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### **Putting the Train of Environmental Protection on Track: Nova Scotia's Experiment in Using Legislation to Strengthen Environmental Law**

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# Putting the Train of Environmental Governance Back on Track: Nova Scotia's Experiment in Using Legislation to Strengthen Environmental Governance

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## 1. Introduction

In a 2008 article entitled “A Train Without Tracks”, Annecoos Wiersema argues that the new governance approaches to environmental challenges lack substantive direction.<sup>1</sup> New governance approaches have focused on process and on engaging non-state actors in the design and implementation of responses to the environmental challenges we face. There are many good reasons to engage non-state actors through effective processes, including: the complexity of the challenges; the social license that is associated with transparency and public engagement in decision making; the role that collaboration with non-state actors can play in compensating for limited government resources and expertise; and the improved compliance that is expected with laws and broader policies that are developed through collaborative processes.

Wiersema, however, argues that this shift of focus from substance to process has come at a price. Using the image of a train without tracks, Wiersema makes the point that a focus on process, without clear environmental goals against which the results of these process-oriented approaches to governance can be measured, risks compromising the very purpose of environmental governance. Governance, at best, becomes a consensus building process among non-state actors with a diverse range of interests. At its worst, the process becomes an end in itself that moves environmental protection toward the lowest common denominator. It can even become a rationale for government inaction, and a tool for those resistant to effective environmental regulation. The definition and achievement of environmental objectives is left too much to the interests, capacity and commitment of self-interested non-state participants.

Wiersema suggests that legislation can play an important role in fixing this problem. Interestingly, at the time Wiersema wrote her article, the Canadian province of Nova Scotia was experimenting with legislation designed to address some of the shortcomings in environmental governance Wiersema identified in her research. This legislation was the *Environmental Goals and Sustainable Prosperity Act*, commonly called *EGSPA* in Nova Scotia.

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<sup>1</sup> Annecoos Wiersema, ‘A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law’ (2008) 38 *Environmental Law* 1239

This chapter explores Nova Scotia's experience with *EGSPA* since its introduction in 2007 and considers what lessons it may have to offer. It concentrates on two innovations inherent in *EGSPA*. First, the chapter explores opportunities to combine new governance arrangements with legislative efforts to hold governments to account for ensuring that the underlying objectives are met. A second innovation explored is the effort in *EGSPA* to integrate environmental protection with economic wellbeing.

The chapter is structured as follows. The first two sections of the chapter provide some basic context and offer an overview of *EGSPA* as passed in 2007. This is followed with an assessment of the performance of the Act between 2007 and its 5-year review in 2012. In the final sections of the chapter, the 2012 amendments are contrasted against what could have been done to improve the Act based on experience to date. This analysis is used as a basis to offer some concluding comments on what lessons other jurisdictions might take from the Nova Scotian experience with *EGSPA*.

## 2. The Context for The Development of EGSPA

Nova Scotia's history with respect to environmental governance is not unlike many jurisdictions in the developed world. First generation efforts in the 1970s and 80s consisted mainly of permissive approval based approaches that sought to regulate releases without discouraging industrial development.<sup>2</sup> Environmental assessment legislation was first introduced in the late 1980s.<sup>3</sup> In the 1990s, in the wake of the 1992 Rio Conference, Nova Scotia became one of the first Canadian provinces to adopt comprehensive environmental protection legislation, the *Environment Act*, which replaced most of the issue specific environmental legislation that had been adopted in the 1970's and 80's.<sup>4</sup> At its core, this Act instituted a comprehensive environmental approvals process that was quite typical of command and control regulation. At the same time, it reflected shifts in approaches to environmental governance that are now generally associated with "New Governance". For example, the Act contemplated the use of a broader range of governance tools in addition to regulation, informed by concepts such as sustainable development, pollution prevention and waste reduction, shared responsibility between governments and others, government's catalytic role, cooperative partnerships, stewardship, the polluter-pay principle, and the active development of environmental technologies.<sup>5</sup>

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<sup>2</sup> See Meinhard Doelle, 'Nova Scotia Chapter' in Alastair Lucas and Roger Cotton (eds), *Canadian Environmental Law* (2<sup>nd</sup> edn, LexisNexis Butterworths, 1996). See also, Peter Mushkat, *Guide to Environmental Law for Nova Scotians* (2<sup>nd</sup> edn, Legal Information Society of Nova Scotia, 2000)

<sup>3</sup> Environmental Assessment Act, RSNS 1989 c149

<sup>4</sup> Environment Act, SNS 1994-95, c 1

<sup>5</sup> *ibid* s 2

Along these “New Governance” lines, the Environment Act established a provincial round table on Environment and Economy and included a legislative commitment to achieving a goal set by the Canadian Council of Ministers of the Environment (CCME) of reducing waste going to the landfill by 50% by the year 2000.<sup>6</sup> Effective management of solid waste thereafter became a focus of provincial environmental efforts and Nova Scotia became the first province to meet the CCME goal.

In the years preceding the passage of *EGSPA*, the Nova Scotia government became interested in the concept of integrating environmental protection and economic prosperity, both by pursuing economic opportunities that had direct environmental benefits, and by protecting Nova Scotia’s environmental capital to ensure long-term prosperity.<sup>7</sup> The basis for this approach was set out in a 2006 document entitled *Opportunities for Sustainable Prosperity*.<sup>8</sup> *EGSPA* was introduced a year later to support this vision. It did so in two ways. It created a framework for combining a strong economy with a clean environment by integrating environmental protection and economic prosperity. In a relatively poor province that has traditionally depended on extractive industries, this implied higher levels of environmental protection as well as higher levels of economic performance. To achieve these objectives, *EGSPA* set out specific environmental goals with firm timelines that would contribute to the achievement of “sustainable prosperity”. While a few of these goals were developed specifically for *EGSPA*, many were drawn from existing policy positions of the provincial government and a number of these were goals on which little progress was made prior to their incorporation into *EGSPA*.<sup>9</sup>

### 3. The Original Version of EGSPA

The original version of the Act came into force on 7 June 2007.<sup>10</sup> At the heart of the *Act* was the long-term objective of integrating environmental sustainability and economic prosperity, as articulated in section 4(1):

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<sup>6</sup> *ibid* s 93(1)

<sup>7</sup> For a more detailed discussion of the political and policy context from which *EGSPA* emerged, see William Lahey and Meinhard Doelle, ‘Negotiating the Interface of Environmental and Economic Governance: Nova Scotia’s Environmental Goals and Sustainable Prosperity Act (2012)’ 35 *Dalhousie Law Journal* 3, 5

<sup>8</sup> Nova Scotia Department of Economic Development, *Opportunities for Sustainable Prosperity* (Nova Scotia Government Economic Growth Strategy, 2006)

<sup>9</sup> For example, the development of a comprehensive water management strategy was foreshadowed in the Department of Environment’s work on a drinking water strategy: see William Lahey, *A Drinking Water Strategy for Nova Scotia: Final Report* (Interdepartmental Drinking Water Management Committee Final Report, 2005). Similarly, a number of goals were previously included in the “Green Plan” that was adopted by the Province in 2003: see Nova Scotia Department of Environment and Labour, *Green Plan: Progress towards a sustainable environment* (Strategy Document for Province of Nova Scotia, 2005), and Nova Scotia Department of Environment and Labour, *Towards a Sustainable Environment* (Strategy Document of Province of Nova Scotia, 2003). In addition, a number of the goals relating to air emissions and energy policy were previously agreed to by Nova Scotia either through the Canadian Council of Ministers of the Environment or the Conferences of the New England Governors and Eastern Canadian Provinces.

<sup>10</sup> Environmental Goals and Sustainable Prosperity Act, SNS 2007, c 7 [EGSPA].

4 (1) The long-term environmental and economic objective of the Province is to fully integrate environmental sustainability and economic prosperity and to this end to

(a) demonstrate international leadership by having one of the cleanest and most sustainable environments in the world by the year 2020; and

(b) provide certainty to all sectors of the economy through the Government's economic development strategy entitled Opportunities for Sustainable Prosperity and establish clear environmental goals while improving the Province's economic performance to a level that is equal to or above the Canadian average by the year 2020.<sup>11</sup>

To achieve this long-term objective, the *Act* enumerated twenty-one short and medium term goals, established a process to monitor and report on the implementation of these goals, and created authority for the adoption and implementation of additional measures necessary to meet the long-term objective.

The twenty-one goals are set out in subsection 4(2) of the *Act*.<sup>12</sup> Many of the goals address substantive targets on a range of issues including: greenhouse gas (GHG) emissions; air pollutants; energy sources and use; solid waste disposal rates; wilderness protection and conservation; and waste-water treatment drinking water quality standards. Others stipulate process-related targets such as the requirement to develop strategies, policies or regulations on resource management, wetlands, brownfield re-development, and government procurement.

The goals can be roughly grouped into five categories. One category embraces a range of goals pertaining to air emissions, including: those requiring emission reductions of NO<sub>x</sub> by 20% by 2009 as compared to 2000; mercury emissions by 70% by 2010 compared to 2001; SO<sub>2</sub> emissions by 50% by 2010 compared to 2001; and GHG emissions by at least 10% by 2020 compared to 1990. This category also includes goals requiring the adoption by Nova Scotia of Canada-wide standards established by the Canadian Council of Ministers of the Environment on ground-level ozone and fine-particulate matter and the adoption of provincial standards for new vehicles on GHG and air pollution emissions, all by 2010.

A second, and obviously overlapping category of goals, particularly given the reliance of Nova Scotia's electricity system on fossil fuels, includes a number of goals tied to the energy sector. One of these goals required all new residential dwellings built in or after 2008 to display an EnerGuide rating. A closely related goal in this category demanded that all new dwellings built in or after 2011 have an EnerGuide rating of 80. A third goal in the energy category required 18.5% of Nova Scotia's energy to be from renewable sources by 2013.

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<sup>11</sup> EGSPA, (n 10) s 4(1)

<sup>12</sup> *ibid* s 4(2)

The third category of goals deals with water. The grouping includes the development of a comprehensive water resource management strategy by 2010, the application of at least primary treatment to all wastewater treatment discharge by 2017, the compliance of all municipal public drinking water supplies with provincial standards by 2008, and the establishment of a policy to prevent net loss of wetlands by 2009.

The fourth category of goals addresses resource conservation and management more broadly. Specific requirements include: the adoption, by 2010, of strategies to ensure sustainability of natural capital in forests, mining, parks, and biodiversity; the legal protection of wilderness areas equal to 12% of Nova Scotia's land mass by 2015; and the development, by 2010, of regulatory tools to stimulate redevelopment of contaminated lands. This category also includes the goal of limiting waste disposal to 300 kg per person by 2015.

The fifth category consists of two goals that relate to the responsibility of government to put its own house in order, and to lead by example. The first of these goals required the Province to adopt a sustainable procurement policy by 2009. The second required the Province to construct a "government facility" to serve as a "demonstration facility in accordance with a leading standard for building efficiency and sustainability".

Most of the goals were designed with environmental protection in mind. This is consistent with the underlying concept of *EGSPA*: that long term economic prosperity depends on environmental stewardship. The *Act* was however, clearly concerned with both economic prosperity and environmental protection. The twenty-one environmental goals were explicitly linked to a single long-term objective: "to fully integrate environmental sustainability and economic prosperity."

Furthermore, there were and continue to be clear economic opportunities associated with a number of the goals. The province had already created employment through solid waste reduction efforts in the 1990s.<sup>13</sup> It has stressed the economic benefits associated with renewable energy production and with energy efficiency and conservation efforts.<sup>14</sup> More broadly, the *Act* was based on

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<sup>13</sup> Sally Walker et al, 'Executive Summary' in *The Nova Scotia Solid Waste-Resource Accounts (Genuine Progress Index: Measuring Sustainable Development Report, 2004)*.

<sup>14</sup> Nova Scotia Department of Energy, *Toward a Greener Future: Nova Scotia's 2009 Energy Strategy* (Government Policy Document, January 2009) [Nova Scotia's 2009 Energy Strategy]; Nova Scotia Department of Energy, *Nova Scotia's Renewed Energy Strategy and Climate Change Action Plan* (Consultation Paper: October 2007); Department of Energy, *Renewable Electricity Plan: A path to good jobs, stable prices and a cleaner environment* (Government Policy Document, April 2010) [Electricity Plan]; David Wheeler and Heather Foley Melvin, Stakeholder Consultation Process For An Administrative Model For DSM Delivery in Nova Scotia (Final Report, 10 April 2008); Michelle Adams and David Wheeler, *Stakeholder Consultation Process For A Renewable Energy Strategy For Nova Scotia* (Final Report to Government of Nova Scotia, 28 December 2009) [Wheeler]

seven principles that were as much about the economy as the environment, including, the principle that “the management of goals for sustainable prosperity, such as emission reduction, energy efficiency programs and increasing the amount of legally protected land will preserve and improve the Province’s environment and economy for future generations.”<sup>15</sup>

However, when it comes to specifics, the *Act* was heavily weighted towards environmental protection and, more specifically, to the twenty-one environmental goals. Not surprisingly, these were the focus during the first five years of the *Act*’s operation, both with respect to implementation and annual reporting.

The *EGSPA* accountability mechanisms are quite basic. First, the *Act* obliged the Minister of Environment to carry out an annual review of progress and to table a report based on that review in the House of Assembly.<sup>16</sup> In doing so, the Minister was, until 2012, required to seek the advice of the Nova Scotia Round Table on Environment and Sustainable Prosperity.<sup>17</sup> The annual reviews are required to consider the implementation of the existing targets, as well as their adequacy in meeting the long-term objective in section 4(1). Second, the Minister is required to ask the Round Table to carry out a “a comprehensive public review of this *Act* and the regulations every five years after this *Act* comes into force” and to submit to the Minister “a report with recommendations for amendments and improvements in the implementation of this *Act*”.<sup>18</sup> Although goals calling for new strategies and policies can be said to imply consultations with the public, the requirement that the five-year review be a public review is the only express provision made for public participation in the implementation of the *Act*.

The *Act* assigns responsibility for implementation of the goals to the government of Nova Scotia. It was however clear from the start that some goals were more directly within the control of the government than others. The substantive goals, such as the reduction of GHG emissions, clearly required action from other levels of government and from non-state actors, including Nova Scotia’s privately owned power utility, major industries and the general population. Other goals that focused more on the development of policy rather than the meeting of a specific substantive target were more directly within the control of the provincial government, though many involved extensive stakeholder consultations. Ultimately, the *Act* makes the provincial government responsible for implementation.

The powers granted in the *Act* to take measures to meet its goals and objectives were allocated to the Governor in Council, not to any particular Minister.<sup>19</sup> These

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<sup>15</sup> *EGSPA*, (n 10) s 3(2)(g)

<sup>16</sup> *EGSPA*, (n 10) s 6(1)

<sup>17</sup> *Environment Act*, (n 7) s 6(3); An Act to amend Chapter 1 of the Acts of 1994-95, the *Environment Act*, SNS 2006, c 30

<sup>18</sup> *EGSPA*, (n 10) s 6(2)

<sup>19</sup> Under the Canadian system of Westminster governance, the Governor in Council effectively means the cabinet of the ruling government.

powers consist of broad authority to pass regulations, to develop programs, and to enter into agreements with other governments or non-state actors.<sup>20</sup> This approach reflected the idea that integration of environmental and economic policy can only happen optimally if it happens on a government-wide scale.

On the other hand, as noted already, the Minister of Environment alone is responsible for reporting to the House of Assembly on implementation of the *Act*. Moreover, most of the specific goals established by the *Act* fell within the mandate of the same Minister under Nova Scotia's *Environment Act*.<sup>21</sup> Thus the *Act* has been largely implemented as environmental legislation that has operated in the context of environmental policy.

In keeping with the focus of this chapter on the role of goal-setting legislation such as *EGSPA* in an age of "New Governance", it is worth noting that *EGSPA* can easily be characterized as an example of the "soft law" associated with New Governance. Under the Canadian law of justiciability, a court would be unlikely to entertain an action based on an alleged breach of the *Act*.<sup>22</sup>

The *Act* aligns with "New Governance" in two other respects. First, in significant measure, it seeks to achieve its objectives through the creation of a range of even softer instruments, including a "comprehensive water resource management strategy", a "natural resources strategy", and a "policy of preventing net loss of wetlands". Even where the *Act* prescribed a specific substantive outcome, such as 18.5% renewable energy by 2014, it left the methods to be used in achieving those outcomes entirely to the implementation process. Second, with only a few exceptions, *EGSPA* creates goals that government can only achieve through processes of governance that include non-state actors. By their nature, most simply could not be implemented without a plan or a process developed and implemented in collaboration with a diverse range of non-state actors. In these respects, *EGSPA* shares the view of New Governance that environmental protection depends as much or more on multi-party governance as it does on government.

#### **4. Assessment of the Original *EGSPA***

*EGSPA*'s performance to date is considered in three steps. First, the performance of *EGSPA* on the original 21 environmental goals is assessed. Second, its impact on the integration of environmental and economic governance more broadly is considered. Third, and more briefly, *EGSPA*'s impact on the process of environmental governance in Nova Scotia is evaluated.

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<sup>20</sup> *EGSPA*, (n 10), ss 5, 7-9

<sup>21</sup> *Environment Act*, (n 4)

<sup>22</sup> *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183; *Lexogest Inc. v Manitoba (Attorney General)*, [1993] MJ No 54; *Canadian Union of Public Employees v Canada (Minister of Health)*, 2004 FC 1334



It is important to have Nova Scotia's changing political situation in mind when evaluating the impact that EGSPA has had on environmental governance within the province. In 2009, a majority government formed by the New Democratic Party (NDP) replaced the minority conservative government that had enacted EGSPA. In respect of the essentially non-justiciable EGSPA, this political change has meant that Nova Scotia's experience under the Act sheds light on the role that legislation such as EGSPA can play in maintaining effort on a program of environmental policy-making across governments.<sup>23</sup>

### *Performance on Specific Environmental Goals*

The quantitative track record with respect to the original 21 goals is impressive. Of the fifteen goals that were due before 2012, seven were achieved on time, one was achieved early, and four were achieved late. In other words, twelve of fifteen goals (80%) have been achieved and more than 50% have been achieved on time. Out of the three that have been missed, one (the labeling of all new dwellings with an EnerGuide rating) was subsumed in the achievement of a later and substantively more important goal (the achievement of a specified EnerGuide rating by all new dwelling), bringing the "achieved" rate to 87%.

One missed goal continues "in progress," but has been largely accomplished (universal implementation of higher municipal water quality standards) while the third (reduction of mercury emissions by 70%) was deferred by the government to a later date.<sup>24</sup> This latter goal is the only instance where government has openly given itself a different timeline from that specified in the *Act*. It is unfortunate that the government did not amend the *Act* in this regard, or consult with the Round Table before changing the timeline; however, in changing the target date government did acknowledge the continuing obligation to achieve the goal.

In short, none of the goals have been ignored or abandoned while the solid majority has been implemented early, on time, or only modestly behind schedule. It is disturbing that the unachieved goals relate to adoption of drinking water quality standards and the reduction of mercury emissions—two goals connected directly to human health. The municipal drinking water goal is however largely accomplished and the government has proposed to deal with the mercury reduction on a different timeline by pursuing a

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<sup>23</sup> Admittedly, the strength of the conclusions that can be drawn in this regard is limited by the fact that the NDP would be regarded by many in a Nova Scotia context to be stronger on environmental protection than was the Progressive Conservative government it replaced. Whether or not this is valid, the NDP is clearly not disinterested or antagonistic to environmental protection. A further change in government in 2013 to the Liberal Party should offer further opportunity to consider the role of legislation in ensuring environmental policy goals survive changes in governments.

<sup>24</sup> Sierra Club - Atlantic Chapter, 'Nova Scotians will pay the price for giving NS Power a pass on mercury regulations' (*Sierra Club*, 26 July 2010), <<http://mil.sierraclub.ca/fr/node/2763>> accessed 25 February 2014; Province of Nova Scotia, 'Province to hold NS Power accountable for new mercury emissions caps' (*Province of Nova Scotia*, 9 December 2010), <<http://novascotia.ca/news/release/?id=20101209002>> accessed 25 February 2014

renewable energy target that goes well beyond the one set out in the *Act*.<sup>25</sup> Moreover, on the positive side of the equation, *EGSPA* has played a crucial role in tipping the balance in favour of decisive action on policy objectives that were of doubtful status prior to *EGSPA*. The leading example of this is the soon to be accomplished goal of bringing wilderness areas equal to 12% of landmass under legal protection.<sup>26</sup>

### *Performance on Integrating Environmental and Economic Governance*

As explained above, *EGSPA* purports to be about more than the achievement of discrete environmental goals. It also purports to be about the integration of environmental and economic governance. While there are broad references in the *Act* to the role that other sectors of society will play, the operational focus of the *Act* is squarely on the role that government plays as maker of environmental and economic policy. The question arises: has the implementation of *EGSPA* produced greater integration of environmental and economic policy-making within the Nova Scotia government?

Evaluating *EGSPA*'s impact in this more diffuse respect is more difficult than evaluating its impact in terms of the implementation of the twenty-one goals listed in subsection 4(2). In the context of its five-year review of the *Act*, the Round Table concluded that limited or uncertain progress has been made under *EGSPA* on integrating environmental and economic policy-making, either in respect of the implementation of the specific *EGSPA* goals or more broadly.<sup>27</sup> The contribution that *EGSPA* has made in this aspect of its stated objectives can be evaluated from at least two perspectives: from the perspective of whether *EGSPA* can be said to have been administered with integration as an objective, and from the perspective of *EGSPA*'s broader influence on matters relevant to *EGSPA*'s objective of policy integration.

From the perspective of how *EGSPA* has been administered, there is little evidence that policy integration has been aggressively pursued as an overarching objective. Judging by the annual reviews that have been published to date, implementation of the *Act* has been overwhelmingly limited to the achievement of twenty-one discrete environmental goals.

As to whether *EGSPA* has had a broader influence on the larger objective of integration between environmental and economic policy-making, there is some evidence of this broader influence at play. The work carried out by the Department of Energy to produce climate change and renewable energy strategies was completed explicitly under the framework of the general principles and objectives laid out in *EGSPA*.<sup>28</sup> The same can be said of the work carried out under the *Act* by or under the direction of the Department of Natural Resources to create strategies for sustaining natural capital in forestry, mining,

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<sup>25</sup> Government of Nova Scotia, *Environmental Goals and Sustainable Prosperity Act: Progress Report 2012* (Progress Report, 2012).

<sup>26</sup> *ibid* 2 and 4

<sup>27</sup> Marty Janowitz, *Report to the Minister of Environment Regarding The Environmental Goals and Sustainable Prosperity Act (EGSPA)* (Round Table on Environment and Sustainable Prosperity Report, 30 March 2012) [Janowitz]

<sup>28</sup> Wheeler (n 14); Electricity Plan (n 14); Nova Scotia Department of Energy, *Towards a greener future: Nova Scotia's Climate Change Action Plan* (Province of Nova Scotia, January 2009)

parks and biodiversity.<sup>29</sup> Economic implications or benefits have also been significant influences of the work of the Department of Environment in meeting EGSPA goals in the area of water resource management and wetland protection.<sup>30</sup>

Despite these examples of integrative policy-making in specific policy fields, the overall picture is one in which the overriding objective of integrated policy-making seems not to have been significantly advanced, at least not under the framework of EGSPA. Instead, EGSPA was largely administered as environmental legislation. In fact, in 2010, the NDP government replaced *Opportunities for Sustainable Prosperity* with an economic development strategy that gave less prominence to the role that environmental sustainability would play in economic prosperity.<sup>31</sup>

More recently, the “One Nova Scotia Commission” has produced a sweeping report on the current state and future prospects of the Nova Scotia economy that calls for fundamental change on multiple fronts to reverse decades of economic and population decline.<sup>32</sup> The report includes a “backgrounder” on “Green Economic Growth and Social Sustainability” that mentions *EGSPA* but neither *EGSPA* nor the broader concept of green economy are discussed in the body of the report. On the other hand, it is interesting that without citing *EGSPA* as a precedent, the Commission recommends enshrining the fundamental goals of economic policy in legislation.

#### *Impact on the Process of Environmental Governance*

The implementation of *EGSPA* has entailed multiple processes of public and stakeholder engagement in the development of a range of new policies or strategies in natural resources, energy, water resource management, wetland protection, waste reduction and on other topics. No comprehensive analysis of these processes of engagement has been carried out. It can however be assumed that most were effectively conducted, given the results they have produced, the absence of public controversy about the majority of the processes and the fact that the five-year review of *EGSPA* did not reveal a pattern of concern about the processes that were used to develop the policies and strategies called for by the legislation.

The clear exception is the process applied to develop a new forestry policy under the umbrella of the natural resources strategy which was itself developed under *EGSPA*. As argued by Duinker, this process served to accentuate and deepen divisions among forestry stakeholders, thereby undoing improvements in relationships made through the

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<sup>29</sup> Nova Scotia Department of Natural Resources, *The Path We Share: a Natural Resources Strategy for Nova Scotia 2011-2020* (Province of Nova Scotia Strategy Paper, 2011)

<sup>30</sup> Nova Scotia Department of Environment, *Water for Life: Nova Scotia's Water Resource Management Strategy* (Province of Nova Scotia Strategy Paper, 23 December 2010); Nova Scotia Department of Environment, *Nova Scotia Wetland Conservation Policy* (Province of Nova Scotia Policy Paper, September 2011).

<sup>31</sup> Province of Nova Scotia, *jobsHere: the plan to grow our economy* (Province of Nova Scotia Strategy Paper, 2010).

<sup>32</sup> The Nova Scotia Commission on Building Our New Economy, *Now or Never: An Urgent Call to Action for Nova Scotians* (The One Commission, Report, February 2014)

Colin Stewart Forestry Forum which developed a plan independently of *EGSPA* to achieve the wilderness conservations goals that were incorporated into *EGSPA*.<sup>33</sup> According to Duinker, bad process predictably produced a policy of “split the difference” outcomes on contentious issues like clear-cutting that left few satisfied and that made little sense from forestry management or sustainability perspectives. His conclusions suggest that *EGSPA* produced a process that was completed on time at the expense of taking the time needed to achieve understanding and consensual accommodation of core interests.

The broader process criticism of *EGSPA* is that it has been implemented in a way that largely limits the engagement of the public and stakeholders to the implementation of the specific goals. With the exception of the five-year review, there has been no broader engagement on the Act as a whole or on its core premise - that higher environmental protection and a stronger economic can become mutually reinforcing policy objectives. Tirone et al. argue the Act assumes an alignment with the values of Nova Scotians that may not be accurate and that the Act cannot be expected to accomplish its larger objective unless this alignment exists or is created.<sup>34</sup> Their skepticism may be supported by the developments in economic policy-making that have followed *EGSPA* and that have largely ignored or given only minimal attention to *EGSPA* and the philosophy on which it is based.

## **5. The 2012 Amendments to *EGSPA***

At the conclusion of the five-year legislative review in 2012, the NS government passed a number of amendments to *EGSPA*. The amendments were generally in line with key recommendations of the Round Table.<sup>35</sup> They responded to some of the key challenges experienced during the first five years of implementation, without fundamentally changing the nature of the Act. The amendments include some significant structural changes to the Act and some new goals.

On the structural side, the overall objectives of the Act have been revised. The target of environmental and economic leadership on a global scale by 2020 has been replaced with a more realistic and measurable goal of continuous improvement in measures of social, environmental and economic indicators of prosperity. There is also now a more explicit recognition of the importance of integration in the stated objectives of the Act. The Mi'kmaq concept of “Netukulimk”, which parallels the concept of sustainable development, has been incorporated into the Act's foundational principles. The basic approach of meeting the long-term objective of integrated prosperity and environmental protection through the establishment of clear and specific individual goals, however, remains. The language of sustainable prosperity has been retained and extended – whereas the Act previously spoke of

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<sup>33</sup> Peter Duinker, ‘In Search of ‘Compass and Gyroscope’, Where Were Adaptive Management and Principled Negotiation in Nova Scotia’s Forest-Strategy Process?’ (2012) 35 Dal LJ 55 [Duinker]

<sup>34</sup> Tirone et al, ‘And the People of the Province: EGSPA’s Social Deficit’ (2012) 35 Dal LJ 71 [Tirone]

<sup>35</sup> The Round Table carried out public consultations as part of its five-year review of the Act.

environmental goals, it now refers to “goals for sustainable prosperity”. In multiple ways, the emphasis on the integration of environmental goals with economic ones, has been reinforced.

On the procedural side of the equation, the Minister of Environment is no longer under an obligation to consult with the Round Table in preparation of the annual report, which must be tabled in the House of Assembly. He or she is however, now obligated to consult with the Ministers of other key departments. This should create a stronger context for integration of the operation of the Act into the wider functioning of government. The scope of the annual reports has also been expanded. They now encompass not only the goals laid out in the Act but the “regulations and activities of all provincial departments relating to sustainability”. The role of the Round Table in conducting a comprehensive public review every five years has been retained.

Key among the changes to the Act is the addition of goals. A first category of new goals is generally in line with the approach taken in the original Act, a focus on environmental objectives. Among these are revised goals on reducing mercury emissions (to replace the one previously missed) and on transitioning to renewable energy (to reflect NDP policy previously announced independently of the Act).

The scope of the Act was expanded by three new goals that are all heavily economic in their thrust. One goal calls for an energy framework that advances the economic, social and environmental benefits of energy efficiency and productivity, sustainable transportation, increasing reliance on renewable energy, replacement of coal and oil with natural gas and energy innovation. A second goal deals with the increase of local food production. A third goal calls for a green economy strategy. Each of these goals, and especially the green economy goal, is as much an economic goal as an environmental goal. All three goals offer clear opportunities to connect environmental and economic performance, and all have important social implications.

The overall impact of these amendments, therefore, is a shift away from the initial focus on environmental goals to more integrated goals, and toward the integration of environmental, social and economic wellbeing. As such, these amendments have the potential to respond to one of the shortcomings identified with the original EGSPA, that while government’s performance of the specific goals was impressive, there was limited evidence of resulting integration of environmental protection with economic prosperity.<sup>36</sup>

Other criticisms of the Act, however, remain unanswered. The government generally avoided setting new targets in areas where the initial goals have been met, and it only set a small number of new targets. As a result, most of the goals now stated in the Act are completed goals. Only minor changes were made to the

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<sup>36</sup> Janowitz (n 27)

mandate or composition of the Round Table. The Act remains silent on the process to be used to develop mandated strategies or policies and the role of the public in these processes. The role of the public in the broader administration of the Act has also not been enhanced. Governmental self-evaluation remains the primary compliance tool. It should be noted however that in each of these respects, the new *EGSPA* largely reflect the conclusions and recommendations of the Roundtable based on its five-year review.

## **6. Lessons For The Design of Goal Oriented Legislation**

Based on the experience to date, it is clear that *EGSPA* has had a positive impact on environmental governance in Nova Scotia. It is also clear that there is room for improvement. Based on our review, we have identified opportunities to strengthen *EGSPA* – and legislation like *EGSPA* - in the following areas:

1. Updating and developing new goals on an ongoing basis rather than just during the legislative five year review.
2. The value of effective public engagement in the administration of the Act and activities undertaken to meet the goals of the Act.
3. The importance of ensuring good process, particularly for the implementation of goals related to policies and strategies.
4. The potential role of an independent commissioner for sustainable prosperity.

### **Updating and Developing New Goals**

Nova Scotia's experience with *EGSPA* shows that legislating environmental goals can help to ensure diligence by government in the meeting stated goals. Under *EGSPA*, this has been the experience not only for goals that are largely internal to government but also for goals developed through multi-stakeholder processes that can only be implemented with the contribution of diverse non-state actors. It therefore follows that our first recommendation for improving *EGSPA* - and similar legislation - is that it should have a built-in mechanism for evaluating, changing and adding to the goals to ensure the Act is focusing attention on a continuing basis on the right goals for achieving the larger objectives of environmental governance.

The rudiments of such a mechanism can be found in the Act. The Act confers authority on government to make regulations that establish additional goals to those contained on the Act itself. The annual report of the Minister of Environment to the legislature provides an opportunity for an evaluation of the continuing appropriateness and adequacy of existing goals. The existing machinery has however not been used, not even when Nova Scotia has moved beyond the goals stated in the Act, as it did when the NDP government increased Nova Scotia's renewable energy target to 40% from the 18% stated in *EGSPA*. The five-year review resulted in the addition of several new goals but otherwise left in place the original list of goals, many of which have been completed.

Later, we suggest that reviewing and proposing changes to existing goals or the adoption of new goals could be one of the primary responsibilities of a new officer called the Commissioner for Sustainable Prosperity. We also think the Round Table could play an important role in the process, including by contributing to the annual reporting process, a role it had before the 2012 amendments. We suggest that the ongoing review of the adequacy of goals presents a good opportunity for public engagement with the Act as a whole and with its overall administration. At the same time, public engagement, effectively conducted, would be critical to the effectiveness of whatever process is created for reviewing and updating goals; for one thing, it could help to ensure buy-in for the goals and the Act.

Legislation such as *EGSPA* which purports to connect specific goals to larger and overarching outcomes such as the integration of environmental governance with economic prosperity should specify, at least in general terms, the criteria to be used in evaluating the contribution that specific goals are expected to make to these larger objectives. This evaluation in turn, should be a key variable in determining whether goals are retained, dropped, changed or added. This could help to ensure that the process of goal-setting is not only keeping the train of environmental governance on *some* track but on the *right* track for reaching desired destinations. In the process, it could build understanding of the role that legislated goal-setting can and cannot play in achieving larger outcomes such as sustainable prosperity.

### **Public Engagement**

As stated above, the only provision made in *EGSPA* for public participation is the description of the five-year review by the Round table as a “comprehensive public review”. In accordance with this provision, the five-year review that was completed in 2012 included a public consultation process. Public and stakeholder consultations have also been part of the processes used to complete the various policies and strategies required under the Act on water management, wetland protection, and natural resources management.

In our view, more effective public engagement in all aspects of the Act should be at the heart of any effort to strengthen the Act’s contribution to environmental governance in Nova Scotia. To do so would make the Act a more effective instrument for combining the strengths of new governance approaches to environmental governance with the importance of holding governments accountable for ensuring that environmental governance leads to ultimate policy objectives. We consider it useful in this regard to distinguish between public engagement in administration of the Act and public engagement in activities that are undertaken to meet or develop specific goals.

With respect to the administration of the Act, public engagement will be critical in at least two respects. First, it is an essential tool in motivating government to continue to take compliance with the specific goals and the overall objective of the Act seriously. The more the public is engaged in the administration of the Act, the less likely it is that governments will be tempted to make choices in favour of other

government objectives that may conflict with the effective implementation of *EGSPA*. Second, the public can contribute directly to the effective administration of the Act, including the enhancement of existing goals and their implementation and the identification of new goals. The combined effect would be a more engaged and informed public that is more likely to be invested in the Act, and a government that is more motivated to pursue the goals and objectives because it knows that the public is supportive. This would address the assessment of Tirone et al, that the effectiveness of *EGSPA* is constrained to the extent that the substance of the Act is misaligned with the values that inform the environmental attitudes and behaviors of Nova Scotians.<sup>37</sup>

### **Ensuring Good Process**

In this section, attention shifts from the general value of public engagement to the need for good process, particularly for policy development. Experience in Nova Scotia and elsewhere has demonstrated time and time again the value of good process. As Duinker points out in the context of forest policy, good process can be critical to achieving an effective outcome, particularly with respect to goals that point to a strategy, policy or regulation rather than an substantive outcome.<sup>38</sup>

Duinker argues that the goal of public engagement should be informed consensus. We take this to mean something different than consensus toward the lowest common denominator, a consensus that effectively addresses the substantive issues at hand. In other words, good process is about building as much consensus as is reasonably possible on how to most effectively achieve a clearly stated objective. It is not about just doing what everyone can agree to do, and it is not about policy development that ignores the views and values of the public and key stakeholder.

We conclude based on the academic literature and our own experience that good process results in a better end product, be that a new wetland policy, a water strategy, or a green economy strategy.<sup>39</sup> This is particularly important for goals that are stated in such a manner that they can be achieved without serving the goal of sustainable prosperity. The goal to develop a wetland policy, for example, should be met in a manner that maximizes long-term net benefits to the province by identifying opportunities to integrate environmental protection with economic and social prosperity. Good process is critical to ensuring the goals are met in a manner that maximize sustainable prosperity, integration, and long term benefits to Nova Scotians.

Equally important, as noted in the previous section, good process builds support for the substance of what is being developed, ensuring more effective implementation.

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<sup>37</sup> Tirone (n 34)

<sup>38</sup> Duinker (n 33)

<sup>39</sup> Duinker, *ibid.* See also Alan Diduck and A. John Sinclair, 'Public participation in environmental assessment: The case of the nonparticipant' (2012) 29(4) *Environmental Management* 578; A. John Sinclair and Alan Diduck, 'Public involvement in EA in Canada: A transformative learning perspective' (2001) 21(2) *Environmental Impact Assessment Review* 113



As pointed out by Tirone, we cannot assume that the general public supports either the specific goals in EGSPA or the overall objectives of integration and sustainable prosperity. Public engagement is an opportunity to build support and to diffuse opposition.

One of the lessons learned from the first 5 years of EGSPA is that a goal to develop a policy or strategy with a firm timeline can lead to bad process and less than desired substantive outcomes even when the intentions are good. For this reason, it is important for legislation such as EGSPA to be clear about the elements of good process, and the importance of good process. One way to assist with this would be to establish clear criteria for good process in the legislation; criteria against which processes utilized to meet the goals in this Act can be measured.

Principles of good process can be found in the public engagement literature.<sup>40</sup> Duinker refers to the desired process as a principled negotiation process, and considers it as a form of participatory democracy, as distinct from representative and deliberative democracy.<sup>41</sup> He notes that an acceptable process is increasingly one that participants are involved in designing. This leads to the conclusion that the criteria that should guide implementation of legislation such as *EGSPA* would include principles of transparency, access to information and decision-makers, inclusiveness, active engagement in decision making, and an effort to build consensus where possible. The criteria could be established in the Act, or the Act could set the stage for their development in regulations as long as their role in the Act was clearly set out. With either approach, the role of legislation would be to prescribe the fundamental principles, such as transparency, inclusiveness, and the basic rules of engagement. It would leave the specific design of processes for specific goals to those directly responsible for those goals.

### **Commissioner For Sustainable Prosperity**

It is important to state at the outset that the role we propose for a commissioner in relation to EGSPA would be a more proactive and cooperative role than has traditionally been the case for such officers, at least in Canada. The leading Canadian example of a commissioner in the environmental field is the federal Commissioner for the Environment who operates as part of the Auditor General's Office. Like other audit officers, the Commissioner seeks to ensure accountability of the federal government for environmental responsibility through after-the-fact audits that result in published reports. The Commissioner plays an important role in making government decision-making on the environment open to public scrutiny and analysis, and we would not suggest otherwise. The model has its limits however. For example, reports of the Commissioner on the federal government's

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<sup>40</sup> See, for example, A. John Sinclair and Alan Diduck, 'Public participation in Canadian environmental assessment: enduring challenges and future directions' in K.S. Hanna (ed) *Environmental Impact Assessment Process and Practices in Canada* (2<sup>nd</sup> edn, Oxford University Press 2009); and D.M. Connor, *Constructive Citizen Participation: A Resource Book* (Connor Development Services Limited, 2001)

<sup>41</sup> Duinker (n 33) 64

failure to implement its commitments relative to climate change have been ignored by the current Conservative government and its Liberal predecessor. More broadly, relationships between governments and auditors general unavoidably tend in the adversarial direction.<sup>42</sup>

What we have in mind primarily is an office charged with overseeing independent research on sustainable prosperity in Nova Scotia. The focus of the office would be on getting things done by figuring out how they can be done (through a transparent and objective process) rather than on getting things done by after-the-fact criticism when goals are missed (probably with little recognition of the difficulties involved in truly implementing certain goals).

Our reasoning for this approach is multifaceted, but it has two essential elements. First, it is an approach that is possible and likely to produce results given the growing track record of follow-through on goals articulated in *EGSPA* and the progress that *EGSPA* has made in becoming a continuing part of the governance framework in Nova Scotia regardless of which party is in power. Second, it has the potential to address the key obstacle to this follow-through to date, which is not political resistance but, as in the case of the mercury emissions goal, uncertainty about feasibility, consequences and implementation options, particularly as economic and technological circumstances evolve.

In addition to having a role in commissioning research, the office could be given responsibility (and resources) for managing public engagement processes and/or leading the annual and five-year reviews with input from the Roundtable. Consistent with the purpose and scope of *EGSPA*, the focus of the mandate should be on how Nova Scotia is doing rather than exclusively on how the government is doing under the Act.

The idea would be to build an institutional infrastructure that carries minimal risk of taking the administration of the Act in an adversarial direction, with the resistance to the Act that this would be likely to engender. The impressive performance under the Act to date certainly does not warrant an adversarial role for a commissioner in Nova Scotia. On the other hand, an institution that brings arms-length transparency and independence to bear on the administration of the Act through a mandate that is more about assisting with implementation than it is with enforcing would be consistent with the governance philosophy that is implicitly embedded in the Act. It would also help to ensure that the role the Act appears to have played in keeping the process of environmental governance on track is consolidated, strengthened and expanded.

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<sup>42</sup> Donald Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (IPAC Series in Public Management and Governance, University of Toronto Press 2008); Commissioner of the Environment and Sustainable Development, *2013 Fall Report of the Commissioner of the Environment and Sustainable Development* (Report to Parliament, Fall 2013), 3

The issues which Nova Scotia is seeking to address under the concept of sustainable prosperity are complex and likely to be among the defining issues of our and future generations. The creation of a Commissioner for Sustainable Prosperity would ensure an independent voice and a source of growing expertise on these critical and complex issues. The more collaborative model we are proposing for the Commissioner will also help to assure citizens that governments will follow through on their environmental commitments while at the same time giving citizens a dependable avenue for participating in the Act's evolving development. The creation of this independent voice will serve these functions naturally, without this having to be the primary focus of the position.

## **7. Conclusion**

For new governance approaches to be effective in the environmental field, it is critical that the engagement and empowerment of non-state actors does not diminish government accountability for achieving clearly stated objectives of environmental governance. Experience in Nova Scotia suggests that a legislative framework which includes clear and specific goals of environmental governance can serve an important role in holding governments accountable for ensuring that the adoption or operation of new governance approaches does not come at the price of environmental progress. In fact, the combination of power sharing and active, constructive engagement of non-state actors through new governance approaches on the one hand, and clear goals that hold governments accountable for meeting stated policy objectives on the other hand, can offer an effective combination of bottom up and top down approaches to environmental governance.

Based on Nova Scotia's experience, this approach may require the following key elements to be effective:

- A conducive political context, including support for both the objectives and the legislative mechanism across political lines
- A clear statement of the overall objective, such as sustainable prosperity or the integration of environmental protection, and economic and social wellbeing
- Specific, well designed goals with clear timelines set in legislation
- Regular review of the adequacy of the goals, including through an institutional mechanism that enjoys the benefits of independence and specialized expertise
- Accountability for the government as a whole and relevant departments
- Transparency about the status of the goals and the process for meeting them
- Active, ongoing and constructive public engagement at multiple levels.

With these elements in place, we conclude that legislation that codifies the goals of environmental governance and the accountability of government for achieving those goals can significantly enhance the performance of environmental governance. It

has the potential to serve as a counterweight to the tendency in an age of “New Governance” to emphasize the process of environmental governance over its substance. In other words, in the terms suggested by Annecoos Wiersema, legislation like *EGSPA* can help to keep the train of environmental governance on track when it is conducted under the diffuse principles and modalities of New Governance. The lesson from the Nova Scotia experience, however, is that careful design in light of local conditions is critical to the success of such an approach, particularly given the need to balance political support with accountability.