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Proposed improvements to Bill C-19, an Act to amend the *Canadian Environmental Assessment Act*

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Introduction

The amendments proposed in Bill C-19 are modest relative to the key limitations of the current law and process.

Bill C-19 as it stands incorporates 13 changes that could have important implications. Some of them promise welcome improvements to the process. Others are questionable and merit adjustment. I have discussed these 13 changes in the paper that you have received and will not addressed them in my presentation, though I will be happy to respond to any questions from the Committee concerning the weaknesses of the present proposals and means of resolving them.

Instead, I would like to focus on the main deficiencies of the *Canadian Environmental Assessment Act* and how these can and should be repaired through adjustments to Bill C-19.

Bill C-19 as currently drafted fails to address six key problems that limit the value of the *Canadian Environmental Assessment Act* as a means of encouraging progress towards sustainability:

These six key failings of the *Act* and Bill C-19 are as follows
- they don't require integrated consideration of broadly environmental concerns,
- they don't encourage positive improvements as well as mitigation of adverse effects,

• they don't require critical examination of purposes and alternative options that might bring greater net benefits;
• they don't ensure proper assessments of policies and programmes; and
• they don't limit circumstances in which projects may be approved even when they are expected to have serious adverse environmental effects;
• they don't provide an effective and efficient mechanism for enforcing the law and decisions made under it.

Background

Wherever it is any good, environmental assessment law has two basic components. It requires project planners and decision makers to give serious attention to environmental concerns, and it opens the deliberations to public scrutiny and participation. If they are incorporated well into the design of the law these two elements motivate planning and decision making that is much more likely to serve the public interest over the longer term.

We have turned to environmental assessment law because we know from unfortunate experience that without it, too many project planners and decision makers have not been moved to give sufficient attention to environmental concerns. Assessment law is not the only way of motivating the necessary changes in behaviour. But it is crucial.

For the last fifteen years or so environmental assessment's purposes have been broadened by acceptance of sustainability as a driving consideration. Since the release of the Brundtland Commission report in 1987, jurisdictions around the world have committed themselves, at least officially, to pursuing sustainability. Accordingly, most newer environmental assessment laws include a clause adopting contributions to sustainability (or sustainable development, which is, for my purposes, essentially the same thing). In the present *Canadian Environmental Assessment Act*, that clause is 4(b).

But most of these new laws have just adopted the words. The processes and obligations that the laws establish are not well designed to deliver contributions to sustainability. This is the case with the present *Canadian Environmental Assessment Act.* It is a serious problem.

For environmental assessment law generally, sustainability is mostly just new language for long standing considerations. It doesn't introduce many obligations that were not already included in some of the original environmental assessment legislation. But it makes the importance of certain factors much clearer. In particular, it underlines the importance of addressing the six components I listed earlier.

Bill C-19 as it now stands would have at best a marginal effect on the strengths and flaws of the present *Canadian Environmental Assessment Act*. Environmental assessment in Canada would continue to encourage some greater attention to environmental factors. It would facilitate some additional public scrutiny of government decision making. And it

would continue to make business as usual a little less damaging. But this is a world, and a nation, in which business as usual is clearly not sustainable. Overall, our current activities are providing many important benefits but are also contributing to growing negative pressures on crucial areas of ecological and community integrity. In this context, making new projects a little less damaging is insufficient. If environmental assessment is to encourage development and approval of undertakings that are positive contributions to sustainabililty, rather than just a little less damaging, C-19 needs to be more ambitious than the bill in its present form.

What needs to be done

What needs to be done not difficult to identify. There is a substantial Canadian and global literature on how to design strong environmental assessment processes and how to use them effectively to help foster more sustainable practices.[1] There have also been a good many detailed analyses of CEAA that have identified its major weaknesses and proposed suitable repairs.[2] The following discussion summarizes the main deficiencies of CEAA that are not addressed by the amendments proposed in Bill C-19 and outlines possible corrections that could be incorporated in revisions to Bill C-19.

The key starting point is objectives. Like many other environmental laws passed in the last dozen years, CEAA is officially committed to sustainability.[3] But in practice most attention is focused on the much more limited objective of reducing seriously negative environmental effects. The positive objective of ensuring improvements and enhancing sustainability is clearly more reasonable. It is also consistent with the 1995 amendments to the *Auditor General Act,*[4] which set out the federal commitment to sustainability and require federal departments to prepare sustainable development strategies covering their activities.

Under CEAA, two review panels – in the Voisey's Bay nickel mine/mill case and the Red Hill Valley Expressway case (now suspended) – explicitly interpreted their mandate as requiring them to adopt sustainability as the key decision criterion. Both issued panel guidelines for environmental impact statements requiring the proponents involved to show that their undertakings would make a positive contribution to sustainability and

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[1] Canadian contributions to this literature have been significant. They include some excellent work by the Canadian Environmental Assessment Research Council in the late 1980s and early 1990s. See, for example, Peter Jacobs and Barry Sadler, editors, *Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future* (Ottawa/Hull: CEARC, 1990).

[2] See, for example, Robert B. Gibson, "The new Canadian Environmental Assessment Act: possible responses to its main deficiencies," *Journal of Environmental Law and Practice* 2:3 (July 1992), pp. 223-255; Meinhard Doelle, "The *Canadian Environmental Assessment Act:* New uncertainties but a step in the right direction," *Journal of Environmental Law and Practice* 4 (1994), pp. 59-91; Hazell, *Canada v. The Environment* (note 7), esp. pp. 139-168.

[3] See especially the purposes section, CEAA s. 4(b).

[4] *Auditor General Act*, 1976-77, c. 34, s. 1; amended by R.S.C., c. A-17, *An Act respecting the Office of the Auditor General of Canada and sustainable development monitoring and reporting*, 1995, c. 43, s. 1.

respect the precautionary principle.[5] Similar developments are evident in assessment processes elsewhere – in Canada and internationally.[6]

More consistent application of CEAA as a vehicle for sustainability assessments would make federal assessment more realistic and effective. It would shift the focus of attention from mere mitigation of negative effects to means of maximizing long term gains. It would foster integrated consideration of factors affecting ecological and community integrity and thereby allow more focused attention to the main overall issues raised by proposed undertakings. And it would help move assessment from a peripheral aspect of project approval to a core concern in project conception and design.

CEAA is at present imperfectly designed for serving its sustainability purpose. Arguably, the law harbours a profound internal conflict insofar as it asserts contribution to sustainability as its purpose but focuses its specific provisions on mitigation of narrowly defined adverse environmental effects. Many of the problems are long-recognized deficiencies of CEAA that should be addressed even if the old agenda of minimizing negative effects were retained. There are six key concerns, many of these long-recognized deficiencies of CEAA. None of them is addressed by Bill C-19 as it stands:

Problem 1. The current ***narrow definitions of "environment" and "environmental effects"*** apparently exclude direct socio-economic and cultural considerations that would be part of any proper sustainability analyses. The narrow definitions discourage adequate attention to the interrelations among ecological, social, economic and cultural conditions, and preclude satisfactory overall evaluations of project proposals or alternatives. This is particularly frustrating for citizens whose concerns are naturally about overall project desirability and who see environmental assessments as the only project approval processes with public involvement. Also, when only the narrow environmental issues are addressed in open assessment processes, the trade-offs between ecological and other considerations are left to secretive backroom dealings. Adopting more realistic definitions that include ecological, social, economic and cultural factors would help

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[5] The two panels were those examining the Voisey's Bay Mine and Mill project (a joint panel) and the Red Hill Valley Expressway (an exclusively *CEAA* panel). For a detailed discussion see Robert B. Gibson, "Favouring the Higher Test: Contribution to sustainability as the central criterion for reviews and decisions under the *Canadian Environmental Assessment Act*," *Journal of Environmental Law and Practice* 10:1 (2000), pp. 39-54.

[6] In Canada, the most important step was initiated by a court decision concerning application of the British Columbia *Environmental Assessment Act* in the case of the proposed reopening of the Tulsequah Chief mine on the Taku River. In her ruling, Madam Justice P.A. Kirkpatrick quashed the provincial government ministers' approval of the proposed project in part because of failure to respect the first purpose of the *Act* (s. 2(a)), "to promote sustainability by protecting the environment and fostering a sound economy and social well-being." See *Taku River Tlingit et al*. v *Ringstad et al*., 2000 BCSC 1001, 28 June 2000, Reasons for Decision, especially paragraph 135. British Columbia's Environmental Assessment Office has accordingly reconvened the project committee (including federal, provincial and Taku River Tlingit First Nation representatives) to develop sustainability criteria for that case, and may well need to consider developing sustainability criteria for other applications as well. Because the British Columbia legislation provides for both strategic and project level assessments, a potentially broad range of applications is involved.

ensure more comprehensive, integrated and open consideration of these matters, their interrelations and any trade-offs.

Solution: Probably it is necessary to revise both definitions.
(i) Define "environment" broadly to incorporate social, economic and cultural as well as biophysical aspects. This is common practice. It appears, for example, in the original environmental assessment law (US *National Environmental Policy Act* 1969) and in Canada's first environmental assessment law (Ontario's *Environmental Assessment Act*, 1975). The following combines language from the Ontario law[7] with the existing CEAA language:

> "environment" means,
> (a) land, water and air, including all layers of the atmosphere,
> (b) all organic and inorganic matter and living organisms, including human life,
> (c) the social, economic and cultural conditions, that influence the life of humans or a community,
> (d) any building, structure, machine or other device or thing made by humans,
> (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
> (f) any part or combination of the foregoing and the interrelationships between any two or more of them, including interacting natural systems

health and socioeconomic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance,

(ii) Define "environmental effects" accordingly, and with appropriate emphasis on long as well as short term effects, and cumulative as well as individual project effects:

> "environmental effect" means, in respect of a project,
>
> (a) any change that the project may cause in the environment, in the short-term or long-term including
> (i) any change in health and socio-economic conditions,
> (ii) any change affecting physical and cultural heritage, or the current use of lands and resources for traditional purposes by aboriginal persons, or any

[7] Ontario, Environmental Assessment Act, section 1(1)
"environment" means,
(a) air, land or water,
(b) plant and animal life, including human life,
(c) the social, economic and cultural conditions that influence the life of humans or a community,
(d) any building, structure, machine or other device or thing made by humans,
(e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
(f) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario; ("environnement")

structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and

(b) any change that is likely to result from the project in combination with other projects or activities that have been, or are being carried out or are reasonable anticipated,

(c) any change to the project that may be caused by the environment,

whether any such change occurs within or outside Canada;

Problem 2. While the current definitions include positive as well as negative effects, at least implicitly, most of the CEAA text and implementation has a limited ***focus on avoidance or mitigation of serious adverse environmental effects*.** This focus may be appropriate for certain specific decisions (for example, as a key consideration in determining need for panel review rather than just screening or comprehensive study). But it is clearly problematic where it discourages due attention to ecological rehabilitation and other positive enhancements. Combined with a broadening of the definitions of "environment" and "environmental effects", an explicit requirement to examine positive as well as negative effects would change the basis for discussions on project purposes, alternatives, designs and adjustments.[8] Most importantly it would encourage emphasis on improvements rather than mere avoidance of serious damage.

Solution: Attention to positive effects could be mentioned explicitly in the definition of "environmental effects" discussed above. The key changes needed are, however, in the central test provisions, sections 20 and 37, which now focus on mitigation. The alternative text for these two sections proposed in the brief from the Canadian Environmental Law Association would serve well. It not only focuses attention on positive as well as adverse effects, but also sets the key test as confidence that the project will make a positive overall contribution to the "environment" (defined broadly to include social, economic and cultural as well as biophysical considerations).[9]

20 (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18 (3):

(a) subject to paragraph (c) (iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will make a positive overall contribution to the environment in the longer term and is not likely to cause significant adverse environmental effects, the responsible

[8] Attention to positive effects is already included in *The 1999 Cabinet Directive on the Environmental Assessment of Polic*y. It also appears in the terms of references of new CEAA (and joint) review panels. See, most recently, the "Agreement between the National Energy Board and the Minister of the Environment concerning Review of the Georgia Strait Crossing Project: Draft for Discussion" (May 2001).

[9] Canadian Environmental Law Association, *Submission to the House of Commons Stamding Committee on Environment and Sustainable Development on Bill C-19: An Act to Amend the Canadian Environmental Assessment Act* (CEAL Report No. 414), January 2002, pp.10-11.

authority may exercise any power or perform any duty or function … [the rest remains the same];

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will cause significant adverse environmental effects or will not make a positive overall contribution to the environment in the longer term, the responsible authority shall not exercise … [the rest remains the same]; or

(c) where

(i) the responsible authority is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, will cause significant adverse environmental effects or will make a positive contribution to the environment in the longer term, or

(ii) public concerns warrant a reference to a mediator or review panel, the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

37 (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23 (a), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate that the project will make a positive overall contribution to the environment in the longer term and will not cause significant adverse environmental effects, the responsible authority may exercise any power or perform … [the rest remains the same]; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will cause significant adverse environmental effects or will not make a positive contribution to the environment in the longer term, the responsible authority shall not exercise any power or perform … [the rest remains the same].

Problem 3. The original legislated environmental assessment process (the US federal process established in the 1969 *National Environmental Policy Act*) and the requirements of other leading jurisdictions include obligatory attention to the purposes of the undertaking and alternative ways to serving these purposes. This is commonly referred to as consideration of ***"need and alternatives".***[10] CEAA treats "the need for the project and alternatives to the project" as matters to be addressed only where a responsible authority

[10] Wood, *Environmental Impact Assessment,* (note 35), pp. 102-114

(in screenings) or the Minister chooses to impose a special requirement. In practice, such special impositions are limited and late.

Obligations to consider needs and alternatives are now often included in panel terms of reference and guidelines for proponents. But typically, panels are established long after the proponent has reached its conclusions about needs and alternatives and has developed a more or less detailed specific project proposal. The effect, therefore, is not to encourage timely critical attention to the nature of actual needs and the range of potential feasible responses, but to force retroactive justification of decisions already made. In environmental assessment, need and alternatives requirements are likely to be effective only where proponents know from the outset of their deliberations that they will be required to show how they considered needs and alternatives. To accomplish this, CEAA would have to be amended to make consideration of need and alternatives mandatory.

That said, even early consideration of need and alternatives issues may often be unduly constrained and minimally useful at the project level because the proponent involved lacks the capacity or authority to pursue more desirable potential alternatives. In such cases, assessment deliberations on needs and alternatives issues are best held at the strategic level of policies, plans and programmes (see problem 4, below).

Solution: Requiring consideration of purposes, need and alternatives would be accomplished by moving the appropriate requirements from the discretionary CEAA clause 16(1)(e) and adding them mandatory considerations in section 16(1) as follows (again I have borrowed some language from the Ontario law, which includes attention to purposes and alternatives among the conventional contents of an environmental assessment[11]):

> 16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
> (a) …
> (e) the purpose of the project, need for the project, and feasible alternatives to the project and alternative methods of carrying out the project;
> (f) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

Problem 4. CEAA has long been criticized for failing to focus assessment work on the most significant undertakings and most important openings for gains.[12] At present, over 99 percent of assessments are screenings of minor projects. Meanwhile, CEAA covers no

[11] Ontario *Environmental Assessment Act* section 6.1. Since 1996, Ontario has allowed variation from the standard contents list through a special "terms of reference" mechanism. The ordinary requirement to consider purposes and alternatives applies equally to major and minor (class) undertakings in Ontario.

[12] This is recognized in the Five Year Review report but the response is limited to more exclusions and streamlinings at the screening level and minor clarifications that could lead to assessments of more projects on reserve and federal lands or involving transboundary effects. See Government of Canada, "Strengthening Environmental Assessment for Canadians" (note 8), pp. 13-15.

undertakings at ***the strategic level of policies, programmes and plans***, and initiates no area- or sector-based assessments of undertakings likely to have significant cumulative effects.[13] Consequently it misses opportunities for greater effectiveness (which would come through addressing the most influential decisions) and greater efficiencies (which would come with shifting a good portion of assessment burdens from multiple projects to overarching programmes).

Strategic assessments are left to a non-legislated administrative process – established in 1990 and adjusted under *The 1999 Cabinet Directive on the Environmental Assessment of Policy* – that lacks transparency and has been widely ignored.[14] Inclusion of strategic level undertakings under an amended CEAA would allow a more effective focusing of assessment resources on key matters, provide more practical and timely means of examining broad alternatives and cumulative effects, and establish a clearer base for efficient planning and assessment of individual projects. Strategic level assessments do involve a variety of complexities (for example, concerning what qualifies as an assessable policy or programme; what to do with strategic level issues for which no formal policy or programme is being developed; and how best to use strategic level results to guide and streamline assessments at the project level). But they also have great potential for enhancing the rigour and transparency of decision making on matters of greater overall environmental significance than most individual projects.

Solution: Extending the scope of CEAA's application to include strategic level undertakings involves some complexities. It is not just a matter of replacing the word "project" with the word "undertaking" and defining it to include policies, plans and programmes as well as physical works and activities.

The draft Canadian Strategic Environmental Assessment Act included as appendix A in the submission of the Canadian Environmental Law Association provides a useful basic model, which could be incorporated in CEAA, and accompanied by authority to make regulations specifying how strategic assessments can be used to specify process and substantive requirements for planning, assessment and decision making on consequent projects. The CELA approach has the advantage of clear dedication to sustainability purposes and broad application. The CELA brief recommends application to "proposals", defined as any "proposed policy, plan or programme that may have adverse environmental effects" (assuming a broad definition of "environmental effects").

A somewhat more detailed proposal for specific amendments was prepared and submitted by the West Coast Environmental Law Association in 1994.[15] While generally consistent with the CELA approach it distinguishes between policies and programmes and sets out mildly different provisions for assessment in these two categories. As well it addresses the tricky issues of document confidentiality in the policy process. And it provides for use of programme assessments in appropriate circumstances to cover some

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[13] The proposed amendments in C-19 promise only a gesture in this direction by encouragingf more attention to area-based studies.

[14] Government of Canada, *The 1999 Cabinet Directive on the Environmental Assessment of Policy*, (Ottawa: Minister of Public Works and Government Services Canada and Canadian Environmental Assessment Agency, 1999).

[15] Christopher J. B. Rolfe and Robert B. Gibson, "Assessment of Policies and Programs under the Canadian Environmental Assessment Act: Recommendations for Reform," (Vancouver, West Coast Environmental Law Association, 10 April 1994), www.wcel.org/wcelpub/6743.html.

or all of the assessment obligations that would otherwise fall on projects covered by the programme. I have appended that old but perhaps now venerable document to my brief. I still think it provides a reasonable response to the evident deficiency here.

Problem 5. CEAA now allows for approval of projects that are likely to have significant adverse environmental effects if these are ***"justified in the circumstances."*** Grounds for such justifications are left undefined. Moreover, the relevant decision making is not guided by any explicit criteria[16] and includes no provision for public involvement or scrutiny. Under Bill C-19, Cabinet approval would be required before a responsible authority could use the "justified in the circumstances" rationale for approving a project likely to have significant adverse environmental effects.[17] But the relevant deliberations would still be cloaked in Cabinet secrecy and there is no reason to assume that in normal practice the decision making would involve rigorous attention to sustainability considerations.

Solution: The "justified in the [undefined] circumstances" provision is unnecessary when the scope of assessment deliberations is properly extended to cover the full range of social, economic, cultural and biophysical factors and consider positive as well as adverse effects. As noted above, this scope is required if assessment is to recognize the interdependence of these factors and foster positive steps towards sustainability.

Accordingly, you can see that the proposed reformulations of sections 20 and 37 above (borrowed from the CELA brief), omit the problematic "justified in the circumstances" wording. Instead they have the key test under CEAA turn on whether "the responsible authority has reasonable grounds to anticipate that project will make a positive overall contribution to the environment in the longer term and will not cause significant adverse environmental effects."[18]

Personally, I would prefer to refer here to "positive overall contribution to sustainability" rather than "positive overall contribution to the environment". Indeed I have done some research funded by the Canadian Environmental Assessment Agency on specifying sustainability-based criteria for environmental assessment decisions (looking particularly at those involving determinations of "significance"). But I will not get into that here. The initial results of that research have been published, in both official languages, on the Agency's web site.[19]

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[16] CEAA, s. 58(1)(a) provides for establishment of such criteria but so far no criteria of this kind have been prepared.

[17] Bill C-19 s. 18, re CEAA s. 37.

[18] Canadian Environmental Law Association, *Submission to the House of Commons Stamding Committee on Environment and Sustainable Development on Bill C-19: An Act to Amend the Canadian Environmental Assessment Act* (CEAL Report No. 414), January 2002, pp.10-11.

[19] Robert B. Gibson, *Specification of sustainability-based environmental assessment decision criteria and implications for determining "significance" in environmental assessment,* monograph prepared under a contribution agreement with the Canadian Environmental Assessment Agency Research and Development Programme, revised January 2002, 40pp. [published on website of Canadian Environmental Assessment Agency < http://www.ceaa-acee.gc.ca/0010/0001/0002/rbgibson_e.pdf >; *Spécification des critères de décision axés sur la durabilité et analyse de leurs incidences sur la détermination de l'"importance" dans l'évaluation environnementale,* projet de recherche appuyée par l'Agence canadianne dévaluation environnementale programme en recherche et développement, janvier 2002, 40pp. <http://www.ceaa-acee.gc.ca/0010/0001/0002/rbgibson f.pdf>.

Problem 6. ***No powers to make enforceable decisions and to impose penalties for non-compliance*** are included in CEAA or proposed in Bill C-19. This continues a long standing tradition in federal assessment. From the outset, the process has been designed to play a merely advisory role in deference to the established authority of existing decision makers. No doubt this has been intended to reduce antagonisms within government. But the absence of enforcement provisions has made pursuit even of CEAA's most modest objectives more difficult.

For example, CEAA itself contains no means of setting and imposing terms and conditions of approval. Instead it relies on a highly inconsistent set of permitting, contractual and other vehicles many of which are ill-designed for the purpose.[20] Even for effective and efficient application of the current law, an enforceable decision-making power and penalties for non-compliance are needed. For more serious use in sustainability assessment, such provisions would be crucial.

Solution: There is no difficulty finding model language for an enforceable decision power in environmental assessment legislation. Ontario, for example, has applied its *Environmental Assessment Act* with such provisions for over a quarter century. The tricky part is accommodating the more central role that environmental assessment plays when the sustainability purpose is taken seriously. As we have seen, assessment with a sustainability purpose adopts a comprehensive definition of environment and environmental effects and provides a vehicle for integrated public evaluation of the big choices that affect our future. This is not the mandate of any one department or any one minister. And to be credible the process must be both independent of particular influence and accountable to elected authority. Accordingly, the administration of the process ought to be visible independent; it should to report centrally, preferably to Parliament, and the ultimate decision authority should rest with Cabinet.

Some specific language to this effect is included in the 1994 WCEL brief that I mentioned earlier. I note, as has the Canadian Environmental Law Association in its brief, that a commitment to such amendments to CEAA was included in the Liberal Party of Canada's red book platform items for the 1992 federal election.[21]

Some of these six items could be addressed individually through incremental adjustments. But clearly it would be better to recognize that they are interrelated and that the most promising responses to them would be designed as a coherently integrated package. Such a package of changes would establish environmental assessment as a key vehicle for broadly transparent, sustainability-focused decision making. This was not the agenda of the Five Year Review and is not the objective of Bill C-19 as introduced in Parliament. But it would respond to the recognized deficiencies of CEAA, would serve

[20] For example, CEAA, s. 20(2) and 37(2) gives responsible authorities superadded powers to add a range of environmental terms and conditions in permits and licences ordinarily issued for particular narrow purposes under other legislation

[21] Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1992), p.63.

broader commitments to sustainability, and would be consistent with the evolutionary path of environmental assessment so far.

Conclusions

Bill C-19 is a modest offering that fails to deal with the major challenges of environmental assessment and the key deficiencies of CEAA. These key deficiencies conflict with the purposes of this legislation and the commitment of Canada to make positive contributions on the path to sustainability.

Some members of this committee will remember what happened earlier in Canada's environmental assessment history when the federal government tried to base its process on a document that was both Guidelines and an Order. The courts had to rule on the contradiction and found that the noun prevailed.

In this case we have a law that claims service to sustainability and at the same time specifies a lesser test. As I have noted, the Voisey's Bay and Red Hill panels recognized this contradiction and found that the sustainability purpose should prevail. Whether the courts would reach a similar conclusion or not is beyond my guessing. But it should not come to that. In my view, it would be much more appropriate for you, the elected legislators, to resolve the matter through amendments that would bring the problematic specific provisions of CEAA in line with the sustainability purpose.

Finally, I would like to remind the Committee members that the *Canadian Environmental Assessment Act* that we have today is, for all its faults, enormously better than the law anticipated in the bill initially introduced in the House. That bill suffered from vagueness and a profusion of openings for discretionary interpretation and action that would have guaranteed confusion and inconsistent application. It was salvaged by this committee, which proposed substantial changes, and gave the House a workable environmental assessment law. The challenges with C-19 is a little different. C-19 is ably constructed but insufficient. I urge the Committee to act, as it did with the original law, to give the House, and Canada, something better.