6: Meaningful Participation), explained in a way that can be understood by those involved and that mechanisms are available to build capacity to help people to understand when they do not;
- Establish ways to test and analyze the knowledge generated through fair and open processes; and,

²¹ *Building Common Ground*, at 40.

- Allow opportunities to learn about Indigenous worldviews and laws. Ascertaining how to learn about these issues is an example of taking the concept of nation to nation relationships seriously.

3. Monitoring of Effects

The Panel recognizes that the monitoring phase “also helps ensure that the IA process is an iterative learning process. Without tracking and assessing the effectiveness of mitigation measures or the accuracy of impact predictions, it is impossible to learn from past successes and mistakes in order to improve future project design, predictions and decision-making.”²² We agree, and suggest that monitoring programs, when done well, offer a critical opportunity for mutual learning beyond the assessment process, and will significantly enhance the efficiency and effectiveness of the assessment process over time.

To ensure a learning orientation, EA monitoring programs should:

- Require mandatory public reporting of monitoring outcomes, through the new registry, of effects and in comparison with effects predictions overseen by the federal Chief Science Officer;
- Require reporting through the new public registry by RAs on the effectiveness of responses to emerging problems and opportunities;
- Require 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; and
- Require involvement of the public in the design, implementation and delivery of monitoring programs (See Part 6: Meaningful Public Participation).

4. Regime Evolution

The Panel also recognized the need for administrative bodies to monitor application of IA processes for successes and limitations, including strengths and deficiencies of impact predictions, Indigenous and public engagement, trade-off avoidance, compliance and effects monitoring and effectiveness of multi-jurisdictional activities in order to ensure learning from the outcomes of these results in modified IA processes as needed. The Panel notes that any IA Agency “would require strong quality assurance programs, as well as audit functions covering both cost control and process. The role of the quality assurance program would be to assess the quality of IAs conducted by the Commission and to ensure that continuous learning and improvement takes place within the organization. Cross-cutting issues would be studied, such as the accuracy of predictions of certain impacts, the effectiveness of

²² *Building Common Ground*, at 66.

mitigation measures and the implementation and effectiveness of follow-up programs. Program analyses would be publicly available.”²³

To achieve this, the new IA statute should include specific provisions for the ongoing assessment of quality assurance to ensure meaningful regime evolution through continuous improvement. This would be accomplished by:

- Providing the Assessment Authority with the power to consider all of the regime evolution issues noted above, with advice from other bodies as required;
- Establishing appropriate legislative requirements for federal authorities and proponents so that the Assessment Authority can do its work;
- Creating a feedback and improvement mechanism so that mistakes are not repeated;
- Compelling federal authorities to comply with any improvements identified by the Assessment Authority as a result of its follow up and quality assurance efforts;
- Requiring the public reporting requirements of decisions, predictions, mitigation, follow-up, monitoring compliance, enforcement actions, and analyses data in a fashion that is easy to understand and interpret by the Assessment Authority through the new national registry (see Part 6: Meaningful Participation), and;
- Requiring formal review of the legislation after an appropriate period of time.

8. Role of Indigenous Peoples

The Expert Panel has clearly recognizes the need to rethink the role of Indigenous peoples, communities, and governments in the assessment process. In particular, it emphasizes:

- The need to assess a proposed project’s impact on asserted and established Indigenous rights and title (the Panel states that this should be done by Indigenous groups themselves and contributed to the assessment process).
- The need to incorporate Indigenous knowledge fully into the assessments, which are currently dominated by western science.
- The need to encourage more Indigenous participation in EA.
- The need to consider the role of the assessment process in implementing Canada’s commitment to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and in particular Indigenous decision making in line with their own institutions, laws and customs, and based on the principle of free prior informed consent.

²³ *Building Common Ground*, at 53.

- The need to recognize that prior informed consent means affected communities have the right to say no, but must exercise this right reasonably, and the need to design an assessment and decision making process that seeks the consent of affected Indigenous communities.
- The need to carefully consider the Assessment Authority's role in the federal Crown's "duty to consult".
- The need to build the capacity of Indigenous communities to participate effectively in the assessment process.

Ensuring an appropriate and effective role for Indigenous peoples in the new assessment process is a complex task. The ideas put forward by the Expert Panel are commendable. At the same time, they raise as many questions as they answer, and more clarity is needed in many areas explored by the Expert Panel. For example, what happens when consensus between Indigenous and other governments involved in a cooperative assessment is not possible on an important aspect of the design or implementation of the assessment process? How will determinations be made as to whether an Indigenous community has exercised its right to withhold consent reasonably? What happens if there is disagreement on this point between an Indigenous community and the Assessment Authority? What if there is disagreement on whether the community is affected by the project? How do we ensure Indigenous communities have the capacity to effectively participate in assessments while adhering to the principles of timeliness and efficiency promoted by the Expert Panel?

9. Post-EA (Follow-up) Process

A historically neglected but critical part of any assessment process is what happens after project approval to ensure the project is implemented in the manner envisaged during the assessment, to ensure adjustments are made to regulatory requirements in case predictions about project impacts turn out to be inaccurate, and to ensure we learn from past assessments to improve future assessments. We refer to these elements collectively as follow-up, a process that should include tracking of information, evaluation, public reporting, an appropriate response, and learning. All too often, critical elements of follow-up are either neglected altogether or are left to project regulators without formal accountability and without ongoing coordination or transparency.

The Expert Panel makes some important recommendations in this regard. Key among them are recommendations for improved transparency, such as the sharing of monitoring and reporting results with the public in a central public electronic database. The Expert Panel also recommends enhanced compliance through better coordination among participating jurisdictions.

As with other elements of the proposed approach, more detail will be needed to ensure the vision is effectively implemented. A key starting point will be to recognize the range of objectives and benefits of monitoring what happens to an

approved project during its life cycle, reporting the results and acting on them appropriately. Follow-up systems should be legislated with the following goals in mind:

- Improving the ability to predict the impacts and benefits of similar projects in the future, and the credibility of predictions made in assessments.
- Improving social licence of approved projects through full transparency of how the project is performing relative to the predictions made and terms and conditions imposed.
- Ensuring the data and other results of follow-up programs are freely accessible electronically to the public.
- Ensuring compliance with terms and conditions of approval.
- Improving the application of adaptive management as a tool to make adjustments to the project, particularly in cases where predictions during the assessment turn out to have underestimated impacts, or overestimated benefits.

Tracking of the implementation of terms and conditions, on an annual basis, with clear allocation of accountability to the appropriate public authority would be a key element of an effective compliance strategy as part of the follow-up program. The power to amend terms and condition, in particular when predictions about impacts turn out to have underestimated negative effects, is also potentially valuable if used appropriately. Finally, reviewing the analysis carried out during the assessment against actual impacts tracked during the follow-up stage will be critical for improving assessment analysis over time.

Conclusion

The Expert Panel Report offers a blueprint broadly consistent with proposals for next generation federal assessment.²⁴ Its key components, including its sustainability focus, its emphasis on cooperative and consensus based approaches, its recognition of the value of regional and strategic assessments, and its focus on the important role of Indigenous peoples in designing and implementing the process and in making decisions at the conclusion of the assessment, are commendable. In light of the extensive engagement of industry, governments, Indigenous communities, community and environmental groups, academics, and individuals, it would be reasonable to expect that the federal government will accept the basic direction proposed and focus its attention on how to make this overhaul of the federal assessment process work.

A key limitation of the report lies in the generality of some of its recommendations. Another area in need of more work is the incomplete treatment of the opportunity

²⁴ For a detailed proposal for next generation EA, see Gibson et al, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment” (available at: <https://ssrn.com/abstract=2670009>).

to utilize regional and strategic assessments to improve the efficiency, effectiveness and fairness of project assessments. Otherwise, what remains is to work through the details, as the details will ultimately determine whether the opportunity to design and implement a federal assessment process that is capable of moving Canada toward sustainability is realized.