

# A New Era of Environmental Governance in Canada

Better Decisions Regarding  
Infrastructure and Resource  
Development Projects

—

by Mark Winfield

## **Metcalf Foundation**

The mission of The George Cedric Metcalf Charitable Foundation is to enhance the effectiveness of people and organizations working together to help Canadians imagine and build a just, healthy, and creative society.

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## FOREWORD

The goal of the Metcalf Foundation's Environment Program is to help build a low-carbon, resource efficient, and resilient Canada. Given the scale and complexity of the task of envisioning and realizing such a transformation, the Foundation sought to elicit a multiplicity of views and opinions, with a particular focus on southern Ontario.

In 2014, Metcalf commissioned a series titled *Green Prosperity Papers*. The aim was to contribute to the emerging policy conversation by connecting Ontario's robust university-based research capacity to timely public policy challenges. We invited proposals from a select number of researchers at Ontario-based universities who have a track record of producing research for public dissemination.

The six resulting *Metcalf Green Prosperity Papers* all address intersections of the environment and economy while taking up a range of topics from social justice, to fiscal reform, to democratic governance.

Since we commissioned the papers, Canada's commitments to climate action and growing a green economy have advanced substantially. The Foundation hopes the ideas explored in this series will assist in the crucial work, that is now underway, toward building a low-carbon, resource efficient, and resilient Canada.

Sandy Houston,  
**President and CEO**  
**Metcalf Foundation**



## INTRODUCTION

One of the defining features of modern environmental policy-making and management has been the introduction of two closely linked procedural policy tools: **environmental impact assessment** and **mechanisms for public participation in decision-making**. These instruments — which began to win widespread acceptance in the 1970s — were thought to have the potential to encourage environmental sustainability and greater democratic accountability and legitimacy in governmental decision-making processes regarding infrastructure and resource development projects.

In practice, environmental assessment processes and enhanced opportunities for public participation in decision-making have improved the quality of environmental decision-making. However, their ability to alter the trajectory of economic activities in the direction of sustainability has never been fully realized. More ominously, over the past two decades, assessment and public participation processes have become the targets of extensive government streamlining efforts designed to accelerate project approvals and construction by “cutting green tape.” This approach was epitomized by the rewriting of the *Canadian Environmental Assessment Act* (CEAA) through the “responsible resource development” provisions of the former Conservative government’s 2012 budget implementation legislation — the notorious Bill C-38.<sup>1</sup> Similar developments, although less brazen, have taken place at the provincial level as well. Canada has not been alone in these directions. Environmental impact assessment processes have been subject to similar streamlinings in the United Kingdom, Australia, and South Africa.<sup>2</sup>

The Canadian experience with streamlining is now relatively advanced. Emerging evidence suggests it has not produced the outcomes that its proponents hoped for. Rather than facilitating speedy approvals and moving project construction forward, streamlining has had the opposite effect. Examples of outcomes include the doubtful future of the proposed Alberta to British Columbia (BC) Northern Gateway pipeline, whose approval was one of the major goals of Bill C-38. Attempts to establish an expedited approval process for conventional and renewable energy projects in Ontario have also met with controversy. In both cases, rather than being resolved, the social, political, and legal conflicts around projects have been compounded and intensified, resulting in greater uncertainty and delay.

The central hypothesis of this paper is that the architects of streamlining lost sight of one of the major reasons why environmental assessment processes were developed in the first place. In Canada, the central political rationale for establishing environmental assessment processes was to

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1. *Jobs, Growth and Long-term Prosperity Act*, 2012, S.C. 2012, c. 19.

2. A. Bond, J. Pope, A. Morrison-Saunders, F. Retief, and J.A. Gunn, “Impact Assessment: Eroding benefits through streamlining?” *Impact Assessment Review*, 45 (2014), pp. 46-53.

provide structures through which social and political conflicts over the distribution of costs and benefits associated with resource and infrastructure projects could be addressed in a manner that participants would regard as procedurally just and fair, and therefore legitimate in their outcomes.

The effort to streamline has effectively stripped these processes of this legitimating capacity. The problem has been reinforced by a perceived shift in the role of some governments from arbitrators of societal disputes, to explicit proponents of particular projects and technologies. As a result, decisions are not accepted by many major constituencies, including affected communities and aboriginal peoples, non-governmental organizations, and even economic actors with interests in the outcomes. Instead, these actors choose to continue, and in some cases intensify, their opposition through other legal and political means.

The situation is further complicated because — absent a credible national plan to address climate change — individual project level assessments of fossil fuel-related infrastructure, like pipelines, have become proxy venues for debates over the future role of fossil fuels in Canada's economy and the implications of their development for Canada's environment and society.

Recent events, involving the management of major projects under streamlined approval processes, have highlighted the significant substantive and political risks these approaches carry. In response, the platforms of both major opposition parties in the 2015 Canadian federal election highlighted the need to reform federal environmental assessment processes.<sup>3</sup> Mandate letters, to the new Minister of the Environment and Climate Change and a number of her colleagues, emphasized the new government's commitment to reform.<sup>4</sup> The theme of reform was also highlighted in the Trudeau government's first Speech from the Throne on December 4, 2015.

This paper explores substantive and political rationales for environmental assessment and public participation mechanisms in decision-making. It also presents recommendations for reform with respect to the **federal environmental assessment process**, and broader issues related to **governance for sustainability** including public participation in decision-making, access to information, and the role of the *Federal Sustainable Development Act*.

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3. See Liberal Party of Canada, *A New Plan for a Strong Middle Class* (Ottawa, 2015), pp. 41-42, and New Democratic Party of Canada, *Building the Country of our Dreams* (Ottawa: NDP, 2015), p. 49.

4. Office of the Prime Minister, *Ministerial Mandate Letters*, November 13, 2015. Office of the Prime Minister, *Minister of Environment and Climate Change Mandate Letter*, November 13, 2015. <http://pm.gc.ca/eng/ministerial-mandate-letters>.



# ENVIRONMENTAL DECISION-MAKING IN CANADA

## THE EMERGENCE OF ENVIRONMENTAL ASSESSMENT AND PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

Since World War II, approaches to environmental decision-making in Canada have evolved through a number of distinct phases that reflect changes in dominant governing and policy paradigms.<sup>5</sup> The period from the beginning of the development of regulatory and institutional infrastructures for resource and environmental management in Canada in the late nineteenth century up to the late 1960s, was defined by a governing paradigm of “bipartite bargaining.”<sup>6</sup> Participation in decision-making was effectively limited to the relevant government agencies and affected private sector economic interests, or between the different levels of government involved. There were no formal opportunities for public input into decisions. Even informal opportunities to comment on proposed projects were rare.

In terms of policy, the central role of the state was understood to be one of facilitating economic development, including the provision of transportation and other infrastructure necessary to facilitate resource extraction, processing, exporting, and other industrial activities. To the extent that environmental considerations even entered the decision-making process under the dominant “pollution control” policy paradigm, the focus was on mitigating the environmental and health consequences of resource extraction, industrialization, and urbanization, while minimizing interference with these processes. In institutional terms, responsibility for environmental matters was fragmented. Different aspects of the environment (air, water, land-use, waste management, energy, natural resources) were dealt with under different pieces of legislation — frequently by different agencies.<sup>7</sup> The acceptability of projects was considered to be a technical issue centred on mitigation of important adverse effects.

By the late 1960s, media-specific “pollution control” policy and industry-government “bipartite bargaining” governing paradigms became subject to increasing challenges. The pollution control policy paradigm seemed less and less able to provide effective responses to the cross-media and cumulative environmental and health effects of industrial activities that were being highlighted by the emerging body of environmental science. It was also

5. Governing paradigms describe the range of state and non-state actors who dominate the processes of policy formulation, decision-making, and implementation. Policy paradigms, in contrast, refer to the prevailing ideas and norms held by different actors in the process in terms of defining problems and the scope of appropriate responses. See Skogstad, G. *Internationalization and Canadian Agricultural Policy: Policy and Governing Paradigms*. (Toronto, ON: University of Toronto Press, 2008), Ch.1, pp.3-42.

6. G. Hoberg, “Environmental Policy: Alternative Styles” in M. Atkinson, Ed., *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Javanovich, 1993), pp. 307-342.

7. M. Winfield, *Blue-Green Province: The Environment and the Political Economy of Ontario* (Vancouver: UBC Press, 2012), pp. 17-39.

becoming clear that institutionally and legislatively fragmented approaches to the management of environmental issues were unable to provide comprehensive perspectives on the potential environmental impacts of proposed projects.<sup>8</sup> At the same time, the results of “bipartite bargaining” decision-making processes were increasingly seen by the public and the media to lack political legitimacy, particularly due to their failure to consider local knowledge or interests in affected communities.<sup>9</sup>

Governmental responses to these challenges focussed on two procedural policy instruments: **environmental impact assessments** and **structures for public participation in decision-making**. The intent was to inject environmental considerations into decision-making around infrastructure and resource development projects by requiring environmental impact assessments before projects could proceed. In addition, specific opportunities for public input and comment were provided. These were initially provided through the environmental impact assessment processes themselves, although they later emerged on a more generalized basis, including through stand-alone legislation.

The environmental impact assessment model was inspired in large part by the *US National Environmental Policy Act* (NEPA) of 1969. NEPA required the preparation of environmental assessments and environmental impact assessments of proposed actions by agencies of the US federal government. In Canada, a federal environmental assessment process was created through the *Federal Environmental Assessment Review Process Guidelines* of 1973. Ontario was the first province to adopt stand-alone environmental assessment legislation through the 1975 *Environmental Assessment Act*.<sup>10</sup>

The assessment processes were generally intended, by their proponents, to provide a more anticipatory and integrated picture of potential project impacts than was offered by the existing, institutionally and legislatively fragmented, environmental regulatory regime. It was hoped that processes would provide early warnings of potential problems and enhance the consistency of decision-making around major projects with significant environmental and social implications. More broadly, there were expectations that the processes would provide opportunities for the integration of environmental considerations into what had hitherto been considered economic decision-making. Structures for public involvement would provide opportunities to access local knowledge about potential problems associated with proposed project locations. Ensuring that the concerns of affected communities were heard and considered would encourage consensus and enhance the legitimacy of decisions.<sup>11</sup>

8. P. Muldoon, A. Lucas, R.B. Gibson, P. Pickfield, and J. Williams, *An Introduction to Canadian Environmental Law and Policy 2<sup>nd</sup> Edition* (Toronto: Emond-Montgomery Publishers, 2015), pp.14-28.

9. Winfield, *Blue-Green Province*, pp.17-39. See also R. O'Connor, *The First Green Wave: Pollution Probe and the Origins of Environmental Activism in Ontario* (Vancouver: UBC Press, 2015).

10. RSO 1990, c. E.-18.

11. Bond, Pope, Morrison-Saunders, Retief, and Gunn, “Impact Assessment: Eroding benefits through streamlining?”

While benefits associated with impact assessment processes were important drivers of environmental assessment regimes in Canada, other more political rationales were also at work. Environmental assessment processes were seen to offer the potential to provide structures through which growing political and social conflicts around major infrastructure and resource development projects might be more effectively managed and resolved. For example, at the time of the development of the *Environmental Assessment Act* in Ontario, the government of Progressive Conservative Premier William Davis was faced with growing conflicts with rural communities in southwestern Ontario. At issue were plans by the provincially-owned utility, Ontario Hydro, to develop a network of high capacity transmission lines through the region. Consistent with conventional practice at the time, Ontario Hydro had developed its plans without any public consultation or discussions, prompting angry responses and protests from the affected landowners and communities.<sup>12</sup>

At the federal level, the 1974-77 Mackenzie Valley Pipeline Inquiry, led by Thomas Berger — generally regarded as the first meaningful federal environmental assessment in Canada — emerged as a process for the resolution of conflicts. In this case, it was conflicts over distribution of risks and benefits associated with energy development in the Arctic and Mackenzie Valley. The inquiry was established during a period of minority government during which there were major debates over the future direction of northern development.<sup>13</sup>

In both cases the conflicts over proposed infrastructure became large and intense enough that they carried the potential for significant political consequences for the governments of the day. Environmental assessment processes were seen to offer forums through which these conflicts could be managed and resolved while reducing the political risks for the governments involved. This function of environmental assessment processes has continued to the present day. The judicial recognition of the potential role of environmental assessment processes as mechanisms through which Canadian governments can fulfil their duty to consult with aboriginal people, highlights this point.<sup>14</sup>

Structures for public participation in decision-making were significant features of emerging environmental assessment processes. These mechanisms typically included public notices and invitations to comment on proposed projects, as well as opportunities to make depositions and, in some cases, more formal presentations of evidence before environmental assessment panels and hearings. The expansion and formalization of public

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12. See N. Freeman, *The Politics of Power: Ontario Hydro and its Government 1906–1995*. (Toronto, ON: University of Toronto Press, 1996), pp.139-150. See also Ontario Power Authority, “Overview of the Development of Power System Planning in Ontario” *Supply Mix Advice: Vol 3*. (Toronto: Ontario Power Authority, 2005) s.3.1, pp.1-12.

13. For a discussion of circumstances around the establishment of the Berger Inquiry, see R. Page, *Northern Development: The Canadian Dilemma* (Toronto: McClelland and Stewart, 1986).

14. See, for example, K.N. Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada*. (Regina: University of Regina Press, 2013).

participation opportunities through municipal land-use planning processes took place from the mid-1970s onwards. Public notice and comment requirements began to be embedded in federal policies regarding the development of new regulations in the late 1970s. The concept of third party “public interest” standing in judicial proceedings, where matters before the courts had legal or policy implications beyond immediate interests of the parties involved, was affirmed and expanded during the same period.<sup>15</sup>

The concept of establishing general requirements for public participation in decision-making reached their height through Ontario’s 1993 *Environmental Bill of Rights* (EBR).<sup>16</sup> Similar but less comprehensive and integrated developments took place at the federal level at the same time. A public petition process, very similar to the Ontario EBR Request for Review process, was established through the 1995 amendments to the *Auditor General Act*<sup>17</sup> creating the office of the Commissioner for Environment and Sustainable Development (CESD). In addition, the *Canadian Environmental Protection Act* (CEPA) 1999<sup>18</sup> created an electronic registry to facilitate public notice and comments on guidelines, policies, and regulations proposed under the Act.<sup>19</sup> CEPA 1999 also contained provisions permitting members of the public to request investigations of alleged violations of the act and to initiate “environmental protection actions,” similar to the “citizen suit” provisions in the Ontario legislation.

### THE DECLINE OF ENVIRONMENTAL ASSESSMENT AND PUBLIC PARTICIPATION

In Canada in the mid-to-late 1990s, we saw the coming into force of the *Canadian Environmental Protection Act*,<sup>20</sup> Ontario’s *Environmental Bill of Rights* (EBR), creation of the Commissioner for Environment and Sustainable Development (CESD) petition process, and the inclusion of public participation provisions of the *Canadian Environmental Protection Act* (CEPA 1999). These have come to represent the zenith of the use of procedural instruments to formalize mechanisms for public participation in environmental decision-making.

Since then, the story regarding environmental assessment and public participation processes in Canada, as in many other jurisdictions,<sup>21</sup> has evolved in less hopeful directions. Environmental assessment processes have been under attack as “green tape” barriers to economic development

15. See *Thorson vs. Canada (Attorney-General)*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors vs. McNeil* [1976] 2 S.C.R. 265; *Minister of Justice vs. Borowski* [1981] 2 S.C.R. 575; and *Findlay vs. Canada (Minister of Finance)* [1986] 2 S.C.R. 607.

16. S.O. 1993, c.28.

17. *An Act to Amend the Auditor General Act*, S.C. 1995, c. 43.

18. S.C. 1999, c.33.

19. The federal registry was narrower in scope than its Ontario counterpart. Unlike the Ontario EBR provisions, the CEPA registry does not provide notice and comment opportunities on specific approvals, such as those issued under CEPA for ocean dumping or imports and exports of hazardous wastes.

20. S.C. 1992, c. 37.

21. Bond, Pope, Morrison-Saunders, Retief, and Gunn, “Impact Assessment: Eroding benefits through streamlining?”

and subject to extensive streamlining efforts at the federal and provincial levels. These processes have been driven in part by the dominance of neo-liberal ideas around limiting the role of the state in the functioning of markets, and also by the dynamics of trade liberalization and globalization. These forces have strongly reinforced the role of resource commodity extraction and export in the Canadian economy.<sup>22</sup>

For the same reasons, there have been parallel erosions of formal opportunities for public participation in decision-making, both inside and outside of environmental assessment processes. In some jurisdictions, including Canada, the situation devolved into government attacks on the legitimacy of those attempting to participate in decision-making processes around infrastructure and resource development projects.<sup>23</sup> Those opposed to such projects were often characterized as potential threats to national security.<sup>24</sup>

The most explicit case in Canada is at the federal level. From the time it came into force in 1995, the *Canadian Environmental Assessment Act* (CEAA) was the target of challenges, particularly from natural resource industries. Initially, a combination of litigation initiated by environmental groups and generally strong support from successive federal environment ministers succeeded in maintaining some degree of integrity in the process. The situation changed significantly following the arrival of the Conservative federal government led by Stephen Harper in 2006.

A Major Projects Management Office was established in 2007 for the specific purpose of facilitating the approval of major resource projects. Significant revisions to the federal environmental assessment process itself began with the 2009 budget, which provided a range of short-term exemptions from CEAA. In the 2011 federal election the Conservative government was re-elected with a majority. The revision of CEAA emerged as the centrepiece of the government's "Responsible Resource Development" initiative and 2012 budget implementation legislation. Bill C-38, the *Jobs, Growth and Long-Term Prosperity Act*, repealed the existing act and replaced it with new legislation.

The *Canadian Environmental Assessment Act, 2012*, eliminated the screening level assessment process for smaller projects. The application of the federal assessment process to larger projects effectively became

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22. See, for example, B. Haley "From Staples Trap to Carbon Trap: Canada's Peculiar Form of Carbon Lock-in.". *Studies in Political Economy*, Vol 88, 2001, pp. 97-132. See also D. Eberts, "Globalization and Neo-Conservatism: Implications for Resource and Environmental Management," in Mitchell, Ed., *Resource and Environmental Management in Canada*. (Toronto: Oxford University Press, 2004), pp. 54-79.
23. Oliver, J., Minister of Natural Resources (2012) "An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada's commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada's national

economic interest." January. <http://www.nrcan.gc.ca/media-room/news-release/2012/1/1909>.

24. See, for example, Royal Canadian Mounted Police (RCMP) *Critical Infrastructure Intelligence Assessment: Criminal Threats to the Canadian Petroleum Industry* (Ottawa: RCMP, 2014). <http://www.desmog.ca/sites/beta.desmogblog.com/files/RCMP%20-%20Criminal%20Threats%20to%20Canadian%20Petroleum%20Industry.pdf> (accessed June 24, 2015).

discretionary. Even where such assessments were required they would only examine a very narrow range of issues, typically where federal regulatory approvals would be required. Considerations of the need and rationale for projects, their overall environmental impacts, cumulative effects (except in very limited terms), social and economic consequences (except narrowly in relation to aboriginal peoples) and the availability of alternatives, were eliminated from the process. The legislation also permitted the “substitution” of provincial assessment processes for federal reviews under CEAA.<sup>25</sup>

Other provisions of the revised statute were designed to limit public participation in the assessment process. Participation was limited to those determined to have an “interest” in designated projects. Amendments to the *National Energy Board Act*, also made through Bill C-38, limited rights to participate in National Energy Board hearings to those “directly affected” by a given project.<sup>26</sup> Amendments limited the scope of hearings to factors “directly related” to a project as opposed to any upstream or downstream effects. Limiting rights of participation in hearings reflected the participation standards adopted in Alberta energy and environmental regulation in the 1990s.<sup>27</sup> Finally, the amendments to CEAA and the NEB Act established the cabinet as the decision-making body for CEAA and NEB reviews, rather than the relevant “responsible authority” or the board.

More broadly at the federal level, efforts to limit participation took on even more ominous tones. The Canada Revenue Agency (CRA) engaged in an aggressive program of auditing the “political activities” of NGOs with charitable status, with the aim of suppressing their public activities.<sup>28</sup> There was a particular focus put on those who had been critical of the government’s environmental and natural resources policies. Reports from the Royal Canadian Mounted Police (RCMP) and Canadian Security and Intelligence Service (CSIS) suggested opponents of energy resource development constituted threats to national security.<sup>29</sup> The Conservative’s anti-terrorism legislation (Bill C-51 – *The Security of Canada Information Sharing Act, 2015*) was widely criticized for identifying, as “threats to the security of Canada,” any activities that might interfere with the “economic and financial stability of Canada”<sup>30</sup> and for potentially criminalizing peaceful advocacy, protest, dissent, and artistic expression.<sup>31</sup>

25. See, for example, R.B. Gibson, “In full retreat: the Canadian government’s new environmental assessment law undoes decades of progress,” *Impact Assessment and Project Appraisal* (2012), Vol 30(3), pp. 179-188, 2012; M. Doelle, “CEAA 2012: The End of the Road for Federal EA in Canada?” *Journal of Environmental Law and Practice*, Vol 25, 2012; and M. Winfield, “The Environment, ‘Responsible Resource Development’ and Evidence Based Policy-Making in Canada”, for Shaun Young Ed., *Evidence Based Policy-Making in Canada*. (Toronto: Oxford University Press, 2013), pp. 196-221.

26. In April 2013, the NEB announced new requirements flowing from the C-38 amendments that any person wishing to comment on a matter before the board complete a ten page application form establishing their status as “directly affected.”

27. G.H. Salomons and G. Hoberg, G. “Setting boundaries of participation in environmental impact assessment,” *Environmental Impact Assessment Review*, Vol 45, 2014, pp. 69-75.

28. See Broadbent Institute, *Stephen Harper’s CRA: Selective Audits, “Political” Activities and Right Leaning Charities* (Ottawa: Broadbent Institute, 2014) and D. Tsao, Z. Stoffman, G. Lloyd-Smith, K. Mohomoud, and C. Sandborn *Tax Audits of Environmental Groups: The Pressing Need for Law Reform*. (Victoria: University of Victoria Environmental Law Centre, 2015).

29. RCMP, *Critical Infrastructure Intelligence Assessment: Criminal Threats to the Canadian Petroleum Industry*.

30. Bill C-51, *The Security of Canada Information Sharing Act, 2015* (s.2).

31. K. Roach, and C. Forcese, *Canada’s Proposed Anti-Terrorism Law: An Assessment*. [www.antiterrorlaw.ca](http://www.antiterrorlaw.ca) (accessed May 27, 2015).

Parallel processes of streamlining environmental assessment and public participation — although sometimes more subtle — have occurred at the provincial level. For example, Ontario's *Environmental Assessment Act* was substantially revised in 1996 to reduce the scope of assessments. Specifically, consideration of the need for projects and alternative ways of meeting those needs was effectively eliminated. Instead, assessments focussed on the mitigation of the direct impacts of projects. The practice of conducting public hearings before Ontario's quasi-judicial Environmental Assessment Board for major projects and undertakings, a central component of the public aspects of the process, was abandoned in the late 1990s. The last hearing before the Board occurred in 1998.<sup>32</sup>

Streamlining continued following the 2003 provincial election, which saw the Progressive Conservative government replaced by a nominally more progressive Liberal government. Under the new government, the trend towards streamlining intensified significantly following the 2008 economic downturn. The Ministry of the Environment began to revise its non-environmental assessment approval processes. Under the new model the ministry would no longer actively review most applications for environmental approvals. Rather, proponents would simply assert their compliance with the required practices and procedures by registering with the ministry before proceeding with their proposed activities. The process, which began to be implemented in the fall of 2011, eliminated the rights of members of the public, established through the *Environmental Bill of Rights*, to comment on proposed approvals before they were granted. The opportunity to appeal approvals to the Environmental Review Tribunal was also eliminated.<sup>33</sup> Similar streamlining reforms began to be pursued by the Ministry of Natural Resources.<sup>34</sup>

With respect to energy, the Liberal government abandoned the previous Progressive Conservative government's market-oriented reforms in the electricity sector. Instead, the concept of system planning was reintroduced through the 2004 *Electricity Restructuring Act*.<sup>35</sup> The province made an explicit decision not to follow the precedent of the handling of Ontario Hydro's 1989 Demand/Supply Plan which was done by conducting a strategic level assessment of the resulting system plans. Instead, the province argued that it made more sense to consider environmental impacts at the level of individual projects.<sup>36</sup> Regulations accompanying the exemption of the proposed Integrated Power System Plan from the *Environmental Assessment Act* did require that the Ontario Power Authority demonstrate it had "considered sustainability" in developing its plan.<sup>37</sup> This requirement

32. Environmental Commission for Ontario (ECO), *2007/08 Annual Report: Getting to K(no)w* (Toronto: ECO, 2008).

33. R. Nadarajah, M. Carter-Witney and E. Macdonald. *Modernizing Environmental Approvals: EBR Registry No 010-9143* (Toronto: Canadian Environmental Law Association, Canadian Institute for Environmental Law and Policy and Ecojustic.ca, 2010).

34. Ontario Ministry of Finance, "Ministry of Natural Resources Transformation," *2012 Ontario Budget: Chapter I: Transforming*

*Public Services*. [http://www.fin.gov.on.ca/en/budget/ontariobudgets/2012/ch1.html#c1\\_ministryONRT](http://www.fin.gov.on.ca/en/budget/ontariobudgets/2012/ch1.html#c1_ministryONRT) (accessed April 2, 2013).

35. S.O. 2004, c.23.

36. M. Mittlestaedt, "Nuclear Plan Skips Key Green Review," *The Globe and Mail*, June 15, 2006.

37. Ontario Regulation, 424/04

has never been tested as the one and only public hearing before the Ontario Energy Board on a system plan was suspended in September 2008, barely two weeks after it began.<sup>38</sup> Bill 135, *The Energy Statute Law Amendment Act, 2016*, which is currently before the Ontario legislature, would permanently exempt the province's energy planning activities from the requirements of the *Environmental Assessment Act*.

With respect to individual energy projects, exemptions from environmental assessment requirements were provided for all solar power projects, emergency generators, and small wind, gas-fired, biomass, cogeneration, landfill gas, on-site generation, and transmission projects. Voluntary proponent-led "screening" level reviews could take place for generation projects and hydro-electric projects up to 200MW.<sup>39</sup> Individual project assessments were limited to large transmission and hydro projects, and facilities burning over 100 tonnes/day of municipal solid waste or using hazardous or liquid industrial wastes as fuel. Newly built nuclear or nuclear refurbishment projects were not addressed via the provincial regulation on the premise that they would be subject to federal environmental assessments under the *Canadian Environmental Assessment Act (CEAA)*.

The 2009 *Green Energy and Green Economy Act*,<sup>40</sup> one of the centrepieces of the government's response to the 2008 economic downturn, established a Renewable Energy Approval (REA) process for solar photovoltaic, wind, and bio-energy projects (i.e. anaerobic digestion, biofuels, biogas, and thermal treatment facilities).<sup>41</sup> Projects falling under the REA process were exempted from the requirements of the *Environmental Assessment Act*. REA approval also replaced the requirements for approvals under the *Environmental Protection and Ontario Water Resources Acts*. Projects subject to the REA process were exempted from the province's *Planning Act* with respect to land-use planning, explicitly eliminating any requirements for municipal planning approvals of renewable energy projects. Renewable energy projects continued to be subject to approval requirements under some natural resources management legislation.<sup>42</sup>

38. M. Winfield, R. Gibson, T. Markvart, K. Gaudreau, and J. Taylor, "Implications of Sustainability Assessment for Electricity System Design: The case of the Ontario Power Authority's Integrated Power System Plan," *Energy Policy*, Vol 38, 2010, pp. 4115-4126.

39. Ontario Regulation, 116/01. See also Ontario Ministry of the Environment, *Guide to Environmental Assessment Requirements for Electricity Projects* (Toronto: Ontario Ministry of the Environment, 2011), p.17.

40. S.O. 1009, c.12.

41. Small wind (<3kW) and solar (<10kW or roof or wall mounted systems) are exempted from the environmental approvals process altogether, while hydro power projects remain outside of the REA process and subject to the requirements of the Environmental Assessment Act and other environmental approvals.

42. P. Mulvihill, M. Winfield, and J. Etcheverry, "Strategic Environmental Assessment and Advanced Renewable Energy in Ontario: Moving Forward or Blowing in the Wind?" *Journal of Environmental Assessment, Planning and Management*, Vol.15(2), 2013.



## THE CONSEQUENCES OF STREAMLINING

Discussions about impacts of streamlining environmental assessment processes in Canada and other jurisdictions have, so far, largely focussed on the direct loss of the benefits traditionally associated with assessment and public participation processes. Specific concerns include losses of consistency and fairness in decision-making; the potential to obtain early warnings of problems with proposed projects; comprehensive and effective consideration of evidence including local and traditional knowledge; prospects for better integration of environmental, economic, and social considerations in the interests of advancing sustainability; and opportunities public involvement.<sup>43</sup> Less attention has been given to broader political consequences of these developments. Nearly 20 years into its own streamlining efforts, Canada is now emerging as an important case study in the downstream consequences of streamlining processes.

Requirements needed for decision-making processes to be able to obtain socio-political and community acceptance of their outcomes, are relatively well articulated in Canada and internationally. Core elements are seen to include perceptions by participants that processes are scoped appropriately, procedurally just, provide distributional justice in their outcomes, and engender trust.<sup>44</sup> The **scope** of processes needs to be defined in a way that ensures that they incorporate key public interest considerations, such as cumulative and upstream and downstream effects, as well as the direct impacts of projects. **Procedural justice** can be defined to include opportunities for interested and concerned members of the public to participate in decision-making processes, to present evidence to decision-makers including local and Indigenous traditional knowledge, and that consideration of that evidence by decision-makers is apparent in their decisions. Opportunities to challenge the evidence provided by proponents are also essential. **Distributional justice** can be understood to imply decision-making processes which produce outcomes that are considered fair in their distribution of costs, benefits, and risks, both within the present (intragenerational justice) and potentially between the present and the future (intergenerational justice). **Trust** in the process requires that decision-makers be seen as independent and to be acting as arbitrators between competing interests, as opposed to proponents for one side or the other. The process needs to be free of bias and a “no” needs to be a serious possibility to win the trust of public participants.

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43. Bond, Pope, Morrison-Saunders, Retief, and Gunn, “Impact Assessment: Eroding benefits through streamlining?”; Salomons and Hoberg, “Setting boundaries of participation in environmental impact assessment.”

44. See, for example, R. Wustenhagen, M. Wolsink, and M.J. Burer “Social acceptance of renewable energy innovation: An introduction to the concept,” *Energy Policy*, Vol 35, 2007, pp. 2683-2691. See also J. Sinclair and M. Doelle, “Environmental Assessment in Canada: Encouraging Decisions for Sustainability,” in B. Mitchell, *Resource and Environmental Management in Canada 4th Edition* (Toronto: Oxford University Press, 2010), pp. 462-494.

Streamlining initiatives adopted in Canada over the past two decades have generally moved in the direction opposite to these four criteria. Screening level assessments at the federal level, and assessment processes for most energy related projects at the provincial level, have been effectively eliminated. The remaining processes score poorly for all four criteria.

In terms of the scope of assessment processes, CEAA 2012 and its accompanying guidelines were specifically designed to narrow the focus assessment to the “direct” impacts of projects and to exclude consideration of their upstream and downstream effects.

With respect to procedural justice, the Bill C-38 reforms to the CEAA and NEB processes were quite explicit in their goals and means of reducing opportunities for public participation in decision-making. Similarly, the types of evidence which can be considered has been explicitly constrained. Provincial level initiatives, such as the reform of the environmental approvals process in Ontario, although more subtle, have had similar impacts. The elimination of the municipal role in decision-making through the REA process has been perceived in comparable terms by renewable energy opponents.<sup>45</sup>

The resulting decision-making processes are also failing to produce outcomes that are perceived to be just in distributional terms. The NEB’s December 2013 approval of the Alberta to BC Northern Gateway pipeline, for example, did nothing to reduce opposition to the project from members of the public, aboriginal communities, and the Government of British Columbia — on the basis that it imposes significant costs and risks on the province for no significant benefit.<sup>46</sup> Similarly, the REA process in Ontario did little to alleviate the conflicts, within communities hosting renewable energy projects, over the distribution of benefits and perceived risks and landscape impacts. Opponents continued to challenge approvals of wind energy projects before the province’s Environmental Review Tribunal and the courts.<sup>47</sup>

More fundamentally, there has been a collapse of trust in decision-making processes, particularly by those who perceive themselves as being likely to bear the costs and risks while receiving few benefits from proposed projects. In the case of energy infrastructure (e.g. pipeline) approvals at the federal level, and of renewable energy projects in Ontario, streamlining efforts were perceived as a shift in the role of decision-making and approval processes, and by implication more broadly, the role of the state. Governments were no longer perceived as arbitrators in disputes over the distribution of costs,

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45. Mulvihill, Winfield, and Etcheverry, “Strategic Environmental Assessment and Advanced Renewable Energy in Ontario: Moving Forward or Blowing in the Wind?”

46. CBC, “Northern Gateway pipeline approved with 209 conditions.” <http://www.cbc.ca/news/politics/northern-gateway-pipeline-approved-with-209-conditions-1.2678285> (accessed June 17, 2014).

47. D. Hasselback, “Ontario’s wind farm approval process faces constitutional challenge” *Financial Post*, November 14, 2014.

benefits, and risks in relation to specific undertakings. Instead governments were perceived as proponents of particular technologies and economic interests, a role often associated with the historical “bipartite bargaining” governance paradigm.

The overall result has been ongoing and escalating legal and political disputes over energy pipeline development for the purposes of exporting oilsands products from Alberta, through British Columbia,<sup>48</sup> Ontario,<sup>49</sup> and Quebec.<sup>50</sup> Given that the streamlined processes fail all four criteria of appropriate scoping, procedural justice, distributional justice, and trust, those with serious concerns or opposition to projects do not accept the resulting decisions as legitimate. In fact, streamlining initiatives, like the federal government’s Bill C-38 and Ontario’s REA process, have become intensifying focal points of the conflicts themselves.

In these situations, opponents of proposed projects chose to continue their opposition through other means — legal challenges, protests, demonstrations and blockades. In the longer term, they may engage in political activities intended to bring about the electoral defeat of the governments promoting the projects in question. Such responses were evident in the activities of wind energy opponents in Ontario in the lead up to the 2011 and 2014 provincial elections. Some believe these activities significantly affected the outcome of the 2011 election, which saw the Liberal government reduced from majority to minority status.<sup>51</sup>

The former federal Conservative government’s significant losses in British Columbia during the 2015 election have been attributed, in part, to its handling of the Northern Gateway and Kinder Morgan pipeline approval processes.<sup>52</sup> Disputes over the impacts of “fracking” for natural gas may have had significant impacts on the 2014 New Brunswick election.<sup>53</sup> Natural gas “fracking” also emerged as a major issue in Nova Scotia in the lead-up to the 2013 provincial election.<sup>54</sup> The issue was referred to an advisory panel for a *de facto* strategic environmental assessment just prior to the election.

Perhaps the most significant Canadian example of the political consequences of planning and assessment process failure is the cancellation of two proposed natural gas-fired electricity plants in Ontario in the lead-up to the

48. Re: the Kinder-Morgan Pipeline expansion see J. Gordon, “Kinder-Morgan Canada pipeline runs into a mountain of opposition,” *Reuters*, October 21, 2014.

49. Re: Line 9 Reversal, see CBC News, “Enbridge Pipeline Road Blocked By Protesters In Burlington,” May 20, 2014; Re: Energy East, see S. McCarthy, “Opposition builds to Energy East pipeline plan,” *The Globe and Mail*, October 13, 2014.

50. Re: Line 9 reversal, see CBC News, “Enbridge’s Line 9 pipeline reversal plan not OK’d by Montreal,” CBC News, September 14, 2014; Re: Energy East, see Reuters, “TransCanada scraps Quebec oil port, delays Energy East pipeline,” April 2, 2015.

51. L.C. Stokes, “The Politics of Renewable Energy Policies: The Case of

Feed-in Tariffs in Ontario, Canada,” *Energy Policy*, Vol 56, 2013, pp. 490–500.

52. The Conservatives won 21 seats in BC in the 2012 election. They emerged from the 2015 election with 10 seats. Their popular vote fell from 45% in 2012 to 30% in 2015.

53. CP, “New Brunswick election: Brian Gallant, Liberals win majority government,” *The Toronto Star*, September 22, 2014.

54. See G. Steele, “Wheeler’s fracking report is good news for Liberals,” *The Globe and Mail*, August 29, 2014. See also Nova Scotia Independent Panel on Hydraulic Fracturing, *Report* (Sydney, NS: Cape Breton University, 2014).

2011 provincial election. In the absence of any meaningful strategic or facility level assessment process, the Ontario Power Authority, the province's electricity planning agency, located the plants exclusively on the basis of technical engineering criteria. There were no opportunities for public input.

When local residents began to identify concerns regarding the location of the plants, the effective exemption of the plants from the requirements of the *Environmental Assessment Act* meant that there was no formal process through which they could express their concerns. In response, the communities began to organize public campaigns against the plants, including efforts explicitly designed to result in the election of opposition party representatives in the affected ridings. In the context of the pending 2011 provincial election, the situation prompted the Premier's office to cancel the proposed projects. Controversies over the handling and ultimate cost of the cancellations would lead to the resignation of first the Minister of Energy, Chris Bentley, and then Premier Dalton McGuinty himself, in October 2012.<sup>55</sup>

The type of outcomes seen in Ontario with respect to renewable energy development and gas-plant controversies, and in BC in the 2015 federal election, were precisely the type of political consequences that the original political architects of environmental assessment and public participation processes sought to avoid. The results in Ontario and BC represent the worst possible outcomes for proponents and governments. Projects were unable to move forward and serious electoral risks and consequences were generated for the governments involved.

In response, the Conservative federal government focussed on disabling the more institutionalized sources of opposition to resource development and infrastructure projects through the activities of the CRA and on portraying other opponents as risks to national security.

In Ontario, there has been some partial recognition that serious problems exist around the decision-making processes for major undertakings, particularly with respect to energy projects.<sup>56</sup> Adjustments to the decision-making process around individual projects were made as a result, particularly the need for community support for new renewable energy projects. There have also been efforts to engage municipalities in regional level energy planning exercises.<sup>57</sup> The wider questions related to the need

55. M. Winfield, "What lessons should Ontario draw from the gas-plant cancellation scandal?" *Ottawa Citizen*, May 13, 2013. See also Standing Committee on Justice Policy *The Cancellation and Relocation of the Gas Plants and Document Retention Issues*. (Toronto: Legislative Assembly of Ontario, 2015).

56. Ontario Power Authority/Independent Electricity System Operator *Engaging Local Communities in Ontario's Electricity Planning Continuum* (Toronto: OPA and IESO, 2013). <http://www.onregion->

[al-planning-and-siting-dialogue.ca/pdf/Regional\\_Planning-Siting\\_Report.pdf](http://www.onregion-al-planning-and-siting-dialogue.ca/pdf/Regional_Planning-Siting_Report.pdf); Richard Carlson, Eric Martin, Pamela Nowina, and Mary Ellen Richardson, *Getting the Green Light: The Path to Public Support for Ontario's Power Plans* (Toronto: Mowat Centre, 2014).

57. Independent Electricity System Operator (IESO), "Regional Planning Process." <http://www.powerauthority.on.ca/power-planning/regional-planning/process-background> (accessed May 27, 2015).

for strategic level assessments and reviews of the province's overall electricity strategy have been left unaddressed.<sup>58</sup>

It is important to note that practical and political challenges arising from streamlinings are not limited to conventional “hard” path technologies and infrastructure. The Ontario experience with Renewable Energy Approvals, for example, highlights that the deployment of relatively low-impact technologies — widely seen as important to achieving sustainable transitions to a low-carbon economy — can also fall victim to situations where planning and approval processes fail the core tests of appropriate scoping, trust, and procedural and distributional justice. In fact, with most of the province's planned conventional (principally natural gas-fired) energy facilities now constructed, the primary impact of the modest reforms to energy project approval processes has been to complicate the approval of low-impact renewable energy projects.

## A NEW OPPORTUNITY FOR ENVIRONMENTAL GOVERNANCE

The Canadian experience highlights a number of challenges with streamlining environmental assessment and public participation processes. Those with concerns regarding proposed natural resource development and infrastructure projects find that the processes fail the tests of trust and procedural and distributional justice. Rather than accepting this and abandoning their opposition to proposed undertakings, they instead move their opposition to other legal and political forums. The results have included major modifications to and even cancellations of projects and programs, and electoral losses — as was the case with the federal Conservative government in BC in 2015. In Ontario, the ultimate result of the gas-plant controversy was the resignation of the premier.

The scope of the problems with the federal Conservative government's approach to major project approvals was recognized in the platforms of both major opposition parties in the 2015 election. Each offered important and largely complementary commitments to reform the federal environmental assessment process. The NDP committed to:<sup>59</sup>

- an affirmation of the government's strong role in environmental protection and assessment;

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58. Mulvihill, Winfield, and Etcheverry, “Strategic Environmental Assessment and Advanced Renewable Energy in Ontario: Moving Forward or Blowing in the Wind?”

59. New Democratic Party of Canada, *Building the Country of our Dreams*, p. 49.

- ensuring and supporting public participation in decision-making; and
- incorporating consideration of cumulative effects, regional assessments, and greenhouse gas impacts for all major projects.

The Liberals promised to:

“Review Canada’s environmental assessment processes and introduce new, fair processes that will:

- restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while also working with provinces and territories to avoid duplication;
- ensure that decisions are based on science, facts, and evidence, and serve the public’s interest;
- provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and
- require project advocates to choose the best technologies available to reduce environmental impacts.”<sup>60</sup>

The Liberals also committed to modernize the National Energy Board, “ensuring that its composition reflects regional views and has sufficient expertise in fields like environmental science, community development, and Indigenous traditional knowledge.”<sup>61</sup>

These themes were carried forward in the mandate letters for the new Liberal federal cabinet, specifically the Minister of the Environment and Climate Change, with the support of the Ministers of Fisheries and Oceans, Natural Resources, and the Canadian Coast Guard, released in November 13, 2015.<sup>62</sup>

The introduction of a new environmental assessment process was referenced again in the government’s December 4, 2015 Speech from the Throne,<sup>63</sup> indicating the possibility of new legislation early in the new government’s mandate. The situation may present a window of opportunity to do more than simply restore decision-making processes to the status they had before they were “streamlined.” In the case of the *Canadian Environmental Assessment Act*, restoration of the old law may not even be entirely desirable. There may be an opportunity to engage in a broader reset of our approaches to project assessment, public participation, and environmental

60. Liberal Party of Canada, *A New Plan*, pp. 41-42.

61. Liberal Party of Canada, *A New Plan*, p. 42.

62. Office of the Prime Minister, *Minister of Environment and Climate*

*Change Mandate Letter*, November 13, 2015. <http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>

63. Speech from the Throne, December 4, 2015. <http://speech.gc.ca/>

governance, as opposed to the normal processes of incremental adjustment and improvement.

## WAYS FORWARD

The following recommendations draw on a number of sources, including papers presented at the 5th Journal of Environmental Law and Practice Conference in Calgary and Kananaskis, Alberta, in June 2015. They address the issue of the **reform of the federal environmental assessment process**, as well as broader questions of **decision-making and governance**, including public participation in decision-making more generally, access to environmental information, and the role of the *Federal Sustainable Development Act*.

### REFORMING THE FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS<sup>64</sup>

In order to achieve the goals of decision legitimacy and acceptance and also advance sustainability, assessment processes need to be seen as appropriately scoped, trustworthy, procedurally just in their processes, and fair in their outcomes. Given the level of attention to the federal assessment process in the Liberal Party platform, ministerial mandate letters, and the December 2015 Throne Speech it is likely that revisions to CEAA will occur on an accelerated timescale. The revised legislation should incorporate the following specific elements.

### GOALS OF THE ENVIRONMENTAL ASSESSMENT PROCESS

The environmental assessment process needs to provide a structure that considers the full range of impacts and risks associated with projects and undertakings with potentially significant environmental consequences. Meaningful consideration of upstream, downstream, and cumulative effects, needs to be part of the assessment process. The process must be perceived as procedurally just, provide distributive justice in its outcomes, and engender trust and perceptions of legitimacy on the part of participants.

The assessment process should seek to integrate environmental, economic, and social considerations to advance sustainability rather than simply seeking to moderate the adverse effects of projects.<sup>65</sup>

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64. The following discussion on the future of the federal environmental assessment process draws substantially on R.B. Gibson, M. Doelle, and A.J. Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment," paper presented at the 5th *Journal of Environmental Law and Policy Conference, Calgary*, June 2015.

65. R.B. Gibson, "Sustainability assessment: basic components of a practical approach," *Impact Assessment and Project Appraisal*, Vol 24(3) September 2006, pp.170-182. See also Gibson, Doelle, and Sinclair, "Fulfilling the Promise."

### Identification of Projects Subject to Environmental Assessment

Bill C-38 introduced a highly discretionary structure for determining what projects would be subject to the federal environmental assessment process.<sup>66</sup> This approach has led to high levels of uncertainty regarding which projects are likely to be assessed, and on what basis designations for assessment occur.<sup>67</sup>

#### Recommendations:

##### Recommendation 1

1. A revised CEAA should incorporate a consistent, non-discretionary triggering mechanism for undertakings in pre-identified categories. These criteria may be based on:
  - the scope and scale of undertakings
  - requirements for specific federal approvals
  - the role of federal agencies as proponents
  - projects being located on federal lands or receiving federal funding

Where warranted by the significance of a project or levels of public concern, provisions should be made for the designation of additional specific undertakings by the Minister of the Environment and Climate Change.

##### Recommendation 2

2. The Legislation should incorporate the potential for two streams in the assessment process:
  - A screening level process for less significant undertakings, with:
    - mechanisms for individual projects to be moved up to the more comprehensive assessment stream – if they are found to have potentially significant impacts;
    - a mechanism for the comprehensive assessments of numerous similar projects that together, have the potential for significant cumulative effects; and
  - A more substantive evaluation and review process – potentially including public hearings by an independent decision-making body – for more significant undertakings, when the likelihood of significant effects or public concerns warrant such a review.

66. See, for example, R. Northey, “Challenges facing project developers who trigger the 2012 Canadian Environmental Assessment Act,” (Toronto: Gowlings, 2015). <https://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4108>

67. Commissioner for the Environment and Sustainable Development, *2014 Fall Report*, Chapter 4 – Implementing the *Canadian Environmental Assessment Act*, 2012 (Ottawa: Minister of Supply and Services, 2014).



## STRATEGIC LEVEL ASSESSMENTS OF PLANS, POLICIES, AND PROGRAMS

The concept of Strategic Environmental Assessment (SEA) emerged as a result of the recognition that project-level Environmental Assessment (EA) processes were typically occurring too late in project life cycles to be fully effective. In particular, there was an acknowledgement that individual projects were often initiated as components of larger policies and plans. The key assumptions about the need for specific projects and the availability of alternatives to them are embedded in higher level policies and plans. These assumptions are frequently considered beyond the scope of project-level assessments or cannot be easily altered in response to the outcomes of such assessments. This situation has led to efforts to focus the assessment process at the level of the underlying policies and plans, where key assumptions could be subject to review and alteration before the initiation of specific project reviews.<sup>68</sup> Project level assessments of individual undertakings flowing from an overall plan, program, or policy which itself had been subject to a strategic level assessment — could then be more focussed on the direct impacts of a project including whether, and how, it complies with the outcomes of the SEA.<sup>69</sup> Recent reports by the Commissioner for the Environment and Sustainable Development have highlighted weaknesses in the existing Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.<sup>70</sup>

### Recommendation:

#### Recommendation 3

3. Revised federal environmental assessment legislation should incorporate requirements and mechanisms for strategic level assessments of programs, plans, and policies. Structures should be provided for linking strategic and project level assessments.

### Intergovernmental Coordination

Project proponents have had long-standing concerns about the application of multiple assessment processes to single projects. On the other hand, community, non-governmental, and aboriginal interests have been concerned that the integrity of assessment processes may be significantly compromised when the requirements of different levels of government are

68. A.J. Sinclair, A.J., and M. Doelle, “Environmental Assessment in Canada: Encouraging Decisions for Sustainability,” in B. Mitchell, Ed. *Resource and Environmental Management in Canada 4<sup>th</sup> Edition* Toronto: Oxford University Press, 2010), pp. 462-494. See also T.B. Fischer, *Theory and Practice of Strategic Environmental Assessment: towards a more systematic approach* (London: Earthscan, 2007).

69. See Gibson, Doelle, and Sinclair, “Fulfilling the Promise,” 20. See also Robert B. Gibson, Hugh Benevides, Meinhard Doelle, and Denis Kirchhoff, “Strengthening strategic environmental assessment in

Canada: an evaluation of three basic options,” *Journal of Environmental Law and Practice*, Vol 20(3), 2010, pp.175-211.

70. Commissioner for Environment and Sustainable Development, *Fall 2015 Report, Report 3: Departmental Progress in Implementing Sustainable Development Strategies* (Ottawa: Minister of Supply and Services, 2015).

integrated or substituted for one another.<sup>71</sup> The recent decision of the BC Court of Appeal regarding the Northern Gateway Pipeline has emphasized the importance of maintaining the integrity of individual jurisdiction's assessment decision-making, even where arrangements for the integration or substitution of different levels of governments' processes are in place.<sup>72</sup>

#### Recommendation:

#### Recommendation 4

4. Revised federal environmental assessment legislation should incorporate mechanisms for the coordination of assessment processes where projects may be subject to assessments by multiple agencies or different levels of government. The integrity of the requirements established by any individual process or level of government should not be compromised through coordination efforts. Instead, intergovernmental coordination should seek upwards harmonization towards best practices.

#### Scope of Assessment Process

C-38 significantly narrowed the scope of federal environmental assessments, particularly in relation to energy projects. The process was focussed on direct impacts, especially in areas of exclusive federal jurisdiction. Upstream and downstream impacts were excluded from consideration. This approach undermined the original goals of assessment processes — to provide a complete picture of the impacts, risks, and benefits associated with projects, and to make clear the trade-offs that may be involved in proceeding with an undertaking.<sup>73</sup> Sustainability considerations, including direct socio-economic effects, as opposed to the simple mitigation of adverse impacts, should be reflected in the criteria employed to assess alternatives within the assessment process.<sup>74</sup>

#### Recommendation:

#### Recommendation 5

5. Revised legislation should ensure that the assessment process incorporates:
  - Examinations of the rationale and need for undertakings;
  - Examinations of reasonable alternatives to undertakings against a common set of criteria. The criteria should incorporate:<sup>75</sup>
    - sustainability related considerations and effects, including:

71. A.J. Sinclair, G. Schneider, and L. Mitchell, "Environmental impact assessment process substitution: experiences of public participants," *Impact Assessment and Project Appraisal*, Vol 30(2), 2012, pp. 85-93.

72. *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34.

73. See, for example, R. Northey, "Fading Role of Alternatives in Federal

Environmental Assessment" Paper Presented at the 5<sup>th</sup> *Journal of Environmental Law and Practice Conference*, Calgary, 2015.

74. Gibson, "Sustainability assessment." See also Gibson, Doelle and Sinclair, "Fulfilling the Promise."

75. These criteria draw substantially from Gibson, "Sustainability assessment" and Gibson, Doelle and Sinclair, "Fulfilling the Promise."

- Maintenance and enhancement of socio-ecological integrity;
  - Livelihood sufficiency, opportunity, and diversity of options;
  - Distributional justice in the present and for future generations;
  - Resource maintenance and efficiency;
  - Resilience/ability to adapt to changed circumstances (environmental, social, technical, and economic, including the impacts of climate change) and to facilitate transitions towards sustainability;
  - Socio-ecological civility and democratic governance;
  - Immediate and long-term integration.
- consideration of uncertainties and risks, including malfunctions and accidents.
  - cumulative effects of all project components based on a pre-determined baseline that includes greenhouse gas emissions.
- The criteria should be considered on the basis of the full life cycle of each alternative, including upstream and downstream effects.

### Public Input and Participation

Explicit efforts to limit public participation in assessment processes were central features of the Bill C-38 revisions to CEAA and the NEB processes.<sup>76</sup> The legislation also undermined the capacity of the federal environmental assessment processes to provide meaningful and substantive consultation with aboriginal people where their rights or interests may be affected, consistent with the Crown's "Duty to Consult"<sup>77</sup> and the United Nations Declaration on the Rights of Indigenous Peoples. The latter point was reinforced by the January 2016 decision of the BC Supreme Court that the Government of British Columbia failed in its "duty to consult" with aboriginal people with respect to the Northern Gateway Pipeline.<sup>78</sup>

### Recommendations:

#### Recommendation 6

6. A revised federal assessment process should guarantee and facilitate meaningful public participation throughout the process. This needs to include:

76. S. Fluker and N.K. Srivastava, "A Study of Public Participation under the *Canadian Environmental Assessment Act*." Paper Presented at the 5<sup>th</sup> *Journal of Environmental Law and Practice Conference*, Calgary, 2015. See also, Gibson, "In full retreat;" Doelle, "CEAA 2012: the End of Federal EA as we know it?;" Winfield, "The Environment, 'Responsible Resource Development' and Evidence Based Policy-Making in Canada."

77. See D. Kirchhoff, H.L. Dardner, and L.J.S. Tsuji, "The Canadian Environmental Assessment Act, 2012, and Associated Policy: Implications for Aboriginal Peoples," *The International Indigenous Policy Journal*, Vol 4(3), January 2013.

78. *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34.

- a broad and inclusive approach to participation, not limited to those with a direct, private, or special interest in an undertaking;
- public notice and opportunities to comment at key stages including initial scoping and process design;
- timely and convenient access to information;

#### Recommendation 7

7. Provisions should be made for the use of different mechanisms for public engagement, such as multi-stakeholder advisory committees, mediation and non-adversarial negotiation, and community boards.<sup>79</sup>

### Participant Funding

Rights and opportunities to participate in assessment processes, particularly in relation to large and complex projects, may only be meaningful if community, aboriginal, and public interest participants have the capacity to participate in a substantive way. These constituencies may lack the resources needed for effective representation to introduce their own evidence and to examine the evidence provided by proponents.

#### Recommendation:

#### Recommendation 8

8. Participant funding should be provided to enable meaningful and effective representation of important public interests, and of constituencies such as aboriginal people and disadvantaged populations that may not otherwise be effectively included.

### Review and Decision-Making Processes

Bill C-38 revisions to CEAA and the NEB processes are seen to have significantly compromised the independence of decision-making processes. Trust has been undermined and the processes are no longer seen to be procedurally fair or to provide meaningful consideration of evidence. Questions have also been raised as to whether the NEB has the experience and expertise to be the lead decision-maker regarding the environmental and social dimensions of energy projects.<sup>80</sup>

#### Recommendations:

#### Recommendation 9

9. The new legislation should provide for an open, independent, and rigorous review process. Legislation should provide for tiered

79. See A.J. Sinclair and A.P. Diduck, "Public participation in Canadian environmental assessment: enduring challenges and future directions" in K.S. Hanna, Ed., *Environmental Impact Assessment Process and Practices in Canada, 3rd Edition* (Toronto: Oxford University Press, forthcoming).

80. This is implicit, for example, in the discussion of the role of the NEB in the environmental assessment process. Liberal Party of Canada, *A New Plan for a Strong Middle Class*, p. 42.

review mechanisms, depending on the significance, scope, and level of public interest in an undertaking. These may range from semi-formal public discussions with impartial facilitation, to formal hearings for major projects.

#### Recommendation 10

10. The legislation should ensure comprehensive and effective consideration of evidence, including local and Indigenous traditional knowledge. Participants should have the opportunity to challenge evidence introduced by proponents and their experts directly, and to provide their own evidence.

#### Recommendation 11

11. Timelines for assessment and review processes need to recognize the complexities and uncertainties associated with major projects, and provide appropriate timeframes for the consideration of evidence and deliberation on implications.

### Decision-Making

Literature on environmental assessment highlights the centrality of public trust in the acceptance of the resulting decisions. The independence of decision-making bodies is seen as central to the establishment of such trust. Decisions and the reasons for them must be transparent and reflect assessment findings. A decision not to proceed with an undertaking must be possible, as well as requirements for significant modifications to undertakings where such outcomes are warranted by evidence and public input.

#### Recommendations:

#### Recommendation 12

12. Legislation should provide for an independent and impartial decision-making body operating at arms-length from any specific government department.

#### Recommendation 13

13. Legislation should require that environmental assessment decisions, and the reasons for them, should be made public. Trade-offs among assessment criteria should be identified and explicitly justified.

### The Role of the Cabinet in Environmental Assessment Decision-Making

There are ongoing debates over the appropriate location of final decision-making authority in the federal assessment process. Bill C-38 placed this authority with the federal cabinet. The approach was widely seen to explicitly politicize decision-making and potentially diminish the role of evidence and public input. Placing primary decision-making authority with an

independent and impartial body is generally regarded as essential to establishing public trust in assessment processes. While the cabinet, which is ultimately accountable to parliament and the electorate, may retain the authority to override environmental assessment decisions, cabinet appeals and decision-making in environmental assessment processes should be the exception, not the norm.

**Recommendation:**

**Recommendation 14**

- 14.** New legislation should provide the Governor in Council with the authority to reverse, revise, or require new reviews following the release of an environmental assessment decision by the primary decision-making body. Specific procedures and timelines, including public notice and opportunities to comment, should be established for cabinet reviews. It should be required that Cabinet decisions to reverse or alter environmental assessment decisions be accompanied by a rationale for the decision.

**Enforceability of Environmental Assessment Requirements and Decisions**

There have been long-standing concerns regarding the enforceability requirements for environmental assessment processes, and the terms and conditions of assessment approvals.

**Recommendation:**

**Recommendation 15**

- 15.** The legislation should establish that projects subject to environmental assessment cannot proceed without environmental assessment approval. Environmental assessment decisions and their accompanying terms and conditions on approval must be enforceable under the legislation. Decision-makers should be required to assign responsibility for the implementation of approval terms and conditions to specific individuals or organizations.

**Process Administration**

A central administrative agency for the environmental assessment process will be required to ensure consistency in the conduct of assessments, monitoring, and enforcement of compliance with terms and conditions of approval. They will also need to conduct ongoing reviews of the operation of the system.

**Recommendations:**

**Recommendation 16**

- 16.** The legislation should establish an independent administrative agency, reporting to Parliament through the Minister of the

Environment and Climate Change, to support the assessment process. The agency's mandate should include:

- administering the assessment process.
- monitoring of effects and compliance with the terms and conditions of approval.
- enforcement of assessment requirements, including terms and conditions of approvals.
- monitoring and regular review of the regime for continuous improvement.

#### Recommendation 17

- 17.** The Major Projects Management Office, which in many ways duplicated the functions of the Canadian Environmental Assessment Agency, should be wound-down and its functions carried out by the new environmental assessment agency.

### Review and Policy Learning

In addition to ongoing operational reviews by the environmental assessment agency, provision should be made for regular, broader, external reviews of the effectiveness and administration of the revised assessment regime. Such reviews would allow for policy learning and regime evolution.

#### Recommendation:

#### Recommendation 18

- 18.** The new legislation should provide for regular (5-year) reviews of its operation and implementation by the House of Commons Standing Committee on the Environment and Sustainable Development, or its successor.

### GOVERNANCE AND DECISION-MAKING BEYOND ENVIRONMENTAL ASSESSMENT

Environmental assessment processes are important mechanisms for gathering information and input from the public, as well as making decisions regarding proposed undertakings. However, not all decisions will be subject to environmental assessment processes. Moreover, major concerns have been raised regarding the former Conservative government's systemic efforts to limit public participation in decision-making around the environment, natural resources, and other subjects beyond the CEAA and NEB processes.

Responses to these developments were offered in both the Liberal and NDP platforms, touching on themes of **public participation in decision-making, access to environmental information**, and the concept of a

**federal *Environmental Bill of Rights***. The potential future role of the ***Federal Sustainable Development Act***<sup>81</sup> was also highlighted.

### Public Participation in Decision-Making

The concept of a statutory right of participation in public decision-making has been presented in MP Linda Duncan's proposed *Canadian Environmental Bill of Rights*.<sup>82</sup> Such an approach offers the potential for a more general response to the Bill C-38 limitations on standing in CEAA, NEB and other federal processes, the CRA audits of "political" activities, and the RCMP and CSIS's monitoring of critics of federal government policies that emerged during the Harper Conservative government. A similar concept of a right of participation was advanced in the context of proposals in Ontario for legislation to combat Strategic Lawsuits Against Public Participation (SLAPPs).<sup>83</sup>

#### Recommendation:

#### Recommendation 19

- 19.** Legislation establishing a statutory right of general application of participation by members of the public in federal decision-making processes, particularly with respect to the environment, energy, and natural resources, should be adopted. Limitations on participation in federal environmental assessment, NEB, and other processes on the basis of a private, direct, or special interest in a matter should be removed. The concept of public interest standing in decision-making processes should be affirmed.

The Canadian Environmental Protection Act (CEPA), 1999, established a number of mechanisms for public participation in decision-making, including an environmental registry, mechanisms through which members of the public could request investigations of alleged offenses, and protection of whistleblowers. However, the scope of the CEPA registry is quite narrow, and the application of these provisions is limited to CEPA itself.

#### Recommendations:

#### Recommendation 20

- 20.** The scope of the CEPA registry created under the *Canadian Environmental Protection Act* (CEPA) 1999<sup>84</sup> should be expanded to provide notice and comment opportunities for all proposed regulations, policies, guidelines, approvals, and permits under federal environmental legislation, including CEPA, CEAA, the *Fisheries Act*,

81. S.C. 2008, c. 33.

82. Bill C-634 *Canadian Environmental Bill of Rights* (1st Reading October 29, 2014) ss.11 and 12.

83. R. Nadarajah, and H. Wilkins, "Breaking the silence: the urgent need for anti-SLAPP legislation in Ontario" (Toronto: Canadian Environ-

mental Law Association, Canadian Institute for Environmental Law and Policy and Ecojustice.ca, 2010).

84. See CEPA Environmental Registry, <http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=D44ED61E-1>



*National Parks Act, Species at Risk Act and Navigation Protection Act* or its successor.

#### Recommendation 21

21. Application of the CEPA 1999 Request for Investigation mechanism<sup>85</sup> should be expanded to encompass all major federal environmental legislation. The process should be administered by the Office of the Commissioner of the Environment and Sustainable Development, as per the existing petition process under the *Auditor General Act*.<sup>86</sup>

#### Recommendation 22

22. The application of the Whistleblower Protection provisions of CEPA 1999<sup>87</sup> should be expanded to include all federal environmental legislation.

### Access to Information

Both the Liberal and NDP platforms recognized the need for significant reforms with respect to information held by the federal government.<sup>88</sup> Bill C-634 proposed a statutory right of access to environmental information.<sup>89</sup>

#### Recommendations:

#### Recommendation 23

23. A general statutory right of access to environmental information in a reasonable, timely, and affordable fashion should be established.

#### Recommendation 24

24. The *Access to Information Act* should be revised to give the Access to Information Commissioner the power to order the release of records, as per the powers of the Information and Privacy Commissioner under *Ontario Freedom of Information and Protection of Privacy Act*.<sup>90</sup> Application of the act should be expanded to include the Prime Minister's Office and ministerial offices.

### The Federal Sustainable Development Act, 2008

Reform of the federal environmental assessment processes and strengthening of access to information and decision-making by the public would be important steps towards restoring trust and accountability in decision-making. These changes cannot, however, advance sustainability on their

85. CEPA 1999, S.C. 1999, c. 33, s.17.

86. *Auditor General Act*, R.S.C., 1985, c. A-17, s.22.

87. CEPA 1999, s.16.

88. Liberal Party of Canada, *A New Plan*, p. 24; *New Democratic Party, Building the Country of Our Dreams*, p. 54.

89. S.10.

90. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, Part IV Appeals.

own. The 2008 *Federal Sustainable Development Act* was intended to provide a structure for the incorporation of some sustainability considerations into all government decision-making and operations. Its potential has not been fully developed.<sup>91</sup> The current federal Sustainable Development Strategy, adopted in 2013, will expire in 2016.

### Recommendations:

#### Recommendation 25

25. The Federal Sustainable Development Strategy should be revised to strengthen its focus on advancing sustainability, climate change mitigation, and adaptation and integration of environmental and economic strategies. The targets within the strategy need to be relevant, specific, measurable, time-bound, and achievable.

#### Recommendation 26

26. The *Federal Sustainable Development Act* should be amended to establish a requirement for Sustainability and Climate Change screening and or assessment on all Memorandums to Cabinet, administered through the Privy Council Office.

## FULFILLING THE PROMISE

On January 27, 2016, Environment and Climate Change Minister Catherine McKenna and Natural Resources Minister James Carr announced a new “interim” approval process for pipeline and energy resource development projects. This approval process applies to projects that were already in, or approaching, the National Energy Board (NEB) approval process. These are reported to include the Alberta to BC Trans Mountain Kinder Morgan Pipeline Project, the Alberta to New Brunswick Energy East Pipeline, Prince Rupert Liquid Natural Gas Terminal, and crude-to-rail terminals.<sup>92</sup>

The new process is based on five principles:

- No project proponent will be asked to return to the starting line. Project reviews will continue within the current legislative framework and in accordance with treaty provisions under the auspices of relevant responsible authorities and Northern regulatory boards.
- Decisions will be based on science, traditional knowledge of Indigenous peoples, and other relevant evidence.

91. See G. Toner, J. Meadowcroft and D. Cherniak, “The Struggle of the Canadian Federal Government to Institutionalize Sustainable Development,” in D. VanNijnatten, *Canadian Environmental Policy and Politics: The Challenges of Austerity and Ambivalence* (Toronto: Oxford University Press, 2015), pp. 116-129. See also Commissioner for Environment and Sustainable Development, *Review of the Draft*

*2013-2016 Sustainable Development Strategy* (Ottawa: Minister of Supply and Services, 2013); Commissioner for Environment and Sustainable Development, *Fall 2015 Report 3: Implementing Sustainable Development Strategies*.

92. S. McCarthy, “Ottawa adds additional steps to pipeline reviews,” *The Globe and Mail*, January 28, 2016.

- The views of the public and affected communities will be sought and considered.
- Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated.
- Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed.<sup>93</sup>

The announcement brought immediate negative responses from First Nations and leaders of communities in British Columbia affected by the proposed energy projects to be covered by the “interim” process.<sup>94</sup> Their response was not surprising given that the implication of the announcement is that reviews of the pipelines and other projects will effectively continue under the *Canadian Environmental Assessment Act, 2012* and NEB rules established by the Conservative Government in 2012 through Bill C-38.

The apparent legislative foundation for the “interim” process is the provisions of Bill C-38 assigning final decision-making authority under CEAA 2012 and the NEB Act to the cabinet. The new process appears to add a separate consultation and a limited climate change impact assessment process to the existing approval process. The consultation and climate change process would apparently function as inputs into the cabinet’s final decision-making process. It is not clear how these processes will work in practice, and the only indication of the basis on which the cabinet would make final decisions is that its choices will be in the “national interest.” Those with concerns about the projects covered by the “interim” process may see it as adding some steps on the road to a yes, not a process for the real review of how these projects affect sustainability, climate change, or the future direction of Canada’s economy and environment.

The Liberal platform, mandate letters to the Ministers of Environment and Climate Change, Natural Resources, Fisheries and Oceans and others, and the December 2015 Speech from the Throne appear to recognize that Bill C-38 streamlined the CEAA and NEB processes to the point that they have lost their capacity to establish the legitimacy of decisions. The platform, mandate letters, and Throne Speech all promised substantial reform to the CEAA and NEB in order to restore their status as providing meaningful processes for consultation, gathering and assessment of evidence, and decision-making. Announcement of the “interim” process implied that the wider review of assessment and decision-making processes could extend over several years.

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93. Canada Newswire, “Ministerial Statement - Government of Canada Moves to Restore Trust in Environmental Assessment,” January 27, 2016.

94. S. McCarthy, “First Nations groups slam Liberal reforms to pipeline reviews,” *The Globe and Mail*, January 28, 2016.

Environmental assessment processes have the potential to function as mechanisms for the evidence-based examination and resolution of significant societal disputes over the distribution of costs, benefits, and risks associated with major projects. It was precisely that potential which was realized 40 years ago through what was effectively Canada's first major environmental assessment process — the Mackenzie Valley Pipeline Inquiry (the Berger Commission). The current situation of intensifying regional divisions over the future direction of energy resource and infrastructure development, and its implications for the environment, climate change, and Canada's economy, requires a similarly substantive response. The announced "interim" measures will not do.

The past ten years are widely regarded as a "lost decade" from the perspective of advancing sustainability at the federal level in Canada. The new federal government arrived in office, in part, on the basis of substantial commitments related to the environment, climate change, and democratic governance. The Liberal government's platform, mandate letters, and first Speech from the Throne all indicate a strong intention to carry through on those commitments. The government's actions over the next two years will determine if those promises are fulfilled.



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