Model for Harmonized Provincial Environmental and Sustainability Assessment

Prepared By

Brenda Heelan Powell
Staff Counsel

Environmental Law Centre (Alberta)

Environmental Law Centre

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The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) is Alberta's oldest and most active public interest environmental law organization and believes that law is the most powerful tool to protect the environment. Since it was founded in 1982, the ELC has been and continues to be Alberta's only registered charity dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment.

Environmental Law Centre
#800, 10025 – 106 Street
Edmonton, AB T5J 1G4

Telephone: (780) 424-5099
Fax: (780) 424-5133
Toll-free: 1-800-661-4238
Email: elc@elc.ab.ca

Website: www.elc.ab.ca

Blog: http://environmentallawcentre.wordpress.com

Facebook: http://www.facebook.com/environmentallawcentre

Twitter: https://twitter.com/ELC_Alberta

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Introduction

Following a truncated statutory review process in late 2011, the federal government introduced radical changes to environmental assessment laws and processes in its omnibus budget bill (*Bill C-38*). Prior to the passage of *Bill C-38*, federal environmental assessment in Canada was governed by the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (*CEAA*). The *CEAA* has now been repealed and replaced with the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*). Under *CEAA 2012*, the number and scope of federal environmental assessments is greatly reduced.

With the changes made to federal environmental assessment by *CEAA 2012*, the provinces seem positioned to take a greater role in environmental assessment as the federal government takes a step back. The expanded provincial role raises issues that warrant further examination. Firstly, with a diminished federal role, province to province harmonization and cooperation will play a greater role. Secondly, in light of the diminished federal role, there may be opportunity to expand the concepts of regional environmental assessment and strategic environmental assessment within and across provinces.

As stated by Gibson:[1]

> The legislative strategy of CEAA 2012 is to shift most environmental assessment responsibility to the provinces. Limiting the scope of federal assessments to matters of exclusive federal jurisdiction leaves matters of shared environmental jurisdiction to provincial assessment processes, which may cover only some of the projects involved. Even for matters of exclusive federal concern, CEAA 2012 (ss. 32-37) provides for substitution of 'appropriate' provincial processes. This greatly expanded reliance of the provinces through deferral and substitution is meant to avoid subjecting proponents to separate federal and provincial processes..... CEAA 2012 signals a rejection of both coordination and harmonization in favour of reliance on the provinces.

This project builds upon the ELC's Environmental and Sustainability Assessment Model Law Project by establishing criteria necessary for successful province to province harmonization and coordination. The project will also explore the means by which provinces can implement regional environmental assessment and strategic environmental assessment within their own borders and cooperatively with other provinces.

This project includes a review and analysis of several provincial environmental assessment regimes (Alberta, Ontario, Saskatchewan and B.C)[2] to shed light on the similarities and disparities that currently

[1] Robert B. Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress" (2012) Impact Assessment and Project Appraisal 179 at 184 to 185.
[2] These jurisdictions were chosen for review due to being Alberta's neighbours (Saskatchewan and B.C.) and being the largest common law province in Canada (Ontario).

exist across Canada. This project will establish criteria necessary to enable successful harmonization and coordination between provinces (a *Model for Harmonized Environmental and Sustainability Assessment*).

The concepts of regional environmental assessment and strategic environmental assessment fit comfortably within the consideration of province to province cooperation and coordination. Both regional environmental assessment and strategic environmental assessment move beyond traditional project based environmental assessment and create a broader framework for decision-making. Ecological regions and the impacts of policy decisions may not respect political boundaries and, as such, are natural topics within the context of provincial cooperation and coordination.

Background to the
Model for Harmonized Provincial Environmental and Sustainability Assessment

Provincial Survey

With the federal government reducing its involvement in environmental assessment, the provinces have the potential to play a more prominent role. While all Canadian provinces and territories have environmental assessment processes and requirements, these vary greatly creating a patchwork of environmental assessment regimes throughout Canada. Environmental impacts do not respect political boundaries creating a need to focus on cooperation and coordination on an interprovincial basis. The following survey highlights the similarities and differences of different provincial environmental assessment regimes thereby establishing a context for a *Model for Harmonized Provincial Environmental and Sustainability Assessment*.

Alberta[3]

The environmental assessment process in Alberta is governed by Part 2 of the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 ("*EPEA*"). Relevant regulations under *EPEA* are the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93 (the "*EA List*") and *Environmental Assessment Regulation*, Alta. Reg. 112/93 (the "*EA Regulation*"). In addition to the environmental assessment legislation, the government has issued numerous guidance documents which are available at http://esrd.alberta.ca/lands-forests/land-industrial/programs-and-services/environmental-assessment/default.aspx.

In Alberta, the stated purpose of environmental assessment is as follows:

> **Section 44** The purpose of the environmental assessment process is
>
> (a) to support the goals of environmental protection and sustainable development,
>
> (b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity,
>
> (c) to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity, and
>
> (d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities.

[3] For an additional review and critique of Alberta's environmental assessment regime see Roger Creasey and Kevin S. Hanna, "Chapter 14: Alberta's Impact Assessment System" in Kevin S. Hanna, ed., *Environmental Impact Assessment: Practice and Participation* (Don Mills, ON: Oxford University Press, 2005).

Environment is defined in s. 1(t) as:

> the components of the earth and includes
> (i) air, land and water,
> (ii) all layers of the atmosphere,
> (iii) all organic and inorganic matter and living organisms, and
> (iv) the interacting natural systems that include components referred to in subclauses (i) to (iii).

Only those activities designated in the *EPEA* Schedule of Activities are subject to the act. If an activity is not included in the Schedule of Activities, this means *EPEA* does not apply and it will not be subject to a provincial environmental assessment. Further, the *EA List* indicates which designated activities must undergo an environmental assessment and which designated activities are excluded from environmental assessment. Any activities which appear on the Schedule of Activities but are not referenced in the *EA List* may undergo an environmental assessment at the discretion of the Director. The Director determines whether such an activity should undergo an environmental assessment by considering factors such as size and location of the activity, complexity and technology required for the activity, and other criteria specified in section 44 of the act.

As with many Canadian environmental assessment regimes, the Alberta regime is project-based (as determined by a list of project types) and does not provide for strategic environmental assessment. In the ELC's view, this is a short-coming of the Alberta environmental assessment regime. While Alberta's legislation does not require strategic environmental assessment, this does not mean it is not permitted. In the ELC's view, regional and strategic environmental assessment could be pursued on an interprovincial basis to address broad environmental issues.

The assessment is prepared by the project proponent, in accordance with terms of reference approved by the Director, and must include components enumerated in section 49 of the act. These components include:

- description of the project and an analysis of the need for the project,
- an analysis of the proposed site for the project and a consideration of alternative sites,
- existing baseline environmental conditions,
- description of potential positive and negative environmental, social, economic and cultural impacts, and an analysis of their significance,
- plans to mitigate negative impacts,
- plans to monitor environmental impacts and proposed mitigation measures,
- plans for waste minimization and recycling,
- plans to prevent minimize the production or release of substances that may have an adverse impact,
- factors listed in the terms of reference, and

- other factors required by the Director.

The environmental assessment process consists of five stages: submission of terms of reference by the project proponent, public and Director review of the terms of reference, proponent submission of the environmental assessment report, review of the environmental assessment report by the Director, and review of the environmental assessment report by the Minister or appropriate regulatory body (Alberta Energy Regulator, Natural Resources Conservation Board or Alberta Utilities Commission).

There are limited opportunities for public participation in Alberta's environmental assessment process. Under s. 44(6), once a decision to require further assessment of a non-mandatory activity has been made, a directly affected person may submit a written statement of concern which sets out the person's concerns with the proposed project. The Director is required to consider all statements of concern when deciding whether or not an environmental impact assessment report is required. As well, under s. 48, members of the public have an opportunity to provide comments on proposed terms of reference for a project's environmental impact assessment report. Finally, under s. 49, an environmental impact assessment report must include information about the proponent's proposed public consultation process and the results of that process.

Section 57 of the *EPEA* does allow for inter-jurisdictional agreements for environmental assessment. The *EPEA* provides that, where another Canadian jurisdiction has legislative provisions that operate for substantially the same purposes, the Minister may enter into an agreement to determine what aspects of a project are governed by the laws of both jurisdictions, to conduct a joint environmental assessment process, or to adopt the other jurisdiction's process or reports with respect to environmental assessments.

In 2004, Alberta and British Columbia entered a Memorandum of Understanding on Environmental Cooperation and Harmonization (under the terms of the agreement, this expired in 2009). This agreement was made pursuant to a broader agreement on Internal Trade. This agreement is focused on government efficiencies, reduction in the cost of public services, and identification of best practices and innovations. As well, the agreement aims to harmonize regulatory frameworks to reduce trade barriers and promote economic development.

In 2005, Alberta and the federal government entered into an agreement regarding environmental assessment cooperation (this agreement was entered while the previous *CEAA* was in effect). This agreement applies where an environmental assessment is required by both federal and provincial legislation. The agreement addresses process items such as establishing a lead party for the purposes of the environmental assessment, establishing a joint advisory review team, timelines and communications. The agreement also provides explicitly for transboundary considerations with both parties agreeing that environmental effects of a project must be assessed regardless of the location of jurisdictional boundaries and that affected jurisdictions must be notified and provided an opportunity to participate in the environmental assessment process.

Ontario[4]

In Ontario, the environmental assessment regime is governed by the *Environmental Assessment Act*, R.S.O. 1990, c. E.18 ("*EAA*") and several regulations under that act.[5] In addition, there are several guidance documents available on the Ministry of Environment website at https://www.ontario.ca/environment-and-energy/preparing-environmental-assessments.

The stated purpose of the *EAA* is found in section 2 as follows: "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment". The definition of environment is broad (s. 1(1)):

> (a) air, land or water,
> (b) plant and animal life, including human life,
> (c) the social, economic and cultural conditions that influence the life of humans or a community,
> (d) any building, structure, machine or other device or thing made by humans,
> (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
> (f) any part or combination of the foregoing and the interrelationships between any two or more of them,
>
> in or of Ontario.

The Ontario environmental assessment process allows review of both physical activities and of proposals, plans and programs. This means, unlike many other Canadian jurisdictions, the Ontario process allows for strategic environmental assessment rather than solely focusing on physical activities. Generally speaking, the *EAA* does not apply to the private sector. The *EAA* applies to public bodies (including municipalities), major commercial or business undertakings designated by regulation, and undertakings for which the proponent has entered a written agreement to have *EAA* applied. Regulations designating major commercial or business undertakings have been made with respect to electricity projects, certain private sector developers, waste management projects, and transit projects.

The environmental assessment report must be prepared by the proponent of the undertaking in accordance with terms of reference that have been approved by the Ministry of the Environment. By

[4] For an additional review and critique of Ontario's environmental assessment regime see Richard D. Lindgren and Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs. Reality" (2010) 21 J.E.L.P. 279; and Sonya Graci, "Chapter 17: The Ontario Environmental Assessment Act" in Kevin S. Hanna, ed., *Environmental Impact Assessment: Practice and Participation* (Don Mills, ON: Oxford University Press, 2005).

[5] Regulations under the *EAA* are: *General*, R.R.O. 1990, Reg. 334; *Deadlines*, Ont. Reg. 616/98; *Designation and Exemption – Private Sector Developers*, Ont. Reg. 345/93; *Electricity Projects*, Ont. Reg. 116/01; *Waste Management Projects*, Ont. Reg. 101/07; *Transit Projects and Metrolinx Undertakings*, Ont. Reg. 231/08.

virtue of s. 6.1, the environmental assessment report must include:

- description of the purpose of the undertaking;
- description of the undertaking, including alternatives methods, and alternatives to the undertaking;
- description of environmental impacts, and actions that may be necessary to prevent, change, mitigate or remedy the negative environmental effects;
- evaluation of the advantages and disadvantages to the environment of the undertaking, alternative methods, and of alternatives to the undertaking; and
- description of consultation by proponent and results of that consultation.

In additional to this information, the terms of reference may require additional matters to be addressed in the environmental assessment report.

The Ontario environmental assessment process consists of 9 stages: terms of reference are submitted, reviewed and approved; preparation and submission of environmental assessment report by the proponent; public notice and review of the environmental assessment report; review of environmental assessment report by the Ministry of Environment; public inspection of the Ministry's review of the environmental assessment report, including the option to request a public hearing; optional closed mediation to resolve matters identified by the Minister as being in dispute; optional public hearing (at discretion of Minister); Minister's or environmental assessment tribunal's decision to approve, approve with conditions or reject the application.

In deciding whether to approve or reject the application, the Minister or the environmental assessment tribunal (as the case may be) must consider the purpose of the act, the approved terms of reference, the environmental assessment report, the Ministry review of the environmental assessment report, public comments; and the mediator's report, if any. If the application is being considered by an environmental assessment tribunal, consideration is only given to public portions of the mediator's report. As well, the Minister may consider other matters that he considers to be relevant to the application.

In addition to the above process, the Ontario environmental assessment regime includes a streamlined process for projects with predictable and manageable environmental effects. The streamlined process is either set out in regulation (*EAA*, s. 39) or through the mechanism of class assessments (*EAA*, Part II.1). The proponent of the undertaking must comply with the regulation or class assessment, as the case may be. Regulations that identify undertakings subject to the streamlined environmental assessment process are the *Electricity Projects Regulation*, the *Waste Management Projects Regulation* and *Transit Projects Regulation*. There are currently 11 class assessments applicable to municipal road, sewage and water infrastructure; highway construction and maintenance; conservation authority works; transit projects; and other public sector activities such as forestry, resource management and transmission lines.

Several concerns have been raised with the Ontario environmental assessment regime.[6] A key concern with the regime is that a large range of proponents and undertakings, including environmentally significant undertakings, are exempt from the environmental assessment process. Another concern is the lack of monitoring and enforcement especially in relation to conditions or other requirements imposed as a result of the environmental assessment process. As well, concerns have been raised with the barriers to meaningful participation, including the lack of a definition of meaningful public participation and the lack of participant and intervenor funding.

Section 3.1 permits harmonization where another jurisdiction has imposed requirements with respect to an undertaking to which the *EAA* applies. If the Minister considers the requirements imposed by the other jurisdiction to be equivalent, then the Minister may declare that the *EAA* does not apply, or vary or eliminate a requirement of the *EAA* to facilitate effective operation of the requirements of both jurisdictions.

In addition to this provision in the *EAA*, the province of Ontario has entered in an agreement with the federal government on EA cooperation. This agreement applies where an EA is required by both federal and provincial legislation. The agreement addresses process items such as establishing a lead party for the purposes of the EA, establishing a joint advisory review team, timelines and communications. The agreement also provides explicitly for transboundary considerations with both parties agreeing that environmental effects of a project must be assessed regardless of the location of jurisdictional boundaries and that affected jurisdictions must be notified and provided an opportunity to participate in the EA process.

Saskatchewan[7]

In Saskatchewan, the environmental assessment regime is governed by *The Environmental Assessment Act*, SS 1980, c. E-10.1 (the "*EAA*"). While no regulations have been promulgated under the *EAA*, the government has issued a variety of guidance documents about the EA process (available at http://www.environment.gov.sk.ca/environmentalassessment).

Unlike legislation in most other Canadian jurisdictions, the *EAA* does not use a list approach to determine which undertakings will be subject to the environmental assessment process. Rather, the *EAA* applies to all developments within the province defined as those projects, operations or activities which are likely to (section 2(d)):

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[6] Richard D. Lindgren and Burgandy Dunn, *supra* note 4; and Sonya Graci, *supra* note 4.

[7] For additional review and critique of Saskatchewan's environmental assessment regime, see Marie Ann Bowden and Bert Weichel, "Chapter 15: Environmental Impact Assessment in Saskatchewan" in Kevin S. Hanna ed., *Environmental Impact Assessment: Practice and Participation* (Don Mills, ON: Oxford University Press, 2005); Marie Ann Bowden, "Environmental Assessment Reform in Saskatchewan: Taking Care of Business" (2010) 21 J.E.L.P. 261; and Ronald J. Zukowsky, *Environmental Impacts Assessment in Saskatchewan* (Environmental Assessment Branch, Sask. Environment and Resource Management), undated, available online at http://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/AC2025.pdf.

(i) have an effect on any unique, rare or endangered feature of the environment;
(ii) substantially utilize any provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose;
(iii) cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
(iv) cause widespread public concern because of potential environmental changes;
(v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or
(vi) have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment.

Environment is defined in s. 2(e) as:

(i) air, land and water;
(ii) plant and animal life, including man; and
(iii) the social, economic and cultural conditions that influence the life of man or a community insofar as they are related to the matters described in subclauses (i) and (ii).

The Saskatchewan environmental assessment regime relies on self-assessment by a proponent (either government or private sector) to determine whether or not the *EAA* is applicable. This determination is made by reference to the *Technical Proposal Guidelines*[8] issued by the Ministry of Environment. In addition, there are specific guidelines developed for the oil and gas, mineral exploration and intensive livestock operation sectors.

If the undertaking is determined to be a "development" by the proponent or the conclusion is unclear, then the proponent must submit a technical proposal to the Ministry of Environment for confirmation that the undertaking is indeed a development. The next step is submission of proposed terms of reference which are subject to review, along with the technical proposal, by the environmental assessment branch of the Ministry (the "EA Branch"). Upon approval of the terms of reference, the proponent must prepare and submit an environmental assessment report. The EA Branch reviews the environmental assessment report and prepares its technical review comments which are subject to public review. Finally, the EA Branch submits the environmental assessment report, its technical review comments and the public comments to the Minister. The Minister decides to approve, approve with conditions or reject the proposed development.

[8] Ministry of Environment, *Technical Proposal Guidelines: A Guide to Assessing Projects and Preparing Proposals under the* Environmental Assessment Act (November 2012, Government of Saskatchewan).

The *EAA* does not set out requirements as to what matters must be addressed by the proponent in the environmental assessment report. However, the *Technical Proposal Guidelines* do provide some information in this regard, as do the sector guidelines.

One critique of the Saskatchewan environmental assessment regime is that, in practice, most undertakings are screened out which means there is little opportunity for public input.[9] Another critique is that, although practice has changed, the *EAA* remains virtually unchanged since its enactment in 1980.[10] In addition, no regulations have been developed to flesh out the legislation.[11]

Section 5 of the *EAA* provides that the Minister may enter into agreements with other governments (federal, provincial, territorial or other nations) for the purposes of furthering, undertaking and enforcing the minister's activities and responsibilities under the *EAA*. In this regard, Saskatchewan has entered into the *Canada-Saskatchewan Agreement on Environment Assessment Cooperation (2005)*. This agreement applies where an environmental assessment is required by both federal and provincial legislation. The agreement addresses process items such as establishing a lead party for the purposes of the environmental assessment process, establishing a joint advisory review team, timelines and communications. The agreement also provides explicitly for transboundary considerations with both parties agreeing that environmental effects of a project must be assessed regardless of the location of jurisdictional boundaries and that affected jurisdictions must be notified and provided an opportunity to participate in the environmental assessment process.

British Columbia[12]

The environmental assessment regime in British Columbia is governed by the *Environmental Assessment Act* ("*EAA*") and its regulations. In addition, the government has published a series of guidance documents which are available at http://www.eao.gov.bc.ca/guidance.html.

The *EAA* does not include a statutory purposes provision. Although the *EAA* references consideration of environmental, economic, social, heritage or health effects, these terms are not defined in the *EAA*. There is no definition of **environment**.

In British Columbia, only physical activities are subject to the environmental assessment process. That is, there is no requirement for strategic environmental assessment of policies, plans or programs. Similarly to many other Canadian jurisdictions, the *EAA* applies to those projects designated on a list

[9] Marie Ann Bowden and Bert Weichel, *supra* note 7.
[10] *Ibid*.
[11] *Ibid.*
[12] For additional review and critique of British Columbia's environmental assessment regime, see Mark Haddock, *Environmental Assessment in British Columbia* (Victoria: Environmental Law Centre, University of Victoria, 2010); Mark Haddock, "Current Issues in Environmental Assessment in British Columbia" (2010) 21 J.E.L.P. 221; and Sonya Graci and Joanne McKenna, "Chapter 13: British Columbia's Environmental Assessment Act" in Kevin S. Hanna, ed., *Environmental Impact Assessment: Practice and Participation* (Don Mills, ON: Oxford University Press, 2005).

established by the *Reviewable Projects Regulation*, B.C. Reg. 370/2002. In addition, the Minister may require environmental assessment of non-listed projects on an *ad hoc* basis or a project proponent may request environmental assessment of a non-listed project. If a project appears on the reviewable projects list, then it *may* be subject to a provincial environmental assessment.

The British Columbia environmental assessment process consists of three stages: pre-application, application review and decision. At the pre-application stage, it may be determined that an undertaking will not have significant adverse environmental, economic, social, heritage or health effects thereby excusing the project from the environmental assessment process (even though the undertaking may be on the reviewable project list under the regulations). If a project is determined to require an environmental assessment at the pre-application stage, it continues through the remainder of the environmental assessment process.

Once a project is determined to be reviewable, this is confirmed by issuance of a s.10 order by the environmental assessment office ("EAO"). As well, a working group - comprised of representatives from the Canadian Environmental Assessment Agency, government agencies, First Nations, local governments and, if appropriate, officials from neighbouring jurisdictions – is formed for the purposes of the environmental assessment process. The working group advises the EAO about issues related to the environmental assessment and plays a key role in assessing the adequacy of proposed mitigation measures.

The EAO also issues a section 11 order which provides direction on the scope of the project, what aspects of the project will be subject to review, what effects will be considered in the review, and what actions and activities the proponent is responsible for in the environmental assessment. The terms of reference are set out in the Application Information Requirements document which is developed in draft form by the proponent, reviewed by the working group and the public, and approved in final form by the EAO. Once the Application Information Requirements are established, the proponent proceeds to prepare its application for screening by the EAO. Screening is used to determine the completeness of the application. Once deemed complete, the application is reviewed by the EAO, the working group, First Nations and the public. After review, the EAO issues its decision report which includes recommendations and reasons for rejecting or issuing an environmental assessment certificate and recommended conditions. The ultimate decision is made by the Minister of Environment and the Minister responsible for the category of project. The Ministers may refuse or grant the environmental assessment certificate (including conditions), or may send the matter back for further review.

Part 4 of the *EAA* makes provision for class assessments. Currently, there do not appear to be any class assessments approved in British Columbia. If a project is of a type specified in a class assessment, then it is not required to undergo an individual environmental assessment but must comply with the requirements of the class assessment.

Neither the *EAA* nor its regulations specify the matters that must be considered in an environmental assessment. Rather, this is determined by the executive director of the EAO in accordance with section

11 of the *EAA*. The *Environmental Assessment Office User Guide* provides guidance on what may be included in the assessment. The assessment may be required to include information about cumulative effects.

In his reviews of the British Columbia environmental assessment regime, Mark Haddock[13] raises several concerns. He provides an overview of the British Columbia regime as follows: [14]

> There are many different models for environmental assessment regimes internationally, and among them the BC process is considered to be a proponent-driven, project-specific regime in which those proposing to carry out projects that are designated "reviewable" must provide information according to requirements approved for each project and apply for an "environmental assessment certificate" before building a project. The EAO oversees and coordinates the process, liaising between the project proponent and regulatory agencies. To a significant extent the EA process responds to information and analysis provided by the proponent, which is in contrast to EA regimes in which the regulatory agency (or agencies) undertakes responsibility for the bulk of the assessment analysis.

Haddock recommends that several considerations should be required as part of British Columbia's environmental assessment regime including evaluation of need and alternatives to the project, cumulative effects and worst case scenario assessment. As well, Haddock recommends that established standards and protocols be used in the environmental assessment. Rather than the usual focus on procedural matters, Haddock recommends that section 11 orders should include more direction on the contents of the environmental assessment.

In addition, Haddock highlights the lack of a purposes section in the *EAA* and recommends one be included to provide guidance for decision-making. He recommends that definitions and criteria (including sustainability criteria) to guide decision-making be incorporated into the act and its regulations.

In terms of coordination and cooperation with other jurisdictions, the *EAA* provides that an environmental assessment may be suspended pending the outcome of any investigation, inquiry, hearing or other process that is material to the proposed project being conducted by the federal government or by a jurisdiction bordering British Columbia (section30). In addition, section 27 of the *EAA* allows agreements regarding any aspect of environmental assessment with another jurisdiction including the federal government, other provinces or jurisdictions outside Canada.

[13] Mark Haddock, *supra* note 12 at 15.

[14] Mark Haddock, *supra* note 12.

The government of British Columbia has indeed entered into agreements with other jurisdictions on environmental assessment matters. For example, in 2013, British Columbia entered into a memorandum of understanding with the Canadian Environmental Assessment Agency allowing substitution of the British Columbia process under the federal environmental assessment regime. In other words, where both a federal and provincial environmental assessment is required, only the provincial process will be conducted and the federal government will rely upon the provincial process to inform federal decision-making.

Disparities in Provincial Environmental Assessment Regimes

As can be seen in the foregoing review, it is apparent that there is great variation in provincial environmental assessment regimes. Our review of the Alberta, Ontario, Saskatchewan and British Columbia regimes illustrates significant differences with respect to:

- the purposes and goals stated in legislation (if any);
- key definitions, including **environment** and **project**;
- the test used to assess undertakings subject to the environmental assessment process;
- the test for determining which undertakings are subject to the environmental assessment process (such as, strategic environmental assessment and whether a project include alterations, operations and expansions);
- a number of provinces provide little or no legislative direction around project scope;
- in considering the scope of environmental assessment, there are variations in the matters which are required to be considered (if such a list exists) and may or may not include alternatives to the project as a whole, cumulative effects and regional impacts;
- the availability, timing, scope, duration and form of public consultation during the assessment process; and
- the constitution and powers of the decision-makers responsible for environmental assessment reviews and hearings (including whether these are *ad hoc* panels or independent boards/agencies).

In order to facilitate interprovincial coordination and cooperation, these differences need to be addressed. Accordingly, the *Model for Harmonized Provincial Environmental and Sustainability Assessment* attempts to explicitly address and resolve these differences.

A similar conclusion was reached by Carver et al.[15] In conducting a comprehensive review of Canada's provincial and territorial environmental assessment regimes, Carver et al.[16] looked at several elements of environmental assessment as points of comparison. These elements were:

[15] Deborah Carver, Robert Gibson, Jessie Irving, Hilary Kennan and Erin Burbidge, *Inter-jurisdictional Coordination of EA: Challenges and opportunities arising from differences among provincial and territorial assessment*

- basic purposes and core criteria,
- triggers and classes of undertakings affected,
- focus of process,
- scope,
- process options,
- decision-making on process,
- basis for project assessment,
- environmental assessment results and governmental decision-making,
- role of aboriginal communities,
- right to appeal,
- mediation and alternative dispute resolution mechanisms, and
- arrangements for joint environmental assessment processes.

Carver et al. considered that these elements affect the potential for improving inter-jurisdictional coordination. Other commentators[17] have suggested that the role of public participation, consideration of cumulative effects and project scope are also key elements to consider. According to Carver et al.,[18] provincial regimes in Canada differ in all key areas of environmental assessment design. Furthermore, the authors concluded that no one provincial regime can be held up as a model for other jurisdictions to which to aspire.

As pointed out by Gibson and Hanna,[19] the final evolution of environmental assessment regimes is integrated planning and decision-making for sustainability. Such an environmental assessment regime would address policies and programs, as well as projects, and address cumulative local, regional and global effects. In addition, review and decision-making processes would be devoted to empowering the public, would recognize uncertainties and favour precaution, diversity, reversibility, and adaptability, and would integrate sustainability into planning and decision-making processes.

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requirements and processes (Report for the Environmental Planning and Assessment Caucus, Canadian Environmental Network: 2010).

[16] *Ibid.*

[17] Teresa Meadows, *Triggers, Tracks and Trends: A Basic CEAA Primer* (Edmonton: 2009, Miller Thomson) in the University of Calgary Seminar Materials on The Law of Environmental Impact Assessment at 11 highlighted these elements as being aspects of environmental assessment regimes that can result in confusion, overlap, duplication and sometimes contradictory requirements in a joint federal-provincial situation.

[18] Deborah Carver, Robert Gibson, Jessie Irving, Hilary Kennan and Erin Burbidge, *supra* note 15 at 120 -121.

[19] Robert B. Gibson and Kevin S. Hanna, "Chapter 2: Progress and Uncertainty: The Evolution of Federal Environmental Assessment in Canada" in Kevin S. Hanna ed., *Environmental Impact Assessment: Practice and Participation* (Don Mills, ON: Oxford University Press, 2005).

What is Harmonization?

Harmonization of environmental assessment processes has been an interest of considerable interest in Canada albeit primarily in the context of federal-provincial harmonization. As stated by Fox and Roach:[20]

> The dominance of federal-provincial relations on the intergovernmental agenda has meant that interprovincial cooperation in areas of provincial jurisdiction in the West – despite the existence of numerous initiatives and agreements – has not received the attention it deserves among politicians, analysts, or the public. As a result, opportunities for additional cooperation have not been pursued with the same aggressiveness as have relations with the federal order of government. There is, therefore, a need for more cooperation, bolder initiatives, and new mechanisms through which to institutionalize cooperation within the region.

The relatively recent changes to the federal environmental assessment regime demonstrate a clear intention to reduce the federal role in environmental assessment. As such, more attention ought to be given to interprovincial relationships. With a less involved federal government, there is an opportunity for provinces to take the lead on the underutilized fields of regional and strategic environmental assessments. This can be achieved with improved interprovincial cooperation and coordination in environmental assessment.

In developing a *Model for Harmonized Provincial Environmental and Sustainability Assessment*, it is essential to clarify what is meant by **harmonization**. Several commentators have provided guidance on this issue (although usually in the context of federal provincial harmonization). The following definition of harmonization has been provided by Cuming:[21]

> Harmonization eschews any suggestion that what is involved in all cases is identical or even substantially identical legislation in all jurisdictions. Rather, it describes a flexible concept embodying a range of measures that may vary according to the context in which an issue is treated. In one context, it may mean that the relevant law of the jurisdictions involved is characterized by a high degree of similarity in basic principles but not detailed provisions. … In yet other contexts harmonization may not require legislative similarity, but legislative complementarity. This would be the case where harmonization of federal and provincial legislation is involved.

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[20] Lisa Fox and Robert Roach, *Good Neighbours: An Inventory of Interprovincial Cooperation in Western Canada, 1990-2002* (Canada West Foundation: Edmonton, 2003) at 4.

[21] Ronald C.C. Cuming, Research Coordinator, *Perspectives on the Harmonization of Law in Canada* published in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada (Toronto: University of Toronto Press, 1985) at 3.

In other words, harmonization embodies the element of coordination and is not necessarily associated with uniformity.

Other commentators have expressed similar views on the meaning of harmonization. For example, Kennett[22] states that harmonization is not equivalent to legislative uniformity. According to Kennett, the hallmark of harmonization is complementary legislation and involves the element of coordination. Similarly, Ogan[23] states that harmonization need not be equated with legislative uniformity but rather involves coordination.

Others have cautioned against harmonization attempts which result in one jurisdiction deferring to another. For example, Doelle indicates that, while harmonization involves the development of consistent rules in process and substance, implementation or decision-making should not be delegated from one government to another.[24]

Similarly, Kwasniak and Brett recommend "abandoning inappropriate quests for equivalency and substitution and instead, aiming for effective harmonization through coordination, cooperation, and where appropriate, convergence."[25] According to Kwasniak and Brett, harmonization is the movement toward adopting or requiring equivalent standards in laws, regulations or policies. However, they note that uniform environmental assessment law throughout Canada would not be appropriate (primarily due to the differing constitutional authority to deal with environmental assessment possessed by the federal and provincial governments).

Kennett[26] also argues that process coordination, as opposed to substitution, is a better approach to harmonization because it facilitates bringing all relative expertise to bear in the process. As stated by Kennett,[27] "[t]he best hope for avoiding regulatory capture is to incorporate pluralism directly into EA through the direct involvement of the EA regimes of all affected governments." Coordination is more likely to maximize the pluralism of values, interests and perspectives considered in environmental assessment. In contrast, substitution forgoes many benefits of coordination, such as, provision of complete information and analysis to decision-makers, the accommodation of multiple interests and

[22] Steven A. Kennett, "Interjurisdictional Harmonization of Environmental Assessment in Canada" in Steven A. Kennett (ed.), *Law and Processes in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993).
[23] Marshal Ogan, "An Evaluation of the Environmental Harmonization Initiative of the Canadian Council of Ministers of the Environment" (2000) 10 JELP 15.
[24] Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Ontario: LexisNexis, 2008).
[25] Arlene Kwasniak and David Brett, "Environmental Assessment and Federalism: A Public Interest and Proponent's Perspective" in University of Calgary, *The Law of Environmental Impact Assessment: A Seminar Hosted by the University of Calgary Faculty of Law* (May 14, 2009) at 2.
[26] Steven A. Kennett, "Chapter 5: Meeting the Intergovernmental Challenge of Environmental Assessment" in Patrick C. Fafard and Kathryn Harrison, *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston: 2000, School of Policy Studies, Queen's University).
[27] *Supra* note 26 at 127.

values (including both government policies and other perspectives), and the opportunities for process diversity and innovation.

For the purposes of the *Model for Harmonized Provincial Environmental and Sustainability Assessment* (the "*ELC's Model*"), **harmonization** refers to improved coordination and cooperation amongst provinces rather than attempting to achieve legislative uniformity or enabling a form of delegation (such as substitution). Kwasniak and Brett[28] suggest that, in the context of environmental assessment, most harmonization will pertain to process matters such as best practice requirements for cumulative effects assessments, monitoring and public participation. The *ELC's Model* strives to provide consistent objectives and principles for environmental and sustainability assessment, as well as, establishing triggers requiring interprovincial cooperation and coordination. Interprovincial harmonization should not result in lower standards for assessment, nor should any province defer its decision-making to another. According to Kwasniak and Brett,[29] either of these results would qualify as "bad harmonization". The goal of the *ELC's Model* is to achieve interprovincial coordination and cooperation that adheres to high environmental and sustainability standards.

Why should we harmonize?

Efforts to harmonize environmental and sustainability assessment on an interprovincial level should be guided by the potential benefits of such harmonization. Remember that for the purposes of the *ELC's Model*, harmonization refers to improved coordination and cooperation amongst provinces rather than attempting to achieve legislative uniformity or enabling delegation. Harmonization on an interprovincial level can enable effective consideration and management of regional environmental issues. This is especially true in the case of a cooperative and coordinated regional or strategic assessment. As well, a harmonized approach can facilitate addressing matters such as transboundary environmental impacts because a process will be pre-existing and established rather than proceeding on an *ad hoc* basis. In the absence of national standards - and in light of the federal government stepping back from environmental assessment – interprovincial harmonization also presents an opportunity to address provincial disparities in environmental assessment regimes.

The rationale for interprovincial harmonization across a variety of policy areas such as trucking, securities and power generation is discussed in *Common Ground: The Case for Interprovincial Cooperation in Western Canada*.[30] The author considers interprovincial cooperation to be a means to save money, reduce confusion both within a region and among external investors, and to increase economic performance. As well, he notes that cooperation allows regional issues such as environmental protection and water management to be addressed and states that "[w]ithout regional cooperation,

[28] Arlene Kwasniak and David Brett, "Environmental Assessment and Federalism: A Public Interest and Proponent's Perspective" in University of Calgary, *The Law of Environmental Impact Assessment: A Seminar Hosted by the University of Calgary Faculty of Law* (May 14, 2009).
[29] *Ibid.*
[30] Robert Roach, *Common Ground: The Case for Interprovincial Cooperation in Western Canada* (Canada West Foundation: Edmonton, 2003).

effective public policy in areas that cross borders is not possible."[31] Given the range of environmental issues that impact provinces but extend beyond provincial boundaries – for example, greenhouse gas management, protection of species at risk habitat, water management – a coherent, cooperative approach to addressing these issues would be beneficial. The *ELC's Model* is meant to provide that coherent, cooperative approach by enabling interprovincial environmental and sustainability assessment for strategic and regional issues.

Specifically in the context of environmental assessment, Carver et al. describe the purpose of harmonization as follows: [32]

> The essential goal of all inter-jurisdictional coordination efforts should be overall enhancement of decision making and end results. The many EA regimes in Canada have co-evolved over several decades but under different circumstances and subject to different traditions and pressures. All of these regimes have their own strengths and limitations as well as conflicts and incompatibilities with each other. Addressing demands for better inter-jurisdictional coordination of EA is therefore also an opportunity to strengthen EA in Canada overall.

Another key task in interjurisdictional environmental assessment coordination identified by Carver et al. is to ensure issues are addressed in a timely and well-integrated manner.

The objectives of environmental assessment harmonization have been expressed by Kennett as follows:[33]

- eliminate unnecessary duplication, cost, complexity and inconsistency of environmental assessment requirements where a project is regulated by two or more jurisdictions;
- create procedural certainty regarding environmental assessment approvals by establishing clear requirements and time frames to avoid reinvention or *ad hoc* development of processes in situations of overlapping jurisdictions; and
- ensure the overall integrity and essential standards of each jurisdiction's environmental assessment regime are respected in the harmonized review process.

According to Kennett,[34] benefits of harmonization include neutralization of the argument that high environmental standards are barriers to investment (since all jurisdictions have the same standards) and the avoidance of intergovernmental conflict. While his comments were made in the context of discussing federal provincial interactions, Kennett's conclusions are applicable to interprovincial interactions. In the event that two or more provinces assert interest in a single undertaking, procedural certainty and elimination of duplication via an established process is beneficial to all involved parties. Further, a process for harmonization should be designed to facilitate cooperation and coordination

[31] *Ibid.* at 5.
[32] Deborah Carver, Robert Gibson, Jessie Irving, Hilary Kennan and Erin Burbidge, *supra* note 15 at 4 -5.
[33] Steven A. Kennett, *supra* note 22 at 300-301.
[34] *Ibid.*

without a loss of autonomy or reduction of standards for either province. The end goal of interprovincial harmonization, as with federal provincial harmonization, is improved decision-making. As stated by Kennett, "intergovernmental harmonization of environmental assessment procedures is essential for effective and efficient environmental management in Canada".[35]

Indeed, in some instances, interprovincial harmonization of environmental assessment processes seems essential. Given that a province's jurisdiction is limited to matters within its own boundaries, a province is not able to regulate extra-provincial sources of pollution. Nor is there a clear federal law that provides a basis for recourse through the courts in cases of transboundary effects.[36] Aside from the issue of extra-provincial pollution, activities within a province can have tremendous environmental impacts on another province. As stated by Kennett: [37]

> Attention to interprovincial and provincial-territorial transboundary issues within Canada reflects the recognition of ecosystems as the logical units for many aspects of environmental management.

Given that environmental concerns are frequently regional in nature and beyond the capacity of a single province, interprovincial cooperation and coordination provides an opportunity to address larger environmental concerns. The concepts of strategic and regional environmental assessment fit neatly into a harmonized interprovincial approach to environmental assessment.

Strategic and regional environmental assessment present an opportunity to consider and evaluate public policy objectives and alternatives, address cumulative effects, and plan on a regional or sectorial basis. It has been argued, that inefficiencies and delays in project-based assessments are caused, in part, by failure to address major environmental and sustainability issues at a strategic level.[38]

Consideration of broad, overarching policy and environmental issues can be addressed through regional or strategic environmental assessment thereby providing guidance to project-based assessments. In fact, according to Benevides et al.,[39] one of the main benefits of strategic environmental assessment is setting a strategic context for project-based environmental assessments making them more efficient and, in some cases, unnecessary. Further, the strategic decisions may not need to be revisited at later stages thereby reducing costs, time and confusion. As well, strategic environmental assessment can also assist with scoping and setting terms of reference for subsequent project-based environmental assessments.

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[35] Steven A. Kennett, *supra* note 22 at 297.
[36] Steven Kennett, "Chapter 7: Boundary Issues and Canadian Environmental Legislation" in Lynton K. Caldwell and Robert V. Bartlett, *Environmental Policy: Transnational Issues and National Trends* (Westport, CT: Quorum Books, 1997).
[37] *Supra* note 36 at 136.
[38] Deborah Carver, Robert Gibson, Jessie Irving, Hilary Kennan and Erin Burbidge, *supra* note 15.
[39] Hugh Benevides, Denis Kirchhoff, Robert Gibson and Meinhard Doelle, *Law and Policy Options for Strategic Environmental Assessment in Canada (December 2008, amended October 2009)*, published on rcen.ca website and submitted to the Canadian Environmental Assessment Agency.

As an example, the proposed Northern Gateway Pipeline raised a variety of social, economic and environmental issues in a multi-jurisdictional setting. This project garnered significant public attention with thousands of Canadians requesting the opportunity to participate in the formal proceedings before the National Energy Board. Public concerns touched on matters such as the appropriate approach to extracting oil sands resources (including the greenhouse gas implications), potential impacts on endangered species, potential impacts on traditional aboriginal lands and wilderness areas, pipeline and tanker safety, and so forth. As well, the Province of British Columbia raised concerns with the level of risk being borne by its residents and the lack of financial benefits accruing to the province. All these issues certainly were relevant to the proceeding but also raised significant policy issues which could have been more effectively addressed in regional or strategic environmental assessment processes that would inform the project-based assessment. Concerns such as regulating greenhouse gas emissions caused by oilsands extraction, the appropriate rate of extraction, the best means of dealing with extracted product (i.e. shipping raw product versus refinement in Canada), and risk/profit sharing could be addressed in a strategic environmental assessment of interprovincial energy policy.

Similar experiences have arisen in the proposed Energy East Pipeline and Trans Mountain Pipeline Expansion processes. The Energy East Pipeline is a 4,600 km pipeline project which involves the conversion of an existing pipeline, construction of additional pipelines across several provinces to link up to the converted pipeline, and construction of associated facilities such as tank terminals and pump stations. The National Energy Board process is ongoing as at October 2015 and has raised significant public attention, including opposition from the Premier of Quebec.[40] The Trans Mountain Pipeline Expansion project involves twinning of an existing 1,150 km pipeline from Alberta to British Columbia. As at October 2015, the National Energy Board process is ongoing and the project has raised significant public attention, including opposition from the City of Burnaby.[41]

In his analysis of the history and factors informing energy policy in Canada, Winfield[42] notes that the current federal government has been focused on energy resource development and export, and the removal of perceived environmental constraints on development. Among other recommendations, Winfield emphasizes the need for federal energy policies to address the interests of non-fossil fuel exporting provinces, the adoption of a carbon pricing mechanism, and strengthening the environmental regulatory framework for energy resources development. It is submitted that strategic environmental assessment could be used to achieve these goals.

[40] See for example, http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/transcanadas-energy-east-pipeline-yet-to-win-quebec-over-premier-says/article26588826/.
[41] See the City of Burnaby's press releases on the proposed project at https://www.burnaby.ca/Proposed-Kinder-Morgan-Trans-Mountain-Expansion-Project/City-of-Burnaby-Press-Releases.html?PageMode=Print.
[42] Mark S. Winfield, ""Dirty Oil", "Responsible Resource Development" and the Prospects for a National Conversation about Energy Sustainability in Canada" (2013) 25 JELP 19.

There has been extensive academic research defining strategic environmental assessment and its principles. Strategic environmental assessment can take a variety of forms. As described by Doelle et al.: [43]

> Perhaps the most familiar form of SEA is the assessment of a proposed government policy, plan and program. This form of SEA is a reactive process that seeks to identify potential environmental concerns associated with proposed government action before Cabinet approval is granted. However, SEAs can take many other forms. Some have focused on specific industry sectors (e.g. offshore wind or tidal power production) or a particular type of activity (e.g. energy, aquaculture, fishing). Others have focused on a range of activities in a given region. SEAs can also be used to develop a new policy, plan or program, or assess existing policies.

One particular form of strategic environmental assessment - regional strategic assessment (R-SEA) - has been defined as a "process designed to systematically assess the potential environmental effects, including cumulative effects, of strategic initiatives, plans, or programs for a region."[44] In other words: [45]

> R-SEA is about informing the development of strategic initiatives, policies, plans or programs for a more informed and efficient downstream project-based environmental impact assessment and regional environmental management initiatives. Emphasis is on ensuring the sustainability of a region and a desired level of environmental or socioeconomic quality, rather than solely on impact mitigation.

According to Noble and Harriman, good R-SEA adheres to several core principles: [46]

> **Strategic**: identifies strategic initiatives, evaluates alternatives, and formulates a strategy for moving forward
> **Futures-oriented**: focuses on identifying possible futures and the means to shape regional outcomes
> **Early commencement**: is undertaken at the earliest possible stages of decision making, to inform the development of strategic initiatives, policies, plans, or programs
> **Cumulative effects-focused**: identifies cumulative effects as the real effects of concern operating at the regional scale

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[43] Meinhard Doelle, Nigel Bankes and Louie Porta, *CIRL Occasional Paper #39: Using Strategic Environmental Assessment to Guide Oil and Gas Exploration Decisions in the Beaufort Sea: Lessons Learned from Atlantic Canada* (Calgary, AB: 2012, Canadian Institute of Resources Law) at 10.
[44] Bram Noble and Jill Harriman, Regional Strategic Environmental Assessment (R-SEA): Methodological Guidance and Good Practice (Edmonton: Government of Alberta, 2008) at 9.
[45] *Supra* note 44 at 16-17.
[46] *Supra* note 44 at 17-18. Similar principles have been identified by Doelle and others; see Meinhard Doelle, Nigel Bankes and Louie Porta, *supra* note 44; Robert Gibson et al. *Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options* (2009) 22 JELP 175; and Hugh Benevides, Denis Kirchhoff, Robert Gibson and Meinhard Doelle, *supra* note 39.

Multi-tiered: assessment informs, and is informed by, broader regional and multi-regional environmental management and also downstream project assessment and decision-making
Multi-scaled: primary issues of cumulative effects can be revisited, where needed, not only at different tiers but also at different spatial scales
Multi-sectorial: encompasses the activities, policies and plans of multiple sectors that may exist in a region or that may influence regional-based processes and decision-making
Participatory: ensures early and ongoing involvement of relevant stakeholders and interested parties in assessment, monitoring and management
Opportunistic: provides an opportunity to examine regional development through broader stakeholder debate, and identifies the need to create or modify institutional arrangements for improved environmental management
Adaptive: treats strategies and policies, plans and programs as 'experiments,' expecting to modify and adapt them as new knowledge is gained through implementation, monitoring, and feedback.

Currently, no Canadian jurisdiction has a transparent and well-established strategic environmental assessment**.**[47] Gibson et al. [48] recommend that core processes and substantive requirements be set in legislation and that more flexible additional requirements and expectations be set in guidelines. In the context of province-province cooperative and coordinated environmental assessment, this would mean that each province would need the legislative structure to enable strategic environmental assessment with other jurisdictions. Interprovincial agreements for cooperation and coordination would be required to set basic requirements and expectations in terms of process.

Harmonization for the purposes of improved coordination and cooperation amongst provinces can have several benefits. Cooperative and coordinated regional or strategic assessment can be used to enable effective consideration and management of regional environmental issues. As well, a harmonized approach can facilitate addressing matters such as transboundary environmental impacts using an established process (as opposed to proceeding on an *ad hoc* basis). In the absence of national standards - and in light of the federal government stepping back from environmental assessment – interprovincial harmonization may also present an opportunity to address provincial disparities in environmental assessment regimes. The *ELC's Model* strives to achieve these benefits of provincial environmental and sustainability assessment harmonization.

[47] Robert Gibson et al., *supra* note 46.
[48] Robert Gibson et al., *supra* note 46. See also Hugh Benevides, Denis Kirchhoff, Robert Gibson and Meinhard Doelle, *supra* note 39.

How to achieve harmonization?

Given the potential benefits of harmonizing provincial environmental and sustainability assessment, the question becomes the best path to achieving harmonization. As stated by Roach, in discussing interprovincial cooperation generally: [49]

> For greater interprovincial cooperation to become a reality, at least two key things need to happen. First, the research community needs to undertake a series of studies aimed at demonstrating the benefits of regional cooperation in concrete empirical terms. More hard evidence of the benefits of working together will help overcome the obstacle to greater interprovincial cooperation rooted in the fact that four separate and elaborate provincial political systems sometimes leads to an overzealous "my province first" mentality. Looking out for provincial interests makes sense in many instances, but not in those cases where the benefits of regional cooperation are clear, significant, and achievable. Second, the western provinces need to explore the development of regional institutions:
>
> > Western Canadians lack the institutional capacity to plan regionally, and representational shortfalls limit the capacity of the federal government to address regional issues. As a consequence, the cooperation and coordination so essential for regional prosperity cannot be fostered without significant institutional development. (Gibbins 2001, 20)

Specifically in the context of environmental assessment, Carver et al.[50] have identified several approaches to coordinating disparate provincial regimes. The various approaches are:

- The null approach which means that nothing is done to coordinate provincial environmental assessment regimes. In discussing this approach, the authors note that many calls for coordination actually seem to be aimed at lowering standards without being clear which inefficiencies would be addressed.
- Deferral of environmental assessment responsibilities from one level of government to another. Typically, it is suggested by advocates of this approach that the federal government defer to provincial environmental assessment processes while retaining decision-making power.
- Enhanced multi-jurisdictional cooperation through joint application processes. The authors note that this is the main approach to coordination in Canada (and is probably the most promising approach although it cannot overcome regime differences by itself). Typically, this approach is accomplished using bilateral agreements.

[49] Robert Roach, *Common Ground: The Case for Interprovincial Cooperation in Western Canada* (Canada West Foundation: Edmonton, 2003) at 14.
[50] Deborah Carver, Robert Gibson, Jessie Irving, Hilary Kennan and Erin Burbidge, *supra* note 15.

- Pilot collaboration in emerging areas that are not well addressed by existing regimes, for example strategic environmental assessment.
- Targeted regime changes could be made to focus on particular elements of law and process design rather than comprehensive change of entire regimes.
- Incorporate best practices into the federal regime and use it as the Canadian standard. This approach requires efforts being made to bring provinces up to the higher federal standards.
- Development of a Canadian environmental assessment standard using a collaborative effort to develop an upward harmonization target. The authors note that, in the 1990s, efforts made to establish a standard best practices guide but these efforts were ultimately abandoned.

The *ELC's Model* incorporates several of these approaches: joint processes, targeted regime changes and expanding the use of strategic environmental assessment. In light of the recent changes to federal environmental assessment law and the federal government's apparent intention to step back from environmental assessment, incorporating best practices into the federal regime to be used as a Canadian standard is not currently a viable option. As well, the ELC is not supportive of the approach of one jurisdiction deferring to another.[51] Effective harmonization should lead to adoption of high standards in the public interest and not involve one jurisdiction deferring its authority or involvement to another.

Other commentators - Fitzpatrick and Sinclair[52] - have considered the best approach to facilitating interjurisdictional coordination of environmental assessment in Canada. According to Fitzpatrick and Sinclair, harmonization (as opposed to standardization or substitution) is the most realistic approach for coordinating efforts. Harmonization has the potential to minimize duplication, avoid process uncertainty, and increase efficiency and effectiveness in environmental assessment. As well, the authors note that both bilateral agreements and project specific agreements have been used to achieve environmental assessment harmonization in Canada, with the former having the greatest chance of success. The authors stress that the approach to developing bilateral agreements needs to change in order to allow public participation in the process.

Fitzpatrick and Sinclair[53] suggest that bilateral agreements for environmental assessment harmonization ought to focus on several matters. For example, bilateral agreements should define **environment** and **environmental effects**, define the scope of assessment including identification of ecosystem components to be considered, and define **project** because that is a critical factor in

[51] For more information on this point, please see Brenda Heelan Powell, *Environmental Assessment & the Canadian Constitution: Substitution and Equivalency* (Edmonton: Environmental Law Centre, 2013).
[52] Patricia Fitzpatrick and A. John Sinclair, "Multi-Jurisdictional Environmental Impact Assessment: Canadian Experiences" (2009) 29 Environmental Impact Assessment Review 252.
[53] See *supra* note 52; and Patricia Fitzpatrick and A. John Sinclair, "Chapter 9: Multi-jurisdictional Environmental Assessment" in Kevin S. Hanna ed., *Environmental Impact Assessment: Practice and Participation* (Don Mills, ON: Oxford University Press, 2005).

determining whether an environmental assessment is to be triggered. In addition, Fitzpatrick and Sinclair suggest that special attention should be paid to public participation. A bilateral agreement should contain specific reference to best practices for public participation such as public notice, access to information, participant funding, opportunities to comment on environmental assessment reports, and notification of schedule changes. As well, the public should be actively involved in setting the assessment process. According to Fitzpatrick and Sinclair, the public participation aspect requires special attention because it is often compromised in the efforts to achieve environmental assessment coordination.

While recognizing bilateral agreements as the most promising approach to achieving environmental assessment harmonization, Fitzpatrick and Sinclair acknowledge that drafting bilateral agreements presents significant legal challenges. Because provinces do not want to create new environmental assessment regimes or to lose decision-making authority, "…the extent that EA laws are harmonized through these agreements is questionable; rather they tend to be cooperative agreements on how to proceed."[54]

Another commentator - Kennett[55] - indicates that the predominant form of harmonization in Canada has been the use of bilateral agreements to overcome jurisdictional and geographical boundaries. He indicates that a second approach is to establish a mechanism for process substitution that would result in allocation of environmental assessment responsibility to one level of government.[56] In the ELC's view, the approach of one jurisdiction deferring to another is not desirable because effective harmonization should not involve one jurisdiction deferring its authority or involvement to another.[57]

The *ELC's Model* is drafted as a bilateral agreement because it is a familiar and accepted approach to harmonization. If the objective of harmonization is seen to be achieve cooperation and coordination (as opposed to identical legislation amongst provinces), bilateral agreements are a promising tool for harmonization. Successful harmonization will require mutually accepted definitions of key concepts (such as environment, environmental effects) and mutually adoption of key aspects of the environmental assessment process (such as triggering, public participation). This does not require identical environmental assessment regimes be adopted by all provinces; rather, the bilateral agreement applies to instances of the provinces acting in a coordinated and cooperative manner such as addressing transboundary environmental impacts or broader, regional issues.

[54] Patricia Fitzpatrick and A. John Sinclair, *supra* note 53 at 181.
[55] Steven Kennett, "Chapter 7: Boundary Issues and Canadian Environmental Legislation" in Lynton K. Caldwell and Robert V. Bartlett, *Environmental Policy: Transnational Issues and National Trends* (Westport, CT: Quorum Books, 1997).
[56] Steven A. Kennett, *supra* note 36.
[57] For more information on this point, please see Brenda Heelan Powell, *supra* note 51.

Experiences with Harmonization

A broad examination of legislative harmonization in Canada has been conducted by Cuming.[58] He concludes that there are not effective mechanisms to facilitate harmonization of laws that deal with matters of national importance. However, he identifies several types of harmonization that have occurred in Canada:

- Spontaneous harmonization which is the product of separate decisions by legislators to adopt laws of other jurisdictions as a model and leads to laws that are substantially similar even though there is no formal mechanism for harmonization.
- Induced harmonization which occurs through the use of federal spending power or through the threat of the federal government exerting its authority in a matter of shared jurisdiction by setting regulations. The result is substantial uniformity in the design and delivery of public programs.
- Bureaucratic harmonization results from joint effort on the part of bureaucracies established to administer government programs and regulatory structures.
- Institutional harmonization where organizations with a mandate for law reform effect harmonization.

Cuming notes that while spontaneous harmonization has historically been an important factor in developing laws in Canada, it is a haphazard means of achieving harmonization. Much of the focus of harmonization efforts has been directed at federal-provincial harmony but, as noted by Neilson,[59] the quest for uniformity and harmonization frequently starts at the interprovincial level.

In the context of environmental assessment harmonization, Canadian harmonization efforts have essentially resulted in agreements to agree.[60] Gibson and Hanna[61] note that the participants in harmonization efforts often have conflicting objectives with project proponents seeking broad simplification, environmental organizations seeking high standards of public process, and provinces

[58] Ronald C.C. Cuming, "Chapter 1: Harmonization of Law in Canada: An Overview" in Ronald C.C. Cuming, Research Coordinator, *Perspectives on the Harmonization of Law in Canada* published in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada (Toronto: University of Toronto Press, 1985).
[59] William A. W. Neilson, "Chapter 2: Interjurisdictional Harmonization of Consumer Protection Laws and Administration in Canada" in Ronald C.C. Cuming, Research Coordinator, *Perspectives on the Harmonization of Law in Canada* published in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada (Toronto: University of Toronto Press, 1985) 59. In this article, Neilson considers harmonization of consumer protection laws in Canada and identifies several models for harmonization and interjurisdictional legislation on a federal-provincial basis.
[60] Robert B. Gibson and Kevin S. Hanna, *supra* note 19.
[61] *Ibid*.

seeking minimal federal involvement. Frequently, the concern that environmental standards will be lowered by harmonization efforts has been raised. [62]

Perhaps the most significant efforts for harmonization of environmental assessment processes in Canada have been the development of a CSA Standard for Environmental Assessment and the CCME Framework for Environmental Assessment. Both of these harmonization efforts occurred in the 1990s.

CSA Standard for Environmental Assessment

In the late 1990s, there was negotiation for a CSA standard for environmental assessment which would have provided a consistent set of guidelines to be used federally and provincially.[63] While there was development of a progressive 14th draft, the initiative was ultimately suspended when the provinces withdrew from the negotiation. If the CSA standard had been completed and adopted, this would have resulted in an uniform approach to environmental assessment throughout Canada.

As stated in the draft, the:[64]

> National Standard for Environmental Assessment is intended to provide organizations with an effective environmental assessment (EA) process based on established EA practices and principles. These practices and principles include the effective and timely integration of environmental considerations into project planning and an open and fair process.

The draft established key definitions and key requirements for environmental assessment processes. These included scoping of the assessment, analysis of environmental effects (including cumulative effects), content of the environmental assessment report, decision-making and follow-up. The draft also included standards for public participation.

CCME Framework for Environmental Assessment

The Canadian Council of Ministers of the Environment ("CCME") embarked on efforts to harmonize environmental regulation in Canada. These efforts were designed to recognize the authority of each province and the federal government, and to set agreements on approaches to environmental regulation. The resulting *Canada-Wide Accord on Environmental Harmonization* included agreements pertaining to environmental assessment. These included a *Cooperative Principles for Environmental*

[62] See, for example, Jodie Hierlmeier, "Alberta – British Columbia Environmental Harmonization: Helping or Hindering the Environment?" (2005) 20(2) Newsbrief. In this case, Hierlmeier considers a memorandum of understanding signed by Alberta and BC (MOU) which has the object of promoting business efficiency, breaking down trade and investment barriers, and lowering costs to business. Hierlmeier raises the concern that the MOU will adopt the lowest common denominator. In her view, improved environmental protection would be better achieved through adequate organization and the injection of money and staff within provincial boundaries rather than a focus on inter-provincial harmonization initiatives.

[63] Robert B. Gibson and Kevin S. Hanna, *supra* note 19.

[64] The Working Group of the EIA Technical Committee, *Preliminary Draft Standard: Environmental Assessment*, Draft #14 (July 26, 1999) at lines 120-123.

Assessment (May 6, 1991), a *Framework for Environmental Assessment Harmonization* (November 26, 1992) and a *Sub-Agreement on Environmental Assessment* (1998). All these documents stress the need for efficiency and reduction of uncertainty and duplication in environmental assessment processes.

The document providing the most operational detail is the *Sub-Agreement on Environmental Assessment* (1998); however, it was essentially an agreement to agree. For example, s. 4.1.1 of the sub-agreement indicates that if the parties have differing definitions of environment or environmental effects, then a definition will be adopted (as opposed to setting a definition in the agreement). As another example, s. 4.1.0 sets out information to *possibly* be included in an environmental assessment report.

The CCME's efforts to harmonize environmental regulation in Canada have generated extensive commentary. With respect to the harmonization of environmental assessment, many have expressed concern with minimization of the federal role under the Accord.[65] Hazell[66] disputes the assertion that the CCME's Accord is aimed at reducing regulatory duplication. Similarly, Ogan[67] asserts that reduction of the federal role in environmental assessment is not clearly a means to achieve efficiency. Nor, according to Ogan, is the harmonization designed to enhance environmental protection and to support sustainable development.

The CCME's approach has been compared to Australia's approach by both Ogan[68] and Kennett.[69] As stated by Ogan, the Australian approach is "more focused, has a central, well-defined objective of sustainable development and is based on the national consensus regarding specific management principles and appropriate intergovernmental (including local governments) agreements that would enhance cooperation."[70] In addition, both Ogan and Kennett note that the Australian approach adopts the "full faith and credit" principle which allows accommodation of the interest of one government in the execution of the responsibility of the other and specifies which process applies in the case of overlap. As noted by both authors, the Australian approach contrasts with the CCME's approach which is general and limited to broad principles for harmonization.

Another major concern with the CCME's approach to harmonization is the fact that intergovernmental agreements are not binding. [71] The environmental assessment agreements negotiated by the CCME are merely administrative and do not bind the governments in any substantive way. This may, to some

[65] Stepan Wood, Georgia Tanner and Benjamin J. Richardson, "What Ever Happened to Canadian Environmental Law?" 37 Ecology Law Quarterly 981; Marshal Ogan, *supra* note 23; and Stephen Hazell, *Canada v. The Environment: Federal Environmental Assessment 1984-1998* (Toronto: Canadian Environmental Defence Fund, 1999).
[66] Stephen Hazell, *supra* note 65.
[67] Marshal Ogan, *supra* note 23.
[68] Marshal Ogan, *supra* note 23.
[69] Steven A. Kennett, *supra* note 22.
[70] Marshal Ogan, *supra* note 23.
[71] William R. MacKay, "Canadian Federalism and the Environment: The Literature" (2004) 17 Georgetown Int'l. Envtl. Law Review 25.

degree, be a reflection of the constraints on intergovernmental agreements identified by Lucas and Sharvit.[72] Lucas and Sharvit note that the establishment and enforcement of environmental standards is a matter of shared federal – provincial jurisdiction which means one level of government cannot absolutely bind the other. This is the case with interprovincial agreements as well; one province cannot purport to bind the other to certain standards. However, as noted by Lucas and Sharvit, it is possible to require a process of intergovernmental consultation.

The *ELC's Model* strives to avoid the shortcoming of the CCME agreements on environmental assessment: the failure to keep environmental objectives as the central goal of harmonization, the deference of one jurisdiction to another and the lack of clarity and substantive provisions.

Criteria for the Model for Harmonized Provincial Environmental and Sustainability Assessment

Given that the Canadian Constitution limits provincial authority to conduct environmental assessment to matters within their own boundaries, there are 2 key arenas in which interprovincial harmonization of environmental assessment processes can play a role: transboundary environmental effects and strategic, regional approaches to overarching environmental matters. While there is no legal imperative compelling cooperation or coordination in these cases, it would prove mutually beneficial to participating provinces. It allows a province the opportunity to address potential impacts within its boundaries on its resources and its citizens (even though the source of the impact is elsewhere). Furthermore, interprovincial cooperation and coordination reflects the fact that ecosystems do not abide by political boundaries. Harmonization is most likely to be achieved through the use of interprovincial agreements implemented using appropriate legislative, regulatory and policy reform within each participating province.

Prior to negotiating an inter-provincial agreement, it is essential that certain requirements be met to ensure accountability and transparency. As stated by Bankes:[73]

> We have a process for enacting statutes; what we need is a political process for negotiating and implementing intergovernmental agreements as well as a legal process which helps ensure accountability.

Other commentators have recommended that intergovernmental agreements should be developed in a transparent manner with meaningful opportunities for public participation.[74] In addition, for the

[72] Alastair R. Lucas and Cheryl Sharvit, "Underlying Constraints on Intergovernmental Cooperation in Setting and Enforcing Environmental Standards" in Patrick C. Fafard and Kathryn Harrison, *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston: School of Policy Studies, Queen's University, 2000).

[73] Nigel Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991) 29 Alta. L. Rev. 792 at 797.

purposes of transparency, it has been recommended that intergovernmental agreements should be located in a central registry with requirements for reporting on administration and enforcement. [75]

As previously defined by the ELC, meaningful public participation is the ability of members of the public to engage in the process and to contribute to decision-making.[76] Several principles for public participation in environmental assessment processes have been proposed by Doelle and Sinclair, including early and ongoing participation, ready access and timely exchange of information, and participant funding.[77] These principles reinforce the idea that a key purpose of EA is to enable public participation which contributes to the assessment.

As such, it is essential that interprovincial agreements for the purposes of environmental assessment harmonization be negotiated in a transparent manner that accommodates and encourages meaningful public engagement. This requires public notice of the intention to negotiate an interprovincial agreement, full and convenient access to information, a reasonable period of time to prepare and present public input, and fair consideration of public input by the provincial agencies responsible for negotiating the interprovincial agreements.

For the purposes of ongoing transparency, interprovincial agreements must be made readily accessible to the public. As well, requirements should be established for reporting on implementation of interprovincial agreements. This would include reporting on consequential legislative, regulatory and policy changes made to implement the agreement. In addition, the conduct of environmental and sustainability assessments undertaken pursuant to the agreement should be reported.

As indicated above, for the purposes of the *ELC's Model*, harmonization refers to improved coordination and cooperation amongst provinces rather than attempting to achieve legislative uniformity or enabling a form of delegation. The goal of harmonization is to achieve coordination and cooperation without compromising high environmental standards that are in the public interest. Numerous principles for achieving this type of upward harmonization of environmental assessment have been proposed by Carver et al.[78] Among others, these principles include:

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[74] Donna Tingley, *Models and Instruments for Harmonization* (Edmonton: Strategic Management Division of Alberta Environmental Protection, February 25, 1994) under contract to the CCME. See also Marshal Ogan, *supra* note 23, who criticized the CCME Accord for Environmental Harmonization, in part, for lack of transparency and public participation in its development.

[75] Donna Tingley, *supra* note 74.

[76] Brenda Heelan Powell, *supra* note 51 at 10. For a detailed discussion of public participation, see Adam Driedzic, *Standing in Environmental Matters* (Edmonton: Environmental Law Centre, 2014) available at http://elc.ab.ca/public-participation/publications/2014.aspx and Adam Dreidzic, "Proving the Right to be Heard: Evidentiary Barriers to Standing in Environmental Matters" (March 6-7, 2015) A Symposium on Environment in the Courtroom: Evidentiary Issues in Environmental Prosecutions and Hearings, University of Calgary.

[77] Meinhard Doelle and A. John Sinclair, "Time for a new approach to public participation in EA: Promoting cooperation and consensus for sustainability" (2006) 26 Envir. Impact Assess. R. 185.

[78] Deborah Carver, Robert Gibson, Jessie Irving, Hilary Kennan and Erin Burbidge, *supra* note 15 at 6 - 7.

- a clear statement of process purposes, centred on commitment to sustainable development or the equivalent, with appropriate evaluation and decision criteria established in order to ensure that assessed undertakings meet the criteria;
- the core test for any approved undertaking is positive contribution to sustainability (through multiple, fairly distributed, mutually reinforcing and lasting gains) while avoiding significant adverse effects;
- entrench a definition of "environment" that covers social, economic, cultural and biophysical factors and their interrelations;
- ensure early and continuing opportunities for informed and effective public participation in open deliberations;
- facilitate transparent and accountable decision making; and
- include provisions for independent monitoring of coordination and harmonization experience and mandatory public review of the results at regular intervals.

While these principles were proposed in the context of federal-provincial harmonization, it is the ELC's view that they are equally applicable on an interprovincial basis. The goal remains to achieve efficiency and effectiveness through upward harmonization. As with federal-provincial harmonization, interprovincial harmonization efforts must not result in lowered environmental standards or deferral of authority from one jurisdiction to another.

The essential elements for interprovincial harmonization of environmental assessment have been suggested by many commentators. Several of these elements are drawn from experience with transboundary environmental issues in the international arena. For instance, Craik[79] argues that trading off environmental values for economic gain may be a valid domestic policy choice but, if there are significant transboundary environmental risks, that decision cannot be made solely by the source state. He asserts that bilateral agreements for harmonization are the best chance of success in managing transboundary impacts.[80]

In considering arrangements for transboundary environmental assessment on an international basis, Kersten[81] recommends several elements:

- Create political accountability by requiring notification of major environmental non-governmental organizations.
- Create a private right to challenge the procedural adequacy of transboundary environmental assessment thereby ensuring legal accountability.

[79] Neil Craik, "Transboundary Environmental Assessment: International and Constitutional Dimensions" (2010) 21 JELP 107.
[80] Although standardization may be more desirable because it creates a standardized approach to environmental assessment across jurisdictions, Craik, *ibid*, concludes this is not likely to happen due lack of political will.
[81] Charles M. Kersten, "Note: Rethinking Transboundary Environmental Impact Assessment" (2009) 34 Yale Journal of International Law 173.

- Impose a duty of due diligence between states (rather than strict liability) to effectively regulate the manner in which development proceeds (rather than effectively disallowing development). Each state would be required to use the best available technology, choose the best location and take appropriate mitigation measures.

Also drawing from the international arena, Kennett has recommended that the *Espoo Convention*[82] be adopted as a model for a decentralized model of transboundary environmental assessment within Canada.[83] The *Espoo Convention* requires that parties undertake EA prior to authorizing a listed activity that is likely to cause significant adverse transboundary impact. If an activity is not listed under the *Espoo Convention*, a party may still request discussion of whether or not the activity is likely to have significant adverse transboundary impacts. The *Espoo Convention* sets out requirements for notification, minimum contents of a transboundary environmental assessment, and dispute resolution mechanisms.

Kennett's proposed model has six key features: [84]

- A mandatory requirement that transboundary effects be identified and taken into account in each jurisdiction's environmental assessment regime.
- Requirements for notification of parties in other jurisdictions that may be affected by transboundary impacts and a procedure for responding to such notification.
- Guarantee the rights of government and the public in other jurisdictions that may be affected by transboundary impacts to participate.
- A range of formal and informal mechanisms for consultation on transboundary environmental assessment.
- Dispute resolution should be incorporated in legislation and intergovernmental agreements.
- A formal commitment to taking transboundary impacts into consideration when reviewing projects.

Kennett notes that to achieve this decentralized approach, the provincial environmental assessment regimes would need to be amended. As well, interprovincial agreements would have to be made to effectively consider transboundary effects.

In dealing with transboundary environmental effects, the experience in the international arena can be helpful for considering interprovincial coordination and cooperation on transboundary effects. The *ELC's Model* does set out specific requirements for assessing transboundary effects including rights for notification, information sharing, and public participation. As well, mechanisms for creating political and legal accountability are incorporated into the *ELC's Model*.

[82] United Nations Economic Commission for Europe Convention of Environmental Impact Assessment in a Transboundary Context (Espoo, 1991).
[83] Steven Kennett, "The *Canadian Environmental Assessment Act*'s Transboundary Provisions: Trojan Horse or Paper Tiger?" (1995) 5 JELP 263.
[84] *Ibid*.

In considering environmental assessment harmonization in a Canadian context, Tingley has identified several elements that are required for an effective harmonization agreement.[85] According to Tingley, a harmonization agreement should address substantive matters on a comprehensive basis including:

- principles for cooperation,
- environmental principles,
- identification of areas of exclusive jurisdiction and include a mechanism for determining areas of responsibility,
- mechanisms for interface and cooperation in areas of exclusive jurisdiction,
- specific mechanisms for addressing matters of shared jurisdiction,
- dispute resolution mechanisms, and
- time limitations.

As well, Tingley recommends that a harmonization agreement identify and clarify implementation mechanisms, cooperation and consultation mechanisms, financial arrangements, and direction for future negotiations. She also suggests that a harmonization agreement should provide for evaluation of the agreement's operation.

In order to provide a comprehensive model, the *ELC's Model* strives to incorporate the elements identified by Tingley. This includes a clear statement of the co-operative principles and guiding environmental principles adopted in the harmonization agreement. Clear enunciation of these principles is essential to resolving differences between the provincial environmental assessment regimes and to guide future negotiations. Perhaps most importantly, clear co-operative principles and environmental principles are necessary to guide implementation of the harmonization agreement in order to achieve a positive social, cultural, economic and environmental legacy for the involved provinces.

[85] Donna Tingley, *supra* note 74.

Model for Harmonized Provincial Environmental and Sustainability Assessment

Whereas the [provinces] seek to create a positive social, cultural, economic and environmental legacy for current and future generations of our provinces,

Whereas the Governments of the [provinces] acknowledge that environmental and sustainability assessment is internationally recognized as a tool for moving towards sustainability,

Whereas the Governments of the [provinces] recognize that the impacts of undertakings on the environment respect neither political nor physical boundaries, and

Whereas cooperation and coordinated action between provincial governments is essential to advancing progress towards sustainability,

The Governments of the [provinces] enter into this agreement to facilitate cooperative and coordinated planning and design of undertakings in a manner that makes a positive contribution to sustainability.

Guiding Environmental Principles[86]

1. The core objective of environmental and sustainability assessment in each province and when acting in a cooperative, coordinated fashion is to allow only those undertakings that make a positive contribution to sustainability.

2. Effective environmental and sustainability assessment requires comprehensive cumulative effects assessment on a regional basis.

3. A key element of effective environmental and sustainability assessment is the implementation of strategic and regional environmental and sustainability assessment supported by a legal framework.

4. Environmental and sustainability assessment procedures must be fair, predictable and accessible.

5. Efforts to improve efficiency and to reduce duplication must not be at the expense of democratic and constitutional review processes.

[86] Several of these principles were developed by a collection of environmental non-governmental organizations in anticipation of changes to federal environmental assessment laws in 2012. See West Coast Environmental Law et al, Environmental Assessment Law for a Healthy, Secure and Sustainable Canada: A Checklist for Strong Environmental Laws (February 2012) 1, online: http://www.envirolawsmatter.ca/statement_of_principles.

6. The precautionary principle which requires that, if there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.

7. The principle of pollution prevention requires the use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and wastes and promotes continuous improvement through operational and behavioural changes.

8. The principle of inter-generational equity requires that undertakings to meet the needs of the present must not compromise the ability of future generations to meet their own needs.

9. Public participation is essential to the environmental and sustainability assessment process and will be facilitated by ensuring transparency in process and decision-making and by providing full access to information.

10. The principle of integration which requires looking for ways to meet human needs and, at the same time, reduce environmental impacts of human activities.

11. Cooperative and coordinated efforts by the provinces must be implemented in a manner that is constantly improving, that reflects and contributes to evidence-based best practices, and that is open, transparent and accountable.

Guiding Cooperative Principles

12. The provinces acknowledge each other's exclusive jurisdiction to deal with matters within its own provincial boundaries; however, the provinces are committed to conducting environmental and sustainability assessment in a cooperative and coordinated manner.

13. The provinces will act in a cooperative and coordinated manner to conduct environmental and sustainability assessment of those undertakings with potential transboundary impacts. A transboundary impact is a social, cultural, economic or environmental impact within one province caused by an undertaking in another province.

14. The provinces will act in a cooperative and coordinated manner to conduct strategic environmental and sustainability assessments on a regional basis. This includes environmental and sustainability assessment of a province's proposed plans, policies and programs that may have a significant impact on sustainability within another province or on a regional basis.

15. The provinces will conduct their environmental and sustainability assessment processes and related decision-making on due diligence basis. This means each province will effectively regulate the manner in which development proceeds and, in particular, will ensure the use of

best available technology, choose the best location for development, and apply appropriate mitigation and enhancement measures.

16. In harmonizing environmental and sustainability assessment goals and processes, regard will be had to:

    a. creating predictable sharing of assessment responsibility among the governments,
    b. promoting efficient administration of assessment processes among the governments, and
    c. following the highest standards and best practices from among the governments, including the highest levels of public participation and funding.

Definitions[87]

17. For the purposes of this agreement,

    "**cumulative effects**" means those changes to social, cultural, economic, environmental and interactive components caused by an undertaking in light of existing background conditions, the range of possible additional stresses on valued ecosystem components and the potential future activities that will be foreclosed by approving the undertaking in combination with past, present and reasonably foreseeable future human activities including those changes that cross jurisdictional boundaries

    "enhancement" means augmentation of a likely positive social, cultural, economic, environmental or interactive effect of an undertaking to improve its positive contribution to sustainability

    "**environment**" means the components of the Earth and includes:
    a. air, land and water,
    b. all layers of the atmosphere,
    c. all organic and inorganic matter,
    d. all living organisms,
    e. the interacting natural systems that include the above components, and
    f. social, cultural, economic, environmental and interactive features or conditions affecting the lives of individuals or communities

    "environmental and sustainability assessment" means assessment of an undertaking having regard to social, cultural, economic and environmental components to determine if the undertaking will make a positive contribution to sustainability

[87] These definitions are adopted from Brenda Heelan Powell, *supra* note 51.

"**environmental effect**" means any change to the environment caused by a project or a government plan, policy or program and includes short term and long term, direct and indirect, and cumulative changes to:

a. human health and socio-economic conditions and trends,
b. physical and cultural conditions and trends,
c. the current use of lands and resources for traditional purposes by Aboriginal persons, or
d. any structure, site or thing that is of historical, archaeological, paleontological or architectural significance

"**meaningful and effective public participation**" means the factual ability of members of the public to engage in the environmental and sustainability assessment process and to contribute to decision-making and requires, at minimum:

a. notice of a matter to be decided be provided in sufficient form and detail to allow the preparation of public input on the matter,
b. full and convenient access to information,
c. a reasonable period of time to prepare public input,
d. an opportunity to present public input,
e. fair consideration of public input, and
f. explicit consideration of information, comments and evidence provided by the public in the decisions made by the provincial government.

"**mitigation**" means the elimination of a likely adverse social, cultural, economic, environmental or interactive effect of an undertaking, through physical or operational technically feasible means to a point where the undertaking makes a positive contribution to sustainability but does not include restitution, compensation, monitoring, follow-up programs, adaptive management or future plans to determine courses of action

"policy" means a general course of action which guides ongoing decision-making[88]

"plan" means a purposeful, forward looking strategy or design that elaborates and implements policy

"program" means a coherent, organized agenda or schedule of commitments, proposals instruments or activities that elaborates and implements policy

"**project**" means a physical work or physical activity including construction, operation, modification, expansion, decommissioning, abandonment or other endeavour in relation to that physical work

[88] The definitions of "plan", "policy" and "program" are adapted from Barry Sadler, *International Study of the effectiveness of Environmental Assessment (Final Report), Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance* (Ottawa: Canadian Environmental Assessment Agency and International Association for Impact Assessment, 1996).

"**project environmental and sustainability assessment**" means the process wherein sustainability objectives and criteria direct a review of purposes and alternatives to a proposed project to determine whether or not that project is likely to make a positive contribution to sustainability

"**proponent**" means the person, body or government that proposes the undertaking

"**provincial government**" means the Crown in Right of the Province and includes:

a. all ministers appointed to the Lieutenant Governor in Council and their departments and agencies, and
b. Crown corporations and other corporate bodies established in the Province whose board members are appointed by the Crown in Right of the Province or ministers of the Lieutenant Governor in Council

"provincial land" means all lands located in the Province, with the exception of federal lands, including all waters on and airspace above those lands

"**regional environmental and sustainability assessment**" means environmental and sustainability assessment of the interactions among all human activities - including past, current and reasonably foreseeable future undertakings - and natural systems within the geographical scope of the assessment with a particular regard to considering cumulative effects and to establishing regional thresholds of change to provide guidance for the planning and assessment of specific undertakings

"source province" means, in the context of potential transboundary environmental effects, the province in which the proposed undertaking is located

"**strategic environmental and sustainability assessment**" means assessment at a high level to provide a strategic framework for subsequent environmental and sustainability assessment of more specific undertakings, including projects, and includes:

a. assessment of options for a government plan, policy or program to determine whether or not that plan, policy or program is likely to contribute positively to sustainability, or

b. environmental and sustainability assessment on a regional basis.

"**sustainability**" means planning and development that acknowledges the inherent limitations of the environment, that is socially, culturally, economically and environmentally sound, and that meets the needs of the present without compromising the ability of future generations to meet their own needs

"undertaking" means a project or a government policy, plan or program

COORDINATED AND COOPERATIVE ENVIRONMENTAL AND SUSTAINABILITY ASSESSMENT

Undertakings subject to a Coordinated and Cooperative Environmental and Sustainability Assessment

18. An undertaking will be subject to the coordinated and cooperative environmental and sustainability assessment if:

    a. an undertaking has potential to impact the range of a species at risk, an endangered ecosystem, or water body shared by the provinces;
    b. an undertaking has potential to have an significant impact on sustainability in another province which is party to this agreement;
    c. two or more provinces that are party to this agreement propose a joint plan, program or policy; or
    d. a province which is party to this agreement has identified an issue which would benefit from a strategic environmental and sustainability assessment on a regional basis;

19. A member of the public resident in any province that is party to this agreement, who is 18 years or older, may petition for a coordinated and cooperative environmental and sustainability assessment of a proposed undertaking. Within 120 days of receipt of the petition, the provinces must either submit the proposed undertaking to a coordinated and cooperative assessment or deny the petition with reasons.

Undertaking with Potential for Transboundary Impacts

20. Where an undertaking is likely to cause direct social, cultural, economic, environmental or interactive effects on another jurisdiction, the source province shall:

    a. direct that an environmental and sustainability assessment of the undertaking be conducted,
    b. notify the other jurisdiction of the potential for direct social, cultural, economic, environmental or interactive effects no later than the notification to members of the source province's public,
    c. notify major environmental non-governmental organizations of the province and of the other jurisdiction of the potential for direct social, cultural, economic, environmental or interactive effects no later than the notification to members of source province's public, and
    d. permit members of the public of the other jurisdiction to participate in the environmental and sustainability assessment process as though they were members of the source province's public.

21. The source province's environmental and sustainability assessment process must provide an opportunity for meaningful public participation, as defined in this agreement. The provinces

acknowledge that, in some circumstances, participant funding may be required to achieve meaningful public participation.

22. All information relevant to the environmental and sustainability assessment for the undertaking shall be readily accessible to the other province and to members of the public of all relevant provinces.

23. The environmental and sustainability assessment process must require – at minimum – the following information for a project with potential transboundary impacts:

    a. the purpose of the project level assessment,
    b. the need for a project with the identified purpose,
    c. the specific sustainability-based criteria adopted for evaluation,
    d. alternatives for serving the purpose and need that are technically feasible at the time of the assessment, including the alternative of not proceeding with a project; a comparative evaluation of those alternatives in light of the social, cultural, economic, environmental and interactive effects using the sustainability-based criteria; and justification for selection of the preferred alternatives as the proposed project,
    e. alternative means of carrying out the project that are technically feasible at the time of the assessment, and the social, cultural, economic, environmental and interactive effects of those alternative means,
    f. a comparative evaluation of those alternatives in light of their social, cultural, economic, environmental and interactive effects, including:
        i. the effects of malfunctions or accidents that may occur in connection with the project,
        ii. a cumulative effects analysis of the effects of the project in combination with past, present and reasonably forseeable future human activities having regard to an appropriate range of future development scenarios, and
        iii. for projects with potentially limited life expectancies, the legacy effects of the project including lasting positive and negative effects, the extent to which the project will avoid lasting damage, remediation or perpetual care obligations, and will contribute to sustainable livelihood opportunities,

    considered using the sustainability-based criteria and justification for selection of the preferred alternative means in the design of the project,
    g. the measures that are technically feasible at the time of the assessment to maximize the social, cultural, economic, environmental and interactive benefits of the project,
    h. the measures that are technically feasible at the time of the assessment that would mitigate any adverse social, cultural, economic, environmental and interactive impacts of the project,
    i. the capacity of renewable resources that are likely to be affected by the project to meet the needs of the present and those of the future,

j. comments made by members of the public and other interested parties,
k. community knowledge and aboriginal traditional knowledge,
l. relevant regional environmental assessments and strategic environmental assessments, and
m. monitoring and follow-up measures required throughout the entire life-cycle of the project.

24. The source province must conduct the environmental and sustainability assessment with due diligence to regulate the manner in which the project proceeds. This includes use of best available technology, selection of the best location, and adoption of appropriate mitigation and enhancement.

25. The source province must issue a decision report setting out the rationale and conclusions related to the environmental and sustainability assessment. The report must include a determination of whether or not the project makes a positive contribution to sustainability and identify what conditions, if any, attach to the project. The report must be delivered to the other jurisidiction.

Strategic Environmental and Sustainability Assessment

26. The province's environmental and sustainability assessment process must provide an opportunity for meaningful public participation, as defined in this agreement. The provinces acknowledge that, in some circumstances, participant funding may be required to achieve meaningful public participation.

27. All information relevant to the environmental and sustainability assessment for the undertaking shall be readily accessible to members of the public of all relevant provinces.

28. A strategic environmental and sustainability assessment undertaken in a cooperative and coordinated manner to address matters on a regional basis must consider – at minimum:

    a. the purpose of the strategic initiative and its justification in light of sustainability objectives,
    b. the need for a strategic undertaking with the identified purpose,
    c. alternatives to be examined in the selection and design of a strategic undertaking with this purpose,
    d. the specific sustainability-based criteria adopted for evaluation,
    e. the social, cultural, economic, environmental and interactive effects of those alternatives,
    f. the relative merits of those alternatives judged in light of these effects and the sustainability criteria and the justification for selection of the preferred alternative for the undertaking,

g. the measures that will maximize the social, cultural, economic, environmental and interactive benefits of the strategic undertaking,
h. the measures that will mitigate any adverse social, cultural, economic, environmental and interactive impacts of the strategic undertaking,
i. comments made by members of the public and other interested parties,
j. community knowledge and aboriginal traditional knowledge,
k. other relevant project or strategic environmental and sustainability assessments, and
l. specific guidance for decision-making regarding on-going, anticipated and potential undertakings in the strategic area; means by which the guidance may be delivered and considered; and time limits and exceptions to its authority.

29. The provinces must issue a joint decision report setting out the rationale and conclusions related to the environmental and sustainability assessment. The report must provide clear and substantive process guidance for subsequent undertakings covered by the proposed policy, plan or program, or within the relevant region.

The Environmental and Sustainability Assessment Process

30. The coordinated and cooperative environmental and sustainability assessment process will consist of several stages:

    a. Screening,
    b. Initial Assessment,
    c. Environmental and Sustainability Assessment Review,
    d. Decision-making, and
    e. Follow-up and Monitoring.

31. A member of the public from any jurisdiction cooperating under this Agreement has the opportunity to seek judicial review of the decision made pursuant a coordinated and cooperative environmental and sustainability assessment under this Agreement if that person:

    a. made submissions, written or oral, in the environmental and sustainability assessment process,
    b. had intervenor status in the environmental and sustainability assessment process,
    c. is directly affected by the decision,
    d. is directly affected by the undertaking, or
    e. represents a public interest related to the undertaking.[89]

[89] The inclusion of public interest standing for the purposes of seeking judicial review in this model raises several questions which fall outside the scope of this paper. For example, to date, public interest standing has been granted by the courts only for constitutional challenges to legislation and for challenges to the legality of administrative decisions. It is not clear that public interest standing would be granted for a broader range of

Implementation

32. Each province will implement the terms of this agreement using appropriate legislative, regulatory or policy instruments.

ADMINISTRATIVE MATTERS

Dispute resolution

33. In the event of a dispute about the interpretation or application of this agreement, the provinces may seek a solution by negotiation or any other method of dispute resolution acceptable to the provinces.

34. In the event that dispute resolution in accordance with section 33 of this agreement is not successful, the provinces will proceed to formal arbitration.

Amendments to the Agreement

35. A province that is a party to this agreement may propose amendments to this agreement.

36. Proposed amendments must be proposed and communicated in writing to all parties to this agreement.

37. All proposed amendments will be discussed by the parties to the agreement and efforts will be made to reach consensus. If no consensus can be reached, then the amendment may be adopted by a 2/3 majority vote of all parties to the agreement.

issues. Furthermore, the adoption of public interest standing may be broader than that allowed by provincial legislation. This means the province would have to amend its legislation (see s. 32 of the Model Agreement which provides the provinces will take necessary steps to implement the agreement). For a detailed discussion of public interest standing, see Adam Driedzic, *supra* note 76. See also Adam Driedzic, "Can Administrative Agencies Grant Common Law Public Interest Standing?" (January 2015) LawNow Magazine available online at http://www.lawnow.org.

Withdrawal from Agreement

At any time after this agreement has been in effect for 2 years, a province party to the agreement may withdraw from the agreement by providing written notice. The withdrawal will not affect application of the agreement to an ongoing environmental and sustainability assessment at the time of the withdrawal.

Term and Review of the Agreement

This Agreement will remain in force a period of 5 years from the date of its execution and may be renewed by mutual agreement, with or without revisions.

Each province is required to prepare and publish an annual report on the implementation and administration of this agreement and on the activities under this agreement.

The provinces will conduct a joint review of this agreement on an annual basis.

Future negotiations[90]

Topics

Harmonization instruments

Timelines

[90] The aspects of future negotiation are those suggested by Donna Tingley, *supra* note 74.