WEST COAST Environmental Law

How Does British Columbia's Proposed New *Environmental Assessment Act* Measure Up?

The BC government has committed to reform environmental assessment ("EA") in the province in order to "ensure the legal rights of First Nations are respected, and the public's expectation of a strong, transparent process is met." After a period of engagement with Indigenous nations – as well as stakeholder consultation, a public comment period on a Discussion Paper, and the release of an EA Revitalization Intentions Paper – the Province introduced Bill 51 in November 2018 to repeal BC's old *Environmental Assessment Act* and replace it with a new law.

So how does Bill 51 measure up?

In May 2018, 24 environmental, social justice and community groups released *A Vision for Next-Generation Environmental Assessment in British Columbia* to set out the high-level principles that should be reflected in a new EA law in order to fully seize the opportunity to rebuild public trust, advance reconciliation and achieve sustainability. The table below summarizes West Coast Environmental Law's take on the strengths and concerns regarding Bill 51 in comparison to each of the 14 principles in the *Vision* document.

Principles in the *Vision for Next-Generation Environmental Assessment in British Columbia*	How Bill 51 measures up
1. Sustainability as a core purpose and outcome 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.	**Strengths** • Promoting sustainability is explicitly listed as one of the purposes of the Environmental Assessment Office (EAO), including by considering environmental, economic, social, cultural and health effects of projects • The EAO's recommendation to Ministers regarding an environmental assessment (EA) certificate must include a recommendation respecting whether the project is consistent with promoting sustainability • Effects on current and future generations, as well as effects on ecosystem functions, are now among the required considerations in every project assessment • A project may be terminated without a full EA if it would have "extraordinarily adverse effects," be incompatible with a government policy (e.g. potentially climate policy), or constitute a re-proposal of a project that was already rejected **Concerns** • The Act lacks any substantive test to ensure decisions actually foster sustainability – it only requires the Ministers to "consider" certain factors when deciding whether to issue an EA certificate • Ministers' ability to consider "any other matters that they consider relevant to the public interest" when making a decision seriously undermines the sustainability purpose of the EAO, as the dominant trend in EA is for economic considerations – such as short-term economic gains – to trump environmental concerns. The wording of the new EA Act risks allowing this trend to continue

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	• No requirement to assess alternatives to the project, or the project's contribution to supporting and enhancing sustainability • Sustainability is defined only indirectly in the purposes of the EAO, which include promoting sustainability by "protecting the environment and fostering a sound economy and the well-being of British Columbians and their communities", and the sustainability purposes of the EAO do not mention critical elements like climate, biodiversity or ecological thresholds • The Act would not set out a purpose for the entire assessment regime (just for the EAO), although the Ministers would have to consider the EAO's purposes when making key decisions • No requirement to assess all activities and project components related or incidental to the project, meaning that the EAO may "scope out" activities from the assessment that have important implications on sustainability
2. Meeting climate targets 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.	**Strengths** • The Act requires that an assessment consider a project's greenhouse gas emissions, including potential effects on BC's ability to meet its targets under the *Greenhouse Gas Reduction Targets Act* • EAO's final recommendations to the Minister must address (among other issues) greenhouse gas emissions and related effects on BC being able to meet its legislated climate targets • The power to 'off ramp' projects that are "clearly incompatible with a government policy" early in the process could be used to ensure that climate strategies are applied (but there is no guarantee of this) **Concerns** • While greenhouse gas emissions must be considered, Ministers may still approve projects that would impair BC's ability to meet its legislated emission reduction targets • No mention of Paris Agreement commitments • No requirement that reasons for a decision explain how the Minister's EA decision is consistent with BC's climate targets and related strategies • No requirement to consider projects' lifecycle and lifespan emissions, such as upstream and downstream emissions
3. Recognizing First Nations as decision-makers 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* (UNDRIP).	**Strengths** • Legislated EAO purposes include collaborating with Indigenous nations in EAs consistent with UNDRIP, and recognizing the inherent jurisdiction of Indigenous nations • Participating Indigenous nations identify themselves in early engagement, rather than being identified based on BC's view of their "strength of claim" • Indigenous-led assessment and studies are enabled

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	• While a weakness is that the process does not adopt a full consent standard (discussed below), improvements on the status quo include: a) a requirement that the EAO seek "consensus" with participating Indigenous nations on most key decisions throughout the assessment process, b) non-binding dispute resolution is available where consensus is not reached (details subject to further engagement) c) two formal stages for an Indigenous nation to express its decision to grant or deny consent – the decision on readiness for EA, and the decision on whether to grant an EA approval, d) if the EAO's recommendation to Ministers about whether to approve a project contradicts the decision of an Indigenous nation to withhold or grant consent, the Ministers must offer to meet the Indigenous nation, and follow through on the offer if the nation responds, before making a final decision and e) the Ministers must publish reasons for their decision **<u>Concerns</u>** • The new EA Act falls short of the UNDRIP minimum standard, which is that the free, prior and informed consent of Indigenous peoples must be obtained prior to approving any project affecting their lands or territories • Under the new EA Act, Ministers may still approve a project (and make other important decisions like exempting a project from assessment) where an Indigenous nation has denied consent, and the EAO would be permitted to make key process decisions even if "consensus" is not reached with Indigenous nations
4. Promoting cooperation among jurisdictions 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.	**<u>Strengths</u>** • Coordinating assessments with other jurisdictions is part of the legislated purposes of the EAO • The Act provides for agreements about environmental assessment with other jurisdictions, including with the federal government and Indigenous nations • The EAO must enter into discussions with Indigenous nations within 6 months after a nation indicates an interest in negotiating an EA-related agreement • While the Act permits substitution of the assessment process of another jurisdiction (e.g. the federal government or Indigenous process) for BC's process, minimum requirements are in place such as public participation and mandatory matters to be assessed • Even in the absence of a government-to-government agreement about EA, if an Indigenous nation wants to conduct the assessment of impacts on the nation or its rights, the process order must provide for this

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	Concerns • Minimum standards for substitution are not specific regarding meaningful public participation requirements, and omit other important standards such as ensuring assessments are based on balanced, peer-reviewed evidence
5. Strong public participation 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.	**Strengths** • One or more community advisory committees will be created by default for project assessments and class assessments (unless there is not sufficient public interest) • Facilitating "meaningful public participation" is included in the legislated purposes of the EAO • An early engagement phase is established • The new EA Act provides for more public written comment periods throughout the EA process (four standard comment periods as opposed to a current standard of two), and the EAO has the power to conduct additional public comment periods or other public engagement activities related to a project **Concerns** • Written comment periods are not strictly required: the EAO would have power to dispense with any comment period (even the first "early engagement" comment period) based on an opinion that the public has not "demonstrated sufficient interest" • A provincial commitment to a public participation funding program is not explicitly reflected in the Act, although further consultation on details has been promised • There is no requirement for community advisory committees to be established early enough so that they can advise about key issues such as the plan for generating and reviewing evidence, the plan for public engagement, the scope of the assessment, and whether the assessment should proceed by panel (in fact, BC's recent EA Revitalization Intentions Paper says that community advisory committees would be established *at the end* of process planning, after these matters are decided) • No guarantee of community hearings or other in-person engagement (these would be optional) • Public written comment periods are short (30 days only) • The overall 150-day limit on assessments will likely be unworkable for most participants • No statutory requirement that key types of records related to an EA be publicly posted online (e.g. including advice of a technical advisory committee, monitoring and follow-up records, etc.), which would be preferable to the current regulatory approach that omits posting requirements for some relevant records

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	• No requirement that public comments during the assessment be summarized or otherwise provided to Ministers making a final decision regarding EA approval • No requirements respecting public participation in regional or strategic assessments
6. Protecting human rights 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.	**Strengths** • Mandatory consideration of a project's disproportionate effects on distinct human populations, including populations identified by gender • Legislated purposes of the EAO include supporting implementation of UNDRIP • Mandatory assessment of a project's impacts on Indigenous nations, including on constitutionally-protected rights **Concerns** • The Act would not require assessment of project impacts on human rights generally • The Act does not explicitly require assessment of project impacts on rights protected by UNDRIP (although this is arguably required of the EAO given its legislated purpose to implement UNDRIP) • Protection of human rights is not included in legislated purposes
7. Regional and strategic assessment 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.	**Strengths** • The new Act will enable the possibility for regional and strategic assessments to occur • Assessments must include mandatory consideration of the project's consistency with relevant land use plans, including Indigenous land use plans, and consistency with any applicable regional or strategic assessment • The Act enables BC to enter into agreements with other jurisdictions, including Indigenous nations, regarding conducting or implementing regional and strategic assessments • The Act includes a provision for an Indigenous nation to request a cooperation agreement on regional or strategic assessment, with a requirement for the EAO to enter into discussions within 6 months • The Minister has power to order that a project assessment be paused pending the outcome of a regional or strategic assessment (or other investigation or inquiry) **Concerns** • No triggers to require that regional or strategic assessments actually occur • No mechanism for the public to request regional or strategic assessments, or for a Ministerial response to such a request • Outcomes of a regional or strategic assessment would not be binding in a project EA (i.e. they would just be a consideration)

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	• No legal mechanism to apply the outcomes of regional or strategic assessment to provincial decisions under other statutes (limiting the tool's usefulness in managing cumulative effects) **Incomplete** • The process and content of regional and strategic assessment has been deferred to future consultation on regulations
8. Independent oversight 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.	**Concerns** • This issue is not addressed (other than a provision for non-binding dispute resolution between BC and Indigenous nations, which provides some independent support for the Act's purpose to further reconciliation and implement UNDRIP, but does not offer general independent oversight or guidance)
9. Assessing more projects 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.	**Strengths** • Indigenous nations and the public may request that the Minister designate any project as reviewable, with a requirement for the Minister to provide reasons in response • There is an ability to require notifications from projects that don't technically meet a reviewability threshold, but are close, so that such projects can be considered for EA designation **Concerns** • The Minister has discretionary power to exempt projects from assessment • Cabinet may make regulations to provide that any part of the Act or regulations does not apply to a particular proponent or project **Incomplete** • The issue of which projects will be assessed is deferred to future consultation on regulations • Further information is needed on implementation of class assessments, which could remove whole categories of projects from being subject to project EAs

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10. Ensuring thorough and balanced evidence 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.	**Strengths** • Legislated purposes of the EAO include applying the best available science, Indigenous knowledge and local knowledge • Indigenous nations may carry out their own assessment of the impacts of a project on their nation and rights • The Act contains legislated safeguards to protect confidentiality of culturally-sensitive Indigenous knowledge (with some concerning exceptions) • Community advisory committees and participant funding *may* provide opportunities for the public to be better involved in planning, generating and reviewing evidence, but this is not clear **Concerns** • The new Act maintains a default process of mostly proponent-generated evidence – while there are *options* for studies by independent experts or knowledgeable EA participants, there are no guarantees this will occur • No requirement for independent peer review of proponent evidence • While the EAO must establish a technical advisory committee, there is no requirement that the committee in fact have the technical expertise needed to review the proponent's materials • The lack of requirements for panel or community hearings limits opportunities for EA participants to directly raise questions or test evidence • While a community advisory committee is required by default, there is no guarantee it will be established *before* the plan for generating and reviewing evidence is complete • No statutory requirements for public online posting of the advice of the technical advisory committee, or any other information relevant to the assessment (see comments on public participation, above)
11. Transparent, accountable decisions 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.	**Strengths** • The Act sets out mandatory matters that must be assessed, and requires that the EAO address those matters in its recommendations to the Minister (but see concerns with Minister's decision below) • The EAO must provide recommendations to the Minister on whether the project is consistent with promoting sustainability (although the definition of sustainability is fairly broad and flexible) • In making a final decision, Ministers are required to consider the purposes of the EAO (including promoting sustainability and recognizing Indigenous jurisdiction) as well as consider the recommendations and referral materials provided by the EAO • Ministers must publicly release the reasons for their final decision on an EA approval, as well as reasons for the Minister's decision on whether a project should proceed to assessment

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	Concerns • The Ministers, in making a final decision, may consider any other matters they believe to be in the "public interest," providing broad decision-making discretion that that is not grounded in the purposes of the Act – there is no clear, legislated test for approval or rejection of projects. This discretion perpetuates the current ability to approve unsustainable projects based on a subjective determination of what is in the "public interest" • The Act does not explicitly require that the EAO's final recommendations to the Ministers be publicly released (although this is required under current regulations and the requirement will presumably be continued in new regulations) • Other than a requirement to address why the Ministers issued a certificate when Indigenous consent has been withheld, there are no specific requirements for what the Ministers' reasons for decision must address
12. **Right of appeal** 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.	**Concerns** • No rights of appeal are provided
13. **Robust monitoring and compliance** 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.	**Strengths** • The Act provides enhanced compliance tools such as the introduction of authority to issue administrative monetary penalties, increased court-imposed fines, and creative sentencing options including prohibitions and directions to take specific actions • The EAO has new authority to require reports on whether mitigation measures for approved projects are achieving their intended outcomes, as well as new power to require independent audits of approved projects • The EAO has expanded authority to amend the conditions of EA approvals, including based on mitigation effectiveness reports and independent audits • The Act enables agreements with Indigenous nations on compliance and enforcement, including potentially working with Indigenous guardianship programs **Concerns** • No statutory requirements for monitoring or follow-up aside from the requirement for proponents to report on mitigation if requested • No mechanisms for public involvement in monitoring and compliance • No requirement to make any monitoring and compliance information publicly available

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	• No requirement for public notification or comment opportunities for extending an EA certificate or amending EA certificate conditions • The new Act lengthens the duration of the EA certificate to ten years before the proponent must have substantially started the project, which risks projects being built in changed environments, without consideration of those changes or new mitigation measures imposed • No ability for the public or Indigenous nations to request an amendment to an assessment certificate, e.g. if effects are not as predicted or the receiving environment changes
14. Funding 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.	**Strengths** • The Act provides regulatory power to establish a tariff of costs to be paid by proponents to defray the costs of Indigenous participation in assessments, dispute resolution and assisting with post-EA inspections **Concerns** • No clear requirement in legislation to implement a participant funding program **Incomplete** • The issue of fees and funding is deferred to future consultation on regulations (although some general commitments are made) • BC has made a political commitment to establish a public participant funding program, but details of this are not addressed in the Act • BC's Intentions Paper commits to ensuring adequate funding for all participating Indigenous nations but the details are left to future regulatory development