

ACHIEVING THE VISION FOR NEXT GENERATION ENVIRONMENTAL ASSESSMENT IN BC:

How Does BC's Discussion Paper on Environmental Assessment Revitalization Measure Up?

June 2018



The BC government has committed to reform the province’s environmental assessment regime, “to ensure the legal rights of First Nations are respected, and the public’s expectation of a strong, transparent process is met.”¹ As West Coast Environmental Law has addressed elsewhere, a complete overhaul of BC’s environmental assessment law is needed to regain public confidence (see [Why it’s Time to Reform Environmental Assessment in British Columbia](#)).

It’s time for a new environmental assessment law that lives up to the [Vision for Next Generation Environmental Assessment in BC](#), which is supported by numerous citizen groups and organizations.

The BC government recently released its [Environmental Assessment Revitalization Discussion Paper](#) (the “Discussion Paper”), which sets out proposals for what a new assessment process could look like and seeks public feedback. At the same time, BC also released: the [Final Report of the Environmental Assessment Advisory Committee](#) (the “EA Advisory Committee”), which was created to provide detailed advice on assessment reform; a [summary of outcomes from regional First Nations workshops](#); and a [summary of direct engagement by the Environmental Assessment Office](#) (the “EAO”) on EA revitalization from February – April 2018.

In this backgrounder, West Coast analyzes the Discussion Paper against the [Vision for Next Generation Environmental Assessment in BC](#) (the “Vision”). Each of the 14 recommendations in the Vision are compared to the proposals in the Discussion Paper, including a summary of key positives and key areas to strengthen. For more detail about needed reforms see also: [A Blueprint for Revitalizing Environmental Assessment in British Columbia](#).

1. Next-generation assessment in British Columbia establishes sustainability as a core purpose and outcome

The Vision recommendation:

“Assessment law has an explicit purpose: to enhance sustainability in all its senses – environmental, economic, social, cultural and health – without exceeding ecological limits. Sustainability-based criteria apply to guide assessments and their outcomes.”

BC’s discussion paper proposals include:

- Protecting the environment and fostering sustainability across the five pillars - environmental, economic, social, cultural and health - is a central purpose of EA. [...]
- Legislated decision criteria require consideration related to sustainable development objectives (e.g., consistency with BC’s climate targets and strategies).²

Key positives:

- The Discussion Paper’s commitment to legislated sustainability criteria is very welcome and consistent with the Vision recommendation, subject to the outstanding issues described below.

What to strengthen:

- Sustainability criteria must actually establish legal requirements to which decision-makers can be held accountable, so that projects which fail to meet defined legislative sustainability and reconciliation criteria – including Indigenous consent, a climate test and respecting ecological limits – must not be approved under a new assessment law. In contrast, legislated criteria will likely be ineffective if they are simply a list of things to be “considered”. There is not yet enough information about the proposed sustainability criteria to determine whether they will be effective.
- It is encouraging that the Discussion Paper identifies fostering sustainability across all pillars as a central purpose of assessment, but sustainability must also be meaningfully defined in law. A clear legislated sustainability purpose, which is given legal teeth through strong sustainability decision criteria, will go a long way to helping a new assessment law further sustainability on the ground.

2. Next-generation assessment in British Columbia ensures climate targets are met

The Vision recommendation:

“Assessment decisions must be consistent with BC doing its share to meet the Paris Agreement commitment to limit global temperature rise to well below 2 degrees Celsius above pre-industrial levels, and cannot impair BC’s ability to meet its legislated greenhouse gas reduction targets.”

BC’s discussion paper proposals include:

“Legislated EA decision criteria will include clear linkages to other planning mechanisms and environmental goals, such as consistency with climate targets and strategies.”³

Key positives:

- It is an important and welcome commitment that legislated decision-making criteria would require assessment outcomes and decisions to be consistent with BC’s climate targets and strategies. This can provide a vehicle for integrating a “climate test” into assessments.

What to strengthen:

- The strength of any climate test in an assessment will depend in part on the strength of BC’s climate targets and strategies. In May 2018, the provincial government introduced legislation to update BC’s greenhouse gas reduction targets, and committed to introduce an updated climate action strategy in autumn 2018 to seek to meet those targets.⁴ New climate action strategies and new assessment legislation should be designed to reinforce each other through practical tools (for example, though provincial carbon budgets that are applied in assessments through sustainability criteria).⁵
- Neither BC’s Discussion Paper nor the Advisory Committee report mention the Paris Agreement or address how international climate commitments will be reflected in assessments. Some observers have criticized BC’s new climate targets as “not strong enough to keep us below the amount of warming that global leaders committed to in the Paris climate agreement.”⁶ New assessment legislation should explicitly recognize that a purpose of assessment is to assist BC in making decisions that support and are consistent with doing our share to meet Canada’s international climate commitments. Also, the new assessment regime should leave “room for improvement” as BC continues to evaluate and strengthen its climate plans, for example through applying carbon budgets in assessments as described above, since carbon budgets can be periodically updated.

3. Next-generation assessment in British Columbia recognizes First Nations as decision-makers

The Vision recommendation:

“First Nations are clearly recognized as jurisdictions with decision-making authority regarding assessment processes, outcomes and follow-up consistent with the *UN Declaration on the Rights of Indigenous Peoples*.”

BC’s discussion paper proposals include:

“• Purpose section of EA legislation includes implementation of the UN Declaration in the context of EA. [...]

• New EA legislation recognizes various options to conduct EA including collaborative and Indigenous-led EAs in whole or part. [...]

• Enable consensus-based decision-making with Indigenous nations at a technical level throughout the EA process, as well as recognition of decisions made by Indigenous governing bodies at key junctures, supported by an alternative dispute resolution mechanism.”⁷

• The Discussion Paper also brings forward for comment the EA Advisory Committee recommendation to create a “Reconciliation Commission”, described in the Discussion Paper as:

“a time-bound alternative dispute resolution process to provide constructive direction and support for reconciliation initiatives within the EA process and to address disputes arising from implementation of the UN Declaration within the EA revitalization initiative – for example to provide support for reconciling the differing decisions of Indigenous nations and public governments with respect to EA – and to apply Indigenous laws and legal processes to address disputes among Indigenous nations in areas of shared territories in relation to EAs when requested to do so.”⁸

Key positives:

• BC’s Discussion Paper makes a number of positive commitments such as enshrining implementation of the UN Declaration as a purpose of the assessment law, as well as putting in place legal requirements and mechanisms to recognize Indigenous knowledge and decision-making jurisdiction in assessment processes and outcomes, including the potential for Indigenous-led assessments.

What to strengthen:

• Indigenous direction and agreement will be important to arriving at the details of legislative approaches on the above-noted issues to bring the UNDRIP standard of free, prior and informed Indigenous consent into action in the context of assessment.

• The Discussion Paper is silent on what will happen if agreement is not reached with First Nations at the process planning stage, for example, on the question of whether the assessment should be by independent or Indigenous-led panel or some other approach, what studies are required and who will conduct them, timelines, funding, and so on. New legislation should require that, where desired by First Nations, government-to-government agreements are in place that address these matters before an assessment commences.

• The Discussion Paper does not clearly establish consent from Indigenous governing bodies as a condition that must be met before an assessment certificate is granted.

4. Next-generation assessment in British Columbia promotes cooperation among jurisdictions

The Vision recommendation:

“All jurisdictions collaborate in carrying out their assessment responsibilities to the highest standard. Legislation establishes an early engagement phase to foster cooperation among jurisdictions on the assessment process and enable early public input.”

BC’s discussion paper proposals include:

“• Revised EA legislation should promote the concept of one project, one assessment between provincial, federal and Indigenous jurisdictions, which allows for a single assessment process to support separate provincial, federal and Indigenous decisions. This should be enabled through new tri-partite agreements, Assessment Plans and revision of the existing Memorandum of Understanding between the federal and provincial governments.”⁹

“• Require an early engagement phase so that Indigenous nations, local communities and others find out about projects earlier and their concerns can be better heard and addressed.”¹⁰

“• Prior to commencing an EA, an Assessment Plan is developed by the EAO and Indigenous nations (working with the proponent, government agencies and other EA participants) that sets out the scope, procedures and methods for EA, and how provincial and Indigenous processes and decision-making will align, including funding, timelines, and opportunities for public participation. Where applicable, Assessment Plans will be informed by standing government-to-government agreements regarding EA in a nation’s territory, and/or project-specific assessment agreements that are concluded before an assessment is commenced. [...]

- Different types of assessment may be specified in an Assessment Plan, including:
 - EAO-led assessment
 - Indigenous-led assessment, in full, or in part
 - Panel process
 - Other collaborative approaches with EAO and Indigenous nations, as identified through government-to-government agreements.”¹¹

Key positives:

- The commitment to an early engagement phase among the various jurisdictions, with a mandatory public engagement component, would be a significant improvement in terms of enabling early review and input regarding project proposals, as well as in reaching agreement on the conduct of assessment among various jurisdictions.

What to strengthen:

- While it is generally true that a single process is preferable, fully collaborative assessments should ensure all jurisdictions carry out their assessment responsibilities to the highest standard in that process. Thus, with the exception of recognizing Indigenous-led assessments, BC should scrap substituted assessments and prioritize collaborative assessment.
- Any substituted assessment must meet key legislated requirements on issues such as public participation, transparency, publically available reasons for decision, and so on.

5. Next-generation assessment in British Columbia ensures the public plays an integral role

The Vision recommendation:

“Public participation, including through assessment hearings, is enshrined in a new assessment law. The public plays an integral role in all levels of assessment through early, ongoing and deep public participation, informed by easy and comprehensive online access to information from assessments, monitoring and compliance.”

BC’s discussion paper proposals include:

- Public engagements provide a variety of types and means of engagement beyond traditional comment periods, including more opportunities for dialogue, supported by plain language materials. [...]
- Formal opportunity for the public to identify interests, issues, and concerns with a project to inform project design, location, alternatives and study requirements, and to shape the approach to public engagement.
- The EA Advisory Committee recommended that in certain circumstances a community advisory committee may be established. [...]
- Increased public engagement opportunities throughout the EA, including: early engagement on project design, on any project’s potential exemption from an EA, and on the Information Requirements, Effects Assessment and EA conclusions.
- Transparent online posting of all substantive project EA information including post-certificate compliance information.¹²
- Assessment Plan identifies proponent responsibilities such as Indigenous nation and public engagement.
- Assessment Plan identifies specific engagement or other tools, such as community hearings, appointed panels of experts, etc.¹³
- See also comments below on BC’s proposed participant funding program.

Key positives:

- There are positive commitments to increasing public engagement opportunities, including earlier engagement and use of a variety of engagement methods beyond comment periods, as well as an opportunity for the public to identify how they would like to be engaged.
- Transparent online posting of all assessment information (except sensitive Indigenous knowledge), including plain language materials and post-certificate compliance information, is welcome. As recommended by the EA Advisory Committee, this information should remain permanently available for subsequent reference and study.¹⁴

What to strengthen:

- It is not clear how assessment legislation will guarantee that public engagement is deeper than simple comment periods. The Discussion Paper suggests that specific engagement such as community hearings will be identified in an Assessment Plan, but this case-by-case approach does not provide assurance that deeper public engagement will occur in practice. Legislation should include public hearings as a default component of assessments, and establish criteria for Assessment Plans to ensure that public engagement consists of more than just comment periods.
- BC should implement the EA Advisory Committee’s recommendation to provide for establishment of a Community Advisory Committee to act as “a visible device for gathering public feedback” and “help in the process of setting information gathering standards and conveying results to the lay public”.¹⁵ A Community Advisory Committee could, for example, support proactive engagement with public assessment participants on key issues to be addressed in the Assessment Plan, such as what public engagement methods will be used in the assessment, and how evidence will be generated and reviewed and the role of public participants in that regard (see below for further discussion regarding evidence).
- The Discussion Paper does not clearly identify who will lead public engagement, and its references to proponent-led engagement are troubling. While proponents will undoubtedly wish to conduct engagement of their own, the public engagement required by legislation should be led by the body conducting the assessment – not the proponent.¹⁶

6. Next-generation assessment in British Columbia protects human rights

The Vision recommendation:

“Assessment law includes in its purposes the protection of human rights under domestic and international law, including the rights of women and Indigenous peoples, and incorporates human rights obligations and environmental justice in the assessment process.”

BC’s discussion paper proposals include:

“• Requirements for social impact assessment are strengthened and include consideration of how different populations could be affected, with particular attention to gender analysis and impacts on Indigenous women and girls, as appropriate.”¹⁷

“• Information requirements are for positive and negative project effects, and cumulative effects, on the natural and human environment; Indigenous rights and title; and, Indigenous human rights as set out in the UN Declaration...”¹⁸

Key positives:

- Commitments to assess effects on vulnerable populations,¹⁹ including gender analysis and impacts specific to Indigenous women and girls, are largely consistent with recommendations in the Vision as well as the EA Advisory Committee report.
- The commitment to assess effects on Indigenous rights and title, as well as Indigenous human rights under the UN Declaration, is welcome.

What to strengthen:

- The protection of human rights should be included in the purposes of the assessment law, and assessments should address impacts on human rights generally (i.e. in addition to impacts on Indigenous human rights set out in the UN Declaration). The Discussion Paper does not propose either of these measures.

7. Next-generation assessment in British Columbia addresses “big picture” regional and strategic issues up front

The Vision recommendation:

“Higher-level assessment and planning addresses big-picture regional and strategic issues up front, such as how to effectively manage cumulative impacts in a region, in order to establish management requirements that apply to project assessments and provincial decisions.”

BC’s discussion paper proposals include:

- “• All project EAs include assessment of cumulative effects informed by the province’s Cumulative Effects Framework, and guided by higher level plans and assessments, including regional and strategic assessments as they become available.”²⁰
- “• Introduce a legal framework for regional and strategic assessments in B.C., including criteria for prioritizing regions for assessment.
- Make resources available for provincial government agencies and Indigenous nations to conduct regional and strategic level assessments to provide context for individual project assessments.”

Key positives:

- The commitment to a legal framework and resourcing for regional and strategic assessments to address “big picture” issues, in a manner that will guide project-level assessments, is a major step forward.
- While the Discussion Paper does not directly propose a structure for what body or bodies will support and lead regional and strategic assessments, it does note that the EA Advisory Committee makes a relevant recommendation that: “Regional ‘Reconciliation’ or ‘Sustainability’ Offices should be put in place to ‘house’ Government-to-Government agreements, the multi-agency regional and strategic assessments and related initiatives and to enable local curators of information to be acknowledged and engaged.”²¹ This important recommendation is worth expanding upon and pursuing.

What to strengthen:

- Legislated triggers and process requirements for regional and strategic assessments are important to ensure that they actually occur, and so that they establish a legally binding floor for environmental protection that applies to project assessments and regulatory decision-making. The Discussion Paper does not directly address these issues.
- Regional Reconciliation or Sustainability Offices proposed in the Discussion Paper should be implemented as independent science centres to assist with generating, overseeing and/or peer reviewing scientific evidence in project and regional assessments, in balance with Indigenous knowledge.

8. Next-generation assessment in British Columbia is independently overseen

The Vision recommendation:

“A body, independent from the interests of proponents and the provincial government, is established to provide oversight, support and guidance to ensure the assessment regime is meeting its purposes, including through higher-level assessment and planning.”

BC's discussion paper proposals include:

The Discussion Paper does not address independent oversight of the assessment regime, other than the "Reconciliation Commission" discussed above.

Key positives:

- While the Discussion Paper does not reflect the Vision recommendation for independent oversight of the assessment regime, the proposed "Reconciliation Commission" discussed above could offer independent guidance as it relates to government-to-government relations between the Crown and First Nations in assessments. Also, the proposal for "Regional 'Reconciliation' or 'Sustainability' Offices" – if implemented as independent science centres – could potentially offer a pathway to greater independence in the generation and analysis of evidence for project, regional and strategic assessments.

What to strengthen:

- The Discussion Paper assumes that the EAO will continue to lead and oversee BC's assessment regime. The EAO is an agency housed within the provincial government and is not independent in the sense contemplated by the Vision document.
- Unless otherwise determined through collaboratively developed Assessment Plans and related government-to-government agreements, independent or Indigenous-led panels should be the default for assessment, not the EAO.

9. Next-generation assessment in British Columbia assesses more projects

The Vision recommendation:

"The types and scope of projects and activities that are subject to mandatory assessment increases significantly in order to meet sustainability objectives. Legislation also establishes a set of basic process requirements for provincial regulatory approvals, which apply regardless of whether an undertaking is subject to assessment, in order to assist in managing cumulative impacts."

BC's discussion paper proposals include:

"• Revise *Reviewable Projects Regulation* to align with new EA legislation and to utilize criteria that reflects the potential for a given project to result in adverse effects."²²

"• The EA Advisory Committee recommended and we heard in our direct engagements that the *Reviewable Projects Regulation* needs to be revised to:

- Move away from being assessed strictly on production capacity-based outputs, to criteria that more accurately reflects the potential for a given project to result in adverse effects.
- Introduce a clear framework and criteria for designation of projects not on the list as reviewable, including by request of Indigenous nations or the public."²³

"• Provide for an early decision by the Minister and Indigenous governing bodies that a project is clearly irreconcilable with existing law or defined policy objectives supported by reasons for decision, or if a project should proceed directly to permitting.

• The criteria for a reviewable project to proceed directly to permitting are clear, including an opportunity for public engagement and reasons for decision."²⁴

Key positives:

- Subject to the issues noted below, the commitment is welcome to revise the *Reviewable Projects Regulation* in a manner that moves away from strictly production-based outputs, provided that BC heeds the advice of the EA Advisory Committee that such revisions must include “provisions to ensure that reviewability thresholds are not avoided through project splitting, scope and size creep” and capture “a range of activities and projects that are not currently reviewable that have substantial environmental and social impacts, contribute to cumulative effects, and could meet the thresholds for reviewability...”²⁵
- The ability to make an early decision to reject a project before an assessment begins, in circumstances where the project is irreconcilable with Indigenous laws or provincial legal or policy objectives, would be a valuable tool to prevent the wasteful expense of time and resources by all parties to assess projects that are clearly untenable.

What to strengthen:

- The Discussion Paper’s proposal to maintain an ability to exempt listed projects from assessment, so that they “proceed directly to permitting”, is entirely contrary to the Vision recommendation and poses an obstacle to strengthening public confidence in BC’s assessment regime. The ability to exempt listed projects from assessment should be scrapped.
- The Discussion Paper contemplates changes to the *Reviewable Projects Regulation*, however, it does not address related changes that are also needed to the assessment law itself. The new assessment law should include criteria and factors to define and guide when a project requires assessment because it stands to impact sustainability, including ensuring that the public and Indigenous peoples can trigger assessments. This is an important part of the reforms needed now to ensure that the number of assessments increase to meet sustainability objectives, yet the Discussion Paper suggests this issue will be postponed to future regulatory development.
- The Discussion Paper does not address or reflect the Vision recommendation for a set of basic process requirements for provincial regulatory approvals (e.g. applying sustainability decision-making criteria, and applying management objectives from an applicable regional or strategic assessment), that would assist in tracking and managing cumulative effects regardless of whether an undertaking is subject to a “full” assessment.

10. Next-generation assessment in British Columbia ensures decisions are based on thorough and balanced evidence

The Vision recommendation:

“Assessments ensure that evidence comes not only from the proponent, but also from the knowledge of Indigenous peoples (with safeguards for culturally-sensitive information), local communities, government and independent scientists, and others with relevant information and expertise. Assessment studies and underlying data are subject to peer review. These requirements are resourced by proponent funding contributions.”

BC’s discussion paper proposals include:

- Support the early collection of data and information specific to needs of Indigenous nations including Indigenous-led collection, analysis and interpretation of data, where desired.”²⁶
- The proponent typically undertakes the technical studies needed to develop its project environmental assessment (EA) Application. In a revitalized EA, the proponent would seek feedback while developing the Application. [...]

“• Mechanisms for independent studies and peer review are important tools to increase confidence in EA information in some circumstances. [...]

“• The proponent develops its Application iteratively, engaging with Indigenous nations, government agencies, technical reviewers and other groups on key topic areas, as defined in the Assessment Plan.

•Proponent and Indigenous nations may choose to work together to develop portions of the Application.

•All of the proponent’s technical studies would be undertaken by appropriately qualified experts and reviewed by independent experts either from inside or outside of governments, as set out in the Assessment Plan (e.g., through the technical advisory group). [...]

“• Opportunities for local community and public engagement using various methods could support the review of a draft application.”²⁷

Key positives:

- There are commitments to ensuring that Indigenous knowledge, collected in a manner led by Indigenous peoples, informs assessments.
- The proposed process would support a direct role for First Nations in determining how evidence is generated, reviewing evidence and drawing conclusions based on the evidence.
- The proposed Regional “Sustainability” or “Reconciliation” Offices, discussed above, hold potential to engage and provide technical assistance to the public on matters of evidence in assessment (although this is not specifically proposed in the Discussion Paper).

What to strengthen:

- The current approach to project assessment in BC – whereby the proponent generates virtually all the evidence, which is reviewed by an informal technical advisory group – is inadequate and needs to end. BC’s Discussion Paper does not go far enough in this regard.
- Although the Discussion Paper proposes that review of all proponent evidence by “independent” experts would be provided for in the Assessment Plan, it also suggests these experts could be provincial line ministry staff and that review could occur through a technical advisory group (which is the current process for technical review in BC’s assessment regime). Requirements for involvement of independent experts and peer review of proponent evidence should be set out in legislation, and reflect the recommendation for mechanisms to involve the public as discussed below.
- The new legislated framework should clarify that public involvement at the early engagement phase should address not just issues of concern but also the question of how evidence will be generated and reviewed if an assessment is to proceed, and that the “EA participants” involved in shaping the Assessment Plan will include non-governmental organizations and engaged citizens.
- The Discussion Paper contemplates largely proponent-led evidence, as well as some Indigenous-led evidence, in a manner determined through the Assessment Plan. While the Discussion Paper states that independent studies and peer review are important tools “in some circumstances”, there is no proposal for how to ensure they are integrated into assessments, nor is there a clear indication that the public would play a role. This is contrary to the Vision recommendation, as well as the EA Advisory Committee recommendation that: “...public trust in technical studies commissioned by proponents can be aided if there are opportunities and necessary funding support for independent analyses that are conducted by local government or key non-governmental organizations.”²⁸
- Legislated and funding mechanisms should enable public participants to engage independent experts to peer review evidence, identify potential information gaps and conduct studies where appropriate.

- A new assessment law should also include other requirements to strengthen the information base and ensure evidence-based decision-making, such as legal requirements that:
 - assessment decisions be based on best available scientific and Indigenous knowledge;
 - provincial scientists with specialist or expert information or knowledge related to assessment of a project make this available; and,
 - all scientific and other information related to an assessment is made available to the public through a registry accessible via the internet.

11. Next-generation assessment in British Columbia requires transparent, accountable decisions

The Vision recommendation:

“Decision-makers must provide reasons that meet clear requirements – including addressing specific criteria for how the decision meets sustainability objectives, identifying the evidence relied upon, and addressing how public input was considered and how it influenced the decision.”

BC’s discussion paper proposals include:

“EA decisions are based on legislated decision criteria and supported by published reasons for decision.”²⁹

“Public has confidence that legislated decision criteria are addressed in recommendation [referring to the effects assessment and recommendation].”³⁰

“Ministers’ decision is based on required criteria with defined factors set out in legislation.”³¹

“Local governments have confidence their issues are considered in the ministers’ decision as it is based on required criteria with defined factors, including the outcomes from public engagement processes.”³²

Key positives:

- The commitment to legislate factors and criteria that apply to assessment recommendations and Ministerial decisions, paired with required reasons, is a very important step towards ensuring transparency and accountability.
- Addressing outcomes from public engagement appears to be one of the factors that has been proposed to apply to Ministerial decisions, which is consistent with the Vision recommendation.

What to strengthen:

- More detail is needed on the content of the factors and criteria before conclusions can be drawn about their effectiveness.
- More detail is also needed about regarding the assessment stages at which criteria will apply. It seems clear that factors and criteria will apply to the effects assessment and recommendations, as well as the final Ministerial decision about whether to issue an assessment approval. However, there are other important stages where criteria are required, such as criteria earlier in the process for determining the scope and procedures of an assessment (e.g., when an independent panel will conduct the assessment).

12. Next-generation assessment in British Columbia provides a right of appeal

The Vision recommendation:

“Both procedural and final assessment decisions are subject to a right of appeal in order to ensure accountable and thorough assessments that meet the purpose of the law.”

BC’s discussion paper proposals include:

The Discussion Paper does not address appeal (or judicial review) of decisions. The EA Advisory Committee suggests that the Reconciliation Commission, described above, could provide certain dispute resolution functions, while not replacing the availability of judicial review. While the EA Advisory Committee proposes that these dispute resolution functions would generally be focused on issues of reconciliation between the Crown and First Nations, the Committee does raise the possibility that “the Commission could include within its mandate a function to serve as the dispute resolution venue for a broader variety of issues arising within a specific EA process.”³³

Key positives:

- Depending on how they are implemented in legislation, the proposed requirements that the assessment report and assessment decisions be based on legislated criteria should assist with subjecting assessments and decisions to improved accountability through judicial review. However, judicial review is generally more limited than a right of appeal.
- The proposed Reconciliation Commission may be able to offer important dispute resolution functions for matters related to reconciliation. However, this does not provide the public an ability to appeal important assessment decisions.

What to strengthen:

- It is concerning from an accountability perspective that BC’s Discussion Paper makes no provision for public appeal of any assessment decisions. (While judicial review may be available regardless of whether a right of appeal is provided in legislation, in general the availability of Court oversight is narrower, and the issues subject to review are more restricted, than where legislation clearly provides for a right of appeal).
- It is important that the factors and criteria set out in legislation are specific and clear enough that those conducting assessments and making decisions can be held to account in meeting them. One criterion should be that the Minister’s decision is based on an effects assessment report that is legally valid and complies with all requirements of the assessment Act. Further, the Act should provide that the effects assessment report itself constitutes a decision that is judicially reviewable.

13. Next-generation assessment in British Columbia ensures robust monitoring and compliance

The Vision recommendation:

“Monitoring and compliance programs are expanded, strengthened and subject to robust oversight that is independent from proponents, in order to ensure assessment requirements are achieved and updated in an ongoing manner as necessary. Indigenous monitoring and public involvement are key.”

BC’s discussion paper proposals include:

“Modernized compliance and enforcement regime including:

- Administrative financial penalties
- Tickets
- Preventative orders
- Increased court imposed penalties [...]
- Authority and opportunity for Indigenous nations to co-administer or participate in monitoring, compliance and enforcement programs (e.g. Indigenous guardian programs).
- Continued engagement of EA participants in compliance and enforcement. [...]
- Address public complaints arising from project operations.”³⁴

Key positives:

- BC’s Discussion Paper reflects much of the Vision recommendation on this issue, committing to expand compliance and enforcement powers, enable ongoing involvement of assessment participants in monitoring, establish a mechanism for addressing public complaints regarding projects in operation, and establish opportunities for monitoring to be co-administered with First Nations, such as through Indigenous guardian programs.

What to strengthen:

- Further details on oversight as well as resourcing of these commitments are needed in order to determine whether they can be meaningfully implemented.

14. Next-generation assessment in British Columbia receives enough funding

The Vision recommendation:

“Assessments receive ample, stable and apolitical funding to accomplish their objectives, with funding contributions from proponents to cover costs related to assessment of their proposals.”

BC’s discussion paper proposals include:

- “• Public participation funding program.”³⁵
- “• Alternate models to ensure Indigenous nations have secure and timely funding for the EA process, e.g. the province and industry provide funding, potentially administered by an independent body.”³⁶
- “• Making resources available for regional and strategic level assessments to provide building blocks for individual project assessments.”³⁷
- “• Early communication of regulatory process costs to proponents undertaking an EA (e.g. EA fees, capacity funding to Indigenous nations and key stakeholders), including consideration of a legislated fee schedule.”³⁸

Key positives:

- The Discussion Paper recognizes the need to commit funding to key reform proposals, particularly Indigenous decision-making and assessment, public participation, and regional and strategic assessments, all of which reflect key recommendations in the Vision.
- The proposal for a legislated proponent fee schedule would offer an important tool to ensure predictable and appropriate proponent funding contributions.

What to strengthen:

- The details of the framework for a public participation funding program are not addressed. It is crucial that this program be anchored in legislation to ensure that sufficient public participation funding is consistently distributed, in a manner independent from political interests.
- The Discussion Paper does not identify the need to increase funding for monitoring and compliance. Improved compliance tools and better opportunities for engagement in monitoring are less likely to be effective if there are insufficient resources to take advantage of those tools and opportunities.

ENDNOTES

1. Office of the Premier, Mandate Letter to the Minister of Environment and Climate Change Strategy (18 July 2017), online: <<http://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/heyman-mandate.pdf>>.
2. British Columbia, Environmental Assessment Revitalization Discussion Paper (June 2018), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_discussion_paper_final.pdf> ["Discussion paper"] page 11.
3. Discussion paper page 16.
4. British Columbia, "New bill updates targets for reducing carbon pollution" (7 May 2018), online: <<https://news.gov.bc.ca/releases/2018ENV0021-000860>>.
5. West Coast Environmental Law, Ecojustice, Environmental Law Centre and Pacific Centre for Environmental Law and Litigation, A Blueprint for Revitalizing Environmental Assessment in British Columbia (April 2018), online: <<https://www.wcel.org/publication/blueprint-revitalizing-environmental-assessment-in-british-columbia>> ["Blueprint"] page 3.
6. Caitlyn Vernon, "Time to stop dangerous wishful thinking about LNG Canada's climate impacts" (17 June 2018), online: <<http://vancouversun.com/opinion/op-ed/caitlyn-vernon-time-to-stop-dangerous-wishful-thinking-about-lng-canadas-climate-impacts>>.
7. Discussion paper page 9.
8. Environmental Assessment Advisory Committee, Final Report of the Environmental Assessment Advisory Committee (2 May 2018), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/revitalization_eaac_report.pdf> ["EA Advisory Committee report"] page 11; Discussion Paper page 10.
9. Discussion paper page 12.
10. Discussion paper page 17.
11. Discussion paper page 19.
12. Discussion paper page 8.
13. Discussion paper page 19.
14. EA Advisory Committee report pages 22 and 26.
15. EA Advisory Committee report pages 24 and 26.
16. Blueprint page 4.
17. Discussion paper page 11.
18. Discussion paper page 19.
19. While the discussion paper commits to assess impacts on "different populations", the recommendation of the EA Advisory Committee is to assess effects on "vulnerable populations"; we assume this is also largely the intent of the commitment in the discussion paper. See EA Advisory Committee report page 27.
20. Discussion paper page 11.
21. EA Advisory Committee report page 8; Discussion paper page 16.
22. Discussion paper page 8.

ENDNOTES (continued)

23. Discussion paper page 14.
24. Discussion paper page 18.
25. EA Advisory Committee report page 18.
26. Discussion paper page 9.
27. Discussion paper page 21.
28. EA Advisory Committee report page 25.
29. Discussion paper page 8.
30. Discussion paper page 22.
31. Discussion paper page 23.
32. Discussion paper page 20.
33. EA Advisory Committee report page 12.
34. Discussion paper page 24.
35. Discussion paper page 8.
36. Discussion paper page 9.
37. Discussion paper page 11.
38. Discussion paper page 12.



West Coast Environmental Law
200-2006 West 10th Avenue
Vancouver BC V6J 2B3
Tel: 604-684-7378
Toll-free: 1-800-330-WCEL
www.wcel.org

Transforming the legal landscape
www.facebook.com/WCELaw
www.twitter.com/WCELaw
www.instagram.com/WCELaw
Support our work:
www.wcel.org/donate

West Coast Environmental Law harnesses the power of law to solve complex environmental challenges. We are transforming environmental decision-making and strengthening legal protection for the environment through collaborative legal strategies that bridge Indigenous and Canadian law. By putting the law in the hands of communities and creating legal risk for those who would harm our land, air and water, we are building the collective power to achieve a more just and sustainable future for all.