

August 1, 2017

Filling the Gaps in the Federal Government Discussion Paper to Regain Public Trust in Federal Assessment

By: Arlene Kwasniak

Document Commented On: [Environmental and Regulatory Reviews, Discussion Paper, Government of Canada, June 29, 2017](#)

As explained in Professor Mascher's July 13th ABlawg [post](#) the Government of Canada's Discussion Paper outlines a series of "system-wide changes" the Government "is considering to strengthen Canada's environmental assessment and regulatory processes". The Discussion Paper remarks that the changes reflect the Government's commitment to "deliver environmental assessment and regulatory processes that regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous peoples, ensure good projects go ahead, and resources get to market" (at 3). The Government seeks comments on the Discussion Paper up to August 28, 2017. Comments may be provided on canada.ca/environmentalreviews. The Government also continues to consult on the law reform initiatives. It promises to table its legislative changes in fall 2017.

The 23 page Discussion Paper proposes changes to the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#) (CEAA 2012), the *National Energy Board Act*, [RSC 1985, c N-7](#), the *Fisheries Act*, [RSC 1985, c F-14](#), and the *Navigation Protection Act*, [RSC 1985, c N-22](#). Professor Mascher's post provides an overview of the Discussion Paper and the proposed changes. Professor Bankes' July 14th [post](#) concerns the Discussion Paper's response to the [Report of the Expert Panel on the Modernization of the National Energy Board](#).

This post focusses on three core matters relating to environmental assessment law reform: what impacts should the legislation require to be assessed, to what end should impacts be assessed, and how should the assessment figure in the project approval or disapproval in the decision-making process. This post considers these matters in the context of the federal government's environmental assessment law reform initiative. It looks at how these matters historically have been treated under Canadian environmental assessment law, how the Expert Panel on the Review of Federal Environmental Assessment Processes' Report, [Building Common Ground: A New Vision for Impact Assessment in Canada](#), released April 5, 2017 (Expert Panel Report), considered these matters and made recommendations regarding them, and how the federal Government's response to the Expert Panel Report in its Discussion Paper deals or fails to deal with them. The post also looks at the potential consequences of the Government response, *vis-à-vis* its promise to regain public trust in environmental assessment. The post ends with suggestions on how to build on the Discussion Paper with respect to these matters to better ensure that new legislation can regain public trust by making impact assessment meaningful and substantive, and not just a procedural hoop for proponents and government. The post focusses on

project assessment, though many of its points apply to strategic assessment of federal policies and undertakings, and to regional impact assessment.

What Impacts Should be Assessed?

Although seemingly tautological, environmental impact assessment legislation in Canada and elsewhere requires the assessment of likely bio-physical environmental impacts of a proposed project. However, impact assessment need not be limited to bio-physical environmental impacts. Assessment legislation may require consideration of additional project impacts such as economic, social, health, and cultural impacts. Legislation also may highlight particular impacts within impact categories (e.g. species at risk within environmental impacts). Legislation may focus only on negative impacts, or may include both negative and positive impacts, it may or may not require a cumulative impact assessment, and may variously direct the scope of impacts. Obviously, it is important to project proponents, government, the public, Aboriginal and other communities, a myriad of for-profit and non-profit stakeholders, and future generations (both human and other than human), not to mention paid impact assessment consultants, what impacts the new federal legislation will direct to be assessed.

Looking back in time, the *Canadian Environmental Assessment Act*, [SC 1992, c 37](#) (CEAA 1992), required the assessment of “environmental effects” defined in section 2(1):

- “environmental effect” means, in respect of a project,
- (a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,
 - (b) any effect of any change referred to in paragraph (a) on
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes by aboriginal persons,or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or
 - (c) any change to the project that may be caused by the environment, whether any such change or effect occurs within or outside Canada;

Accordingly, CEAA 1992 mandated the assessment of bio-physical environmental effects of a project. The impacts noted under clause (b) (health, socio-economic, etc.) were to be assessed only if they were caused by a bio-physical environmental effect.

The [Canadian Environmental Assessment Act 2012, SC 2012, c 19](#) (CEAA 2012), which replaced CEAA 1992, required the assessment of bio-physical environmental effects, and certain effects of those effects, but section 5 narrowed their application to those under “legislative authority of Parliament,” specifically:

- (i) fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*,
- (ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,
- (iii) migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and

(iv) any other component of the environment that is set out in Schedule 2 [note: none listed].

The narrowing of the ambit of environmental effects to those under federal legislation was not required in a constitutional sense. Pivotal decisions on environmental jurisdiction such as *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, [1992 CanLII 110 \(SCC\)](#) make it clear that there is broad federal authority to gather information in the context of a federal environmental assessment and that authority is not limited to matters within federal constitutional legislative jurisdiction. (See also Professor Meinhard Doelle, “[Reflecting on Federal Jurisdiction for the Upcoming EA Reform.](#)” Dalhousie University Blogs, June 21, 2016 and Professor Martin Olszynski “[Can Federal Legislative Jurisdiction Support a Broad, Sustainability-Based Impact Assessment?](#)” ABlawg, May 17, 2017.) As Professors Doelle and Olszynski discuss in their blogs, for the triggering of a federal assessment, in contrast to gathering information in the context of an assessment, a project must have potential impacts on an area of federal constitutional jurisdiction. As well, regulating a project, in contrast to assessing it, such as issuing a *Fisheries Act* authorization with conditions, may raise questions of federal jurisdiction.

By contrast to both CEAA 1992 and 2012, the Expert Panel, in endorsing a sustainability framework for impact assessment, further discussed below, recommends that impact assessment identify environmental, social, economic, health, and cultural impacts, both beneficial and adverse, and the relationships among impacts. These impact categories are called the “five pillars of sustainability” (Expert Panel Report at 2.1.3). The Panel does not limit these impacts to those under federal legislative authority.

The Government’s response in its Discussion Paper (at 18) proposes legislative changes to broaden the scope of project impacts for the purposes of assessment from those in CEAA 2012 to include:

- [E]nvironmental, economic, social and health impacts to support holistic and integrated decision making
- Consistent use of Gender-Based Analysis Plus (GBA+) in assessments to better understand the impacts on communities (e.g. the influx of people in a temporary work camp)
- Strengthening existing provisions that explicitly require assessment of impacts on Indigenous peoples
- Considering both positive and negative impacts of a project in the assessment process.

Curiously, the Discussion Paper adopts all of the impacts recommended by the Expert Panel except for cultural impacts. The Discussion Paper does not explain this omission.

The Discussion Paper does not specifically state whether the impacts it includes are limited to those within the legislative authority of Parliament, though a contextual reading of the Paper suggests that they would not be. For example, considering impacts on communities would largely involve provincial jurisdictional matters. If this is a correct interpretation of the Discussion Paper, the federal Government has made an important policy reversal overt in CEAA 2012 to restore policy implicit in CEAA 1992. However, readers should bear in mind that the Discussion Paper does not explicitly make this reversal. It would be a regrettable and

unnecessary straitjacketing of impact assessment if new federal legislation contained the CEAA 2012 limitation.

The move from primarily bio-physical environmental effects, which in principle are ascertainable and quantifiable through natural science investigation and prediction, to a range of types of effects that will engage social scientists and others to ascertain, accurately describe, and predict, would be a major change for the federal Government. To implement it, the federal Government will need to expand its assessment capacity and engage experts and others to ensure that potential impacts under each of the impact headings are appropriately assessed. Government must be careful not to get stuck on assessing a project primarily for adverse bio-physical environmental impacts. Although a formidable task, it is not unprecedented. Provinces' and Territories' impact assessment legislation commonly requires assessment of a range of impacts in addition to environmental ones. This point is substantiated in a comparative review of assessment legislation in Canada by Deborah Carver and Robert Gibson et al, "[Inter-jurisdictional Coordination of EA: Challenges and opportunities arising from differences among provincial and territorial assessment requirements and processes](#)," Canadian Environmental Network, November 20, 2010.

To What End Should Impacts be Assessed?

What is the point of assessing impacts? What determination is a statutory delegate meant to make on the basis of a report setting out potential impacts?

Both CEAA 1992 and CEAA 2012 require the designated statutory delegate to use the assessment to determine the whether a project is likely to cause significant adverse environment effects, taking into account mitigation measures (CEAA 2012 s 52, CEAA 1992 ss 20, 37). According to [Canadian Environmental Assessment Agency guidance material](#), determining significance is meant to be an objective, legal test based on the evidence presented in the environmental assessment process. "Significant" is not defined in the CEAA and CEAA's requirement that the designated statutory delegate determine whether there are significant adverse environmental effects has its critics. The test has been claimed to be too subjective and malleable. For example Professor Tollefson argues "Large, controversial projects should not be able to secure approval simply because the proponent's scientists manage to persuade federal regulators that the predicted adverse effects of a project fall below this ill-defined "significance" threshold"(see "[There are at least ten good reasons why Ottawa should start from scratch, and redesign our environmental assessment laws](#)" *Policy Options*, July 13, 2016). The test also has been argued to be too limited and therefore unsuitable in some circumstances. For example, Toby Kruger argues that "Despite the importance of "significance" in the assessment process, the lack of objective criteria to determine when the threshold of significant has been reached in the greenhouse gas emissions context has made the process ineffective" ("The *Canadian Environmental Assessment Act* and Global Climate Change: Rethinking Significance" (2009) 47 *Alta L Rev* 161).

The Expert Panel departs from the "significance" test in favour of a test for net benefits pursuant to sustainability assessment principles. In its words:

Sustainability should be central to federal [Impact Assessment] IA. To meet the needs of current and future generations, federal IA should provide assurance that approved

projects, plans and policies contribute a net benefit to environmental, social, economic, health and cultural well-being.

In evaluating what federal IA should consider, there is historic context for the current focus on the significance of adverse environmental effects ... However, this approach may no longer be appropriate. First, it focuses only on negative effects, and second, because significance is a “yes/no” decision, it results in adversarial relations at the outset. Instead, assessment should in the future include a review of net benefits and a review of trade-offs between benefits and negative effects. (Expert Panel Report at 2.1.3)

As mentioned in my April 12 ABlawg [post](#) on the Expert Panel Report (at 4), sustainability as a core aim of impact assessment has been put forth by a number of environmental assessment academics, and is well represented in the article by Professors Robert Gibson, Meinhard Doelle, and John Sinclair, “Fulfilling the promise: basic components of next generation environmental assessment” (2015) 29 JELP 251.

Although the Discussion Paper expands the types of effects to be assessed to include those pertinent to most of the five pillars of sustainability assessment, namely to positive and negative environmental, social, economic, and health effects, remarkably the Paper is silent on to what end these are assessed, except to say that project decisions must be in the “public interest” (at 13). The Discussion Paper does not mention “sustainability” at all, which is more than odd as moving from a significance based assessment to a sustainability assessment was core to the Expert Panel’s recommendations, and highly featured in the Panel process. As I mentioned in my post on the Expert Panel Report (at 4), the Panel received significant calls to adopt the sustainability approach including “more than 11,000 letters from supporters of the David Suzuki Foundation and more than 500 letters from supporters of the West Coast Environmental Law Association” (Expert Panel Report at 4.0).

The Discussion Paper does not speak to whether the determination of adverse environmental effects and their significance would be retained as the aim of assessment in new impact legislation. However, since the Paper enlarges the scope of impacts to be considered far beyond environmental impacts, presumably Government intends not to retain this explicit aim. Indeed, the specific mention of the public interest test to determine whether projects should proceed suggests that significance of effects will not be a specific factor in the determination. The question is, then, what will?

How Should the Assessment Figure into the Project Approval or Disapproval in the Decision-Making Process?

A fundamental question regarding environmental or more extensive impact assessment processes is: are the processes substantive, merely procedural hoops, or something in between? Legislated fully substantive processes would require specific responses given the results of the assessment. For example, a finding of significant adverse environmental effects that cannot be mitigated would require that a project not be approved. If processes are mere procedural hoops the legislation would provide little, if any, connection between the processes and the project decision at the end. For example, although legislation might require an impact assessment with respect to a project it would explicitly or implicitly give the decision maker discretion to approve or disapprove the project regardless of the results of the assessment.

Neither CEAA 1992's nor CEAA 2012's impact assessment processes are fully substantive, but they are patently more than mere procedural hoops. As mentioned, under both CEAA 1992 and CEAA 2012 the designated statutory delegate uses the assessment, in accordance with the purposes of the legislation, to decide whether or not the project is likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures (CEAA 1992 s 20, CEAA 2012 s 52). If the statutory delegate deems that the project is unlikely to cause significant adverse environmental effects the delegate may permit it to proceed. If there is a determination of significant adverse environmental effects the federal government may still permit the project to go ahead, but only if the designated statutory delegate, currently Cabinet, determines the effects can be justified in the circumstances (CEAA 2012 s 52, CEAA 1992 ss 20 and 37). The legislation does not require that reasons be given for such decision, which obviously detracts from the substantive-ness of the processes.

If followed, the Expert Panel recommendations would move impact assessment processes considerably farther in the substantive direction. The Panel recommends that where "it is determined that a project would contribute positively to sustainability" the project may be approved with any relevant conditions. But where "it is determined that a project would not contribute positively to sustainability, this must result in a decision that the project not proceed, that no federal authority may make or take a decision that would allow the project to proceed in whole or in part, or both." Decisions would be subject to an appeal to Cabinet, but Cabinet's resulting decisions "should be evidence-based, supported by reasons related to the five pillars of sustainability, prompt and publicly available" (at 3.2.2.3).

The Discussion Paper, by contrast, on its face, could hurl impact assessment processes farther in the mere procedural hoop direction than any previous federal environmental assessment legislated regime. As mentioned, there is no stated purpose for impact assessment in the Discussion Paper, and no mention of "sustainability" or "significant adverse effects". The Paper does not allude to legislated mandates, principles, or criteria to direct how a statutory delegate should inter-relate impacts under different pillars when assessing or making decisions based on an assessment. For example, it does not provide direction on how a given environmental impact might relate to an economic, social, or health impact. The Paper does not direct decision makers regarding what to do with an assessment, save to make a project decision in the "public interest", which is a vague and open-ended term. Without more, this would permit decisions to be made on purely economic grounds, or cultural grounds, or whatever grounds that a decision maker could reasonably rely on to make a decision. It would be at best, old-fashioned, un-reined and misinterpreted sustainable development, where decision-makers carry out an open-ended "balancing" exercise and have relatively unconstrained discretion to find that economic benefits outweigh environmental, social, or health risks.

The Potential Consequences for Federal Impact Assessment

As Professor Mascher states in her post on the Discussion Paper "It would seem to go without saying that next generation environmental assessment and regulatory processes need to be guided by substantive environmental principles and that any changes to the existing frameworks should be guided by these principles - but it should not literally go without saying" (at 3). But that is just what the Discussion Paper does, on its face. It proposes a significant change from the existing framework of assessing primarily bio-physical environmental effects and determining whether

there are significant adverse environmental effects, and then approving or not approving projects in accordance with statutory requirements, to assessing the range of environmental, social, economic, and health effects, with no indication of how these effects are to be assessed or why they are assessed, and how decision-making meaningfully relates to the assessment. The Discussion Paper literally goes without saying what mandates, substantive principles, and criteria will direct assessment and decisions relating to regulatory processes.

How are we to understand this absence? Here are two possibilities:

- Implicitly the Discussion Paper proposes that no mandates, substantive principles or criteria direct impact assessment processes and their relation to decision making. If this is so, the Discussion Paper is a far cry from restoring the public's trust in environmental assessment. How could there be public trust in a process that is essentially discretionary and unpredictable, a process that fails to guide decision makers on how to carry out assessments and how to connect assessment with decision-making? How could there be public trust in a process that that essentially is a procedural hoop?
- Alternatively, the new legislation will include such mandates, substantive principles, and criteria. The Discussion Paper merely failed to mention them. Perhaps Government ministries were not in agreement on them when the Discussion Paper was due for release. Perhaps Government is awaiting comments on the Paper before it fully develops them to fill the gaps.

The second alternative surely is preferable to the first and I am going to assume that it is correct.

The question then is, what should new impact legislation contain by way of mandates, substantive principles and criteria to fill in the gaps left by the Discussion Paper's broadening the types of impacts to be assessed but not directing why or how to assess the impacts, and why or how the assessment relates to decision making. This post ends with suggestions. The suggestions may not be the only way to fill the gaps, but I believe they generally reflect one well-studied and widely acclaimed and supported way. That is the way directed by sustainability assessment, advocated by the Expert Panel and many others.

The following list of suggestions for new - next generation - federal impact assessment legislation is not exhaustive. Others have provided more complete lists and analyses, for example, Professor Robert Gibson, in his *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), chapter seven. The list below is merely meant to be indicative of what I see as some of the essential matters that new impact legislation should contain if it is to require assessment of impacts in addition to bio-physical environmental ones and if assessment is to be meaningfully and substantively linked to sustainability-based decision-making. Some of these suggestions would be best mapped out in legislative language in the statute itself, some in regulations, and some in guidance material. I have indicated below where matters might be located.

Filling in the Gaps

To fill the gaps left in the Discussion Paper specifically related to the issues raised in this post, it is suggested that new impact legislation and related guidance materials:

- include cultural impacts among the impacts to be assessed, so that the new Act requires assessment under all five sustainability pillars: environmental, economic, social, health, and cultural (statute);
- require assessment of positive as well as adverse impacts, direct and indirect impacts, cumulative effects, and assessment of alternatives, including the “no-go” alternative (statute);
- broadly define each of the sustainability pillars for the purposes of impact assessment and specifically not limit assessment to matters within federal legislative jurisdiction (statute);
- set out clear purposes for impact assessment including that approved projects contribute to “a net benefit to environmental, social, economic, health and cultural well-being” (statute, as per the Expert Panel Report at 2.1.3);
- recognize the importance of the interactions among the pillars (for example, how a social or economic benefit might result in an environmental injury), and direct and guide statutory delegates regarding recognizing and dealing with interactions in a manner that will seek “maximum multiple, mutually reinforcing, fairly distributed and lasting gains” (statute, details provided in regulations or guidance material, phrase from *Sustainability Assessment*, ed. Robert Gibson, (Taylor and Francis E-book, 2016) [About the book](#));
- recognize that there may need to be trade-offs between positive and adverse impacts across pillars in order to achieve the best combination of net sustainability benefits, but require that trade-offs be avoided and a last resort, and be permitted only in accordance with specific criteria aimed at best ensuring over-all net gain and benefits (statute, details provided in regulations or guidance material);
- make it clear that sustainability assessment precludes a “balancing” of impacts exercise, sometimes associated with sustainable development (statute, and regulations or guidance materials);
- require the avoidance and minimization of adverse environmental impacts in particular with respect to any trade-offs (statute, with details provided in regulations or guidance material);
- recognize the need for clear direction to statutory delegates in carrying out and considering sustainability assessment, and contain clear direction and requirements (statute, with details provided in regulations and guidance materials):
 - to apply an intergenerational equity test so that alternatives, project design or other options that will more likely preserve environment and opportunities for future generations are favoured;
 - on how to link strategic and regional assessment to project assessment with respect to the five pillars;
 - on how to recognize and deal with degrees of uncertainty regarding the accuracy of impact predictions (e.g. see Aud Tennøy, Jens Kværner and Karl Idar Gjerstad, “[Uncertainty in environmental impact assessment predictions: the need for better communication and more transparency](#)” (2006) 24:1 *Impact Assessment and Project Appraisal* 45) and on how to incorporate adaptive management into approvals and conditions with respect to impacts under all five pillars;
 - on how to incorporate Indigenous knowledge and account for Indigenous interests and concerns;
 - on how to incorporate public and Indigenous participation in assessment processes;

- require decision makers to approve a project only if, based on the assessment, the project would positively contribute to sustainability under each pillar and among the pillars (statute, details provided in regulations or guidance material);
- provide for an appeal process where the appellate body is “required to provide the full reasons for decisions based on the purposes of the legislation, including explanation and justification of trade-offs, as well as the project-specific sustainability criteria” (statute, as per the Expert Panel 3.1.1).

This post may be cited as: Arlene Kwasniak “Filling the Gaps in the Federal Government Discussion Paper to Regain Public Trust in Federal Assessment” (1 August, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/08/Blog_AK_DP.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

