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

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July 8, 2017

This note provides an initial analysis of the following document:

Government of Canada, *Environmental and Regulatory Reviews Discussion Paper* (June 2017), https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf
en français:
https://www.canada.ca/fr/services/environnement/conservation/evaluation/examens-environnementaux/faites-connaitre-vos-opinions/approche-proposee.html

Capsule summary

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

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

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

- The DP promises some of the foundations for a sustainability-based approach to assessment, which has been widely recommended, but does not ensure attention to inter-generational effects, or mention a "contribution to sustainability test" for determining whether assessed undertakings are in the public interest.
- The DP emphasizes use of strategic and regional assessments to address cumulative effects, but does not include provisions for regional and strategic assessments in the proposed legislative changes, or outline basic process components for strategic and regional assessments.
- The DP recognizes needs for strategic and regional assessments to address larger matters that are not addressed well in project-centred assessments, but does not consider how these matters will be addressed in project assessments when strategic and regional assessments are not available.
- The DP proposes greater transparency and public engagement, but signals continuing reliance on non-legislated assessment processes for many project and strategic level undertakings, with no indication of steps to ensure transparency and other fundamental process qualities (except for transparency for assessments of projects on federal lands).

Other key matters not addressed include

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

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

Introduction to the analysis: matters addressed and neglected

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

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

The structure of the Discussion Paper

Process:

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

Seven topic areas:

Addressing Cumulative Effects
Early Engagement and Planning
Transparency and Public Participation
Science, Evidence and Indigenous Knowledge
Impact Assessment
Partnering with Indigenous Peoples
Cooperation with Jurisdictions

Proposed program and legislative changes

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

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

The assessment law issues and components addressed in this analysis
Purpose
Scope, criteria and alternatives
Application and triggering – project level
Application and triggering – regional/strategic level
Tiers
Streams
Cumulative effects, broad alternatives and big policy issues
Decision making responsibilities – the assessment stage
Decision making responsibilities – the review stage
Decision making responsibilities – approval (or not) stage
Early engagement and planning
Post-decision monitoring and follow-up
Transparency and participation
Information and uncertainty
Learning
Administration and guidance
Partnering and co-governance with Indigenous authorities and processes
Cooperation with provincial and territorial authorities and processes

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

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

Purpose

Discussion Paper:

- The DP includes an early statement reiterating the initial purpose of the reform exercise (as set out before any of the consultations began): "regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous peoples, ensure good projects go ahead, and resources get to market" (p.3).
- The purpose of the assessment law and process is not discussed directly.

- At least at the project level, the broad test to be applied in decision making is to be based on "whether the project is in the public interest" (p.18).
- There is no mention of avoiding or mitigating significant adverse environmental effects, which are the focus of the current law.

Comment:

- The Minister in a pre-release briefing for the Multi-Interest Advisory Committee stated that the intent of the reforms was "all about taking a sustainability approach." That intent is not conveyed explicitly in the DP.
- As presented in the DP, scope of assessment includes effects within the usual components of sustainability but includes no reference to their interactions and interdependencies, or inter-generational considerations and lasting effects, or overall sustainability. The DP makes no mention of trade-offs or the need for rules to guide trade-off decisions.
- Absent inter-generation concerns, interdependences and interactions and trade-off guidance, the broader scope of considerations in assessments would facilitate emphasis on near term effects and short-sighted trade-offs between perceived immediate economic imperatives and social and ecological considerations. The result would be retrograde. Without a clear sustainability-based purpose, the new legislation would be a step backward. Retention of the current narrow focus on significant adverse environmental effects would be preferable.
- The current and previous versions of the *Canadian Environmental Assessment Act* have included a purposes section with multiple objectives, including contribution to sustainable development. The core design of the current law and process, however, has centred on identification and mitigation of significant adverse environmental effects, unless "justified in the (undefined) circumstances."
- The DP proposes expanding the basic *scope* of assessment to encompass social, economic, health and environmental effects, positive and negative (p.13). While that is consistent with a sustainability agenda, the DP is silent on the overall purpose of the legislation. DP proposes decision making "in the public interest" (p.13), without further elaboration. It does not identify any more specific test to be applied to assessed undertakings and does not mention attention to significant adverse effects.
- Despite expressed commitments to greater clarity and predictability, the DP is not clear whether proposed undertaking are expected to make overall positive contributions to sustainability (or "lasting wellbeing"), or to avoid significant adverse effects, or to do both? or in some other way to be "acceptable" in the public interest, however the decision makers may choose to define it at the time.
- The Expert Panel on assessment process reform, the Multi-Interest Advisory Committee and many other participants in the reform process so far have advocated a core purpose of making "positive contributions to sustainability." That test would be the appropriate basis for determining whether the project (in comparison with the reasonable alternatives including the null option) is "in the public interest," since contribution to sustainability is essentially contribution to the lasting public interest.

Upshot:

The next steps in elaboration will need to

- establish "contribution to sustainability" (or the equivalent in other words) explicitly as the core purpose of the law and process;

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

[See also the following section.]

Scope, criteria and alternatives

Discussion Paper:

- As noted above, the DP proposes to expand the basic scope of federal assessments to encompass positive and negative social, economic, health and environmental effects (p.13), but does not include commitment to sustainability, explicit attention to interactions or lasting inter-generational effects, or means of discouraging trade-offs.
- Unlike the Expert Panel, the DP does not include cultural effects explicitly in the scope of assessments.
- Assessment of effects on Indigenous peoples would be required as would use of Gender-Based Analysis Plus (p.13).
- The DP also emphasizes needs for transparency and clearly communicated reasons for assessment and regulatory decisions (p.11).
- The DP proposes to develop and apply criteria for revising the Project List and designating or exempting projects (pp. 13-14) and criteria for substitution of Indigenous government processes (p.17), but does not mention criteria for evaluations and decision making in assessments of projects or strategic or regional undertakings.
- The DP does not provide direction on how alternatives will be included in the scope of assessments, though it does recognize alternatives as one matter that merits better early attention than provided under the current federal assessment process (p.11).
- The DP does not address the need for guidance in evaluating and making trade-offs.

Comment:

- The scope of considerations would be generally appropriate for sustainability-based assessment if explicit attention to cross-pillar interactions, inter-generational interests and lasting effects, and trade-off rules were added.
- The omission of cultural effects is problematic unless specific requirements are added to ensure attention to effects on Indigenous culture.
- For clarity of expectations and consistency of decision making, explicit criteria and early guidance on specification of criteria for particular applications will be crucial.
- These criteria are especially important as foundations for consistency and accountability in evaluations and decisions, and necessary for credible justification of decisions by the Minister and/or Cabinet.

- Clear attention to how alternatives are to be addressed in assessments is also important for two main reasons:
    - The key question in assessments has been evolving from the old regulatory tradition of judging whether a proposed project is "acceptable" to determining whether the project is the "best option" among reasonable alternatives, including the null option (the project does not go ahead). The acceptability approach presumes an identifiable line between acceptable and unacceptable, which is more plausible in narrow regulatory rulings that turn on technical issues than in broader assessments. The "best option" approach relies on comparative evaluation of potentially reasonable alternatives, and is better suited to applications where many broad public interest considerations are taken into account.
    - While all project planning involves the identification and weighing of various options, the range of possible alternatives is potentially wide. Determining which are potentially reasonable and merit careful comparative assessment is important and not always easy. The answers depend, for example, on the capacities of the proponent (private sector proponents often have more limited options than public sector ones), the nature of the undertaking (mining projects may involve various infrastructure and process options but the orebody is not moveable; in contrast, alternatives for highway projects may often include evaluation of different locations).

  Some portion of individual assessment cases are likely also to involve reasons to examine broader alternatives that lie beyond the interests and capacities of the project proponent. Often, these broader alternatives would be addressed more effectively and efficiently through a regional or strategic assessment, but where this is not feasible, provisions will be needed to ensure attention to these broad alternatives by government participants in project assessments (see the section below on "cumulative effects, broad alternatives and big policy issues").
- Rules to guide trade-off decision making are crucial. Progress towards sustainability, which would seem to be the objective underlying service to the public interest, depends on recognizing
    - the interdependence of social, economic, health and environmental aspects of sustainability; and
    - the consequent need for multiple, mutually supporting gains in all of these areas.

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

Upshot:

The next steps in elaboration will need to

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

- incorporate trade-off rules that favour options that avoid sacrifices to important aspects of sustainability and protect the interests of future generations.

Application and triggering – project level

Discussion Paper:

- Application to project level undertakings is to be determined through use of
  - a Project List, which would be subject to "periodic review" guided by "clear criteria" in a "transparent process" (p.13); and
  - processes for designation and exclusion (exemption), "based on clear criteria and a transparent process" (p.14).
- The DP suggests that some non-designated projects and perhaps other undertakings would be subject of an "assessment" process or processes different from the process established for designated projects:
  - The DP proposes that "assessment of non-designated projects" be done by the lifecycle regulators – the National Energy Board, the Canadian Nuclear Safety Commission and the Offshore Boards (p.18). No specifics about this "assessment" process are provided.
  - As well, the DP proposes "[e]nhancing transparency and requirements for the assessment of projects on federal lands" (p.19). The proposal does not refer directly to this being an "assessment" process for non-designated undertakings, but it is not likely that this particular category of undertakings would need specially enhanced transparency and other requirements in the process for designated undertakings.

Comment:

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

  The DP does not otherwise propose or discuss assessment processes for non-designated projects. The DP provides no information on
  - the nature of "assessments" for non-designated undertakings;

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

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

- The DP includes no evident preparations for application to a range of projects with more and less potential for serious consequences, controversy and/or complexity more or less demanding assessment requirements. In particular, the DP is silent about needs for different assessment streams or for scaling individual assessment requirements according to the potential severity of their consequences. That silence may simply indicate that streaming and scaling issues and options had not yet been addressed sufficiently within government to be addressed in the DP. Or it may signal an expectation that the project list will be limited as it is now to a few major projects.
- Some indicators suggest a related assumption that few government projects will be designated:
  - At many points in the document, the language of the DP assumes that the proponents of designated projects will be in the private sector. Concerning the early planning and engagement phase, for example, the DP emphasizes case-specific guidance "to industry" (rather than to proponents, including government bodies) on matters of scoping, information requirements, etc. (p.10). Also provision of easy-on-line access is proposed to help Canadians "track companies' progress as they address the conditions required to advance their project" (p.11).
  - The reference to a separate "assessment" process for non-designated projects noted above would provide a vehicle for assigning federal projects to a less defined and demanding process. Use of this vehicle for some government projects seems lie behind the proposal for "[e]nhancing transparency and requirements for the assessment of projects on federal lands" (p.19), which is comprehensible only if a process for non-designated projects is being enhanced.

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

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

Upshot:

The next steps in elaboration will need to include

- specification of the "clear criteria" and "transparent process" for development of the designated projects list and for application in designation and exemption decision making;
- clarification of when and how the legislated assessment process will apply to government projects and other undertakings, including
  - projects of the federal government (alone or with partners)
  - projects on federal lands
  - projects with federal funding

  - federal activities that are not physical works but may have important consequences for sustainability;
- delineation of project assessment process options in the form of pre-established process streams for categories of projects covered by the law list, or for selection and adjustment as appropriate in the case-by-case determination of particular assessment process requirements in early planning;
- clarification of what is meant by "assessment of non-designated projects," including
  - the nature of "assessments" for non-designated undertakings;
  - what categories non-designated undertakings would be subject to assessment of some kind;
  - how such assessments would be triggered;
  - what basic requirements, processes and participants would be involved; and
  - what justification there is for reliance on a non-legislated assessment process.

Application and triggering – regional/strategic level

Discussion Paper:

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

Comment:

- On application at the strategic/regional level, the DP emphasizes cumulative effects guidance for project level assessments and recognizes the need for collaborative processes with other authorities and stakeholders. It does not address other commonly identified strategic level assessment needs beyond cumulative effects delineation, or mention legislated provisions for strategic and regional assessments, or specify the processes for strategic and regional assessment by the federal government alone or in collaboration with other authorities.
- Missing strategic assessment applications include two big classes of strategic assessments to assist project level assessments – those that would provide
  - comparative evaluation of broad options, beyond what is feasible at the project level (e.g., alternative approaches to protecting coastal waters and resources from the effects of

shipping and other human activities); and

- resolution of big policy issues that have become controversial at the project level (e.g., whether it would ever be in the public interest to approve a new non-renewable resource extraction project in the mining or hydrocarbon sectors that would entail post-closure care in perpetuity).

- Application of legislated assessment requirements to the development of policies, plans and programs now subject to the Cabinet Directive is not mentioned. This is a major omission given that
  - the Cabinet Directive has been the federal government's main vehicle for strategic assessments for a quarter century;
  - its non-transparent process precludes credibility and clearly offends the first guiding principle behind the federal assessment reform initiative ("fair, predictable and transparent" (p.7)); and
  - reviews by the Commissioner for Environment and Sustainable Development have consistently found unsatisfactory compliance with the policy-based requirements.

  While only some strategic undertakings that have been subject to the Cabinet Directive many have direct implications for projects subject to assessment. Most of these strategic undertakings could have important sustainability-related effects and some would be at least as deserving of rigorous and transparent assessment as projects.
- The DP is not clear on whether or when "regional assessments" are being conceived as regional studies rather than assessments of regional undertakings (e.g., assessments built into regional planning or regional program development). While regional studies may often be useful, they are less likely than regional plans and programs to provide firm guidance for project planning and assessment (e.g., just as regional urban studies are less likely to provide clear guidance than regional urban plans that set basic rules for urban project developments).
- The DP does not mention establishment of a legislated base for strategic and regional assessments. It does not describe a mechanism for designation or other triggering of strategic or regional assessments, or for identifying appropriate proponents where need for a new strategic or regional initiative is recognized. Nor does it outline the basics of a process (or different process streams) for strategic and regional assessments under the law. All are needed.

Upshot:

The next steps in elaboration will need to include

- the substance of a legislated base and essential process components for strategic and regional assessments;
- transparent and participative law-based processes for triggering strategic and regional assessments, with clear provisions for
  - strategic assessment of undertakings that address broad options and big policy issues as well as means of dealing with existing and anticipated cumulative effects that are beyond the capacity and authority of project level assessments;
  - regional assessments (often inter- or multi-jurisdictional) of undertakings such as plans and programs that address broad regional issues and opportunities and provide firm guidance for project level assessments and project planning and approval outside the assessment process;

  - law-based strategic assessments of other strategic undertakings that may have important sustainability-related effects (including relevant strategic undertakings now subject to the Cabinet Directive); and
- provisions for assignment of proponency responsibilities to initiate strategic and regional undertakings to address recognized emerging needs.

Tiers

Discussion Paper:

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

Comment:

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

Upshot:

The next steps in elaboration will need to include

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

Streams

Discussion Paper:

- The DP does not address whether or how assessment processes at the strategic/regional or project levels would be assigned to different (more and less demanding) streams in initial designation or other triggering.

- For project level assessments, however, the DP describes a new "early planning and engagement phase" that would develop clear early guidance for the proponent on "what will be assessed" (undefined: perhaps the scope of the project and associated assessment requirements), key issues, information requirements, means of attending to relevant interests and authorities, expected timelines, and "the scale of assessment required" (p.10). The latter implies that case-by-case streaming is anticipated.

Comment:

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

Upshot:

The next steps in elaboration will need to include

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

Cumulative effects, broad alternatives and big policy issues

Background:

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

Discussion Paper:

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

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

Comment:

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

Upshot:

The next steps in elaboration will need to include

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

Decision making responsibilities – the assessment stage

Discussion Paper:

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

Comment:

- The proposal to leave assessment responsibility with proponents signals rejection of the Expert Panel's recommendation to shift this responsibility to an independent commission supported by a multi-authority/interest project committee and an expert committee, beginning at the early

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

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

Upshot:

- The proposed changes by themselves do not provide potentially satisfactory responses to the identified problems.
- While leaving lead responsibility for assessment in the hands of proponents may be necessary because of the need to integrate assessment work and project planning, the reality of proponent bias remains and much more specific provisions for limiting and offsetting that bias are needed than are provided in the DP. The needed provisions (in addition to the early engagement, public participation support and peer review ideas already in the DP) include
    - development of case-specified sustainability criteria for decision making, with open engagement of relevant interests, authorities and experts;
    - identification and comparative evaluation of potentially reasonable alternatives;
    - clear provisions for effective early engagement of relevant interests and experts as well as authorities in developing the assessment agenda for individual cases, including review of the methods to be used;
    - more effective and unfettered involvement of government experts in reviews of key assessment plans and products; and
    - stronger support for intervenors to undertake or commission capable critical reviews of proponent work.
- While some of these requirements will have to be scaled to the demands of more and less consequential cases and assessment streams, the concerns to be addressed are likely to be present in most if not all cases.
- The decision to leave the proponent with core assessment stage responsibility will not eliminate the potential for more consensus oriented assessment processes, but some serious rethinking will be needed.

Decision making responsibilities – the review stage

Discussion Paper:

- The review of proponent project proposals and supporting assessments would in non-energy cases be the responsibility of a "single government agency" (henceforth "the agency") assigned to guide and conduct federal assessment reviews (pp.13, 18).
- Joint reviews would be undertaken

  - by the agency and the "life-cycle regulators" in cases where regulatory responsibilities lie with the National Energy Board, the Canadian Nuclear Safety Commission or one of the Offshore Boards (p.13)
  - the agency and Indigenous and/or provincial/territorial authorities in cases of collaborative inter- or multi-jurisdictional assessment.
- Beyond the points about joint reviews, the DP does not describe the anticipated nature of the review process, including decision making on whether and when there would be public hearings, how Panels would be appointed, what powers they would have, and how their conclusions (presumably in the form of recommendations) would be treated.

Comment:

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

Upshot:

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

Decision making responsibilities – approval (or not) stage

Discussion Paper:

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

Comment:

- The proposal to place decision making in the hands of the Minister(s) or Cabinet is rationalized as ensuring "accountable government" without attention to the obscuring cloak of Cabinet secrecy or the vulnerability of political decision makers to short term imperatives. If those problems are not to undermine process credibility and predictability, the government will need to establish clear sustainability-based criteria for assessment decision making and construct a tradition of providing reasons for all assessment decisions based on those criteria.
- Appeals of decisions have been common and are unlikely to disappear even with a much improved law and process. Consideration of best mechanisms for dealing with appeals is needed.

Upshot:

- Placing decision making authority in the hands of Ministers or Cabinet can be justified only if accompanied by unwavering commitments to adherence to the purposes of the legislation,

application of explicit sustainability-based criteria for assessment decisions, and public provision of reasons clearly based on those criteria for all assessment decisions.

- Despite best efforts to build consensus, apply a credible process and make well justified decisions, dissatisfactions and appeals of decisions are likely. The next steps in elaboration will need to include attention to the preferable mechanism(s) for directing and hearing appeals.

Early engagement and planning

Discussion Paper:

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

Comment:

- The DP has adopted the new early engagement and planning phase idea from the Expert Panel, though with important revisions. As noted above, the DP rejects the Expert Panel's recommendation to remove assessment responsibility from the proponent. Also, there is no reference to the Panel's recommended early planning committees (a project committee of multiple authorities and interests and an expert committee), though that may be a specific component that is not addressed at the general level of the DP.
- Clarity about what "early" means is needed. Because the advantages of the new early phase turn on the opportunity for authorities, stakeholders and other interests to influence project planning and assessment before major study and design trajectories are set, the legislation and associated guidance will need to require initial information from proponents at a stage where there is reasonable confidence in project visibility but key options remain open.
- The provisions for an early deliberative process phase need elaboration that is consistent with the objective of effective multi-interest engagement. Merely seeking public feedback on an initial list of issues would not be meaningful engagement. Especially if the list were drafted by the proponent, as seems likely in proponent-led processes, the potential for process credibility would be negligible.
- An "early" phase that awaits detailed project information and then proceeds by seeking public feedback on an initial list of issues would be no different from current practice. It would also lack

potential for developing consensus on the key process issues (scope, priority considerations, criteria, process steps and timelines, etc.) or enhancing process credibility.

- Much greater clarity is also needed on the substance of the guidance to be drafted in the early engagement and planning phase. The core contents of a project assessment plan are likely to include
    - the scope of the project being assessed, including the general nature of potentially reasonable alternatives to be considered (recognizing that further options may emerge);
    - the major issues likely to require particular attention (recognizing the full generic scope of considerations and criteria set out in law and other guidance), including any immediately evident strategic issues (larger cumulative effects, broad alternatives and big policy issues) that are beyond the reasonable capacity of the proponent to address and would have to be the responsibility of government(s) through strategic assessments or within the project assessment
    - an initial set of case-specified evaluation and decision criteria based on the sustainability-based criteria set out in the law and other guidance;
    - assignment other roles and responsibilities;
    - initial specifics on information requirements (recognizing the earliness of this phase in the process), methods;
    - initial plans for further consultations and engagement of government bodies (federal, Indigenous, federal/territorial, municipal, as appropriate), the proponent(s), stakeholders and other interests;
    - particular requirements and responsibilities for the engagement of Indigenous people;
    - expected timelines; and
    - provisions for adjustment of the plan as the assessment proceeds.
- It will be important to recognize
    - that preparing the project assessment plan would be the responsibility of government (the agency or the agency with their equivalents from collaborating other jurisdictions), not a matter to be delegated to the proponent;
    - that the project assessment plan would be directed not only to the proponents but also to the collaborating governments and other participants; and
    - that with the level of information available at a truly early phase, the guidance on most of the matters listed above would be tentative and subject to iterative improvement.
- The level of ambition reflected in individual project assessment plans would need to be scaled to the potential consequences of the project. As with other process matters, the legislation must ensure clarity about what aspects of early engagement and planning are fundamental and what aspects can be condensed or set aside in individual cases or in less onerous process streams.
- Given the nature of what is to be presented credibly and with consensus (to the extent possible), much greater clarity is also needed on the nature of engagement, including
    - the key role of the agency (not the proponent) in facilitating the engagement leading to the project assessment plan;
    - the means by which consensus is to be sought, among whom and on what; and
    - how non-consensus items are to be addressed (e.g., possible roles for dispute resolution mechanisms).

- Maintaining agency credibility in the process will be a challenge. In the early engagement and planning phase alone, the agency will have multiple potentially conflicting roles as a facilitator, participant and authority responsible for important decisions (especially about the contents of the initial project assessment plan and the level of flexibility to adjust this plan as new issues and opportunities arise). Because the approach taken depends heavily on the credibility of the agency, the legislated provisions and accompanying guidance and administrative practices will need to include mechanisms for maintaining effective and visible impartiality.

Upshot:

The next steps in elaboration will need to include clarification of

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

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

Post-decision monitoring and follow-up

Discussion Paper:

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

Comment:

- Better monitoring, enforcement and follow-up have been promised repeatedly over the years. The main barriers to effective action appear to have been failures to assign responsibility and resources, and inadequate links between assessment and regulatory decision making.
    - The DP recognizes the latter problem, though its responses are limited to continued integration with the lifecycle regulatory bodies on enforcement matters within their mandate areas (p.19) and another promise of enhanced compliance and enforcement by other relevant government regulators.

  - The DP is largely silent about legislated responsibilities even though clearly legislated responsibilities are typically a pre-requisite for any serious prospect of adequate resources.
  - The most promising new component is the DP's proposal for inclusion of Indigenous authorities and local people (communities and landowners) in monitoring. While local people may not have existing expertise in monitoring protocols, they are likely to have the strongest incentives for careful and timely monitoring and pressure for effective responses to identified issues.
- The proposed peer reviews of science and evidence that are presented as contributions to the assessment phase (p.12) could also be used to strengthen monitoring and follow-up work.
- The steps to facilitate adaptive management are welcome, but are not accompanied by recognition of needs also to favour adaptable design in approved undertakings.

Upshot:

The next steps in elaboration should include

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

Transparency and participation

Discussion Paper:

- The DP devotes a section to transparency and participation (p.11). It lists a set of directions centred generally on reasons for decisions and responses to public input, greater on-line access, improved participant funding programs, and opportunities in monitoring and compliance activities.
- Some of the proposed changes are positive but undefined. These include
  - "open opportunities for meaningful public participation in assessments and regulatory reviews" (p.11); and
  - "clearer transparency requirements for more projects (e.g. assessments of projects on federal lands, notice of proposed works on navigable waters)" (p.11).
- The implications for assessment law reform are uncertain because of the vagueness of the proposals and because some aspects (e.g., opportunities in regulatory reviews) appear to lie outside the usual ambit of assessment law.
- Additional gains for participation and transparency seem likely to arise from introduction of the early engagement and planning phase, though as noted above the nature of public participation at that phase is not elaborated well (see above).
- The DP's coverage of transparency and participation focuses on assessment of projects. Similar treatment of strategic and regional assessments may be assumed but is not mentioned.

Comment:

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

Upshot:

The next steps in elaboration should include

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

Information and uncertainty

Discussion Paper:

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

Comment:

- The proposal for an open science and data platform (including Indigenous knowledge) is welcome, indeed long overdue. The difficult parts will include how best to ensure that the databank
    - is suitably accessible and searchable,
    - engages many partners,
    - respects its sources,
    - is consistently updated, and

  - is accompanied by effective means of facilitating research and other uses in the public interest.
- The proposal to strengthen inclusion of and respect for Indigenous knowledge in assessments appears to be a useful further step in what has been a slow process. As is the case with most DP proposals, much will depend on specifics (e.g., the what extent "Indigenous knowledge" is treated as something more than a source of more data to supplement data from prevailing forms of western science. But the opening is important, particularly in the context of the DP's section on "partnering with Indigenous peoples" (pp.15-16), which includes broader commitments to "sharing an administrative authority and management responsibility" and "co-development of frameworks for collaboration" (p.15).
- Peer reviews of "science and evidence" should also be useful, though they cannot be a sufficient means of building impartiality and credibility into assessment work led by proponents with strong interests in gaining approvals for undertakings they have already determined to be to their advantage (see above re decision making responsibilities at the assessment stage). Important questions include
  - how and with whose input decisions will be made about priorities for peer review, and
  - how peer reviews will be treated as complementary to expert reviews commissioned by other participants in assessments and assessment reviews.
- Plain language summaries are not new or potentially sufficient. Many assessment summaries have been explicitly labelled as "plain language" or the equivalent, and many of these have been as comprehensible and concise as can be expected, given the complexity of the issues, options and underlying concepts. The complexities will remain. What is needed for process credibility and effectiveness is much greater emphasis on capacity building and learning, achieved through a much more diverse and creative set of tools and initiatives than plain language summaries.
- The DP's sections on early engagement and planning, enhancement of transparency and participation, and partnering with Indigenous peoples provide more important openings for mobilization of more existing knowledge, understanding and commitment to learning. In each case the specifics of approaches taken will be crucial, but the potential for gains is substantial.
- Critiques of impact assessments and related decision making have often pointed to undue reliance on simplifying assumptions, inadequate attention to the behaviour of dynamic ecological and social systems, and poor recognition of uncertainties and their implications for judgements – all of them exacerbated by the long-standing weakness of post-decision effects monitoring and learning from experience. In this context, the DP's proposals to improve the quality of information gathering will need to be supplemented by steps to ensure more respect for and attention to complexity and uncertainty.

Upshot:

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

Learning

Discussion Paper:

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

Comment:

- The DP provides important openings for increased learning from assessment.
- Beyond suitable expansion and elaboration of these openings, other needed steps include
    - broad engagement in development of generic and case-specified criteria and trade-off rules for assessments;
    - clear commitment to legislated strategic and regional assessments with transparency, public engagement and iterative review and renewal;
    - processes at the assessment review stage that encourage and respect active and influential engagement and build capacity for such engagement;
    - regular auditing of assessment performance under the new law; and
    - specified dates for mandatory reviews of the legislation to identify and respond to needs for updating in light of lessons learned.

Upshot:

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

Administration and guidance

Discussion Paper:

- The DP proposes assignment of most assessment responsibilities to a "single government agency" (p.18). The main exceptions are that
    - proponents retain core responsibility for impact assessments, subject to government direction (p.10);
    - the Minister(s) or Cabinet are to be the decision makers on approvals (or not) and conditions of approval for assessed proposals (p.18);
    - the agency's responsibilities are shared with other jurisdictions in cases of co-governance with Indigenous, provincial and/or authorities and processes (pp.17, 19); and
    - some roles are to be shared with the lifecycle regulators for projects in their mandate areas (pp.13, 18).

- The DP recognizes some specific needs for clear guidance from government to proponents, beginning with the early planning phase (p.10). The proposed agency would seem to be the prime candidate for development and provision of much of this guidance, perhaps often in collaboration or co-governance with other bodies inside and beyond the federal government.
- The DP also includes provisions for establishing advisory committees "for indigenous peoples, stakeholders and experts" reporting to the Minister (p.18).

Comments:

- Consolidation of assessment review responsibilities in a single agency has important advantages, especially in light of the demonstrated limitations of the lifecycle
- regulators in assessment reviews. However, the number and diversity of role raises risks of potential conflict. As noted above (see the section on "early engagement and planning"), even at the outset of individual assessments, the agency is expected to be a facilitator, participant in consensus-seeking discussions, and lead government authority for guiding proponents and making decisions on the assessment agenda, scope and process.
- The DP recognizes only a few of the many needs for guidance that would have to be met at least in part by the agency. In addition to the identified expectations for agency guidance to proponents in particular cases (concerning assessment scope, information requirements for proponents, consultation expectations and timelines, etc.), the agency would face needs for clear and credible guidance a host of broader matters, for example on
    - project list interpretation;
    - designation and exemption processes and criteria (p.14);
    - strategic and regional assessment processes;
    - impact assessment methods;
    - approaches to cumulative effects assessment in project and regional/strategic-level assessments
    - the scope of reasonable alternatives;
    - incorporation of different forms of evidence based on different knowledge traditions and sources – including incorporation of Indigenous knowledge, with the guidance development relying heavily on the knowledge holders (p.12);
    - the responsibility of government bodies to contribute to reviews of submitted proposals and assessments, and to address major cumulative effects, broad alternatives and big policy issues not covered by strategic or regional assessments;
    - the authority of assessed strategic level undertakings (policies, plans, programs) in project planning and assessment;
    - grounds for exceptions to timelines;
    - evaluation and decision criteria;
    - assignment of responsibilities for monitoring and follow-up; and
    - acceptable forms of co-operation agreements with Indigenous governments and provincial/territorial governments.
- In addition to this guidance, the agency would have important responsibilities for negotiating and sharing co-governance relations with Indigenous, provincial and territorial authorities.

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

Upshot:

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

Partnering and co-governance with Indigenous authorities and processes

Discussion Paper:

- The DP notes that one of the initial purposes of the reform exercise was to "advance reconciliation with Indigenous peoples" (p.3) and reports that one of the guiding principles for the assessment law and process changes is
    - "Participation of Indigenous peoples in all phases that advances the Government's commitment to the United Nations Declaration on the Rights of Indigenous Peoples and reconciliation" (p.7).
- The DP includes a section on "partnering with Indigenous peoples" (pp.15-16) as well as attention to Indigenous engagement, knowledge, rights and interests in other sections, including the one on "cooperation with jurisdictions" (p.16).
- The proposals in these various sections include the following:
    - "direct engagement between Crown representatives and Indigenous peoples" (p.10);
    - "improving participant funding programs for Indigenous peoples" (p.11);
    - "incorporating Indigenous knowledge" (p.12);
    - "enabl(ing) increased Indigenous involvement, including Indigenous-led assessments" (p.15);
    - "sharing of administrative authority and management responsibilities" (p.15);
    - "seeking to achieve free, prior and informed consent" (p.15);
    - "co-development of frameworks for collaboration" (p.15);
    - "specific working tables with Indigenous peoples" in individual assessments (p.15);
    - "Indigenous partnerships and co-development in monitoring" (p.16);
    - "build(ing) capacity and enabl(ing) their participation in assessments" (p.16);
    - process design or application to "better recognize Indigenous jurisdiction, laws, practices and governance systems" (p.17); and
    - enabling substitution of Indigenous assessment processes for the federal process (p.19).

- The DP includes a proposal for "(s)trengthening existing provisions that explicitly require assessment of impacts on Indigenous peoples" (p.18).
- In contrast to the Expert Panel, the DP proposes a scope of assessment that does not identify culture as one of the broad areas of consideration (p.13).

Comment:

- As is the case with most proposals in the DP, the ones related to reconciliation with Indigenous peoples are general and depend heavily on specifics that have not yet been presented. How Indigenous people are engaged in government-to government processes for elaborating the specifics will be an important test of the commitments outlined in the DP.
- The DP reference to "seeking to achieve free, prior and informed consent" (p.15) would seem to far well short of commitment to obtaining free, prior and informed consent, despite "the Government's commitment to the United Nations Declaration on the Rights of Indigenous Peoples and reconciliation" (p.7).
- The omission of culture from the list of broad categories of assessment considerations may be significant for Indigenous peoples. Attention to cultural impacts is not otherwise proposed in the DP, at least not directly. Cultural impacts may be covered by the general proposal to strengthen provisions that "require assessment of impacts on Indigenous peoples" (p.18). In the DP, most references to impacts involving Indigenous peoples focus on "rights and interests" (e.g., pp.9, 10). Even if cultural impacts would normally be included as effects on rights and interests, explicit references to cultural impacts in the legislation might be needed to support consistency of application.
- The DP anticipates three relationships between federal assessments and Indigenous processes:
    - joint assessments with shared "administrative authority and management responsibilities" and perhaps harmonized requirements (pp.15, 19);
    - Indigenous-led assessments (p.15); and
    - substitution of Indigenous processes for the federal process, and development of criteria to enable such substitutions (p.19).

  None of these is yet accompanied by any indication of how they would work, including the nature of the processes and the criteria for determining when any of them would be used.
- Substitution of Indigenous processes may be reasonable in some circumstances. Substitution of provincial for federal assessment is undesirable for several reasons, some of which are tied to the Constitutional division of federal and provincial responsibilities (see the following section). The relationship between Indigenous and federal powers and responsibilities is different, in ways that make substitution of Indigenous processes more suitable where the relevant issues are within Indigenous authority. Here too the details will be crucial.

Upshot:

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

Cooperation with provincial and territorial authorities and processes

Discussion Paper:

- The DP indicates a desire for cooperation with other jurisdictions in project assessments, chiefly for efficiency in the form of "one project – one assessment" (p.17). For the provinces and territories, the DP proposes continuing to allow substitution of provincial or territorial assessment processes for the federal process "where there is alignment with federal standards" (p.17).
- Further inter- and multi-jurisdictional cooperation is proposed for "planning and management of cumulative effects" (pp.9, 17). The identified cooperative activities (p.9) include
    - "developing and strengthening national environmental frameworks" (e.g., the Pan-Canadian Framework on climate change);
    - "conducting strategic assessments" on the implications of the national environmental frameworks for "activities subject to federal oversight," presumably including designated projects under federal assessment legislation;
    - "regional assessments to guide planning and management of cumulative effects" (e.g. effects on biodiversity and species at risk); and
    - populating the "integrated open science and data platform."

Comment:

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

  That is not the case for Canadian provincial and federal jurisdictions, whose areas of authority diverge as well as overlap, and whose assessment requirements and processes differ substantially. In such circumstances, the public interest is best served by cooperative joint applications that benefit from each jurisdiction's attention and process strengths. A better case may be made for substitution of territorial processes insofar as full federal jurisdiction is covered.
- Inter- and multi-jurisdictional cooperation in regional and strategic assessments is desirable and likely often to be necessary if the assessments are to be sufficiently comprehensive of the issues and response options and if the conclusions are to be applied effectively.
- The greater problem with the proposals for regional and strategic assessments in the DP is that the proposals do not yet address
    - establishment of a legislated base;
    - clear focus on assessment of strategic undertakings (plans, programs, policies);
    - assignment of proponency responsibilities;
    - basic process components; or

- grounds for credible and authoritative tiering to project assessments.

Upshot:

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