



**Manitoba Law
Reform Commission**

**DISCUSSION PAPER:
MANITOBA'S ENVIRONMENTAL
ASSESSMENT AND LICENSING REGIME**

January 2014

The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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INVITATION TO COMMENT

Comments on this Discussion Paper should reach the Manitoba Law Reform Commission (“MLRC”) by April 25, 2014.

This Discussion Paper identifies 18 Issues for Discussion relevant to the reform of Manitoba’s environmental assessment and licensing regime. The Issues for Discussion are phrased as open-ended questions for your consideration, and the MLRC invites you to describe how reform might affect your participation in Manitoba’s environmental assessment process. The MLRC will consider all comments when developing its final recommendations.

The MLRC encourages you to provide your thoughts, comments and suggestions concerning the reform of Manitoba’s environmental assessment and licensing regime. Please refer to the Issues for Discussion identified in this Paper, and any other matters you think should be addressed. Please submit your comments in writing by email, fax or regular mail to:

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The MLRC assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not comment anonymously, or request confidentiality, MLRC may quote from or refer to your comments in its Report for Consultation or Final Report.

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The material in this Discussion Paper is presented for informational purposes and is intended to generate discussion and ideas for reform. It does not necessarily represent the views of those who have so generously assisted the Commission in this project.

EXECUTIVE SUMMARY

In November 2012, at the suggestion of the Public Interest Law Centre, the Manitoba Law Reform Commission began a project to study the provincial environmental assessment and licensing regime and make recommendations for its reform.

Environmental assessment engages important economic, social and environmental interests and is considered a critical tool in the pursuit of sustainable development. Manitoba's system for environmental assessment is found in *The Environment Act* and many of its core provisions date from 1988. Reform may now be appropriate to account for changing technologies and approaches to environmental assessment. The recently enacted *Canadian Environmental Assessment Act 2012* may limit the reach of federal environmental assessment, underscoring the need for a comprehensive and effective provincial system.

Environmental assessment reform initiatives typically focus on a system's effectiveness and efficiency, and these concerns underlie this project as well. The objective of this Discussion Paper is to develop proposals for reform that enhance certainty, transparency and flexibility in Manitoba's environmental assessment regime.

There are seven chapters in this Discussion Paper:

Chapter 1: Introduction provides a background on environmental assessment and identifies the need and objectives for reform.

Chapter 2: An Overview of Manitoba's Environmental Assessment Process provides a high level overview of the following steps in Manitoba's environmental assessment process: triggering, screening, scoping, impact assessment, review of environmental assessment reports, decision-making, appeals and judicial review, and post-licensing follow-up.

Chapter 3: Environmental Assessment and Sustainable Development examines the connection between environmental assessment and principles of sustainable development. It also questions how the need for, and alternatives to, a proposed development should be addressed in the legislative framework.

Chapter 4: Cumulative Effects and Strategic Environmental Assessment explores practical ways to support cumulative effects assessment within Manitoba's regime. These include increased ministerial authority in respect of strategic environmental assessment, the development of a repository of cumulative environmental information, and guidelines around the collection and presentation of data.

Chapter 5: Public Participation identifies possible areas for reform in connection with the timing and mechanisms of public participation, engagement with First Nations and other Aboriginal groups, and the role of the Clean Environment Commission as a venue for public participation.

Chapter 6: Balancing Certainty and Flexibility examines the challenge of achieving an appropriate balance of certainty and flexibility in the environmental assessment framework. The chapter focuses on three main issues: legislative support for environmental assessment, significance determinations, and written reasons for decision.

Chapter 7: Specific Procedural Steps applies the themes outlined in earlier chapters to specific procedural steps in Manitoba's environmental assessment process: triggering, screening and scoping, statutory appeals, and compliance and enforcement.

The Paper identifies 18 Issues for Discussion, appearing throughout the text and listed for convenience at Appendix A.

CHAPTER 1: INTRODUCTION

Environmental assessment is the process by which environmental considerations are factored into development approval decisions. It was first introduced in 1970 with the enactment of the U.S. *National Environmental Policy Act*. Since then, over 100 countries and international aid and financial agencies have adopted formal environmental assessment procedures.¹ Engaging important economic, social and environmental interests, environmental assessment has attracted the attention of policy-makers and law reformers for close to 50 years.

In Manitoba, environmental assessment evolved from statutory pollution control mechanisms that have been in place, in some form, since the early 20th century. In 1976, Manitoba's cabinet approved a policy for the establishment of an environmental assessment and review process for all proposed provincial projects that may significantly affect the environment as a result of air, water and soil contamination. With the enactment of *The Environment Act* (the "Act") in 1988, environmental assessment became a legislated requirement for certain types of development.

A. The Need for Reform

The 1988 Act was ahead of its time in many ways. Its contemplation of social and economic effects, focus on environmental protection and goal of conserving resources for future generations were novel and progressive. The Act uniquely provides for a comprehensive assessment and licensing process, and its provisions for public participation remain a model for many jurisdictions.

The Act has been amended several times since 1988, but its core provisions for environmental assessment have not changed. Reform may now be appropriate to account for changing attitudes about the role of environmental assessment and technological advances.

Recent amendments to the federal environmental assessment legislation provide an additional impetus for reform. Changes include the elimination of certain process options and new triggering, screening and scoping procedures. The *Canadian Environmental Assessment Act, 2012* is new legislation and not yet fully tested, but some experts predict fewer environmental assessments with a more limited scope under the new federal scheme.² This underscores the need for a comprehensive and effective provincial regime.

This is not the first reform initiative to consider Manitoba's environmental assessment process. The Commission is indebted to the *Report on the Consultation of Sustainable Development Implementation* ("COSDI"), and to the Department of Conservation and Water Stewardship, which publicly explored possibilities for reform in its 2001 paper, *Building a Sustainable Future*.³ This Discussion Paper builds on many of the ideas expressed in these earlier initiatives.

B. Objectives for Reform

In light of the Commission's statutory mandate to improve the law and administration of justice in Manitoba, this project's focus is on changes to the legislation, regulations and policy framework for environmental assessment and licensing in this province. Methodological, operational and technical considerations are generally beyond the project's scope.

Several past studies have evaluated environmental assessment systems for their effectiveness and efficiency, considerations which inform this project as well. In this context, effectiveness refers to "whether something works as intended and meets the purpose for which it is designed."⁴ A well-designed system should also be efficient in terms of costs in time, money and human resources.⁵

Consistent with the Commission's mandate, and bearing in mind the reasons for reform, this Discussion Paper is focused on developing proposals intended to result in a transparent, certain and flexible framework for environmental assessment. These reform objectives inform the analysis in the following ways:

Transparency: This Discussion Paper recognizes the need for clear indicators about how and why development approval and procedural decisions are made.

Certainty: This Discussion Paper recognizes the need for certainty and clarity in Manitoba's environmental assessment and licensing process.

Flexibility: This Discussion Paper recognizes the need for flexibility in the environmental assessment process. The Act captures a wide range of activities involving complex and often competing interests. Reform ought to be aimed at achieving levels of assessment appropriate to the nature, location and circumstances of the proposed development. Flexibility also implies a variety of legislative, regulatory and policy instruments, all of which have a place in law reform.⁶

The subject of environmental assessment and licensing is far-reaching, and the Commission has been selective in its choice of Issues for Discussion. While the Discussion Paper will identify emerging areas of interest and scholarship, its focus is on those topics for which there is a sufficient body of knowledge and experience to identify good practice.

C. Structure of this Discussion Paper

The Discussion Paper explores ideas for reform in several key areas, based on a review of good environmental assessment practices, stakeholders' views, academic and professional literature, and contextual factors specific to Manitoba.

There is no single best way to analyze the regulatory framework for environmental assessment. The Commission approached this project by examining the various steps in Manitoba's process, identifying four main themes that influence the framework as a whole, and applying these

themes to specific procedural aspects of the system. The approach is reflected in the chapters of the Discussion Paper, as follows:

Chapter 2: An Overview of Manitoba's Environmental Assessment Process

Chapter 3: Environmental Assessment and Sustainable Development

Chapter 4: Cumulative Effects Assessment and Strategic Environmental Assessment

Chapter 5: Public Participation

Chapter 6: Balancing Certainty and Flexibility

Chapter 7: Specific Procedural Steps

D. Consultation Process

This Discussion Paper identifies 18 Issues for Discussion phrased as open-ended questions. The Commission will consider all responses in formulating its recommendations. If you have comments about other relevant matters, please include them in your submission.

Comments on the Discussion Paper may be submitted until April 25, 2014. A Report for Consultation will be circulated for additional comment before the publication of the Commission's Final Report.

CHAPTER 2: AN OVERVIEW OF MANITOBA'S ENVIRONMENTAL ASSESSMENT PROCESS

Environmental assessment generally follows a series of distinct, though often overlapping, procedural steps. This chapter will briefly describe these steps in the context of Manitoba's legislative and policy framework.

Triggering

Triggering refers to the mechanism(s) by which activities are brought into the environmental assessment process. In Manitoba, *The Environment Act* ("the Act")⁷ and the *Classes of Development Regulation*⁸ prescribe a list of activities that automatically trigger the environmental assessment process. Any activity that is consistent with those identified in the *Classes of Development Regulation* will be subject to environmental assessment under the Act. Proponents are required to file a proposal with the Department of Conservation and Water Stewardship for every development falling within the *Classes of Development Regulation*. The proponent must obtain a licence from the director before constructing, altering, operating or setting a Class 1, 2 or 3 development into operation. Of all proposals filed in Manitoba, approximately 48% are for Class 1 developments and 51% are for Class 2 developments. Class 3 developments represent less than 1% of proposals filed.

Screening

Screening refers to the process by which the level of assessment is determined. It is widely recognized that the breadth and rigour of the environmental assessment process should correspond to a project's potential impacts. In Manitoba, the legislative framework contemplates different levels of assessment depending on the development's classification as Class 1, 2 or 3 in the *Classes of Development Regulation*. In practice, the assessment path is generally determined with reference to a development's particular characteristics.

Scoping

Scoping is the process of identifying the major issues associated with a proposed development and determining procedural and informational requirements for environmental assessment. Manitoba's Act requires the director or minister to determine the form of assessment, and permits the director or minister to request additional information, issue guidelines for further studies, or require an environmental assessment report.

For the large majority of Manitoba developments, the licensing decision is made on the basis of the Environment Act proposal ("EAP"). In these cases, the scope of environmental assessment is generally determined before the EAP is filed, with reference to the informational requirements in the *Licensing Procedures Regulation*.⁹ The EAP may then be adjusted as a result of public and Technical Advisory Committee ("TAC") input.

For more complex developments, the director or minister may require a detailed environmental assessment report, often described as an environmental impact statement (“EIS”). The Act authorizes the minister or director to issue guidelines and instructions for the EIS as part of the scoping process. In practice, proponents often submit their own scoping documents which may be made available for public comment and are subject to review and modification by the regulator.¹⁰

Impact Assessment

Impact assessment is the process of identifying and analyzing the potential impacts of a proposed development and mitigation techniques. The proponent is responsible for impact assessment, and this analysis is found in either the EAP or the EIS.

Review of the Environmental Assessment Reports

In Manitoba, the director or minister reviews the content of the EAP or EIS before making a licensing decision, with input from the TAC and the public. The minister can order a public hearing to review the environmental assessment of any class of development. In such cases, the Clean Environment Commission conducts public hearings and makes licensing recommendations to the minister.

Decision-Making

This is the stage at which the decision-making authority approves or rejects a development proposal. Licensing conditions are imposed on approved developments. In Manitoba, the director has decision-making authority over Class 1 and 2 developments. The minister makes decisions for Class 3 developments. *The Environment Act* allows the minister to exercise the director’s authority over Class 1 and Class 2 developments where a public hearing has taken or will take place.

Appeals and Judicial Review

Development approval or rejection decisions are subject to judicial review. Judicial review is concerned with the procedural legality of the administrative process, and does not typically address a decision’s merits.

Some environmental assessment decisions are also subject to statutory appeal. In Manitoba, any person who is affected by the director’s decision may appeal to the minister. The Lieutenant Governor-in-Council considers appeals from minister’s decisions made under sections 10, 11, 12 or 14(2) of the Act.

Post-Licensing Follow-Up

This is the stage at which developments are supervised to ensure compliance with licensing terms and conditions. Proponents are generally expected to monitor and manage the

development's impacts. Statutory enforcement mechanisms are also relevant to post-licensing follow-up. *The Environment Act* contains several provisions relating to compliance and enforcement, which are examined in chapter 7 of this Discussion Paper.

CHAPTER 3: ENVIRONMENTAL ASSESSMENT AND SUSTAINABLE DEVELOPMENT

This chapter first examines the purpose of environmental assessment and the extent to which it serves as an instrument for sustainability, or sustainable development.¹¹ It goes on to question how an analysis of the need for, and alternatives to, a development should be addressed in the legislative framework.

A. Sustainable Development and Sustainability Assessment

In its most traditional sense, environmental assessment helps to ensure that environmental considerations are explicitly addressed and incorporated into the development decision-making process. Environmental assessment serves to anticipate and avoid, minimize or offset the adverse effects of a development proposal.

Increasingly, environmental assessment is also seen as a way to advance and promote certain environmental and social values. Environmental protection, conservation, social equity, biodiversity and public participation are among the many principles identified as falling within the scope of environmental assessment. Foremost among these is the concept of sustainability.

The classic definition of sustainable development comes from the 1987 Report of the World Commission on Environment and Development, *Our Common Future*: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹² Since that time, governments, industries and non-governmental organizations have embraced the idea of sustainability.

There is now an extensive academic literature on the possibilities of using environmental assessment as a platform from which to engage in sustainability assessment.¹³ This would involve a consideration of the environmental, economic and social effects of a proposed development, and the interaction among these effects. An overall goal of sustainability assessment, as described in the literature, is to achieve a net contribution to sustainability with a focus on the public interest.

Contemporary examples of sustainability assessment include recent joint review panels established under the *Canadian Environmental Assessment Act* and provincial or territorial statutes, several of which have adopted a net contribution to sustainability test when analyzing proposed developments.¹⁴ In Alberta, the Natural Resources Conservation Board decides whether major non-energy natural resources projects are in the public interest, considering economic, environmental and social effects.¹⁵ In England, sustainability appraisals have been required for all local land use plans since 1999.¹⁶

Despite some practical experience, the concept of sustainability assessment remains fluid. There is uncertainty around the meaning of sustainability, the relationship between intra-generational

and inter-generational equity, the preferred frameworks and methodologies for sustainability assessment, and the principles underlying the trade-offs between environmental, social and economic interests.¹⁷

In the Commission's view, it is not yet possible to identify a best practice of sustainability assessment. Moreover, the adoption of a sustainability assessment framework would represent a significant policy choice, involving new forms of knowledge, different participants and a change in focus. While the Commission suggests that Manitoba's policy-makers consider the merits of sustainability assessment, it is not in a position to make specific recommendations in this regard.¹⁸

That is not to say that environmental assessment cannot play an important role in promoting sustainability principles, as discussed in the section below.

B. Sustainability Principles and Environmental Assessment in Manitoba

Manitoba's Act makes clear that environmental assessment is, at a minimum, a tool for decision-making and for identifying and mitigating significant adverse impacts. The entire legislative structure for review and decision-making confirms and supports these roles.

The Act contemplates broader objectives as well. According to section 1(1), the Act's purpose is, "to develop and maintain an environmental protection and management system in Manitoba which will ensure that the environment is protected and maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations."

Legislative references to social and economic development, future generations and public involvement in environmental decision-making all point toward sustainability.

The government of Manitoba has signalled its policy commitment to sustainability with the enactment of *The Sustainable Development Act* ("SDA") in 1997,¹⁹ and more recently in its *Tomorrow Now* initiative.²⁰

The purpose of the SDA is to create a framework through which sustainable development will be implemented in the provincial public sector and promoted in private industry and in society generally.²¹

The SDA adopts the *Our Common Future* definition of sustainable development, and enacts a number of principles and guidelines to be applied in the pursuit of sustainability.²² Many of these are relevant to environmental assessment, including the integration of economic, environmental, social and human health factors in decision-making, stewardship, prevention, and conservation.²³ The SDA also emphasizes procedural factors relevant to environmental assessment such as public participation, access to information and accountability.²⁴

It seems only logical that the SDA’s principles and guidelines of sustainable development inform the conduct of environmental assessment in Manitoba, and be given expression in the Act.

Establishing a legislative connection between environmental assessment and sustainability is, in itself, straightforward. Some Manitoban natural resources statutes do so by referring to sustainable development as a statutory objective, and elaborating on the principles and guidelines provided in the SDA.²⁵

Statutory definitions could also be reviewed to ensure consistency with sustainability objectives. Definitions of such terms as “adverse effect”, “assessment” and “environment” are integral to supporting the Act’s purposes. Guidance on the analysis of social and economic effects might also be required.

A legislative connection between the Act and the SDA would be an important reflection of Manitoba’s commitment to sustainable development, helping to guide the interpretation of the Act, and inform the participants’ expectations.

Issue for Discussion

Should *The Environment Act* be amended to establish more direct links between the environmental assessment process and principles and guidelines of sustainability provided in *The Sustainable Development Act*? Are there particular developments for which sustainability principles are most relevant? How would this change affect your participation in Manitoba’s environmental assessment process?

Other statutory changes could also strengthen environmental assessment as a tool for sustainability, and the SDA’s principles and guidelines inform much of the analysis in the following chapters. The rest of this chapter concerns a question relevant to both good environmental practice and the pursuit of sustainable outcomes: how should a consideration of the need for, and alternatives to, a proposed development be addressed in the legislative framework?

C. The Need for and Alternatives to the Development

The consideration of the need for, and alternatives to, a proposed development (“NFAT”) seems to be implied in many of the SDA’s principles and guidelines. Sustainability goals such as stewardship, conservation and enhancement, for example, are best served by choosing the most sustainable option from a range of reasonable alternatives.

Much of the environmental assessment literature describes NFAT as a best practice, and the “key to creative, proactive and decision relevant assessment.”²⁶

Most commentators agree that NFAT should ideally occur at a strategic level. This has led to an extensive literature on the advantages of regional strategic environmental assessment and strategic environmental assessment, which are examined in more detail in Chapter 4 of this Discussion Paper.

NFAT is more challenging at an individual development level. Indeed, in many cases, feasible alternatives will no longer be practically available by the time a project reaches the regulatory assessment stage.

There are also legitimate questions about whether NFAT is necessary and appropriate for all proponents and all developments. Public proponents, for example, may be best placed to articulate the need for the project in broad public interest terms, and to explore a full range of alternatives.

In Manitoba, the director or minister may require the proponent to identify alternatives to the proposed development's processes and locations for Class 2 and 3 developments.²⁷ *The Environment Act Proposal Report Guidelines* suggest that an analysis of the need or rationale for the development, purpose and alternatives ought to form part of an Environment Act proposal ("EAP").²⁸ The binding *Licensing Procedures Regulation* is silent on the consideration of needs for and alternatives to the development in an EAP.²⁹

Some Canadian jurisdictions specify NFAT as a requirement for all environmental impact statements.³⁰

With its inclusion in *The Environment Act Proposal Report Guidelines*, NFAT seems to be an informal requirement for at least some developments in Manitoba. The question is whether NFAT should be formalized in the Act or regulations as a requirement for some or all proposed developments. There are various legislative approaches available. NFAT may, for example, be a discretionary requirement for all proposals, mandatory for all proposals with some exceptions, or mandatory for only some proposals.

NFAT need not be an onerous requirement. The policy context may often assist in articulating the need for a project and identifying appropriate alternatives, for both private and public developments. Guidelines could be developed to identify appropriate ranges of alternatives in the context of particular developments. More extensive use of strategic environmental assessment would also reduce the burden on individual proponents. In some cases, it may be appropriate to assign the responsibility of identifying alternatives to a government department or agency with special expertise in the subject area.³¹

Greater institutional capacity for NFAT analysis may also be required, particularly in the context of public hearings.

Issue for Discussion

Should a consideration of the need for, and alternatives to, a development (“NFAT”) be a requirement for some or all proposed developments? Are there types of developments for which NFAT is more or less appropriate? What legislative and policy supports are necessary for meaningful consideration of the need for, and alternatives to, a development?

CHAPTER 4: CUMULATIVE EFFECTS AND STRATEGIC ENVIRONMENTAL ASSESSMENT

The previous chapter examined the connection between environmental assessment and principles of sustainability. The topics of cumulative effects assessment, strategic environmental assessment and regional strategic environmental assessment are directly related to sustainability, as discussed in this chapter.

A. Cumulative Effects Assessment

Cumulative effects are changes to the environment caused by an action in combination with other past, present and future actions.³² The consideration of cumulative effects is central to environmental assessment as a tool for sustainability,³³ particularly in areas where multiple large-scale projects operate or are planned.

It is acknowledged as a best practice, but cumulative effects assessment (“CEA”) is methodologically complex and there are challenges to its effective implementation. These include determining the proper scope in terms of both geographic proximity and time; dealing with multiple stakeholders and cross-jurisdictional issues; establishing appropriate baselines for CEA; and determining the proper roles of proponents, regulators, and members of the public.

Many jurisdictions publish guidance on effective CEA. Alberta’s guidelines, for example, provide general guidance, recognizing the need for flexibility while suggesting certain basic questions that should be answered in any CEA process.³⁴ Alberta’s system allows the CEA requirement to be tailored to suit the particular circumstances of individual projects.

Some experts believe that CEA is not well suited for inclusion in project-level assessment, either conceptually or operationally.³⁵ This has led to calls for more strategic environmental assessment initiatives, discussed in greater detail below. Policy-makers may nevertheless wish to consider how to accommodate cumulative effects assessment at the individual development level, particularly in the absence of formal mechanisms for strategic environmental assessment.

Although Manitoba’s Act and regulations are silent on the need for CEA at either the development or strategic level, it is not uncommon for proponents to address cumulative effects. The regulator typically requires CEA for large developments with the potential for widespread and extensive effects.

Other statutory models for environmental assessment address CEA more directly, making it a requirement of every environmental impact statement, or identifying it as a factor in decision-making.³⁶

Consistent with the idea of environmental assessment as an instrument for sustainability, the regulatory framework should ideally support and facilitate CEA. In many cases, proponents may

be able to identify how their proposed developments will contribute to the cumulative state of the environment. This could be a legislative requirement for some or all proposed developments.

To reduce the burden of CEA on individual proponents, it is generally agreed that better technical guidance is required and that government should have an active role in assembling and publishing cumulative environmental information.³⁷ In most cases, proponents cannot reasonably be expected to gather data from competitors in the region, and the obligation should only extend to reliance on publicly available information.

Effective CEA also depends on the existence of thresholds, and other useful cumulative environmental indicators.³⁸ Additional work is required outside the legislative framework to build capacity in this regard.

Issue for Discussion

Should a consideration of cumulative effects be mandatory for all environmental assessments conducted in Manitoba? What legislative and policy supports are needed for meaningful cumulative environmental assessment at the individual development level?

The remainder of this chapter will focus on strategic environmental assessment initiatives as a vehicle for CEA, and the connection between strategic and development-level assessments.

B. Strategic Environmental Assessment

Strategic environmental assessment (“SEA”) is a process by which government assesses the environmental effects of its own policies, plans and programs.³⁹ Whereas development assessment processes focus on concrete proposals, SEA is aimed at identifying development goals and strategies for a particular sector or region.⁴⁰

Most observers agree that SEA offers the best opportunity to consider cumulative environmental effects and the need for and alternatives to various types of developments. It is also considered a key factor in achieving sustainability, permitting an integrated consideration of environmental, economic and social factors at an early stage.

Strategic environmental assessment can be implemented in various ways. Many jurisdictions provide for strategic environmental assessment through administrative order, cabinet directive or policy guideline.⁴¹ Some provincial statutes expressly allow for a form of strategic environmental assessment by authorizing the minister to require the environmental assessment of a plan or program.⁴²

There are SEA-type activities taking place outside the formal environmental assessment regime. Manitoban examples include integrated watershed management plans such as the Assiniboine Delta Aquifer Management Plan and the Swan Lake Basin Management Plan.

The Commission does not propose to recommend a legislated framework for SEA. While its merits are undisputed, there is no single best approach to SEA implementation. Much will depend on individual circumstances, and flexibility of approach seems essential.⁴³ It is expected that an accumulation of experience in strategic activities in Manitoba will eventually inform the development of a formal SEA framework.

There may, however, be merit in considering ways to address strategic environmental assessment in the existing legislation. As mentioned, some jurisdictions expressly authorize the minister to order the environmental assessment of a program or plan. Another possibility is to trigger strategic environmental assessment when a project-level assessment reveals a clear absence of publicly available cumulative environmental information.

Issue for Discussion

Strategic environmental assessment is considered an effective method for considering the need for and alternatives to development and cumulative environmental effects. How, if at all, should strategic environmental assessment be reflected in Manitoba's environmental assessment framework?

C. Regional Strategic Environmental Assessment

Regional strategic environmental assessment (“RSEA”) is a type of strategic environmental assessment, and a critical area of interest for academics, practitioners and policy-makers.

RSEA is a process by which environmental considerations are taken into account at a regional level, allowing for more meaningful consideration of alternatives, cumulative effects and ecological systems. RSEA is directly linked to the pursuit of sustainability.⁴⁴

The Canadian Council of Ministers of the Environment (“CCME”) suggests that the overall objective of RSEA is to, “inform the preparation of a preferred development strategy and environmental management framework(s) for a region.”⁴⁵ While cautioning against an overly prescriptive approach, the CCME identifies nine methodological steps that ought to form part of most RSEA processes.⁴⁶

RSEA is often discussed in the context of planning for specific sectors. It has potential applications in integrated land-use planning, urban planning, watershed management, regional energy strategies and conservation and protected areas planning. It may apply most usefully to specific ecological components, such as a species of animals or particular natural resources within a region.

While the theory of RSEA is highly regarded, there are practical barriers to its implementation. Among these are the absence of data, standards and thresholds at regional scales, and the administration and coordination of RSEA activities.⁴⁷

Legislative amendment alone cannot overcome these barriers, but it may facilitate more effective RSEA. The minister, for example, could be empowered to order RSEA where appropriate, and to require proponent participation in the RSEA process. Such engagement might include participation in multi-stakeholder regional environmental studies, the sharing of relevant data and the creation of regional environmental standards. Participation in RSEA is already a licensing condition in some cases, but could be formalized in the legislation.

To address the information gap, observers have identified the need for a repository of publicly available regional environmental data.⁴⁸ With data resulting from government-led regional studies and individual project monitoring, the repository would provide a reference point for cumulative effects assessment at the individual development level. The Department of Conservation and Water Stewardship could be responsible for maintaining and administering the data.

Another challenging aspect of RSEA is its connection to individual development assessment processes. Before its repeal in 2012, the *Canadian Environmental Assessment Act* addressed this issue, providing that the results of relevant regional environmental studies should be taken into account at the project level.⁴⁹ This is a practical legislative approach.

However, if RSEA-type activities are to inform development-level environmental assessment, it is critical that they be open, rigorous and subject to public comment. In the absence of a formal legislative model for strategic environmental assessment, it is all the more important that criteria be developed to determine what regional assessment activities are sufficiently robust to apply to development approvals. Criteria should include, at a minimum, adequate public participation at the strategic level.

Finally, effective RSEA depends on consistency in the collection and presentation of data. For monitoring data to be aggregated in a meaningful way, it must share certain characteristics. This speaks to the need for consistent rules on the collection and presentation of environmental monitoring data.

Issue for Discussion

How can the legislative framework support more effective regional strategic environmental assessment (“RSEA”)? Options for reform include authorizing the minister to require RSEA and proponent engagement in RSEA processes, maintaining a database of cumulative regional environmental information, developing criteria for the application of RSEA at the individual development level, and establishing guidelines for the consistent collection of environmental data.

CHAPTER 5: PUBLIC PARTICIPATION

Public involvement is central to the environmental assessment process. It helps to identify significant impacts, potential mitigation measures and contentious issues. Provisions for open, inclusive and robust public participation enhance the legitimacy of the environmental assessment process, and promote confidence in its outcomes. Good environmental assessment practice provides for meaningful public input at multiple process stages.

Manitoba's statutory framework for environmental decision-making reflects the importance of public participation. *The Sustainable Development Act* ("SDA") identifies public participation and access to information among its Guidelines for Sustainable Development.⁵⁰ The Act emphasizes the importance of public participation at several places, and establishes a public registry in which key documents are posted in respect of every proposed development.

This Discussion Paper examines ways to strengthen this aspect of Manitoba's system, addressing the requirements of public participation under four headings:

- A. When should the public be involved;
- B. How should the public be involved;
- C. Engagement with First Nations and other Aboriginal groups; and
- D. The role of the Clean Environment Commission.

A. When should the public be involved?

The Act provides for mandatory public consultation at only one stage in the environmental assessment process. On receipt of an Environment Act proposal ("EAP"), the director or minister must file a summary in the public registry and notify the public through advertisements in the local newspaper or radio.⁵¹ The public is invited to file comments and objections on the proposal. The Technical Advisory Committee ("TAC") reviews the proposal at the same time, and provides its comments to the director or minister.

The Information Bulletin - *Environmental Assessment and Licensing under The Environment Act* indicates that guidelines for environmental impact statements, and the statements themselves, are also screened by the public.⁵² But this is solely at the discretion of the regulator. The Manitoba Court of Queen's Bench decision in *Swampy Cree Tribunal Council v Clean Environment Commission* confirms that the public is not entitled to "participate or have any input whatsoever in the framing of the guidelines, the terms of reference or the environmental impact assessment."⁵³

A review of other environmental assessment systems suggests multiple stages at which public participation could be required or encouraged: pre-filing, scoping, environmental assessment report review, terms of reference for public hearings and post-licensing follow-up.

i. Before filing the proposal

In the interests of efficiency and effectiveness, public input should ideally be sought at the earliest possible opportunity. This helps to identify contentious issues and streamlines the process at later stages.

One way to encourage early public participation is to require that proponents identify in their filing documents the communities that might be affected by the development, public concerns that have been expressed and plans to address those concerns.

Recognizing that early engagement may not be necessary or appropriate for every development, this approach stops short of requiring pre-filing consultation in every case. Instead, it encourages the proponent to turn its attention to public participation at an early stage and identify any steps taken in that regard.

ii. Scoping

The Act requires public consultation on the EAP. While the scope of environmental assessment is typically established before the EAP is filed, many proposals are amended on the basis of public and TAC input.

The public does not have a legislated role in developing the scope of the assessment report, also referred to as the environmental impact statement (“EIS”), typically required for more complex developments with various widespread effects.

iii. Review of the Environmental Impact Statement

Section 17 of the Act requires that a copy of the EIS be filed in the public registry. Except in cases of a public hearing, however, there is no formal statutory opportunity for the public to comment on the contents of the EIS. Although the minister or director may routinely seek public input on the EIS at his or her discretion, it might be useful to formalize this practice in legislation.

iv. The Terms of Reference for a Public Hearing

Section 6(5.1) of the Act provides that the minister may specify terms of reference that the Clean Environment Commission is to follow in carrying out a public hearing. Terms of reference set limits on the public’s ability to engage in a critical examination of the environmental assessment. However, as confirmed in *Swampy Cree*, the public has no statutory right to provide input at this stage.

v. Post-Licensing Follow-Up

The environmental assessment literature highlights the need to involve the public in post-licensing activities. This is consistent with the principles of access to information and public

participation promoted in the SDA. Possible methods for engaging with the public at this stage include the mandatory publication of monitoring information, subject to confidentiality considerations, and a larger role for community liaison committees in follow-up activities.

Issue for Discussion

The Discussion Paper identifies five procedural stages at which public participation might be effective: pre-filing, scoping, review of the environmental impact statement, establishing terms of reference for a public hearing, and post-licensing follow-up. At what stages in the environmental assessment process is public participation most valuable?

B. How Should the Public be Involved?

This section of the Discussion Paper explores ways to improve the effectiveness of public participation, without unduly adding to the duration and complexity of the process.

i. Levels and Techniques of Public Engagement

The environmental assessment literature recognizes different levels of public engagement, ranging from basic public notification to negotiation.

Manitoba's provisions for public participation go beyond notification. In every case, the public is invited to comment on the EAP. In some instances, community advisory groups help explore alternatives to the project and develop the scope of environmental assessment. For some developments, public engagement may extend to negotiation about the features of the proposed development and the scope of environmental assessment.

Manitoba's system is versatile enough to allow for various techniques of public engagement including written consultation, public information sessions and individual meetings. There is no apparent need to amend the legislation to allow for greater flexibility in consultation.

Nevertheless, it may be useful to provide guidance to both proponents and the public about best practices in this area.⁵⁴ Published guidelines could identify public engagement techniques and signal the regulator's expectations about proponent-public consultation.

ii. The Timing of Public and TAC Review

*The Licensing Procedures Regulation*⁵⁵ sets deadlines for the publication and advertisement of an EAP and other procedural steps. These have not been amended since 1988. It may now be time to review the regulation and update the time frames to reflect modern practice and expectations. Prescribed time limits should allow for meaningful public review without compromising process certainty.

The EAP is circulated to the public and to the TAC at the same time. The TAC identifies technical shortcomings in the proposal and often requests additional information and clarification. Members of the public may also comment and request information on the EAP.

Some observers have suggested that the TAC review ought to be complete before the EAP is published. This would allow the public to focus on the proposal in its revised form, with the most complete and up-to-date information. A related suggestion is that TAC comments be provided to the public before the end of the public consultation period.

Although these proposals may add time to the initial consultation period, they should contribute to the overall efficiency of the system by allowing the participants to focus on the most significant aspects of the proposed development.

iii. Notification

This section of the Discussion Paper addresses the regulator's role in notifying the public about a proposed development.

The Act provides for publication of a summary of the EAP in the public registry and for advertisements in the local newspaper or radio. The limits of this statutory responsibility were tested in *Caddy Lake Cottagers Assn. v Florence-Nora Access Road Inc.*⁵⁶ In this application to quash a licence issued under the Act, the court ruled that the statute did not require notice to those individuals or communities most directly affected by the proposed development.

The findings in *Caddy Lake* highlight the need to review the Act's notice provisions. Some sources suggest that giving notice to those individuals directly affected by a proposed development is a minimum good practice.⁵⁷ This would be consistent with the principles and guidelines of sustainable development, and may help to ensure more effective public engagement.

In addition, although newspaper and radio advertisements may be useful, there are now multiple methods of public engagement. These include social media and electronic mailing lists, both of which are used effectively in other jurisdictions.⁵⁸

iv. The Public Registry

Section 17 of the Act establishes a public registry and prescribes the documents it must contain. The public registry serves an important function in Manitoba's environmental assessment system, facilitating meaningful public engagement. There have been many recommendations for improvements to Manitoba's public registry, most of which do not require legislative amendment.⁵⁹

The Commission has identified one aspect in which legislative amendment could reinforce the utility of the public registry. The Act does not require that information on appeals be included in

the public registry, and it is the government's practice not to publish such information. Section 17 of the Act could be amended to address this legislative gap. There is no apparent reason for excluding appeal information from the public registry, and its publication would promote transparency in the system.

Issue for Discussion

How can the legislative framework strengthen public engagement in Manitoba? Options for reform include publishing guidelines on effective public engagement, providing for TAC involvement before public notification, requiring notice to directly affected members of the public, and including appeal information in the public registry. How would these reforms affect your participation in the process?

C. Engagement with First Nations and Other Aboriginal Groups

First Nations and other Aboriginal groups occupy a unique place in Canada's constitutional framework. *The Constitution Act, 1982* expressly recognizes and affirms existing Aboriginal and treaty rights.⁶⁰ Aboriginal rights stem from activities that are integral to the culture of Aboriginal peoples that existed before European contact or assertion of sovereignty, and that continue in some form to the present.⁶¹ Canada's courts have elaborated on the meaning of Aboriginal title and non-title rights.⁶² Treaty rights arise out of treaties signed by the government and Aboriginal people, and often include rights of hunting, fishing and trapping, annuities and the right to land.

The cultures, traditions and livelihoods of First Nations and other Aboriginal groups are often closely connected to the land, and their communities may be disproportionately affected by industrial development. Their centuries-long ties to the land have also resulted in an accumulated knowledge about the characteristics and interactions of various components of the surrounding ecosystem. This Aboriginal traditional knowledge can contribute to the environmental assessment process in significant ways. In addition, Canada's international obligations underscore the need for meaningful engagement with its Aboriginal peoples when making resource development decisions.⁶³ For these reasons, engagement with First Nations and other Aboriginal groups requires special consideration.

Engagement with First Nations and other Aboriginal groups involves many considerations beyond the reach of environmental assessment procedures. With the scope of this project in mind, the Discussion Paper focuses on two areas in which Aboriginal law and environmental assessment law closely intersect: the relationship between environmental assessment and the Crown's duty to consult, and the place of Aboriginal traditional knowledge in the environmental assessment framework.

i. Environmental Assessment and the Crown's Duty to Consult

Section 35(1) of the *Constitution Act, 1982* provides that “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”⁶⁴ This provision has been interpreted as engaging a duty on the part of the Crown to consult with Aboriginal peoples about any action or decision that might adversely affect the exercise of an Aboriginal or treaty right. The Crown also has a duty to address or accommodate the concerns of Aboriginal communities raised in consultations. The Crown may delegate procedural aspects of the process but ultimately remains legally responsible for consultation and accommodation.⁶⁵

The duty to consult arises most often in the context of environmental assessment and licensing and natural resource allocation decisions. Crown-Aboriginal consultation and environmental assessment processes are closely connected, and could benefit from greater integration.

The proponent's environmental assessment documents should ideally inform and facilitate the Crown-Aboriginal consultation process. Indeed, the proponent is typically in the best position to identify a development's potential effects on the interests of First Nations or Aboriginal peoples. Not all environmental assessment documents address these issues effectively, however, and reform may be appropriate in this regard.

One possibility is to amend the Act's informational requirements to establish a closer connection between the two processes. The Act could require that the EAP identify any First Nation or Aboriginal community affected by the development, the activities and interests engaged, and proposed methods for addressing the effects.

Stakeholders have also identified the possible merits of an early notification system to inform affected communities about the environmental assessment process, and its connection to Crown consultation. A single proposed development can give rise to multiple consultations, often occurring at the same time or in close succession. This can obscure the distinction between the two processes and the ways in which they interact. Earlier and better information about the relationship between environmental assessment and Crown consultation might enhance engagement with First Nations and other Aboriginal groups.

ii. Aboriginal Traditional Knowledge within the Legislative Framework

There is no universally accepted definition of Aboriginal traditional knowledge. For the purpose of this Discussion Paper, the Commission adopts the Canadian Environmental Assessment Agency's description of Aboriginal traditional knowledge as a body of knowledge built up by a group of people through generations of living in close contact with nature. It is held by and unique to Aboriginal peoples.⁶⁶

As a matter of policy, Aboriginal traditional knowledge is widely recognized as an important part of project planning, resource management and environmental assessment. International instruments emphasize the importance of incorporating Aboriginal traditional knowledge into the

environmental assessment process.⁶⁷ Some Canadian statutes expressly identify Aboriginal traditional knowledge as a relevant decision-making factor and informational requirement,⁶⁸ and these are possible models for reform in this regard.

There is also a perceived need to promote good practices in the collection and use of Aboriginal traditional knowledge in the context of environmental assessment. Stakeholders identify problems in the use of confidentiality agreements, collection methods and the interpretation and application of Aboriginal traditional knowledge.⁶⁹ Manitoba-specific guidelines could be developed, in collaboration with First Nations and other Aboriginal groups, with reference to protocols and standards adopted throughout Canada and internationally.⁷⁰

Issue for Discussion

The Discussion Paper identifies several measures for reform that may enhance engagement with First Nations and other Aboriginal groups in the context of environmental assessment and licensing. These include: requiring that the EAP describe how the proposed development will affect First Nations and other Aboriginal groups, recognizing Aboriginal traditional knowledge in the legislation, and publishing best practice guidelines for the collection and use of Aboriginal traditional knowledge. How would these measures affect your participation in the environmental assessment process?

D. The Clean Environment Commission

The Environment Act establishes the Clean Environment Commission (“CEC”) for the purpose of providing advice and recommendations to the minister, and developing and maintaining public participation in environmental matters.⁷¹ It has other functions, but this Discussion Paper is principally concerned with the CEC as a forum for the independent and public review of environmental assessment.

The minister may refer an EAP to the CEC and set the terms of reference for the public hearing. The CEC may hear evidence from experts and members of the public, and provides licensing recommendations to the minister. Any member of the public may apply to the CEC to be a Presenter. Presenters are given 15 minutes of hearing time to comment on the proposed development, but may not cross-examine. Members of the public may also apply to be Participants and, if accepted, may adduce evidence, make arguments and cross-examine.⁷² The minister may establish a participant assistance program for a particular hearing, and the *Participant Assistance Regulation* provides a mechanism for members of the public to apply for participant funding.⁷³ Less than 1% of all development proposals filed in Manitoba are referred to the CEC for a public hearing.

Participants in Manitoba's environmental assessment system have identified four principal areas of interest with regard to the CEC:

- i. CEC experts;
- ii. Reviewing scoping documents and environmental impact statements;
- iii. Expanded public engagement at the CEC; and
- iv. The timing of CEC hearings.

i. CEC Experts

The CEC often hires its own experts and gathers information in advance of the hearing. This enables panel members to make informed observations about various technical aspects of the environmental assessment under consideration. However, there is no formal statutory authority for this practice, and the Act could be amended to expressly permit it.

There is also very little public information available to explain the role of CEC experts in the hearing process. The CEC's Process Guidelines do not address this point. Administrative law principles of procedural fairness and transparency suggest that the experts' role ought to be more robustly defined in the CEC's Process Guidelines.

ii. Reviewing Scoping Documents and Environmental Impact Statements

While the CEC has reviewed scoping documents and environmental impact statements in cases where the assessment is destined for a public hearing, it has no formal authority in this regard. The practice allows the CEC to gain an earlier appreciation of the issues involved, and to identify areas in need of clarification and elaboration. It streamlines the public hearing process.

Formalizing the CEC's role in reviewing environmental assessment documents could promote transparency and certainty in the system.

iii. Expanded Public Engagement at the CEC

The CEC is essential to effective public engagement in Manitoba. It is the only venue in which members of the public can interact with the proponent, the regulator and each other. The Act is permissive enough to allow for a variety of proceedings before the CEC, including public meetings, alternative dispute resolution processes and public investigations.

Despite this flexibility, the CEC is almost exclusively engaged in long, technical and often adversarial hearings. While the rigour of CEC hearings is critical to obtaining a comprehensive understanding of a proposed development, it is not always conducive to a free flow of ideas and information.

To support its role as a facilitator of truly public engagement, there is value in encouraging a wider range of proceedings before the CEC. Ideas offered to the Commission in this regard include employing the CEC as a forum for mediation, scoping hearings, public hearings on

smaller developments, information sharing open-houses, and proceedings relating to strategic environmental assessments and development plans.

While most of these activities are likely already permitted under the Act, express statutory language may help to reinforce and encourage their use.

Changes to the *Environmental Assessment Hearing Costs Recovery Regulation*⁷⁴ might also broaden the CEC as a forum for public engagement. The regulation requires the proponent to pay the CEC's hearing costs in respect of Class 3 developments. Since Class 3 developments represent less than 1% of all proposals filed in Manitoba, the regulation should arguably grant the minister discretion to require cost recovery in respect of all classes of development.

iv. The Timing of CEC Hearings

The regulatory process of environmental assessment contemplated in the Act is separate from the CEC's public hearing process. Each has distinct rules governing notification and requests for information. To avoid overlap and duplication, there may be merit in drawing a clear legislative distinction between the regulatory process and the CEC hearing.

The Act could make clear that the regulatory process for exchanging information and completing environmental assessment reports is complete before any hearing process begins. It may also be useful to consider the timing of CEC hearings in relation to any RSEA⁷⁵ or NFAT⁷⁶ proceedings mandated by the minister.

Issue for Discussion

The Discussion paper identifies four areas of possible reform in connection with the Clean Environment Commission ("CEC"). These are: clarifying the role of CEC experts, formalizing the CEC's authority to review environmental assessment documents, encouraging a larger variety of CEC proceedings, and clearly distinguishing the regulatory and hearing processes. How would these reforms affect your participation in the environmental assessment process?

CHAPTER 6: BALANCING CERTAINTY AND FLEXIBILITY

Achieving an appropriate balance of certainty and flexibility is a critical challenge in the design of an environmental assessment and licensing regime.

In Manitoba, permissive and discretionary provisions assure the system's flexibility. Some degree of discretion is necessary to accommodate the diversity of activities and circumstances falling within the environmental assessment system. It is not possible, or advisable, to prescribe a set of rules that must be applied to every decision under the Act. Each assessment and licensing decision should be tailored to a development's unique characteristics.

On the other hand, unlimited discretion can create uncertainty for participants and may affect the consistency of environmental assessment. It may also contribute to a lack of transparency, undermining the sustainability goals of access to information and public participation.

Ideally, the statute should achieve an appropriate middle ground between unfettered discretion and a rigidly prescribed decision-making process. This is consistent with a line of judicial authority confirming that administrative and executive discretion must be exercised within a legal framework and with regard to the object and purpose of the statute.⁷⁷

The tension between certainty and flexibility informs many aspects of the environment assessment and licensing regime, and is addressed throughout this Discussion Paper. This chapter will focus on questions of process certainty, referring to three features of Manitoba's system:

- A. Legislative support for environmental assessment;
- B. Significance determinations; and
- C. Written reasons for decision.

A. Legislative Support for Environmental Assessment

Most sources agree that good practice depends on a strong legislative foundation for environmental assessment.⁷⁸ Legislative support for key procedural steps, it is argued, provides a degree of certainty to participants and improves oversight, compliance and enforcement. According to some best practice models, environmental assessment legislation should prescribe rules for triggering, scoping, assessment options, participation requirements, reporting obligations, approval decision criteria, timelines for key steps and governance structures.⁷⁹

Manitoba's Act is lacking specific provisions on scoping, process options, minimum participation requirements, and approval decision and conditioning criteria. Consistent with good practice, reform measures should ensure that critical process steps are supported in the legislation.

In particular, there are very few decision-making criteria in Manitoba’s Act.⁸⁰ The director and minister make important procedural and approval decisions, mostly without any meaningful statutory direction. A core set of requirements applicable in every case might help to ensure consistency and certainty for participants.

While discretion is a necessary feature of all statutory environmental assessment regimes, other provincial models offer clear decision-making criteria for various steps in the process.⁸¹ Some common approval criteria emerge from these examples: the purpose of the legislation, public comments, sensitivity of the proposed site, the significance of the development’s anticipated effects, the environmental assessment documents and the regulator’s review of the environmental assessment.

Some statutory models also provide criteria for the procedural decisions to order a public hearing or require an environmental impact statement.⁸²

It is common for legislation to provide mandatory minimum content requirements for environmental assessment reports, which help to establish consistency in the scoping and reporting aspects of the process. Manitoba’s *Licensing Procedures Regulation* prescribes the information that must appear in an Environment Act proposal (“EAP”), although the director may waive these requirements.⁸³ These requirements could be reviewed and updated. There may also be merit in prescribing mandatory minimum content requirements for environmental impact statements.⁸⁴

Issue for Discussion

The Discussion Paper identifies a need for more concrete rules and criteria in the legislation. What aspects of Manitoba’s environmental assessment and licensing regime are most in need of clearer legislative criteria?

B. Significance Determinations

Significance determinations are central to environmental assessment, and inform multiple procedural steps such as screening, scoping, baseline analysis, alternatives analysis, impact identification, impact prediction, impact interpretation, impact management, consultation, documentation and decision-making.⁸⁵

The term “significant” appears throughout the Act, but is not defined in the legislation, regulations or any published guidelines.

The idea of significance does not lend itself well to precise definitions. Significance judgments may be difficult to apply consistently. The term can be interpreted narrowly or broadly and in that sense depends largely on the overall purpose of the environmental assessment process.

There is considerable variety in the way other jurisdictions address significance determinations. In Nova Scotia, for example, the term is defined in the regulations.⁸⁶

Many EA systems feature published guidance on significance determinations. These guidance documents typically refer to regulatory standards, objective criteria and thresholds. They provide examples of significant effects and certain basic criteria to guide significance determinations.⁸⁷

Ideally, significance determinations are based not only on professional judgments and technical methods but also on more qualitative factors obtained through public and stakeholder input. This is all the more important when determining the significance of social and economic effects.

Although a best practice does not exist when it comes to defining significance in the context of environmental assessment, most experts recognize the need for guidelines, and for open, explicit reasoning to support significance determinations.

There is an important distinction between significant effects before mitigation and significant residual effects. This often gets lost in environmental assessment reports, but is essential to evaluating a development's impacts and the effectiveness of mitigation techniques. To reinforce this distinction, there could be a legislative requirement that all Environment Act proposals clearly describe significant effects before mitigation, the proposed mitigation measures and significant residual effects.⁸⁸

Issue for Discussion

What are the most important factors in a significance determination? Should proponents be required to explain their significance determinations with reference to published guidelines, distinguishing between pre-mitigation and residual effects?

C. Written Reasons for Decision

In administrative law, written reasons for decision are credited with improving the quality of decision-making, enhancing consistency, promoting accountability and facilitating rights of review. In the context of environmental assessment, written reasons for decision are consistent with sustainability principles of public participation and access to information. Written reasons can contribute to a common understanding of important concepts, making the system more predictable and transparent.

Manitoba's Act requires the minister or director to provide written reasons for decision in four circumstances: 1) when the director decides not to recommend a public hearing in the face of objections; 2) when the minister decides not to request a public hearing after the director recommends a hearing; 3) when the director or minister refuses to issue a Class 1 or Class 2, but not Class 3, licence; and 4) when the minister declines to follow the recommendations of the Clean Environment Commission in respect of a licence.⁸⁹

Notably, there is no statutory requirement to provide written reasons for decision when a licence is approved. Although the disposition and status of each proposal must be noted in the public registry, this does not necessarily provide a justification or explanation for the decision and licensing conditions, as would typically be found in written reasons.

Other key decisions in the process could perhaps be better supported by written reasons for decision. These include decisions to approve minor alterations, appeal decisions, and certain enforcement and implementation decisions. In the interests of transparency, written reasons for decision would ideally be available in the public registry.

Issue for Discussion

Written reasons for decision can enhance process certainty and fulfill the objectives of public participation and transparency. What environmental assessment and licensing decisions should be supported by written reasons?

CHAPTER 7: SPECIFIC PROCEDURAL STEPS

Previous chapters of this Discussion Paper have identified overarching issues of sustainability, public participation, and balancing certainty and flexibility. This chapter applies these themes to select procedural steps in Manitoba's environmental assessment process. The focus is on those procedural elements for which legislative amendment can realistically enhance both the effectiveness and efficiency of environmental assessment. This chapter addresses triggering, screening and scoping, statutory appeals, and post-licensing follow-up.

A. Triggering Environmental Assessment

This sub-section addresses the breadth of *The Environment Act* and the ways in which activities are brought into the environmental assessment regime. These considerations are central to good environmental assessment practice, helping to ensure that potentially harmful activities are captured in the legislative framework. This section identifies three related areas for discussion: triggering methods for environmental assessment, unlicensed activities and environmental assessment-type processes, and staged licensing and project splitting.

i. Triggering Methods for Environmental Assessment

The mechanism by which activities are brought within the environmental assessment process is central to its effectiveness. A well designed triggering process also promotes process certainty.

Environmental assessment statutes generally provide one or both of the following triggering methods: 1) a list of activities that are automatically subject to environmental assessment, also known as an inclusion list; and 2) discretion to determine what activities are subject to environmental assessment.

Like most provincial jurisdictions, Manitoba uses an inclusion list to determine the activities that trigger the environmental assessment process. Any development consistent with the activities enumerated in the *Classes of Development Regulation* will be subject to environmental assessment. For some of the examples cited, the regulation sets out thresholds to be met in terms of capacity or size before environmental assessment is triggered.

The inclusion list has the advantages of clarity and certainty. On the other hand, it inevitably creates gaps in coverage. Secondary triggering methods should be employed to ensure that developments with the potential to create material environmental impacts are not excluded from the process.

The Manitoba Court of Queen's Bench decision in *Campbell Soup Co. v Manitoba*⁹⁰ highlights the gaps created by an inclusion list, reinforcing the need for a secondary triggering method. In *Campbell Soup*, the court found that a mushroom farm is not consistent with a food processing plant, and is therefore not contemplated in the *Classes of Development Regulation*.

The court also considered section 16 of the Act, which allows the minister to determine whether an activity is a development. The court rejected the argument that section 16 permits the minister to require an environmental assessment of an activity not contemplated in the regulation.

Thus, despite the parties' agreement that the mushroom farm had the potential for significant environmental impacts, it was not subject to an environmental assessment process.

To address the problems raised in *Campbell Soup*, it makes sense that the minister be authorized to order the environmental assessment of a development not contemplated in the *Classes of Development Regulation*. This authority is especially important where the potential environmental impact of a proposal is unclear or uncertain, or where proposals fall near the thresholds established for listed projects. The combination of an inclusion list and ministerial discretion is provided in several Canadian jurisdictions.⁹¹

A regular mandatory review of the inclusion list would also address some of its shortcomings, ensuring that new technologies are considered and that prescribed thresholds remain appropriate.

For greater certainty, ministerial discretion to require environmental assessment of an unlisted activity could be exercised with reference to specified criteria. The intended site of the development, the sensitivity of the area, the particular environmental values at stake, the communities affected by the intended development, and the potential contribution of a development to the cumulative state of the environment are all factors that may be relevant to this exercise of discretion.

Exclusion lists may also be used to identify those activities that are excluded from the environmental assessment process either as a matter of policy or because their effects are known to be insignificant.

Issue for Discussion

Should the Act expressly provide the minister with authority to require environmental assessment of an activity not contemplated in the *Classes of Development Regulation*? What factors should guide this exercise of discretion?

ii. Unlicensed Activities and Environmental Assessment-Type Processes

This sub-section addresses unlicensed activities and environmental-assessment type processes occurring outside the Act. As with triggering, the goal is to ensure that activities with the potential to produce adverse effects are subject to an open, robust assessment process.

Some Manitoba developments have never undergone any type of environmental assessment. Others were authorized under *The Clean Environment Act* before 1988 and these are deemed to be licensed under the Act.⁹²

In light of technological advances and contemporary thinking about the role of environmental assessment, it may now be beneficial to consider bringing unlicensed developments, and those subject to a pre-1988 *Clean Environment Act* order, into the modern environmental assessment regime.

Other activities with the potential for significant adverse effects are regulated outside the environmental assessment and licensing regime. Examples include activities related to the oil and gas industry, activities regulated under *The Dangerous Goods Handling and Transportation Act*,⁹³ some licences issued under *The Mines and Minerals Act*,⁹⁴ and Crown resource allocation decisions under various provincial natural resource management statutes.

It may now be prudent to review these environmental assessment-type processes to ensure they are as robust and comprehensive as the system established under the Act. If necessary, certain activities could be redefined to require an environmental assessment under the Act. A single statutory assessment process for all activities with the potential for significant adverse environmental effects might be appropriate.

Issue for Discussion

Should unlicensed activities, and those licensed under other regulatory regimes, be brought into the environmental assessment process established under *The Environment Act*? Are there activities that should not be subject to environmental assessment under the Act?

iii. Staged Licensing and Project Splitting

Section 13(1) of the Act allows a development to be licensed in stages. It authorizes the minister or director to issue a licence in respect of a specified stage in the development's construction or operation. In practice, this section permits the separate assessment and licensing of, for example, the construction of an industrial facility, the construction of infrastructure to support the facility, and the operation of the facility.

In its application, the staged licensing provision has the potential to be inconsistent with principles of sustainability. It permits the separate consideration of factors that in reality act in concert to produce environmental, economic, and social impacts. This would preclude a comprehensive consideration of the development's aggregate effects.

Although section 13(1) may have been enacted with a legitimate efficiency-related purpose in mind, some observers question whether it is consistent with a modern approach to environmental assessment. The *Report on the Consultation of Sustainable Development Implementation* (COSDI) addressed this issue, recommending that staged licensing be contingent on a determination that environmental impacts of the project as a whole are insignificant or can be mitigated with known technology.⁹⁵ At a minimum, it would be prudent to re-evaluate the provision's purpose and language.

This discussion highlights the related issue of project splitting. The Act currently does not prevent a large project being broken into individual steps, with each one assessed separately. The minister has no statutory authority to combine multiple steps of a development into a single assessment if they are presented as separate proposals. This authority would provide more flexibility in establishing the proper scope of the project, which is critical to a meaningful environmental assessment process. The Act could be amended to provide the minister with this authority, as do some other provincial environmental assessment statutes.⁹⁶

Issue for Discussion

Should the Act allow for staged licensing? In what circumstances is staged licensing useful? What provisions are needed to ensure that all aspects of a development and their aggregate effects are adequately addressed in the environmental assessment process?

B. Screening and Scoping

Screening is the process by which the regulator determines the level of assessment for a particular development. Scoping is the process of identifying the major issues associated with a proposed development and determining procedural and informational requirements for environmental assessment. The two steps often overlap in both theory and practice.

Legislative screening and scoping mechanisms have important implications for sustainability objectives and process certainty. A well designed system allows proponents to plan for environmental assessment while preserving an appropriate level of flexibility.

i. Screening

There is an extensive literature describing the need to apply different levels and types of assessments to different undertakings. The rigour of the process should increase with the level of environmental, economic and social risk.

In Manitoba, the assessment process is theoretically guided by a development's classification as Class 1, 2 or 3 under the *Classes of Development Regulation*. The classification model is based in part on a development's risk of pollution.⁹⁷

This raises an interesting question about whether the risk of pollution is an adequate basis on which to classify developments in a modern environmental assessment regime. The activities identified as Class 1 may engage environmental, social and economic considerations that go far beyond the release of pollutants, justifying a robust environmental assessment process. Both mining and forestry activities are Class 2 developments despite their potential long-term environmental implications.

Moreover, it appears the level of assessment applied to a particular development has little to do with its classification. There are few discernible differences in the prescribed assessment paths for Class 1, 2 or 3 developments.⁹⁸

In practice, the required level of assessment depends on the potential risk posed by the development and the public's reaction to the proposal. However, the absence of statutory criteria in this regard raises the risk of inconsistency and may impede the proponent's ability to plan for the environmental assessment process.

ii. Scoping

Scoping identifies the significant environmental, social and economic issues associated with a proposed development, establishes the approach to assessment, and highlights missing information. Many observers consider it the most important aspect of environmental assessment, in terms of both substance and procedure.

Several factors affect the scope of environmental assessment. The nature of the development, the purpose of the environmental assessment regime, statutory definitions and criteria, and public concern are all important factors. While much of this Discussion Paper is relevant to scoping in its broad sense, this sub-section focuses on statutory scoping provisions.

Best practice models support early, open and interactive scoping procedures.⁹⁹ While efficiency considerations require that the scope of assessment be established early on, scoping mechanisms must be flexible to account for changing environmental conditions, new information and public concerns.

Manitoba's legal foundation for scoping could be improved. Currently, on receipt of an Environment Act proposal, the director or minister must determine the form of assessment and may require additional information or issue guidelines and instructions for assessment.¹⁰⁰

With the exception of these few provisions, the Act is silent on when, how and by whom scoping is conducted. Scoping appears to be mandatory under the Act, but is not expressly so. There are few scoping requirements and little clarity about the respective roles of the regulator, the proponent and the public. At a minimum, the legislation and policy framework should clarify the regulator's approach to scoping.

iii. Models for Reform

The analysis in this section suggests a need to re-examine Manitoba's system for classification and scoping. Legislative schemes in other jurisdictions offer various models for determining the level and scope of assessment.

One model prescribes defined assessment paths for certain types of development. The Nova Scotia regulations, for example, prescribe mandatory environmental impact statements and

public hearings for its Class 2 undertakings.¹⁰¹ While this approach promotes predictability, it may come at a cost to flexibility. This model should include a mechanism to bump a particular development from one assessment path to another in appropriate circumstances.

Other jurisdictions require an early registration of every project triggering environmental assessment. Under this approach, a project is typically registered before the proponent has done extensive field work.¹⁰² A basic project description is filed with the decision-making authority and made available to the public. The level and scope of assessment are determined only after a period of public input and technical consideration.

Early notification may enhance certainty by identifying public and technical concerns at the beginning of the planning process, resulting in fewer surprises later on. It also offers advantages in identifying and exploring alternatives to the development.

The Commission recognizes that it may not always be practical to disclose development plans at an early stage. Early notification may be more appropriate for some types of developments and proponents than others.

While there is no clear best approach to screening and scoping, it may be worthwhile to review and consider revisions to the current system. Both prescriptive and discretionary provisions have their place, and procedures could be combined into a comprehensive process.

Issue for Discussion

How effective is the scheme for determining levels of assessment established by *The Environment Act* and *Classes of Development Regulation*? Are you in favour of a system of basic notification for some or all proposed developments to aid in early, open and interactive scoping?

C. Statutory Appeals

Most environmental assessment and sustainable development literature emphasizes the importance of a system for effective, impartial review of assessment decisions.¹⁰³ A review mechanism promotes transparency and fairness, and is consistent with the principles outlined in *The Sustainable Development Act*.

There are two principal mechanisms for reviewing environmental assessment decisions and actions: judicial review and statutory appeals.

Judicial review of environmental assessment decisions is available in Manitoba, as it is throughout the common law system. Possible improvements to the judicial review process are not addressed in this Discussion Paper.

The availability of statutory appeals from environmental assessment decisions is of greater interest. The Act allows any person affected by certain directorial or ministerial decisions to file an appeal.¹⁰⁴ Director's decisions are appealed to the minister, and minister's decisions are appealed to the Lieutenant-Governor-in-Council.

Manitoba's system for statutory appeals is robust when compared to several provincial systems which provide no opportunities for appeal. Nevertheless there may be opportunities for improvement, particularly in two areas: timing of appeals, and the body for hearing appeals.

Statutory appeals under the Act can take considerably longer than 12 months to be decided. Significant delays are important in this context because licences are rarely stayed on appeal. The delay has implications for proponents who require certainty about the licensing terms and conditions, and for members of the public with concerns about the environmental effects of the development as licensed. Prescribing a reasonable period of time during which appeals must be decided could help address this concern.

A more challenging problem is the perception of bias associated with political, cabinet-level appeals such as exist in Manitoba. The risk of perceived bias is greatest in cases where the government is the proponent, the decision-maker and the appellate body.¹⁰⁵

There are relatively few Canadian alternative models to a cabinet-level appeal mechanism. In some jurisdictions, specialized environmental administrative tribunals are authorized to hear appeals from development approval and licensing decisions, with varying degrees of binding decision-making authority.¹⁰⁶

The Commission has considered whether the Clean Environment Commission might play a greater role in appeals from directorial or ministerial decisions in some cases. As an alternative, ad hoc independent panels may be appointed to hear appeals from decisions with the greatest risks of perceived bias. The involvement of an external review body would also help to address the anomalous situation of a cabinet-level appeal pending when the Government changes.

Issue for Discussion

What improvements might be made to Manitoba's system for statutory appeals? Options for reform include prescribed time frames for decision-making and the involvement of standing or ad hoc appeal panels.

D. Compliance and Enforcement

Compliance and enforcement are important to good environmental practice and the pursuit of sustainable outcomes.¹⁰⁷ Post-licensing follow-up ensures that the terms and conditions of the project approval are implemented, and assists in coping with unanticipated changes and adjusting plans to suit changing circumstances.

This section will address post-licensing issues under four headings: monitoring, auditing, program evaluation, and enforcement mechanisms.

i. Monitoring

Monitoring is the process of measuring and recording information about environmental impacts identified in the environmental assessment, testing the effectiveness of mitigation measures, and identifying potentially damaging changes in the environment as a result of the development.

Monitoring is typically the responsibility of proponents, although the regulator and members of the public also play a role. Monitoring provisions usually form part of the terms and conditions of the licence and the proponent's environmental management plan. The extent of the monitoring requirements imposed on a proponent depends on the size, complexity and potential impacts of the development.

Under Manitoba's Act, the director or minister may require information about a proponent's post-licensing plans, but monitoring is not mandatory. Under other statutory models, monitoring plans may be required information for an environmental assessment report, and some expressly require monitoring for every approved development.¹⁰⁸

The public communication of monitoring results is also discussed as a good environmental assessment practice. Manitoba's Act is silent on this point. While the publication of monitoring results would improve access to information, any such requirement must be subject to provisions for the safeguarding of public security and proprietary or other confidential information.

Good environmental assessment practice may include a role for the public in monitoring the impacts of licensed developments. A larger monitoring role for community advisory committees could further sustainability goals of public participation and access to information.

ii. Audits

Auditing refers to a process in which auditors check the proponent's monitoring program, procedures, reports and results to ensure compliance with licensing conditions and environmental standards. Manitoba's Act currently authorizes environment officers to inspect licensed developments, but is silent on the power of the regulator to conduct a full audit or to require a third party audit. Express statutory provisions allowing for regulator and third-party audits would reinforce the Act's enforcement provisions.

iii. Program Evaluation

Program evaluation refers to a review of the environmental assessment system overall, with particular reference to past licensed projects. Program evaluation measures the system's cost effectiveness, the reliability of predictive methods and safeguards, and the extent to which the system is working as intended. This has occurred in Manitoba on an ad hoc basis, but a regular,

formal review of the environmental assessment program could result in process improvements and better environmental outcomes.¹⁰⁹

iv. Enforcement

A flexible and responsive environmental assessment system depends on a full range of compliance and enforcement provisions. Manitoba's Act has several provisions relevant to enforcement including the power to require a new proposal when evidence warrants a change in the licence for Class 3 developments only, the power to suspend or cancel a licence in cases of violation, and the power to charge and prosecute an offender.¹¹⁰

Previous law reform initiatives in Manitoba have identified gaps in the Act's enforcement provisions. The Act does not, for example, permit the minister to review and amend a licence where significant environmental effects may occur with the continued operation of the development as licensed. The minister is also not authorized to periodically review a licence to evaluate its performance in protecting the environment.¹¹¹

Other jurisdictions offer additional options for reform. Some Canadian provincial jurisdictions formally allow individuals to request investigations of possible offences.¹¹² Others impose a positive obligation on the licensee to provide any new information concerning possible adverse effects.¹¹³ Several environmental assessment statutes contemplate administrative penalties as an enforcement tool, although few have applied them in practice.¹¹⁴

Issue for Discussion

What changes to *The Environment Act* might help to improve compliance and enforcement? Options for reform include mandatory monitoring and publication of monitoring information, the power to order audits, routine program evaluations and enhanced enforcement techniques.

NOTES

¹ Christopher Wood, *Environmental Impact Assessment- A Comparative Review*, 2nd ed (Harlow: Pearson Education Limited, 2003) at 5.

² See Robert Gibson, “In Full Retreat: the Canadian Government’s New Environmental Assessment Law Undoes Decades of Progress” (2012) 30:3 *Impact Assessment and Project Appraisal* 179; Meinhard Doelle, “CEAA 2012: The End of Federal EA as We Know It?” (2012) 24 *JELP* 1.

³ Manitoba Conservation and Water Stewardship, *Report of the Consultation on Sustainable Development Implementation* (June 1999), online: Province of Manitoba <http://www.gov.mb.ca/conservation/susresmb/cosdireport.html> [COSDI]; Manitoba Conservation, *Building a Sustainable Future: Proposed Changes to Manitoba’s Environment Act – A Discussion Paper* (September 18, 2001). The Commission has also referred to the recent work of Mark Haddock, *Environmental Assessment in British Columbia* for the Environmental Law Centre, University of Victoria, Faculty of Law (November 2010); Deborah Carver et al, *Inter-jurisdictional Coordination of EA: Challenges and Opportunities Arising from Differences Among Provincial and Territorial Assessment Requirements and Processes* for the Environmental Planning and Assessment Caucus, Canadian Environmental Network & the East Coast Environmental Law Association (November 2010); Brenda Heelan Powell, *A Model Environmental and Sustainability Assessment Law* (Edmonton: Environmental Law Centre, 2013).

⁴ Canadian Environmental Assessment Agency & International Association for Impact Assessment, *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance - International Study of the Effectiveness of Environmental Assessment*, Final Report by Barry Sadler (Supply and Services Canada, 1996) at 37 [Sadler].

⁵ Wood, *supra* note 1.

⁶ In the context of this Discussion Paper, the term “policy instruments” refers primarily to published guidelines issued by the Manitoba Department of Conservation and Water Stewardship.

⁷ *The Environment Act*, SM1987-88, c 26; CCSM c E125.

⁸ *Classes of Development Regulation*, Man Reg 164/88.

⁹ *Licensing Procedures Regulation*, Man Reg 163/88.

¹⁰ In the context of this Discussion Paper, the term “regulator” refers to the Manitoba Department of Conservation and Water Stewardship, including the director and the minister.

¹¹ In this Discussion Paper, the terms “sustainability” and “sustainable development” are used synonymously. See Robert Gibson et al, *Sustainability Assessment* (London:Earthscan, 2005) at 64, n1.

¹² UN World Commission on Environment and Development, *Our Common Future* (1987) online: UN Documents Gathering a Body of Global Agreements <http://www.un-documents.net/our-common-future.pdf>.

¹³ Organisation for Economic Co-operation and Development, *Guidance on Sustainability Impact Assessment* (2010) online: OECD <http://www.oecd.org/greengrowth/46530443.pdf>.

¹⁴ See e.g. Robert Gibson, “Application of a Contribution to Sustainability Test by the Joint Review Panel for the Canadian Mackenzie Gas Project” (2011) 29:3 *Impact Assessment and Project Appraisal* 231; Meinhard Doelle, “The Role of EA in Achieving a Sustainable Energy Future in Canada: A Case Study of the Lower Churchill Panel Review” (2013) 25 *JELP* 113 [Doelle].

¹⁵ *Natural Resources Conservation Board Act*, RSA 2000, cN-3, s2.

¹⁶ Some industries have also developed sustainability frameworks. See e.g., Mining, Minerals and Sustainable Development-North America, *Towards Change: The Work and Results of Mining, Minerals and Sustainable Development North America* (Winnipeg: International Institute for Sustainable Development, 2002).

¹⁷ See Jenny Pope, David Annandale & Angus Morrison-Saunders, “Conceptualizing Sustainability Assessment” (2004) 24 *Environmental Impact Assessment Review* 595.

¹⁸ In this regard, the Commission’s position contrasts with the *Report of the Consultation on Sustainable Development Implementation* (COSDI) which recommended that “Manitoba broaden the concept of assessment from the environmental impact assessment as set out in *The Environment Act*, to an effects assessment to include the assessment and review of all of the sustainability factors of a development.” See COSDI, *supra* note 3, Recommendation 4B.

¹⁹ *The Sustainable Development Act*, SM 1997, c 61; CCSM c S270.

²⁰ Manitoba Conservation and Water Stewardship, *Tomorrow Now- Manitoba’s Green Plan* (2012), online: Province of Manitoba <http://www.gov.mb.ca/conservation/tomorrownowgreenplan>.

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- ²¹ *The Sustainable Development Act*, *supra*, note 19, s 2.
- ²² *Ibid*, s 1.
- ²³ *Ibid*, Schedule A ss 1, 2, 4, 5.
- ²⁴ *Ibid*, Schedule B ss 2, 3, 4.
- ²⁵ See e.g. *The Mines and Minerals Act*, SM 1991-92, c 9; CCSM c 162, s2.
- ²⁶ Sadler, *supra* note 4 at 55.
- ²⁷ *The Environment Act*, *supra* note 7, ss 11(9)(c), 12 (5)(c).
- ²⁸ Manitoba Conservation and Water Stewardship, Environmental Approvals Branch, *Information Bulletin – Environment Act Proposal Report Guidelines* (June 2013), online: Province of Manitoba https://www.gov.mb.ca/conservation/eal/pubs/info_eap.pdf.
- ²⁹ *Licensing Procedures Regulation*, *supra* note 9.
- ³⁰ See the *Environmental Protection and Enhancement Act*, RSA 2000 c E-12, s 49(a),(b),(h); the *Environmental Assessment Act*, RSO 1990 c E18, s 6.1(2).
- ³¹ Doelle, *supra* note 14 at 126.
- ³² See G Hegmann et al, *Cumulative Effects Practitioner’s Guide* (1999) online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=43952694-1>.
- ³³ Monique Dubé, “Cumulative Effect Assessment in Canada: A Regional Framework for Aquatic Ecosystems” (2003) 23 *Environmental Impact Assessment Review* 723 at 724 [Dubé].
- ³⁴ Alberta Environment, Environmental Assessment Branch, *Cumulative Effects Assessment in Environmental Impact Assessment Reports Required under the Alberta Environmental Protection and Enhancement Act*, online: Alberta Environment <http://environment.alberta.ca/documents/CEA-in-EIA-Reports-Required-under-EPEA.pdf>.
- ² Peter Duinker & Lorne Greig, “The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment” (2006) 37:2 *Environmental Management* 153.
- ³⁶ See e.g. the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 19(1)(a); *Environmental Protection and Enhancement Act*, *supra* note 30, s 49(d).
- ³⁷ See Office of the Auditor General of Canada, *2011 October Report of the Commissioner of the Environment and Sustainable Development* (October 4, 2011) at Chapter 2, online: Office of the Auditor General of Canada http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201110_e_35765.html.
- ³⁸ International Finance Corporation, World Bank Group, *Good Practice Handbook- Cumulative Impact Assessment and Management: Guidance for Private Sector in Emerging Markets* (August 2013) at 54 online: http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_cumulativeimpactassessment.
- ³⁹ Strategic environmental assessment is closely related to land use planning. The *Report of the Consultation on Sustainable Development Implementation*, (COSDI), *supra* note 3, made comprehensive recommendations to establish better connections between land-use planning and environmental assessment activities. This Discussion Paper will not re-examine the issue.
- ⁴⁰ Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (2009), online: Canadian Council of Ministers of the Environment http://www.ccme.ca/assets/pdf/rsea_in_canada_principles_and_guidance_1428.pdf at 8 [CCME].
- ⁴¹ See e.g. Privy Council Office & Canadian Environmental Assessment Agency, *Cabinet Directive of the Environmental Assessment of Policy, Plan and Program Proposals* (Ottawa: Public Works and Government Services Canada, 2010), online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/default.asp?lang=En&n=B3186435-1>.
- ⁴² See e.g. the *Environmental Assessment Act*, SBC 2002, c 43, s 49; the *Environment Act*, SNS 1994-95, c1, s 3(az).
- ⁴³ See Bram Noble, “Promise and Dismay: The State of SEA in Canada” (2009) 29:1 *Environmental Impact Assessment Review* 66 at 73.
- ⁴⁴ Dubé, *supra* note 33.
- ⁴⁵ CCME, *supra* note 40.
- ⁴⁶ *Ibid* at 17.
- ⁴⁷ See Jill Harriman & Bram Noble, “Characterizing Project and Strategic Approaches to Regional Cumulative Effects Assessment in Canada” (2008) 10 *Journal of Environmental Assessment Policy and Management* 25.
- ⁴⁸ Dubé, *supra* note 33.
- ⁴⁹ *Canadian Environmental Assessment Act*, SC 1992, c 37, s 16.2 [Repealed].
- ⁵⁰ *The Sustainable Development Act*, *supra* note 19, Schedule B, ss 2-3.
- ⁵¹ *The Environment Act*, *supra* note 7, ss 10(4)(a), 11(8)(a), 12(4)(a).

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- ⁵² Manitoba Conservation and Water Stewardship, Environmental Approvals Branch, *Information Bulletin – Environmental Assessment and Licensing under The Environment Act* (June 2013), online: Province of Manitoba http://www.gov.mb.ca/conservation/eal/pubs/info_eal.pdf.
- ⁵³ *Swampy Cree Tribunal Council v Clean Environment Commission* (1994), 94 ManR(2d) 188 (Man QB) at para 29.
- ⁵⁴ Manitoba Conservation and Water Stewardship has published a *Guide for Public Comments on Environment Act Proposals* and a *Public Registry Guide*, online: Province of Manitoba <https://www.gov.mb.ca/conservation/eal/pubs/index.html>.
- ⁵⁵ *Licensing Procedures Regulation*, *supra* note 9.
- ⁵⁶ *Caddy Lake Cottagers Assn v Florence-Nora Access Road Inc* (1998) 126 Man R (2d) 230 (CA).
- ⁵⁷ UN University Online Learning, RMIT University & UN Environmental Programme, *Environmental Impact Assessment: Course Module* at Chapter 3-2 “What is Public Involvement?” online: EIA Open Educational Resource http://eia.unu.edu/course/index.html%3Fpage_id=129.html [UN University].
- ⁵⁸ Canada, Nova Scotia, Ontario, Alberta, British Columbia, Northwest Territories and the Yukon all use email lists and RSS feeds to communicate with interested members of the public.
- ⁵⁹ For example, COSDI, *supra* note 3, Recommendation 5M makes extensive recommendations for improvements to the public registry. There have been improvements made to the registry in response to these and other recommendations.
- ⁶⁰ *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, s 35.
- ⁶¹ *R v Van der Peet*, [1996] 2 SCR 507.
- ⁶² See e.g. *Delgamuukw v British Columbia*, [1997] 3SCR 1010; *R v Sparrow*, [1990] 1 SCR 1075.
- ⁶³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008) 15 at Art 32, online: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.
- ⁶⁴ *The Constitution Act, 1982*, *supra* note 60.
- ⁶⁵ See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511. In Manitoba, Crown-Aboriginal consultation is conducted in accordance with the *Interim Policy for Crown Consultation with First Nations, Métis Communities and other Aboriginal Communities* (May 4, 2009), online: http://www.gov.mb.ca/ana/pdf/interim_aboriginal_consultation_policy_and_guidelines.pdf.
- ⁶⁶ Canadian Environmental Assessment Agency, *Considering Aboriginal traditional knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act—Interim Principles*, online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=4A795E76-1>.
- ⁶⁷ See e.g. the *United Nations Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79; 31 ILM 818 at Art 7(j), online: Convention on Biological Diversity <http://www.cbd.int/doc/legal/cbd-en.pdf>.
- ⁶⁸ See e.g. *Canadian Environmental Assessment Act, 2012*, *supra* note 3, s 19(3); *Mackenzie Valley Resource Management Act, SC 1998 c 25 s 60.1*.
- ⁶⁹ The legal implications of confidentiality agreements in the preparation of Aboriginal traditional knowledge land use studies and community benefit agreements are relatively unexplored and merit further study.
- ⁷⁰ See e.g. First Nations Centre, *OCAP: Ownership, Control, Access and Possession* (Ottawa: National Aboriginal Health Organization, 2007), online: Centre for Aboriginal Health Research <http://cahr.uvic.ca/nearbc/documents/2009/FNC-OCAP.pdf>; The Council of Yukon First Nations, *Traditional Knowledge Research Guidelines. A Guide for Researchers in the Yukon* (August 2000) online: Northern Contaminants Program <http://www.northerncontaminants.ca/done/guidelines/tkGuidelines/TK%20Guidelines.pdf>.
- ⁷¹ *Supra* note 7, s 6.
- ⁷² Manitoba Clean Environment Commission, *Process Guidelines Respecting Public Hearings* (February 2012), online: Manitoba CEC [http://www.cecmanitoba.ca/resource/file/Procedures%20Manual%202012\(2\).pdf](http://www.cecmanitoba.ca/resource/file/Procedures%20Manual%202012(2).pdf).
- ⁷³ *Participant Assistance Regulation*, Man Reg 125/91.
- ⁷⁴ *The Environmental Assessment Hearing Costs Recovery Regulation*, Man Reg 210/92.
- ⁷⁵ RSEA refers to regional strategic environmental assessment, *supra* pp 17-18.
- ⁷⁶ NFAT refers to the need for, and alternatives to, a development, *supra* pp 12-14.
- ⁷⁷ See *Roncarelli v Duplessis*, [1959] SCR 121.
- ⁷⁸ See e.g. Sadler, *supra* note 4 at 21.
- ⁷⁹ Andrew Macintosh, “Best Practice Environmental Impact Assessment: A Model Framework for Australia” (2010) 69:4 Australian Journal of Public Administration 401.

⁸⁰ Section 12.02 of the Act, *supra* note 7, provides only mandatory statutory decision-making criteria. It requires the director or minister to take into account – in addition to other potential environmental impacts of the proposed development – the amount of greenhouse gases to be generated by the proposed development and the energy efficiency of the proposed development.

⁸¹ See e.g. Ontario's *Environmental Assessment Act*, RSO 1990, C E18, s 9(2); Nova Scotia's *Environmental Assessment Regulations*, NS Reg 26/9, s 12.

⁸² See e.g. *Environmental Assessment Regulations*, 2003, NLR 54/03 s25, which provides that the minister shall require an environmental impact statement where there may be significant negative environmental effects or public concern.

⁸³ *Licensing Procedures Regulation*, *supra* note 9, ss 1-2.

⁸⁴ See e.g. the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 49.

⁸⁵ See David Lawrence, *Significance Criteria and Determination in Sustainability-Based Environmental Impact Assessment (Final Report)* for Mackenzie Gas Project Joint Review Panel (November 30, 2005) at 8, online: CEAA https://www.ceaa-acee.gc.ca/155701CE-docs/David_Lawrence-eng.pdf.

⁸⁶ *Environmental Assessment Regulations*, NS Reg 26/95, s 1(1).

⁸⁷ Common criteria include: extensiveness over time and space; intensiveness in concentration and proportion; compliance with environmental standards and thresholds; compliance with environmental policies, land use plans or sustainability strategies; impact on ecologically sensitive areas; levels of public concern; and impact on social and community values and traditions.

⁸⁸ UN University, *supra* note 57 at Chapter 6-6 "Evaluating Impact Significance".

⁸⁹ *The Environment Act*, *supra* note 7, ss 10(7),-(7.1), 10(9),-(10), 11(10),-(10.1), 11(12)-(13), 12(6)-(8).

⁹⁰ *Campbell Soup Co v Manitoba* (1991), 74 Man R (2d) 237.

⁹¹ See e.g. *Environmental Assessment Act*, SBC 2002, c43; *Environmental Protection and Enhancement Act*, RSA 2000, c E-12; *Environmental Protection Act*, SNL 2002, CE-14.2; the *Environment Act*, SNS 1994-95, c 1.

⁹² *The Environment Act*, *supra* note 7, s15(3).

⁹³ *The Dangerous Goods Handling and Transportation Act*, RSM 1987 c D12; CCSM c D12.

⁹⁴ *The Mines and Minerals Act*, SM 1991-92 c 9; CCSM c M162.

⁹⁵ COSDI, *supra* note 3, Recommendation 4I.

⁹⁶ See e.g. section 6(4) of the *Environmental Impact Assessment Regulation*, NB Reg 87-83 made under New Brunswick's *Clean Environment Act* RSNB 1973, c C-6, which allows the minister to view an undertaking in isolation or together with any enterprise, activity, project, structure, work or program that is likely to be carried on with the undertaking.

⁹⁷ According to the section 1 of the Act, *supra* note 7, the effects of a Class 1 development are limited to the release of pollutants. Class 2 developments' effects are unrelated to the release of pollutants or in addition to the release of pollutants. Class 3 developments are exceptional in terms of the magnitude of their effects or the number of environmental issues they generate.

⁹⁸ The Act, *supra* note 7, contemplates that the minister can require the proponent to engage in public consultation and prepare an assessment report only for Class 2 and 3 developments. The *Licensing Regulation*, *supra* note 9, prescribes different time periods for certain process decisions and public consultation depending on the class of development. These timelines are not consistently observed in practice as they often do not allow for adequate review and consultation.

⁹⁹ UN University, *supra* note 57, Chapter 5-2 "Purpose of Scoping".

¹⁰⁰ *The Environment Act*, *supra* note 7, ss 10(6), 11(9), 12(5).

¹⁰¹ *Environmental Assessment Regulations*, NS Reg 26/95, s 11.

¹⁰² For example, the Newfoundland & Labrador *Environmental Protection Act*, SNL 2002, c E-14.2 requires an initial registration of all undertakings identified in its inclusion list. The public may comment on the registration document. Within 45 days of registration, the minister must decide to: release the undertaking from the environmental assessment process, require an Environmental Preview Report, require an Environmental Impact Statement, or refuse the undertaking.

¹⁰³ See Robert Gibson, "Sustainability Assessment: Basic Components of a Practical Approach" (2006) 24 *Impact Assessment and Project Appraisal* 170 at 179, 180.

¹⁰⁴ *The Environment Act*, *supra* note 7, ss 27-28.

¹⁰⁵ This problem is exacerbated in Manitoba where, as a result of reorganization in the early 2000s, the Department of Conservation and Water Stewardship can act as both proponent and regulator.

¹⁰⁶ For example, the Alberta Environmental Appeals Board which hears appeals from decisions made under the *Environmental Protection and Enhancement Act*, *supra* note 30, s 90.

¹⁰⁷ See Robert Gibson et al, *supra* note 11 at 147.

¹⁰⁸ See e.g. *Environment Act*, SNS 1994-94, c 1, s 41(a).

¹⁰⁹ See e.g. Office of the Auditor General of Canada, *2011 October Report of the Commissioner of the Environment and Sustainable Development* (October 4, 2011); Office of the Auditor General of British Columbia, *An Audit of Environmental Assessment Office's Oversight of Certified Projects* (July 2011).

¹¹⁰ *Supra* note 7, ss 12(2), 19(1), 31.

¹¹¹ Manitoba Conservation, *Building a Sustainable Future: Proposed Changes to Manitoba's Environment Act – A Discussion Paper* (September 18, 2001).

¹¹² See e.g. *Environmental Protection and Enhancement Act*, *supra* note 30, s 196; *Environmental Protection Act*, *supra* note 91, s 91.

¹¹³ *Environmental Protection and Enhancement Act*, *ibid*, s 76.

¹¹⁴ *Ibid*, s 237.

APPENDIX A: LIST OF ISSUES

CHAPTER 3: ENVIRONMENTAL ASSESSMENT AND SUSTAINABLE DEVELOPMENT

Issue 1

Should *The Environment Act* be amended to establish more direct links between the environmental assessment process and principles and guidelines of sustainability provided in *The Sustainable Development Act*? Are there particular developments for which sustainability principles are most relevant? How would this change affect your participation in Manitoba's environmental assessment process?

Issue 2

Should a consideration of the need for, and alternatives to, a development ("NFAT") be a requirement for some or all proposed developments? Are there types of development for which NFAT is more or less appropriate? What legislative and policy supports are necessary for meaningful consideration of the need for, and alternatives to, a development?

CHAPTER 4: CUMULATIVE EFFECTS AND STRATEGIC ENVIRONMENTAL ASSESSMENT

Issue 3

Should a consideration of cumulative effects be mandatory for all environmental assessments conducted in Manitoba? What legislative and policy supports are needed for meaningful cumulative environmental assessment at the individual development level?

Issue 4

Strategic environmental assessment is considered an effective method for considering the need for and alternatives to development, and cumulative environmental effects. How, if at all, should strategic environmental assessment be reflected in Manitoba's environmental assessment framework?

Issue 5

How can the legislative framework support more effective regional strategic environmental assessment ("RSEA")? Options for reform include authorizing the minister to require RSEA and proponent engagement in RSEA processes, maintaining a database of cumulative regional environmental information, developing criteria for the application of RSEA at the individual development level and establishing guidelines for the consistent collection of environmental data.

CHAPTER 5: PUBLIC PARTICIPATION

Issue 6

The Discussion Paper identifies five procedural stages at which public participation might be effective: pre-filing, scoping, review of the environmental assessment report, establishing terms of reference for a public hearing, and post-licensing follow-up. At what stages in the environmental assessment process is public participation most valuable?

Issue 7

How can the legislative framework strengthen public engagement in Manitoba? Options for reform include publishing guidelines on effective public engagement, providing for TAC involvement before public notification, requiring notice to directly affected members of the public, and including appeal information in the public registry. How would these reforms affect your participation in the process?

Issue 8

The Discussion Paper identifies several measures for reform that may enhance engagement with First Nations and other Aboriginal groups in the context of environmental assessment and licensing. These include: requiring that the EAP describe how the proposed development will affect First Nations and other Aboriginal groups, recognizing Aboriginal traditional knowledge in the legislation, and publishing best practice guidelines for the collection and use of Aboriginal traditional knowledge. How would these measures affect your participation in the environmental assessment process?

Issue 9

The Discussion paper identifies four areas of possible reform in connection with the Clean Environment Commission (“CEC”). These are: clarifying the role of CEC experts, formalizing the CEC’s authority to review environmental assessment documents, encouraging a larger variety of CEC proceedings, and clearly distinguishing the regulatory and the hearing processes. How would these reforms affect your participation in the environmental assessment process?

CHAPTER 6: BALANCING CERTAINTY AND FLEXIBILITY

Issue 10

The Discussion Paper identifies a need for more concrete rules and criteria in the legislation. What aspects of Manitoba’s environmental assessment and licensing regime are most in need of clearer legislative criteria?

Issue 11

What are the most important factors in a significance determination? Should proponents be required to explain their significance determinations with reference to published guidelines, distinguishing between pre-mitigation and residual effects?

Issue 12

Written reasons for decision can enhance process certainty and fulfill the objectives of public participation and transparency. What environmental assessment and licensing decisions should be supported by written reasons?

CHAPTER 7: SPECIFIC PROCEDURAL STEPS

Issue 13

Should the Act expressly provide the minister with authority to require environmental assessment of an activity not contemplated in the *Classes of Development Regulation*? What factors should guide this exercise of discretion?

Issue 14

Should unlicensed activities, and those licensed under other regulatory regimes, be brought into the environmental assessment process established under *The Environment Act*? Are there activities that should not be subject to environmental assessment under the Act?

Issue 15

Should the Act allow for staged licensing? In what circumstances is staged licensing useful? What provisions are needed to ensure that all aspects of a development and their aggregate effects are adequately addressed in the environmental assessment process?

Issue 16

How effective is the scheme for determining levels of assessment established by *The Environment Act* and *Classes of Development Regulation*? Are you in favour of a system of basic notification for some or all proposed developments to aid in early, open and interactive scoping?

Issue 17

What improvements might be made to Manitoba's system for statutory appeals? Options for reform include prescribed time frames for decision-making and the involvement of standing or ad hoc appeal panels.

Issue 18

What changes to *The Environment Act* might help to improve compliance and enforcement?

Options for reform include mandatory monitoring and publication of monitoring information, the power to order audits, routine program evaluations and enhanced enforcement techniques.