

“For Future Generations”: The Amendments to the Federal Sustainable Development Act and the Implementation of Intergenerational Equity

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Abstract: The Government of Canada recently amended the Federal Sustainable Development Act (FSDA), the statute governing the design and implementation of Canada’s approach to sustainable development. Among the numerous changes is the explicit inclusion of the principle of intergenerational equity and the requirement for it to be considered in the development of federal sustainable development strategies. In this paper, I review these amendments to the FSDA and consider the practical effect they may have in giving a voice to the interests of future generations. Specifically, I examine the extent to which these amendments comply with the principle of intergenerational equity, a legal framework which balances the needs of present and future generations while taking into account our planet’s ecological limits. In conducting this analysis, I identify and critique two particular shortcomings: the weak definition of intergenerational equity and the absence of effective representation for the interests of future generations. I conclude that the principle of intergenerational equity has been only nominally incorporated into the FSDA and, without further legal or policy mechanisms, due consideration of the interests of future generations will remain elusive under Canada’s approach to sustainable development.

Résumé: Le gouvernement du Canada a récemment modifié la Loi fédérale sur le développement durable (LFDD), la loi qui régit la conception et la mise en œuvre de l’approche du Canada en matière de développement durable. Parmi les nombreux changements, on note l’inclusion explicite du principe d’équité intergénérationnelle et l’obligation de le considérer dans l’élaboration des stratégies fédérales de développement durable. Dans cet article, je passe en revue les modifications apportées à la Loi sur le développement durable et j’examine l’effet pratique qu’elles peuvent avoir en donnant une voix aux intérêts des générations futures. Plus précisément, j’examine dans quelle mesure ces modifications sont conformes au principe d’équité intergénérationnelle, un cadre juridique qui équilibre les besoins des générations actuelles et futures tout en tenant compte des limites écologiques de notre planète. En effectuant cette analyse, j’identifie et critique deux lacunes particulières : la faible définition de l’équité intergénérationnelle et l’absence de représentation effective des intérêts des générations futures. Je conclus que le principe d’équité intergénérationnelle n’a été que nominalelement incorporé dans la LDFS et que, sans autres mécanismes juridiques ou politiques, la prise en compte des intérêts des générations futures restera insaisissable dans l’approche canadienne du développement durable.

Titre en français : « Pour les générations futures » : Les modifications de la Loi fédérale sur le développement durable et la mise en œuvre de l’équité intergénérationnelle

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“Canadians want cleaner air, healthier communities, and a strong economy for their children and grandchildren. As we work toward net-zero emissions by 2050, the federal government must lead by example, and the improvements to the Federal Sustainable Development Act help us do just that. Together, we can create a healthier and more prosperous Canada for future generations.”¹

1. INTRODUCTION

We are in the midst of a planetary crisis. In Canada and around the world, 2021 was another year of record-breaking heatwaves, wildfires, hurricanes, floods, and other extreme weather events. Human activities are causing catastrophic and potentially irreversible changes to Earth’s marine, terrestrial, and climatic ecosystems which will disproportionately impact the lives, health, safety, and well-being of youth and future generations.² And yet, as climate change, biodiversity loss, and widespread environmental degradation intensify and increase the likelihood that future generations will inherit a much less habitable world than the one that exists today, bias for the interests of the present³

¹ Environment and Climate Change Canada, News Release, “Strengthening transparency and accountability: Amendments to the Federal Sustainable Development Act now in force” (7 December 2020), online: *Government of Canada* <canada.ca/en/environment-climate-change/news/2020/12/strengthening-transparency-and-accountability-amendments-to-the-federal-sustainable-development-act-now-in-force.html>.

² See e.g. Nathalie J Chalifour, Jessica Earle & Laura Macintyre, “Coming of Age in a Warming World: The *Charter’s* Section 15(1) Equality Guarantee and Youth-Led Climate Litigation” (2021) 17:1 *JL & Equality* 1 at 75–85; Nick Watts et al, “The 2019 Report of the *Lancet* Countdown on Health and Climate Change: Ensuring That the Health of a Child Born Today Is Not Defined by a Changing Climate” (2019) 394:10211 *Lancet* 1836 at 1836 (“[a] child born today will experience a world that is more than four degrees warmer than the pre-industrial average, with climate change impacting human health from infancy and adolescence to adulthood and old age. Across the world, children are among the worst affected by climate change”). The terms youth and future generations will be defined below, in Part 3.2.

³ See Joerg Chet Tremmel, “The Four-Branches Model of Government: Representing Future Generations” in Marie-Claire Cordonier Segger, Marcel Szabó & Alexandra R Harrington, eds, *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions* (Cambridge: Cambridge University Press, 2021) 754 at 754–56 [Tremmel, “Four-Branches”] for a discussion of the concept of political ‘presentism’, which he defines as harmful short-termism and

continues to dominate public policy and governance in Canada. Economic growth and short-term political concerns are frequently prioritized over long-term environmental health and well-being. The result is a shifting of the costs and burdens of the planetary crisis onto youth and future generations and a failure to provide meaningful protection for their environmental interests.⁴ The fears and anger that young people share about the consequences of this current trajectory for their futures is reflected in the surge of youth-led climate strikes and climate change litigation in Canada and around the world.

Concern for the well-being of children and future generations was espoused as a driving force behind the Government of Canada's recent amendments to the *Federal Sustainable Development Act (FSDA)*, the statute governing the development and implementation of its federal sustainable development strategy.⁵ These amendments followed an extensive review of the *FSDA* that began in 2016 and culminated with the enactment of Bill C-57, *An Act to amend the Federal Sustainable Development Act*. Among the numerous changes Bill C-57 made to the *FSDA* when it came into force on December 1, 2020, is the explicit inclusion of the principle of intergenerational equity and the requirement for it to be considered in the creation of federal sustainable development strategies.

In this paper, I review the Canadian government's apparent commitment to intergenerational equity and consider the practical effect the recent inclusion of this principle in the *FSDA* may have in safeguarding the needs and interests of future generations. Specifically, I critically examine the extent to which the amendments comply with intergenerational equity, a legal framework which defines the rights and obligations of present and future generations with respect to the planet's natural resource base.⁶ In conducting this analysis, I identify two particular shortcomings of the recent amendments: the weak definition of intergenerational equity and the government's decision not to establish an advocate for future generations. I contextualize this critique by highlighting some of the main challenges of implementing

contrary to intergenerational justice and the interests of future generations. See also note 111, *below*, and accompanying text.

⁴ See e.g. *Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada – Report 5: Lessons Learned from Canada's Record on Climate Change* (Ottawa: Officer of the Auditor General of Canada, 2021) at 2, 33, online (pdf): <oag-bvg.gc.ca/internet/docs/par_cesd_202111_05_e.pdf> [*Canada's Record of Climate Change Report*] (“youth and future generations face intergenerational equity issues as they will be burdened by the consequences of an increasingly dangerous climate”); *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 15 (“Both nationally and globally, the economic and human costs of climate change are considerable. Canada's Minister of Finance has estimated that climate change will cost Canada's economy ... up to \$43 billion per year by 2050 if no action is taken to mitigate its effects”); *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Factum of the Interveners, Intergenerational Climate Coalition et al. at para 10); “Tip of the Iceberg: Navigating the Known and Unknown Costs of Climate Change for Canada” (December 2020), online (pdf): *Canadian Institute for Climate Choices* <climatechoices.ca/wp-content/uploads/2020/12/Tip-of-the-Iceberg_-_CoCC_-_Institute_-_Full.pdf>; Brett M Frischmann, “Some Thoughts on Shortsightedness and Intergenerational Equity” (2005) 36:2 *Loyola U Chicago LJ* 457 at 459.

⁵ RSC 2008, c 33 [*FSDA*].

⁶ See Part 3.1, *below*, for a thorough discussion of the principle of intergenerational equity. Note: the terms intergenerational equity and intergenerational justice are frequently used interchangeably in the literature. In this paper, I chose to use intergenerational equity as it appears to be the term more commonly employed within the Canadian law and policy landscape.

intergenerational equity through a national policy mechanism like the *FSDA*. I argue that the principle of intergenerational equity has been only nominally incorporated into the *FSDA* and, without further legal or policy mechanisms, respect for and protection of the interests of future generations will remain elusive under Canada's federal sustainable development strategy.

This paper is divided into four parts. In Part II, I provide a short summary of the history of sustainable development as a global concept and of Canada's approach to sustainable development under the *FSDA*. Part III contains an overview of intergenerational equity and its relation to sustainable development. In Part IV, I summarize the recent amendments to the *FSDA*, particularly the inclusion of the principle of intergenerational equity. My analysis of the extent to which these amendments might assist in the implementation of intergenerational equity follows, with subsections dedicated to each of the particular shortcomings I critique. A brief conclusion is offered in Part V.

2. CANADA'S APPROACH TO SUSTAINABLE DEVELOPMENT

2.1. ORIGINS OF SUSTAINABLE DEVELOPMENT AND ITS ADOPTION IN CANADA

Consideration of how society's actions today will impact the quality of life for future generations of humans has been at the core of the debate surrounding sustainable development since the United Nations (UN) World Commission on Environment and Development (the Brundtland Commission) released its seminal report, *Our Common Future*, over 30 years ago.⁷ To address the detrimental impact of modern economic growth and development on planetary resources, the Brundtland Commission stressed the urgency of a global shift to sustainable development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."⁸ This positioned intergenerational equity, or fairness between present and future generations, as an inherent component of sustainable development.⁹

In 1992, several years following the release of the Brundtland Commission report, at the United Nations Conference on Environment and Development (the Rio Earth Summit), countries from around the world agreed to a global partnership for sustainable development and a concrete set of principles to guide this initiative.¹⁰ The implementation of this commitment has been the foundation of quinquennial international conferences since that time. At the conference in 2015, United Nations (UN) member states—including Canada—adopted the *2030 Agenda for Sustainable Development* that sets seventeen sustainable development goals for eradicating poverty and hunger, building peaceful, just and inclusive societies, protecting the planet from degradation, and ensuring prosperity for all human beings by the end of this

⁷ *Report of the World Commission on Environment and Development: Our Common Future*, UNGAOR, 42nd Sess, Supp No 25, UN Doc A/42/427 (1987) [Brundtland Report].

⁸ *Ibid* at 54, para 1.

⁹ See e.g. Lynda Collins, "Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance" (2007) 30:1 Dal LJ 79 [Collins, "Revisiting"]. See also Markus W Gehring & Alexandra R Harrington, "Intergenerational Equity and the European Constitution" in Segger, Szabó & Harrington, *supra* note 3, 281 at 287.

¹⁰ See United Nations Conference on Environment & Development, UNCEDOR, Annex II, Agenda 21, UN Doc A/CONF.151/26/Rev.1 (Vol I) (1992) at 9.

decade.¹¹

Sustainable development is a decision-making paradigm that aims to attain and preserve the minimal conditions necessary for human well-being and quality of life in both the present and the future.¹² Since its inception, it has been seized as a policy mechanism for environmental governance by governments, international organizations, businesses, and others around the globe. Sustainable development links three societal objectives: economic development, environmental protection, and social justice. The integration and implementation of these components is supported by a variety of principles, including the precautionary principle, the polluter-pays principle, the principle of participation, and the principle of intergenerational equity.¹³

Given the inherent ambiguity in the Brundtland Commission's definition of sustainable development, the concept has been interpreted and applied in a variety of different ways by governments, policymakers, and scholars.¹⁴ Two distinct approaches have emerged. The first is often referred to as the "weak" approach to sustainable development. Under this interpretation, economic, environmental, and social objectives are seen as equally important "pillars" of sustainable development, but there is no clear guidance on how the balancing of these three political goals is to be achieved.¹⁵ In practice, economic growth is prioritized by those that adopt this approach. As Halley and DesMarchais explain, "[s]o-called 'weak' sustainability tends to favour economic development by allowing the substitution of natural stock with goods and wealth generated by human activity, with the justification that this wealth might then be invested in environmental protection."¹⁶ According to this approach, the environmental consequences of current economic growth models, such as the depletion of natural resources and environmental degradation, can be offset by technology and other forms of human-made capital.¹⁷ In essence, it assumes that the economy can expand indefinitely, despite the finite nature of the planet.

In contrast, the "strong" approach holds ecological integrity at the core of sustainable development and mandates that it be the foundation of all decision-making. It recognizes that there are ecological limits to economic and social activities and that for development to be sustainable (i.e., capable of enduring over a long period of time) it must occur within

¹¹ See United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, UNGAOR, 70th Sess, UN Doc A/Res/70/1 (2015).

¹² See John C Dernbach & Federico Cheever, "Sustainable Development and Its Discontents" (2015) 4:2 *Transnational Environmental L* 247 at 252–53.

¹³ *Ibid* at 253; Natasha Affolder, "The Legal Concept of Sustainability" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, AB: University of Calgary Press, 2019) 92 at 96–99.

¹⁴ There is a substantial body of literature dedicated to addressing the contested nature of the concept of sustainable development. See e.g. Bill Hopwood, Mary Mellor & Geoff O'Brien, "Sustainable Development: Mapping Different Approaches" (2005) 13:1 *Sustainable Development* 38; Steve Connelly, "Mapping Sustainable Development as a Contested Concept" (2007) 12:3 *Local Environment* 259.

¹⁵ See Affolder, *supra* note 13 at 95.

¹⁶ Paule Halley & Pierre-Olivier DesMarchais, "Sustainable Development under Canadian Law" in Ingelson, *supra* note 13 at 9.

¹⁷ See Hopwood, Mellor & O'Brien, *supra* note 14 at 40.

the biophysical constraints of the Earth system.¹⁸ No amount of manufactured capital or technology can replace ecological processes, such as clean air, functioning water cycles, and resilient ecosystems, that are essential to human well-being and survival. This approach has been vigorously promoted by environmental law scholars like Bosselmann, who states: “[t]here is only ecological sustainable development or no sustainable development at all. To perceive environmental, economic and social as equally important components of sustainable development is arguably the greatest misconception of sustainable development and the greatest obstacle for achieving social and economic justice.”¹⁹

In Canada, the prevailing definition of sustainable development referred to in provincial, territorial, and federal legislation (including the *FSDA*) is that expressed by the Brundtland Commission in *Our Common Future*: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”²⁰ Scholars have argued that even though this definition is silent with respect to the environment, it implies achieving and maintaining ecological conditions that support human well-being.²¹ In theory, therefore, for development to be sustainable, certain economic activities will need to be limited, or in some cases even halted, to preserve and restore Earth’s natural systems. In practice, however, the weak approach to sustainable development, wherein the often-conflicting objectives of environmental protection, social justice, and economic prosperity are seen as equally relevant and as needing to be balanced, has continued to dominate the sustainable development paradigm in Canada.

Although it may have driven some commendable improvements in environmental protection and quality, the sustainable development paradigm has also served as a vehicle for greenwashing.²² Specifically, it has permitted governments and corporations to maintain existing patterns of production and consumption that are environmentally destructive under the guise of a sustainable development agenda. In other words, it facilitates perpetual economic growth, or business as usual, with a green economy facade.²³ This greenwashing trend is reflected in the government of Canada’s approach to sustainable development over the last three decades. Just as sustainable development was becoming entrenched in the Canadian policy landscape in the 1990s, federal, provincial, and territorial governments were simultaneously

¹⁸ See Affolder, *supra* note 13 at 96.

¹⁹ Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd ed (London: Routledge, 2016) at 21.

²⁰ See Affolder, *supra* note 13 at 94; *FSDA*, *supra* note 5, s 2; Brundtland Report, *supra* note 7.

²¹ See Affolder, *supra* note 13 at 94; Dernbach & Cheever, *supra* note 12 at 261. See generally Bosselmann, *supra* note 19 for a fulsome history of the emergence of the concept of sustainable development, including its origins and cultural context.

²² See e.g. Sam Adelman, “The Sustainable Development Goals, Anthropocentrism and Neoliberalism” in Duncan French & Louis J Kotzé, eds, *Sustainable Development Goals: Law, Theory and Implementation* (Northampton, Mass: Edward Elgar, 2018) 15 (“Within five years of the publication of *Our Common Future*, more than 70 definitions of sustainable development had been proposed, demonstrating the chameleon-like capacity of the concept to mean all things to all people, but it is this vague capaciousness that enables states and transnational corporations to greenwash unsustainable activities by misleading the public about the environmental impacts of their products or services” at 22–23).

²³ See e.g. Sam Adelman, “Rio+20: Sustainable Injustice in a Time of Crises” (2013) 4:1 *J Human Rights & Environment* 6 at 10–15.

taking contradictory action, such as weakening environmental laws, cutting environmental department budgets, and de-regulating environmental activity.²⁴ Despite championing the sustainable development paradigm, the Canadian government has failed to meet any of the greenhouse gas emissions reduction targets it has set since 1992 and continues to approve oil and gas projects that will lock in additional emissions for decades to come.²⁵ Below, I summarize the purpose, potential, and promise of the *FSDA*, before providing further analysis of Canada's approach to sustainable development.

2.2. CANADA'S FEDERAL SUSTAINABLE DEVELOPMENT LAW AND STRATEGY

The *FSDA* was enacted as a mechanism for developing and implementing an overarching federal sustainable development strategy in 2008.²⁶ Prior to this time, large federal departments were producing their own sustainable development strategies once every three years in a siloed fashion. This was done in fulfilment of a requirement that arose in 1995 under amendments to the *Auditor General Act*, which simultaneously created the role of Commissioner of the Environment and Sustainable Development (Commissioner) and assigned her the duty of monitoring and reporting on the implementation of Departmental Sustainable Development Strategies (DSDSs).²⁷ Not long afterwards, however, the Commissioner began raising concerns about the difficulties and weaknesses created by the lack of a cohesive approach to sustainable development at the national level.²⁸ Parliament responded to the Commissioner's concerns by enacting the *FSDA* and concurrently fulfilled the commitment it had made at the UN environmental conferences in 1992, 1997, and 2002 to develop a national sustainable development strategy.²⁹

Under the *FSDA*, the Minister of Environment and Climate Change is required to prepare a Federal Sustainable Development Strategy (FSDS) every three years. The FSDS must set out specific goals and targets for sustainable development and an action plan for achieving them.³⁰ Additionally, the *FSDA* requires federal departments and agencies to prepare their own

²⁴ See generally Stepan Wood, Georgia Tanner & Benjamin J Richardson, "What Ever Happened to Canadian Environmental Law" (2010) 37:4 Ecology LQ 981 at 1006–16.

²⁵ See *Canada's Record of Climate Change Report*, *supra* note 4 at 3, 5; *Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada – Report 1: Progress on Reducing Greenhouse Gases* (Ottawa: Officer of the Auditor General of Canada, 2017), online: <oag-bvg.gc.ca/internet/English/parl_cesd_201710_01_e_42489.html>. See also Chalifour, Earle & Macintyre, *supra* note 2 at 15–19; *OECD Environmental Performance Reviews: Canada 2017*, OECD Environmental Performance Reviews Series (Paris: OECD, 2017) at 16, 37.

²⁶ See *FSDA*, *supra* note 5.

²⁷ See *An Act to amend the Auditor General Act*, SC 1995, c 43, amending RSC 1985, c A-17.

²⁸ See e.g. House of Commons, Standing Committee on Environment and Sustainable Development, *Federal Sustainability for Future Generations – A Report Following an Assessment of the Federal Sustainable Development Act*, 42-1 (June 2016) (Chair: Deborah Schulte) at 2 [FSDA Assessment Report].

²⁹ See e.g. "Toward a National Sustainable Development Strategy for Canada: Putting Canada on the Path to Sustainability within a Generation" (January 2007) at 1, online (pdf): *David Suzuki Foundation* <davidsuzuki.org/wp-content/uploads/2019/02/national-sustainable-development-strategy-canada-path-sustainability.pdf>.

³⁰ See *FSDA*, *supra* note 5, s 9(1)–(2). The FSDS must also identify the Minister responsible for meeting each target and the targets must be measurable and include a time frame.

sustainable development strategy that complies with, and contributes to, the FSDS.³¹

The *FSDA* contains several mechanisms to ensure broad participation in the development of the sustainable development strategies and oversight of their implementation. There is a mandatory 120-day consultation period before the FSDS may be finalized, during which time the Sustainable Development Advisory Council, various parliamentary committees, the Commissioner, and the public are given an opportunity to review and comment on the draft strategy.³² Implementation of the FSDS is monitored by the Sustainable Development Office, which must provide a report to the Minister of Environment and Climate Change on the Government of Canada's progress in implementing the FSDS at least once every three years.³³ The Commissioner is responsible for examining this report to assess the fairness of its contents and for reporting annually on each federal department's implementation of their DSDSs and contribution to the objectives of the FSDS.³⁴

The *FSDA* is a unique piece of legislation. Its stated purpose "is to provide the legal framework for developing and implementing a Federal Sustainable Development Strategy that makes decision making related to sustainable development more transparent and subject to accountability to Parliament, promotes co-ordinated action across the Government of Canada to advance sustainable development and respects Canada's domestic and international obligations relating to sustainable development, with a view to improving the quality of life of Canadians."³⁵ But what is really meant by a "legal framework" for sustainable development, which is itself only a policy agenda? Unlike many other federal laws, the *FSDA* does not attempt to influence the actions of relevant nonstate actors, such as individuals or businesses, on a particular policy issue through the authorization of government regulations or spending. Instead, the role of the *FSDA* is to guide the Government of Canada's behaviour.

In essence, the *FSDA* legally mandates the federal government to set goals and targets for sustainable development—i.e., to have a plan for sustainable development. The *FSDA* does not contain provisions prescribing the substance or guiding the implementation of those sustainable development goals and targets. The requirement is simply that the federal government and relevant organizations make a plan—any plan. This is curious, given that the Canadian government does not legally require a statute instructing it to develop plans, strategies, or policies.³⁶ There are no requirements in the *FSDA* regarding government spending for measures promoting sustainable development at the federal level, nor provisions specifying particular economic, social, or environmental goals or targets to be achieved through sustainable development strategies.³⁷

³¹ *Ibid*, ss 11(1), 12(1).

³² *Ibid*, s 9(3)–(4).

³³ *Ibid*, s 7. The Sustainable Development Office is within Environment and Climate Change Canada.

³⁴ See *Auditor General Act*, RSC 1985, c A-17, s 23 [AGA].

³⁵ *FSDA*, *supra* note 5, s 3.

³⁶ Under the Trudeau Liberal government, a number of similar pieces of legislation have been enacted that require the federal government to develop a strategy on a particular societal issue. See e.g. *National Housing Strategy Act*, SC 2019, c 29, s 313; *Poverty Reduction Act*, SC 2019, c 29, s 315; *National Framework for Diabetes Act*, SC 2021 c 19; *National Strategy for Alzheimer's Disease and Other Dementias Act*, SC 2017, c 19.

³⁷ This is in contrast to some provincial sustainable development laws that include more robust requirements,

The political context of the *FSDA* helps to elucidate its purpose and promise. The *FSDA* was created through a Liberal private member's bill that was adopted by Stephen Harper's minority Conservative government at a time when it was simultaneously rolling back federal environmental regulations and protections.³⁸ According to Toner, Meadowcroft, and Cherniak, the enactment of the *FSDA* was part of the Harper government's "empty rhetoric" on sustainable development, which it used to promote its "Responsible Resource Development" agenda that prioritized economic growth over environmental concerns (see: greenwashing).³⁹ As scholars have noted, the *FSDA* is, in theory, an ambitious piece of legislation with potential significance for institutionalizing sustainable development. It is difficult, however, to avoid the conclusion that the *FSDA* plays at least a small role in a larger greenwashing campaign associated with the sustainable development paradigm. The repeated failures of the federal government to make substantial progress towards addressing critical environmental challenges, especially mitigating climate change through the reduction of greenhouse gas emissions, reinforce this conclusion.⁴⁰ In a November 2021 report, the Commissioner of the Environment and Sustainable Development expressed the extent of Canada's failures to act on climate change by stating that the country "has become the worst performer of all G7 nations since the landmark Paris Agreement on climate change was adopted in 2015."⁴¹

The Canadian government's record on achieving sustainable development goals has been discouraging regardless of the party in power. Certainly, the Trudeau Liberal government has taken a very different approach to the environment than the Harper Conservatives since it was elected in 2015. Consciously or not, however, it may be using the *FSDA* and its recent amendments to contribute to the appearance of action, in the hopes of gaining electoral reward or of boosting its credentials as an environmentally conscientious government both domestically and internationally, as much as to achieve specific sustainable development outcomes. The Liberal government had an opportunity in the process of amending the

including funds for financing measures and programs promoting sustainable development. See e.g. *Sustainable Development Act*, CQLR c D-8.1.1; Bill 213, *An Act to Achieve Environmental Goals and Sustainable Prosperity*, 2nd Sess, 63rd GA, Nova Scotia, 2019 (assented to 30 October 2019), SNS 2019, c 26; Bill 16, *The Climate and Green Plan Implementation Act*, 3rd Sess, 41st Leg, Manitoba, 2018 (assented to 8 November 2018), SM 2018, c 30.

³⁸ See Jason MacLean, "Will We Ever Have Paris? Canada's Climate Change Policy and Federalism 3.0" (2018) 55:4 *Alta L Rev* 889 at 907.

³⁹ See Glen Toner, James Meadowcroft & David Cherniak, "The Struggle of the Canadian Federal Government to Institutionalize Sustainable Development," in Debora L VanNijnatten, ed, *Canadian Environmental Policy and Politics: The Challenges of Austerity and Ambivalence*, 4th ed (Don Mills: Oxford University Press, 2016) 116 at 123.

⁴⁰ See e.g. Commissioner of the Environment and Sustainable Development, *Review of the 2018 Progress Report on the Federal Sustainable Development Strategy* (Ottawa: Office of the Auditor General, 2019); Commissioner of the Environment and Sustainable Development, "Reports to Parliament", online: *Office of the Auditor General of Canada* <www.oag-bvg.gc.ca/internet/english/parl_lp_e_901.html>; Commissioner of the Environment and Sustainable Development, *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (Ottawa: Office of the Auditor General, 2013). See also MacLean, *supra* note 38 at 908.

⁴¹ "Commissioner documents 30 years of missed opportunities on climate change action in Canada" (25 November 2021), online: *Office of the Auditor General of Canada* <www.oag-bvg.gc.ca/internet/English/mr_20211125_e_43956.html>.

FSDA to give the law some real teeth, move away from a greenwashing exercise, and to begin meaningfully fulfilling its stated commitment to providing a safe, healthy, and sustainable future for children, grandchildren, and future generations. Below, I argue that this opportunity was squandered and critique two particular ways in which the *FSDA* amendments fall short of meaningfully ensuring effective implementation of intergenerational equity. Before doing so, the next section delves into the meaning of intergenerational equity and the legal framework for its implementation.

3. INTERGENERATIONAL EQUITY: FAIRNESS BETWEEN GENERATIONS

3.1. THE PRINCIPLE OF INTERGENERATIONAL EQUITY

Concern for the well-being of future generations and the moral obligations owed to them by present generations is embedded in numerous cultural, religious, legal, philosophical, and political traditions.⁴² The principle of intergenerational equity has emerged from these historical roots, as well as the growing recognition of the devastating consequences that widespread environmental degradation and increasing financial debt will pose in the coming decades. Philosophers, lawyers, sociologists, political scientists, and others have offered a variety of views regarding the meaning, scope, and application of intergenerational equity.⁴³ At its core, intergenerational equity is fairness in the distribution of resources between generations. Given that it involves questions about sacrifices and choices, intergenerational equity is primarily an ethical issue that demands consideration of the obligation today's generation has to preserve living conditions for future generations.⁴⁴ The justifications advanced to support the existence of intergenerational equity include: "the Earth is held in common by the community of humans as a whole; the present generation benefits from the sacrifices and investments of prior generations; future generations will be disproportionately harmed by environmental degradation in the present."⁴⁵ Over time, intergenerational equity has also been broadened to include other species and ecosystems in addition to humans.⁴⁶

In the late 1980s, environmental law scholar Edith Brown Weiss published *In Fairness to Future Generations*, in which she articulated the pre-eminent legal theory of intergenerational equity.⁴⁷ Brown Weiss' theory provides a clear, comprehensive, and pragmatic legal framework

⁴² See e.g. Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development" (1992) 8:1 *Am U Intl L Rev* 19 at 20 [Brown Weiss, "Sustainable Development"]; Collins, "Revisiting", *supra* note 9 at 94–96; David W-L Wu, "Tsilhqot'in Nation as a Gateway Towards Sustainability: Applying the Inherent Limit to Crown Land" (2015) 11:2 *JSDLP* 339 at 347–48.

⁴³ See e.g. Burns H Weston & Tracy Bach, *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (South Royalton: Vermont Law School, 2009) at 18–26; Lukas H Meye, ed, *Intergenerational Justice* (London, UK: Routledge, 2017).

⁴⁴ See Marcel Szabó, Marie-Claire Cordonier Segger & Alexandra R Harrington, "Intergenerational Equity in Sustainable Development Treaty Implementation" in Segger, Szabó & Harrington, *supra* note 3 at 783.

⁴⁵ Judith E Koons, "Earth Jurisprudence and the Story of Oil: Intergenerational Justice for the Post-Petroleum Period" (2011) 46:1 *USF L Rev* 93 at 123.

⁴⁶ See e.g. *ibid* at 124; Prue Taylor, "The Business of Climate Change: What's Ethics Got to Do With It?" (2007) 20 *Global Bus & Development LJ* 161 at 191.

⁴⁷ See Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers, 1989) [Brown Weiss, *In Fairness to Future*

that permits meaningful and consistent implementation of intergenerational fairness in all aspects of decision making.⁴⁸ Intergenerational equity, as articulated by Brown Weiss, provides a moral compass for the care and use of Earth's natural resources.⁴⁹ It requires that individuals consider what impact the decisions they make today may have on the robustness and integrity of the environment they leave behind for their children, future generations of humans, and other future beings. The principle consists of both rights and responsibilities (or duties).⁵⁰ Members of the present generation must act as trustees of the Earth for the benefit of future generations.⁵¹ At the same time, the present generation is also a beneficiary of the trust passed on by their ancestors and has a corresponding right to use and benefit from Earth's resources.⁵² In this way, the principle of intergenerational equity provides that humans "hold the natural environment of our planet in common with other species, other people, and with past, present and future generations."⁵³ In other words, there is a collective relationship among all generations—past, present, and future—based on our integral connection to, and dependence upon, the Earth's natural systems.

From this foundational understanding of intergenerational equity, Brown Weiss proposed three elements to form the basis of a set of planetary rights and obligations held by each

Generations]. There is considerable debate in the literature (philosophy and law) about whether living human beings owe moral, political, and legal obligations to future persons whose identity we cannot determine in advance and whether the well-being of such persons should be a matter of moral and political concern. For the purposes of this paper, however, I assume that we do, and it should. I will be addressing neither the philosophical or theoretical underpinnings of intergenerational equity, nor its critiques. For a thorough analysis of these issues, see e.g. Collins, "Revisiting", *supra* note 9. See also Antonio D'Aloia, "Constitution and future generations: A new challenge for law's theory" in Laura Westra, Janice Gray & Antonio D'Aloia, eds, *The Common Good and Ecological Integrity: Human Rights and the Support of Life* (London, UK: Routledge, 2016) 211; Jessica Eisen, Roxanne Mykitiuk & Dayna Nadine Scott, "Constituting Bodies into the Future: Toward a Relational Theory of Intergenerational Justice" (2018) 51:1 UBC L Rev 1; Burns H Weston, "Climate Change and Intergenerational Justice: Foundational Reflections" (2008) 9:3 VJEL 375 [Weston, "Climate Change"]; Burns H Weston, "The Theoretical Foundations of Intergenerational Ecological Justice: An Overview" (2012) 34:1 Hum Rts Q 251; Tracey Skillington, "Changing perspectives on natural resource heritage, human rights, and intergenerational justice" (2019) 23:4 Intl JHR 615; Wilfred Beckerman, "The Impossibility of a Theory of Intergenerational Justice" in Joerg Chet Tremmel, ed, *Handbook of Intergenerational Justice* (Northampton, MA: Edward Elgar, 2006) 53; Zena Hadjiargyrou, "A Conceptual and Practical Evaluation of Intergenerational Equity in International Environmental Law" (2016) 18 Intl Community L Rev 248 at 253–56; Ori J Herstein, "The Identity and (Legal) Rights of Future Generations" (2009) 77 Geo Wash L Rev 1173; Axel Gosseries, "On Future Generations' Future Rights" (2008) 16:4 J Political Philosophy 446.

⁴⁸ See Brown Weiss, *In Fairness to Future Generations*, *supra* note 47 at 100, 139; Lynda Collins, "Environmental Rights for the Future? Intergenerational Equity in the EU" (2007) 16:3 RECIEL 321 at 322–23 [Collins, "Environmental Rights"]

⁴⁹ Brown Weiss' theory of intergenerational equity applies to both natural heritage and cultural heritage, however, I will focus exclusively on the environmental aspect of the theory in this paper.

⁵⁰ See Edith Brown Weiss, "The Theoretical Framework for International Legal Principles of Intergenerational Equity and Implementation through National Institutions" in Segger, Szabó & Harrington, *supra* note 3 at 22.

⁵¹ See e.g. Edith Brown Weiss, "Sustainable Development", *supra* note 42 at 20.

⁵² *Ibid* at 20, 22.

⁵³ *Ibid* at 20.

generation:

First, each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by previous generations. This principle is called “**conservation of options.**” Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generations. This is the principle of “**conservation of quality.**” Third, each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations. This is the principle of “**conservation of access.**”⁵⁴

These three elements of intergenerational equity—conservation of options, quality, and access—place constraints on the present generation’s development and use of the planet they have inherited. Consideration of the conservation of options, quality, and access is only intended, however, to provide guidance in the management of natural resources as opposed to specifically prescribing what limitations must apply.⁵⁵ As such, intergenerational equity helps to transform concern for future generations into obligations thereby providing “a normative basis for the concept of sustainable development.”⁵⁶

The rights and obligations emanating from intergenerational equity have a temporal dimension, extending through the past, present, and future. Intergenerational equity also contains an *intragenerational* component, which requires wealthier nations, communities, and individuals to assist poorer nations, communities, and individuals in benefitting from Earth’s natural resources and realizing their right to use the Earth’s resources in a sustainable manner.⁵⁷ This approach recognizes the rights of all members of the present generation to equitable access to, and use of, the planetary trust. It also acknowledges that poverty plays a significant role in the destruction of the Earth’s natural systems.⁵⁸ As Brown Weiss has stated, “one cannot expect people to fulfill obligations to future generations if they are not able to satisfy their basic needs.”⁵⁹

There are many different legal and institutional mechanisms through which intergenerational equity can be implemented.⁶⁰ Over the past few decades, recognition of the

⁵⁴ Edith Brown Weiss, “Our Rights and Obligations to Future Generations for the Environment” (1990) 84:1 Am J Intl L 198 at 201–02 [Brown Weiss, “Our Rights”] [emphasis added].

⁵⁵ See Brown Weiss, “Sustainable Development”, *supra* note 42 at 23.

⁵⁶ *Ibid.* See also Collins, “Revisiting”, *supra* note 9 at 140; Collins, “Environmental Rights”, *supra* note 48 at 322 (Collins cogently argues that intergenerational equity can be viewed as the legal mechanism for achieving the goal of sustainable development).

⁵⁷ See Brown Weiss, “Our Rights”, *supra* note 54 at 200–01. But see Eisen, Mykitiuk & Scott, *supra* note 47 at 3, arguing that Brown Weiss’ account of intergenerational equity “is concerned with a ‘fundamentally different’ problem from *intra*-generational justice, which concerns disparities of circumstances, resources, or interests *within* a given generation.”

⁵⁸ See Brown Weiss, “Sustainable Development”, *supra* note 42 at 22.

⁵⁹ Edith Brown Weiss, “Climate Change, Intergenerational Equity, and International Law” (2008) 9:3 VJEL 615 at 618.

⁶⁰ The *FSDA* is only one of the many tools that could be used to implement the principle of intergenerational

principle of intergenerational equity has extended to the global legal community, with the concept having been incorporated into policies, laws, institutions, and judicial decisions at international, national, and local levels.⁶¹ There is concern, however, that the substance and application of intergenerational equity has been weakened and taken a back seat to the language of sustainable development, which does not adequately safeguard the environmental interests of future generations.⁶² Scholars have argued that when framed as sustainable development, intergenerational equity is mostly used as a way to “green” policy, when in reality status quo economic development continues.⁶³ Before delving into how the definition of the principle of intergenerational equity in the *FSDA* adopts this problematic framing, the following subsection reviews the concept of future generations and how young people factor into the discourse on intergenerational equity.

3.2. THE ROLE OF YOUNG PEOPLE IN THE INTERGENERATIONAL EQUITY CONVERSATION

References to the rights and well-being of future generations, as well as the children and grandchildren of the people alive today, are increasingly made in the public dialogue surrounding the planetary crisis. Scholars propose that these statements, given their moral

equity at the national level. The rights and interests of future generations may be (and in some cases already are) protected through impact assessments, common law doctrine, constitutional rights litigation, modern treaties between First Nations and the state, Aboriginal title, and market-mechanisms such as sovereign wealth or heritage funds. See e.g. *Intergenerational Solidarity and the Needs of Future Generations: Report of the Secretary-General*, UNGAOR, 68th Sess, UN Doc A/68/322 (2013), online (pdf): <digitallibrary.un.org/record/756820?ln=en#record-files-collapse-header> [*Intergenerational Solidarity*]; *Impact Assessment Act*, SC 2019, c 28; Jerry V DeMarco, “Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law” (2004) 15 *J Environmental L & Policy* 1; Nigel Bankes, “Green Regs and Ham: Some Thoughts on Contaminated Sites, the *Redwater* Decision and the Principle of Intergenerational Equity” (5 October 2017), online (blog): *ABlawg* <ablawg.ca/2017/10/05/green-regs-and-ham-some-thoughts-on-contaminated-sites-the-redwater-decision-and-the-principle-of-intergenerational-equity/>; Kelly-Dawn Clarahan, “To capitalize on Canada’s natural resources, stop borrowing from tomorrow to fund today”, *The Globe and Mail* (8 January 2015), online: <www.theglobeandmail.com> [https://perma.cc/5RDE-BXZM]; Chalifour, Earle & Macintyre, *supra* note 2; Tara Dawn Atleo, Marie-Claire Cordonier Segger & Alexandra R Harrington, “Intergenerational Equity, Justice, and Modern Treaties between First Nations Communities and Canada” in Segger, Szabó & Harrington, *supra* note 3 at 663–70; *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 74 (“Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations”).

⁶¹ See e.g. Edith Brown Weiss, “Implementing intergenerational equity” in Malgosia Fitzmaurice, David M Ong & Panos Merkouris, eds, *Research Handbook on International Environmental Law* (Northampton: Edward Elgar Publishing, 2010) 100 [Brown Weiss, “Implementing IE”]. See also Tamara Krawchenko & Karen R Foster, “‘Generationing’ Public Policy: A Multicountry Review of Intergenerational Equity Policies” (2016) 7:2 *Public Policy & Governance Rev* 95; Elizabeth Dirth, *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity* (MSc Sustainable Development, Utrecht University, 2018) [unpublished]; Lydia Slobodian, “Defending the Future: Intergenerational Equity in Climate Litigation” (2020) 32:3 *Geo Envtl L Rev* 569; Tremmel, “Four-Branches”, *supra* note 3.

⁶² See Collins, “Revisiting”, *supra* note 9 at 139.

⁶³ See e.g. Laura Westra, “Future Generations’ Rights: Linking Intergenerational and Intragenerational Rights in Ecojustice” in Ved P Nanda, ed, *Climate Change and Environmental Ethics* (New York: Routledge, 2017) 171 at 179.

weight and rhetorical strength, have the potential to motivate meaningful cultural, legal, and political change.⁶⁴ It is not always clear, however, what is meant by the reference to future generations. A “generation” can mean different things to different people in different contexts.⁶⁵ In the context of intergenerational equity, future generations are often referred to as potential beneficiaries without clearly defining the category. In this paper, I use the term “future generations” to mean the individuals who are not yet born but will exist at some future point in time.

“Youth” or “young people,” which I define to include all individuals who are currently alive but not yet of voting age (and therefore excluded from formal political participation), are frequently conflated with future generations in discussions around fairness between generations.⁶⁶ Although there is a clear connection between youth and future generations, it is important to keep these generational groups conceptually distinct. As governments fail to meaningfully address the planetary crisis, the costs of inaction are being shifted unfairly onto the shoulders of both youth and future generations.⁶⁷ Dr. Joerg (Chet) Tremmel, founder of the German-based Foundation for the Rights of Future Generations, has argued that “[c]lose future generations and today’s infants and adolescents are materially on an equal level, thus one should talk about ‘succeeding’ instead of ‘future’ generations.”⁶⁸ Youth, however, have the potential for public participation and the capacity for playing a vital role in the normative shift toward intergenerational equity that future generations do not.⁶⁹ For example, youth-led climate movements around the globe are shining a spotlight on the grave injustice of delaying action on climate change and pressuring governments to take urgent and ambitious steps to protect their security, health, and well-being. This article predominantly references the needs and interests of future generations, as the operationalization of intergenerational equity will simultaneously conserve options, quality, and access to Earth’s natural systems for youth, as well as present and future generations of other species and ecosystems. In the next section, I review the recent amendments to the *FSDA* as they relate to intergenerational equity and assess whether these changes are likely to result in greater protection for the rights and interests of future generations.

⁶⁴ See e.g. Slobodian, *supra* note 61 at 589; Karen Foster & Tamara Krawchenko, “How policy can support intergenerational equity”, *Policy Options* (4 November 2016), online: <policyoptions.irpp.org/> [https://perma.cc/YDV4-LUJD].

⁶⁵ For a discussion of the vastly different understandings of ‘generations’ in the context of intergenerational equity, see e.g. Joerg Chet Tremmel, *A Theory of Intergenerational Justice* (Sterling, Va: Earthscan, 2009) (“a generation is referred to as a ‘future generation’ if none of its members is alive at the time the reference is made” at 24); Krawchenko & Foster, *supra* note 61 at 96; Weston & Bach, *supra* note 43 at 17–18; Hadjiargyrou, *supra* note 47 at 249–50.

⁶⁶ See e.g. Weston & Bach, *supra* note 43 at 18.

⁶⁷ *Ibid* at 13–14. See also *Canada’s Record of Climate Change Report*, *supra* note 4; Frischmann, *supra* note 4.

⁶⁸ Joerg Chet Tremmel, “Establishing intergenerational justice in national constitutions” in Joerg Chet Tremmel, ed, *Handbook of Intergenerational Justice* (Northampton, Mass: Edward Elgar Publishing, 2006) 187 at 205 [Tremmel, “Establishing Intergenerational Justice”].

⁶⁹ See Tracey Skillington, “Natural Resource Inequities, Domination and the Rise of Youth Communicative Power: Changing the Normative Relevance of Ecological Wrongdoing” (2021) 22:1 *Distinktion: J Soc Theory* 23.

4. ANALYSIS AND CRITIQUE OF THE INTERGENERATIONAL EQUITY AMENDMENTS TO THE *FEDERAL SUSTAINABLE DEVELOPMENT ACT*

4.1. RECENT AMENDMENTS TO THE FEDERAL SUSTAINABLE DEVELOPMENT ACT

In 2016, the House of Commons Standing Committee on Environment and Sustainable Development (SD Committee) undertook a review of the *FSDA* along with an assessment of the draft 2016–2019 FSDS. After holding three meetings and hearing from numerous witnesses, the SD Committee released a unanimous report (the *FSDA Assessment Report*) calling on the federal government to make fundamental changes to the *FSDA* to improve its effectiveness and implementation.⁷⁰ The report contained 13 recommendations for amendments to the *FSDA*, including: expanding the purpose of the *FSDA* to encompass the economic, social and environmental pillars of sustainable development; enabling a whole-of-government approach in the development and implementation of the FSDS; introducing a list of well-accepted sustainable development principles on which to base the FSDS and departmental strategies; incorporating Canada’s international sustainable development commitments; and developing additional measures for improving enforceability and accountability.⁷¹

In response to these recommendations, the Minister of Environment and Climate Change submitted a report to the SD Committee in June 2017 indicating that she agreed that changes to the *FSDA* were required.⁷² That same month, the government tabled Bill C-57, *An Act to amend the Federal Sustainable Development Act*.⁷³ While many of the SD Committee’s recommendations were reflected in Bill C-57, others were omitted without explanation. Some of the more notable amendments to the *FSDA* include the expansion of the number of federal organizations required to prepare sustainable development strategies from 28 to 99, a shift from the exclusive focus on environmental decision making to also include the social and economic components of sustainable development, and the introduction of seven new sustainability principles to guide the development of sustainable development strategies. The amendments came into force on December 1, 2020.⁷⁴ The 2019–2022 FSDS is based on the requirements set out in the *FSDA* prior to the recent amendments, but Environment and Climate Change Canada released the draft 2022–2026 FSDS for public consultation on March 11, 2022. The final strategy will be published, along with a report summarizing the public’s comments, after the consultation closes on July 9, 2022.⁷⁵

⁷⁰ See *FSDA Assessment Report*, *supra* note 28.

⁷¹ *Ibid.*

⁷² See Government of Canada, *Report to the House of Commons Standing Committee on Environment and Sustainable Development on the Federal Sustainable Development Act* (Ottawa: GOC, June 2017) at 7 online: <www.canada.ca> [<https://perma.cc/7HXE-8B8G>].

⁷³ See Bill C-57, *An Act to amend the Federal Sustainable Development Act*, 1st Sess, 42nd Parl, 2019, cl 2 (assented to 28 February 2019).

⁷⁴ See Parliament of Canada, *Order Fixing December 1, 2020 as the Day on which that Act Comes into Force*, 2019-612, No 12 (12 June 2019).

⁷⁵ See Environment and Climate Change Canada, News Release, “Government of Canada encourages feedback on the draft 2022-2026 Federal Sustainable Development Strategy” (11 March 2022), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/news/2022/03/government-of-canada-encourages-feedback-on-the-draft-2022-2026-federal-sustainable-development-strategy.html>.

Over the course of reviewing the *FSDA* and considering Bill C-57, intergenerational equity and concern for the needs and interests of future generations was a central point of discussion for the SD Committee. They heard from several dozen witnesses and received over 150 briefs.⁷⁶ Environmental law and policy experts and representatives from international bodies, such as the Future Justice Director of the World Future Council, the former Wales Commissioner for Sustainable Futures, and the Secretary General from the German Council for Sustainable Development, provided evidence to the SD Committee regarding the importance of implementing intergenerational equity, and different mechanisms for doing so.⁷⁷ Many of the recommendations and insights shared by these witnesses were left out of Bill C-57. Nevertheless, Members of Parliament and Senators alike touted the new amendments as helping to safeguard the interests of future generations.⁷⁸ In the sections that follow, I argue that this positive framing of the implications of the amendments to the *FSDA* for intergenerational equity is premature and misplaced in light of two significant shortcomings: the weak definition accorded to the principle of intergenerational equity and the lack of effective representation for future generations.

4.2. WEAK DEFINITION OF THE PRINCIPLE OF INTERGENERATIONAL EQUITY

The principle of intergenerational equity is defined in the amended *FSDA* as follows: “that it is important to meet the needs of the present generation without compromising the ability of future generations to meet their own needs.”⁷⁹ It is included among a list of seven principles that must be considered in the preparation of the FSDS and DSDSs.⁸⁰ The *FSDA* is one of the only pieces of legislation in Canada to date that explicitly references intergenerational equity and the first federal statute to do so.⁸¹

While the inclusion of the principle of intergenerational equity is a welcome development

⁷⁶ See “Bill C-57, An Act to amend the Federal Sustainable Development Act”, Report Stage, *House of Commons Debates*, 41-2, No 300 (24 May 2018) at 1335 (Hon Deborah Schulte).

⁷⁷ See e.g. House of Commons, Standing Committee on the Environment and Sustainable Development, *Evidence*, 42-1, No 9 (12 April 2016); House of Commons, Standing Committee on the Environment and Sustainable Development, *Evidence*, 42-1, No 10 (14 April 2016) [HOC No 10].

⁷⁸ See “Bill C-57, An Act to amend the Federal Sustainable Development Act”, *Debates of the Senate*, 41-2, vol 150 (29 November 2018) (Hon Diane F Griffin) (“[t]his bill can help us safeguard the interests of future generations” at 1430); “Bill C-57, An Act to amend the Federal Sustainable Development Act”, 3rd reading, *House of Commons Debates*, 41-2, No 306 (1 June 2018) (Hon Catherine McKenna) (“[t]his act is intended to make sure that as government makes decisions, we consider the impact on future generations” at 1025) [HOC No 306].

⁷⁹ *FSDA*, *supra* note 5, s 5(b).

⁸⁰ *Ibid.*

⁸¹ The *Environmental Rights Act*, SNWT 2019, c 19, s 17(1.1)(d), which came into force several months after the Bill C-57 received Royal Assent, contains the same definition of intergenerational equity as the one now in the *FSDA*. Intergenerational equity is also referenced, though not defined, in a few Quebec statutes and regulations related to pension plans. See e.g. *An Act to foster the financial health and sustainability of municipal defined benefit pension plans*, CQLR c S-2.1.1, s 46. Note that references to ‘future generations’ and ‘sustainable development’ are found in many other pieces of legislation in Canada, see e.g. DeMarco, *supra* note 60; Affolder, *supra* note 13; *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, Preamble (“Parliament recognizes that it is the responsibility of the present generation to minimize impacts of climate change on future generations”).

on its face, there are several reasons to be skeptical about the practical effect of this amendment. One of the biggest concerns is that the definition of intergenerational equity lacks precision, substance, and clarity. Indeed, it is simply a reiteration of the vague definition of sustainable development set out in the *FSDA*: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁸² It is also the Brundtland Commission’s definition of sustainable development, which (as noted earlier) has been subject to multiple interpretations given its imprecision and malleability.⁸³ The implication, that sustainable development and the principle of intergenerational equity are one and the same, creates confusion and practical challenges not only for the application of the principle of intergenerational equity but also in the interpretation of the *FSDA* as a whole. As Dirth has noted, “sustainable development is often defined as fairness for future generations, but intergenerational justice is not only defined as sustainable development” and although advancing the UN sustainable development goals may contribute to intergenerational equity, “to claim that they are specifically designed to implement this would be an exaggeration.”⁸⁴ If the federal government and its departments are meant to consider the principle of intergenerational equity in working to achieve sustainable development, the principle must have its own unique content independent of sustainable development and its specific goals.

Furthermore, the *FSDA*’s definition of the principle of intergenerational equity is a watered-down version of the concept as it is most commonly understood in legal scholarship and international instruments.⁸⁵ One of the experts that provided evidence to the SD Committee about amendments to the *FSDA* was David Boyd, Associate Professor of Law, Policy, and Sustainability at the University of British Columbia and the UN Special Rapporteur on Human Rights and the Environment from 2018–2022. In his written submissions, Boyd defined intergenerational equity as the obligation that each generation has “to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation.”⁸⁶ The definition in the *FSDA*, however, fails to capture the constituent planetary rights and obligations of intergenerational equity—the conservation of options, quality, and access for future generations. As a result, it lacks normative force and risks becoming an instantiation of the weak approach to sustainable development—i.e., prioritizing economic growth over conservation of the ecological foundations necessary for the health and survival of humans and other species. In this way, short-term economic priorities and the maintenance of existing patterns of production and consumption may continue to be elevated above meaningful protection of the rights and interests of future generations in federal sustainable development decision-making processes.

⁸² *FSDA*, *supra* note 5, s 2.

⁸³ See note 14, *above*, and accompanying text.

⁸⁴ Elizabeth Dirth, “European approaches to institutions for future generations” in Jan Linehan and Peter Lawrence, eds, *Giving Future Generations a Voice: Normative Frameworks, Institutions and Practice* (Northampton, Mass: Edward Elgar Publishing, 2021) 190 at 191 [Dirth, “European approaches”].

⁸⁵ See Weston, “Climate Change”, *supra* note 47 at 393–97.

⁸⁶ Government Submission to the Standing Committee on Environment and Sustainable Health from David R Boyd (14 April 2016), “Strengthening the Federal Sustainable Development Act” at 5, n 13 [Boyd, “Committee Submission”].

Finally, the *FSDA* does not provide guidance to decision-makers on how to factor the principle of intergenerational equity into the development of the FSDS or the DSDSs. That is to say, the definition does not have a built-in implementation mechanism. Lynda Collins has argued that sustainable development, as a legal principle, is descriptive rather than normative and lacks specificity regarding its implementation.⁸⁷ Having been allotted the same ambiguous definition as sustainable development, the principle of intergenerational equity under the *FSDA* will be plagued by similar concerns. Specifically, this inadequate definition obscures the duties inherent in the principle of intergenerational equity, including the obligation to conserve the diversity and quality of natural species and ecosystems so that future generations may determine and satisfy their own needs. As such, the federal government may be able to comply with the *FSDA* without “explicitly addressing crucial questions regarding the implementation of meaningful safeguards for the environmental rights of future human beings.”⁸⁸

If the federal government already has clear ideas about how it intends for the principle of intergenerational equity to be applied in practice, it was unwilling to share them during the debate on Bill C-57. When asked to explain the meaning of intergenerational equity and what kind of actions the government would be taking to support that principle, the Minister of Environment and Climate Change simply generalized about the need to consider future generations as government makes decisions to secure a sustainable future for Canada:

[W]hen we talk about a sustainable future, we cannot do it without thinking about future generations. Indigenous people often talk about seven generations. I have three children and often think about the future they want. This is exactly what this act would do. This act is intended to make sure that as government makes decisions, we consider the impact on future generations and look at sustainable development as a whole.⁸⁹

The Minister evaded specific reference to the definition and implementation of intergenerational equity. In doing so, she failed to answer the question of how the explicit inclusion of the principle of intergenerational equity in the *FSDA* would change Canada’s existing approach to sustainable development, given that commitment to the principle of intergenerational equity and to preserving the environment for future generations was included in previous FSDSs.⁹⁰ While the 2019–2022 FSDS highlighted the Canadian public’s concern for the intergenerational aspects of sustainable development and desire for protecting the environment for future generations, it excluded mention of any specific actions taken by

⁸⁷ See Collins, “Environmental Rights”, *supra* note 48 at 322 (“the principle of sustainable development describes a destination without providing a map as to how to get there”); Collins, “Revisiting”, *supra* note 9 at 93, 132 (“[t]he sustainable development paradigm eschews the language of both rights and responsibility, lacks any mechanism for effective implementation, and is highly ambiguous as a policy framework” at 93).

⁸⁸ Collins, “Environmental Rights”, *supra* note 48 at 331.

⁸⁹ HOC No 306, *supra* note 78 at 1020 (Hon Catherine McKenna).

⁹⁰ See Canada, Environment and Climate Change Canada, *Achieving a Sustainable Future: A Federal Sustainable Development Strategy for Canada 2016-2019* (Gatineau: Environment and Climate Change Canada, 2016) at 7; Environment and Climate Change Canada, *Achieving a Sustainable Future: A Federal Sustainable Development Strategy for Canada 2019 to 2022* (Gatineau: Environment and Climate Change Canada, 2019), online (pdf): <fsds-sfdd.ca/downloads/FSDS_2019-2022.pdf> at 2–3, 10 [FSDS 2019-2022].

the federal government to incorporate the rights or interests of future generations into the development of the strategy's goals, targets, milestones, or actions.⁹¹ The only reference to the principle of intergenerational equity in the 2019–2022 FSDS was a statement that support for the principle is reflected in the government's commitment to “conserve lands, water and wildlife and to address problems we face today—such as climate change—that threaten the well-being of future generations.”⁹²

The imprecision and ambiguity of the definition of intergenerational equity may hinder the Commissioner's ability to adequately monitor and report on whether the principle has been considered in the development and implementation of federal sustainable development strategies. Although the Commissioner applauded the inclusion of the new principles, she anticipated that her office “may have difficulty assessing whether the principles have been put into practice, because several are open to interpretation.”⁹³ In her appearance before the Senate, the Commissioner explained that in order to measure how intergenerational equity has been incorporated into the development of the FSDS and DSDSs her office would look at the various definitions of the principle and turn it into “audit speak”; that is, specific criteria they will use to audit the FSDS and the 99 DSDSs to verify whether the government incorporated the principles into their work.⁹⁴ The Commissioner acknowledged that this was a considerable task, noted that she would like the principles to be more specific, and asked the SD Committee and the Ministers “to try to be very precise in what you say on this topic, so that we may let you know if the principles were followed or not.”⁹⁵

As there is no direction for implementation embedded within the definition of the principle of intergenerational equity, it is not yet clear how compliance with the requirement to consider intergenerational equity in preparing federal sustainable development strategies will be measured by the Commissioner in the years ahead. Protection of the interests of future generations would be strengthened by the enactment of a regulation or the distribution of a directive that includes the core components of intergenerational equity and detailed guidance regarding its application. For example, as a starting point, the federal government could take a similar approach to the one it took in providing guidance under the federal *Impact Assessment Act* for understanding and applying the principle that requires consideration of “the well-being of present and future generations” as part of an analysis of a project's contribution to sustainability.⁹⁶ The federal government has indicated that this principle requires consideration

⁹¹ See FSDS 2019-2022, *supra* note 90 at 2–3. During the consultation period for the draft 2019-2022 FSDS, the federal government received more than 850 comments from the public and it estimates that its communication reached over 250,000 people.

⁹² *Ibid* at 10.

⁹³ House of Commons, Standing Committee on the Environment and Sustainable Development, *Evidence*, 42-1, No 88 (5 December 2017) at 8:50 (Julie Gelfand, Commissioner of the Environment and Sustainable Development) [HOC No 88].

⁹⁴ See “Bill C-57, An Act to amend the Federal Sustainable Development Act”, Standing Senate Committee on Energy, the Environment and Natural Resources, *Senate Debates*, 41-2, No 51 (8 November 2018) at 51:67–51:68; HOC No 88, *supra* note 93 at 9:20 (Julie Gelfand, Commissioner of the Environment and Sustainable Development).

⁹⁵ HOC No 88, *supra* note 93 at 9:20 (Julie Gelfand, Commissioner of the Environment and Sustainable Development).

⁹⁶ “Framework: Implementation of the Sustainability Guidance” (last modified 6 December 2021),

of the project's effects on "the elements of environmental, health, social and economic well-being that communities identified as being valuable to them" and how these effects could change over time and affect future generations.⁹⁷ Both community participation and long-term thinking are inherent here, with explicit acknowledgement that effects on future generations might very well extend beyond the life cycle of a particular project and that Indigenous and community knowledge are important sources of information for assessing these impacts. Moving towards substantive direction regarding the types of impacts, relevant obligations and time frames, and sources of knowledge to be considered would help to operationalize the principle of intergenerational equity through its inclusion in the FSDS and DSDSs.

As is currently stands, the *FSDA*'s definition of the principle of intergenerational equity is ambiguous, imprecise, and impractical, leaving it at risk of being plagued by implementation challenges. The draft 2022-2026 FSDS expands upon the *FSDA*'s definition of intergenerational equity by explaining that it is "about ensuring that future generations inherit a set of economic and environmental assets that are at least as good as the previous generation's" and recognizing that "[u]rgent action is needed to halt and reverse" the actions and environmental problems that are thwarting the government's ability to fulfil this obligation.⁹⁸ Similar to past FSDSs, however, the draft 2022-2026 FSDS does not specify how or to what extent the principle of intergenerational equity was or should be expressly considered in the development and implementation of its goals, targets, and milestones.⁹⁹ Along with the weak definition of intergenerational equity discussed above, this deficiency will detrimentally impact the ability to operationalize intergenerational equity and preclude transparency, oversight, and enforcement of the *FSDA*. These negative implications will be exacerbated by the absence of effective representation of future generations in the federal government's sustainable development agenda.

4.3. LACK OF EFFECTIVE REPRESENTATION FOR FUTURE GENERATIONS

Affording representation to future generations in policy-making processes that will ultimately affect their interests is recognized as one of the most important strategies for successfully implementing intergenerational equity.¹⁰⁰ There are two key reasons for this. First,

online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance.html>.

⁹⁷ *Ibid.* Note, however, that the guidance is not likely to solve all implementation problems. The federal government encourages those conducting an impact assessment to ask the question "what is considered future generation?" without providing any recommendations or opinions on how such a question might be answered and the impact it will have on the overall application of the principle of considering the well-being of future generations.

⁹⁸ Government of Canada, *Achieving a Sustainable Future: Draft Federal Sustainable Development Strategy 2022 to 2026* (Gatineau: Environment and Climate Change Canada, 2021), online (pdf): <www.fsds-sfdd.ca/downloads/2022-2026_DRAFT_FSDS.pdf> at 98.

⁹⁹ The draft 2022-2026 FSDS contains 17 goals, which are framed with a specific focus on the environmental aspects of the 17 sustainable development goals from the UN's 2030 Agenda for Sustainable Development. The goals are supported by at least one target, as well as short-term milestones and implementation strategies.

¹⁰⁰ See e.g. Brown Weiss, "Sustainable Development", *supra* note 42 at 25; Sacha Hollis, "Old Solutions to New Problems: Providing for Intergenerational Equity in National Institutions" (2010) 14 NZ J

individuals who stand to benefit most from actions taken to implement intergenerational equity either do not yet exist (in the case of future generations) or cannot yet vote (in the case of youth) and therefore do not have a clear political voice or role in lobbying government.¹⁰¹ Additionally, short-term democratic election cycles tend to focus on the needs of the present and disregard the interests of future generations.¹⁰² As twenty-first century decision-makers have gained the capacity to impact the living conditions and quality of life of future generations on a scale that was previously impossible and unimaginable, “today we are in need of ‘checks and balances’ against the tyranny of the present over the future.”¹⁰³

A spokesperson for future generations is particularly important in Canada given that there is no clear, current beneficiary for intergenerational equity under the *FSDA* or Canada’s sustainable development strategies. While amending the *FSDA*, the opportunity to provide effective representation for future generations was within Canada’s reach. Its failure to rise to the occasion raises questions about whether Canada’s stated concern for and commitment to the needs of future generations was simply another instance of greenwashing.

In the *FSDA* Assessment Report, the SD Committee explicitly recommended that the Canadian government establish an advocate for future generations (Advocate).¹⁰⁴ Noting that future generations lack the ability to provide input on current decisions that impact their interests, the SD Committee concluded that there was “value in having a position that helps to protect the needs of future generations.”¹⁰⁵ It summarized the evidence it received about models used in other jurisdictions—Finland, Hungary, Israel, Malta, New Zealand, and Wales—and the function and importance of such an institution in promoting intergenerational

Environmental L 25 at 46; Marie-Claire Cordonier Segger et al, “Comparing Progress in Intergenerational Governance” in Segger, Szabó & Harrington, *supra* note 3 at 576; *Intergenerational Solidarity*, *supra* note 60; Alexandra Harrington et al, “National Policies & International Instruments to Protect the Rights of Future Generations: A Legal Research Paper” [undated] World Future Council & Centre for International Sustainable Development Law Working Paper (on file with author).

¹⁰¹ See e.g. Tremmel, “Establishing Intergenerational Justice”, *supra* note 68 at 187–90; Emmanuel Agius, “Intergenerational Justice” in Joerg Chet Tremmel, ed, *Handbook of Intergenerational Justice* (Northampton, MA: Edward Elgar Publishing, 2006) 317 at 319; Tracey Skillington, “Changing perspectives on natural resource heritage, human rights, and intergenerational justice” (2019) 23:4 Intl JHR 615 at 615. See also Brundtland Report, *supra* note 7 at ‘From One Earth to One World’, para 25 (“We borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions”).

¹⁰² See Tremmel, “Four-Branches”, *supra* note 3 at 756–60; Halina Ward, “What Should We Protect? Future Generations Institutions as Counterweights” in Segger, Szabó & Harrington, *supra* note 3, 117 at 122–24; Tremmel, “Establishing Intergenerational Justice”, *supra* note 68 at 187–90.

¹⁰³ Tremmel, “Four-Branches”, *supra* note 3 at 764. See also Marie-Claire Cordonier Segger, Marcel Szabó & Alexandra R Harrington, “Introduction” in Segger, Szabó & Harrington, *supra* note 3 (“[t]hrough degradation of the Earth’s marine and terrestrial ecosystems and its climate, including the natural resources upon which all people depend, human civilization holds the potential to deprive billions of their rights to life, taking millions of other species as well” at 1).

¹⁰⁴ See *FSDA* Assessment Report, *supra* note 28 at 22.

¹⁰⁵ *Ibid* at 22–23.

equity.¹⁰⁶ The recommendation encouraged the government to draw on the expertise from other jurisdictions and international best practices to develop the Advocate's mandate.¹⁰⁷ As an alternative (or an addition) to an Advocate, the SD Committee recommended creating a Parliamentary Committee for the Future to safeguard the interests of future Canadians.¹⁰⁸ With reference to the experiences of Germany and Finland with such an institution, the SD Committee suggested the following examples of tasks a Parliamentary Committee for the Future might assume: assessing the legal impact of legislation, identifying major future problems and opportunities, and examining the long-term impact of government actions.¹⁰⁹

The recommendation to establish an Advocate and/or a Parliamentary Committee for the Future was rejected by the federal government without a clear explanation. Potential reasons for this decision, however, can be gleaned from the parliamentary debates and reports on Bill C-57. First, the government appeared to believe that an independent body to represent future generations was unnecessary given their stated position that the existing role of the Commissioner helps to support intergenerational equity and includes consideration of the needs of future generations.¹¹⁰ As an alternative to establishing an Advocate or Parliamentary Committee for the Future, Parliament could have made amendments to the *FSDA* and the *Auditor General Act* to strengthen the Commissioner's role in representing and protecting the interests of future generations. The *Auditor General Act* provides that the purpose of the Commissioner is to provide sustainable development monitoring and reporting on the progress federal departments make towards achieving sustainable development.¹¹¹ Respect for the needs of future generations is listed as one of the ways by which sustainable development may be achieved.¹¹² At the time Bill C-57 was tabled, the government indicated that it was considering options for better reflecting and reinforcing this aspect of the Commissioner's mandate to address the intent of the SD Committee's recommendation to establish an Advocate.¹¹³ Ultimately, however, Bill C-57 did not include any amendments directed towards this objective. When pressed in the House of Commons about this exclusion and failure to reflect the SD Committee's recommendations regarding an Advocate, the Liberal government

¹⁰⁶ *Ibid.* Wales, for e.g., has enacted the *Well-being of Future Generations (Wales) Act 2015* and established a Future Generations Commissioner whose mandate is to promote sustainable development, act as a guardian for the interests of future generations in Wales, and support public bodies in their work to achieve the statutory well-being goals. The Future Generations Commissioner's role is separate from that of the Auditor General for Wales, however, they work together to ensure a coordinated approach to examinations and reviews of the public bodies subject to the act. See also Shlomo Shoham & Nira Lamay, "Commission for Future Generations in the Knesset: Lessons Learnt" in Joerg Chet Tremmel, ed, *Handbook of Intergenerational Justice* (Northampton, Mass: Edward Elgar Publishing, 2006) 244; Benedek Jávör, "Institutional protection of succeeding generations – Ombudsman for Future Generations in Hungary" in Joerg Chet Tremmel, ed, *Handbook of Intergenerational Justice* (Northampton, Mass: Edward Elgar Publishing, 2006) 282.

¹⁰⁷ See *FSDA Assessment Report*, *supra* note 28 at 23–24.

¹⁰⁸ *Ibid* at 24.

¹⁰⁹ *Ibid.*

¹¹⁰ See Government of Canada, *supra* note 72 at 11.

¹¹¹ See *AGA*, *supra* note 34, s 21.1.

¹¹² *Ibid*, s 21.1(h).

¹¹³ See Government of Canada, *supra* note 72 at 11.

maintained its position that consideration of future generations is already reflected in the purpose of the *FSDA* and the Commissioner's mandate.¹¹⁴ Specifically, Jonathan Wilkinson, then Parliamentary Secretary to the Minister of Environment and Climate Change, stated: "I think it's covered in the sense that sustainable development by its very nature is about future generations, so it's very much reflected in the purpose of the act itself. It is also reflected in the fact that the commissioner herself has a mandate that includes consideration of future generations. That's the position that has been taken in Bill C-57."¹¹⁵ It may be that the government truly felt the administrative changes and resources required to implement these recommendations were too great, but the implication of its decision and evasion of a clear explanation is that the government simply wished to maintain the status quo.

Notwithstanding the government's faith in the Commissioner's mandate, the Commissioner does not currently have formal authority to focus on future generations or intergenerational equity in a proactive or specific manner. In essence, the Commissioner serves only in an auditory capacity, raising public awareness and making recommendations to the government regarding sustainable development issues.¹¹⁶ The government never responded directly to the SD Committee's conclusion that the Advocate's role should be distinct from that of the Commissioner given her auditing function. Although the former Commissioner did not express her opinion on whether the creation of an independent office for an Advocate was advisable, she did state that there were "advantages and disadvantages" with having the Commissioner's office in the audit office.¹¹⁷ Specifically, she indicated that she must use audit methodology and consider only the facts of the particular audits that she completes. She suggested that she could address the needs of future generations, "by trying to select really good audits that deal with that, but oftentimes, I can't give you an opinion based on 30-odd years of working in this area, because I am in the audit office."¹¹⁸ The Commissioner's mandate is limited, and although it does include discretion to undertake studies and produce reports, there is no authority "to act independently to secure compliance with Canadian commitments related to the rights of future generations."¹¹⁹ The Commissioner cannot propose legislation or regulations, veto or challenge existing laws, policies, or project proposals, nor hold the government accountable in any other way for decisions that threaten the conservation of options, quality, or access for future generations. Without these capacities, the Commissioner's power or ability to influence the government to protect the interests of future generations is

¹¹⁴ See House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No 82 (2 November 2017) at 10:40 (Hon Jonathan Wilkinson) [HOC No 82].

¹¹⁵ *Ibid.*

¹¹⁶ See David Wright & James McKenzie, "Canadian Commissioner of the Environment and Sustainable Development" in Segger, Szabó & Harrington, *supra* note 3, 461 at 474 (the authors note that the strengths of the Commissioner include: independence; access to relevant information; communication tools and organizational capacity; skilled, multidisciplinary staff and advisors; and strong financial management).

¹¹⁷ HOC No 88, *supra* note 93 at 9:15 (Julie Gelfand, Commissioner of the Environment and Sustainable Development).

¹¹⁸ *Ibid.*

¹¹⁹ Cordonier Segger et al, *supra* note 100 at 586. For a thorough discussion of the role and functions of the Commissioner, see Wright & McKenzie, *supra* note 116 at 461–77 (the authors note that the Commissioner's studies do not comment on the merits or substance of government policy).

significantly limited.¹²⁰

The current mandate of the Commissioner is different from that which would be assumed by the Advocate. As Boyd explained in his appearance before the SD Committee:

The commissioner of the environment and sustainable development does an amazing job, has done so for two decades here in Canada, but the role of the commissioner is really a backwards-looking one. It's reviewing the commitments government has made and the actions government has taken. The role of an advocate for future generations would be much more forward-looking, looking into the future to determine what the future trends are that Canada will face. What are the challenges we're going to face? What are the opportunities? What kinds of laws, policies, programs, and plans can Canada put in place that will protect the needs and the interests of those future generations? That is a novel concept. There are only a handful of countries in the world that have adopted that, but I think it's something that Canada could and should be at the forefront of globally.¹²¹

In response to questions about whether the Commissioner should have a forward-looking role, Boyd recommended keeping the Commissioner's role as an auditor separate from the role of the Advocate.¹²² He noted that expecting the Commissioner to take on the mandate of an advocate and an auditor would undermine both roles.¹²³ Among the list of potential responsibilities of an Advocate that Boyd identified for the SD Committee, none are currently carried out by the Commissioner.¹²⁴

According to Boyd, the appointment of an advocate for future generations and the creation of a parliamentary standing committee for the future are "visionary amendments" that would have increased the *FSDA's* effectiveness while concurrently making Canada an international leader in tackling the intergenerational equity issues at the heart of sustainable development.¹²⁵ In choosing not to implement the SD Committee's recommendations despite strong supporting evidence of necessity and effectiveness in protecting the needs of future generations, the Government of Canada failed to heed Boyd's encouragement to be "creative

¹²⁰ See e.g. Tremmel, "Establishing Intergenerational Justice", *supra* note 68 at 196.

¹²¹ HOC No 10, *supra* note 77 at 11:25 (David Boyd).

¹²² *Ibid* at 11:54 (Nathan Cullen); Boyd, "Committee Submission", *supra* note 86 at 8.

¹²³ See HOC No 10, *supra* note 77 at 11:54 (David Boyd).

¹²⁴ See Boyd, "Committee Submission", *supra* note 86 at 8–9. These responsibilities included to: publish a future trends report that helps galvanize public understanding and support for the need to take action; review existing and proposed federal laws, budgets, policies, plans, programmes and projects to ensure that they are consistent with the *FSDA* and *FSDS*; identify any process or policy that undermines sustainable development and propose alternative processes or policies to the Government for adoption; identify trends which may give rise to significant unsustainable development outcomes and which will not be reversed on the basis of current or planned action, and recommend actions to reverse such trends; encourage departments and agencies to take greater account of the long-term impact of their actions; provide advice or assistance to departments and agencies (which includes providing advice on climate change); encourage best practices amongst departments and agencies in taking steps to meet SD targets; and publish a periodic report regarding how departments and agencies should better safeguard the ability of future generations to meet their needs.

¹²⁵ Boyd, "Committee Submission", *supra* note 86 at 2, 10.

and innovative.”¹²⁶ In his view, representation for future generations through these institutions is essential for ensuring the incorporation of a long-term perspective in government decision making.¹²⁷ Other scholars have similarly argued that the purpose of these types of institutions, which are also referred to as “commitment devices,” is “to make it harder for governments to ignore the long-term public interest.”¹²⁸

When the Minister of Environment and Climate Change was asked how the government would ensure enforcement, oversight, and accountability of the *FSDA* without a forward-looking advocate for future generations, she evaded a direct response, stating:

I certainly agree that consideration of future generations is critical to this act. That’s one of the principles that’s embodied: that we need to be thinking about how the actions that our government is taking across the government are impacting on future generations. We believe that is clear with the principle embodied in the act. We also do believe that the commissioner has a critical role. The commissioner does a very good job in looking at sustainable development monitoring. Her mandate includes a respect for nature and the needs of future generations. We believe that is an effective model, both for the act and also for the commissioner for environment and sustainable development.¹²⁹

Dirth argues that those institutions which are more focused on sustainable development “have less space for long-term thinking” than those which have a specific mandate to consider future generations or intergenerational equity.¹³⁰ This is due in part to the fact that the former institutions (of which the Commissioner is one) tend to be less independent and “their goals tend to be more multi-faceted, and this includes goals for the present, short term and medium term as well as the long term.”¹³¹ The result is that immediate demands frequently take precedence over longer-term dynamics and considerations, which further allows sustainable development priorities to trump intergenerational equity.

Another possible reason for the federal government’s belief that the creation of an Advocate was unnecessary is the representation provided to youth under the *FSDA*. In its written response to the *FSDA* Assessment Report recommendations, the Government of Canada noted that in addition to incorporating the principle of intergenerational equity into the *FSDA*, it intended to increase the diversity and inclusiveness of the Sustainable Development Advisory Council, including by adding youth representation.¹³² The government also pointed to the fact that it is

¹²⁶ *Ibid* at 10.

¹²⁷ *Ibid* at 8.

¹²⁸ Jonathan Boston, “Protecting long-term interests: the role of institutions as commitment devices” in Jan Linehan and Peter Lawrence, eds, *Giving Future Generations a Voice: Normative Frameworks, Institutions and Practice* (Northampton, Mass: Edward Elgar Publishing, 2021) 84 at 88.

¹²⁹ HOC No 82, *supra* note 114 at 9:00 (Hon Catherine McKenna, Minister of Environment and Climate Change).

¹³⁰ See Dirth, “European approaches”, *supra* note 84 at 194, 201.

¹³¹ *Ibid* at 194.

¹³² See Government of Canada, *supra* note 72 at 11. The *FSDA* amendments do not guarantee youth representation on the Sustainable Development Advisory Council, they simply require that when appointing its 28 representatives, the Minister of Environment and Climate Change “seek to reflect the diversity of Canadian society by taking into account demographic considerations such as age and gender,”

already engaging with youth through the Prime Minister's Youth Council, which includes 26 members aged 16 to 24 who provide "non-partisan advice to the Prime Minister on national issues, including issues related to sustainable development such as climate change, clean growth, and building stronger communities."¹³³

It appears that the government may be conflating the interests of young people with those of future generations. The government's commitment to youth representation in sustainable development decision-making processes, while of value for younger generations and a component of intergenerational equity,¹³⁴ fails to adequately incorporate the long-term view necessary to fully implement intergenerational equity. The present generation of children and youth are not, nor should they be expected to be, representatives for future generations.¹³⁵ To have a voice in today's decision making, future generations require a designated advocate—someone who has been vested with the profoundly important responsibility to speak on their behalf and to prioritize their interests and well-being above the short-term interests that typically preoccupy government agendas.

Given the significant time and energy from experts and politicians that went into the review of the *FSDA* and consideration of mechanisms for implementing intergenerational equity, it is disappointing that the government did not take the opportunity to secure genuine, effective representation for future generations. Certainly, there would be considerable practical and ethical challenges in developing an institutional advocate for future generations, including the enormous task of determining the needs and interests of future generations and incorporating them into decision-making and policies. Furthermore, these methods of implementing intergenerational equity are not without criticism.¹³⁶ Arguments against the institutional representation of the voice of future generations include interference with existing democratic institutions, the impossibility of ascertaining the interests of future generations, increased bureaucracy, an outright denial of obligations to future generations based on the nonidentity principle, trade-offs between present and future needs, the claim that only present citizens are members of the democratic community, and the costs of creating and running these new institutions.¹³⁷

see *FSDA*, *supra* note 5, s 8(1.1)).

¹³³ Government of Canada, *supra* note 72 at 11.

¹³⁴ See e.g. Dirth, "European approaches", *supra* note 84 ("[m]any governments, non-governmental organizations (NGOs) and international bodies understand intergenerational justice to include fairness towards and participation of young people" at 196).

¹³⁵ But see Julia Pitts, "Are We Giving the Voice of the Future a Word in the Present?" in Segger, Szabó & Harrington, *supra* note 3, 254.

¹³⁶ See e.g. Eisen, Mykitiuk & Scott *supra* note 47 at 2; Brown Weiss, "Implementing IE", *supra* note 61 at 114; Jane Anstee-Wedderburn, "Giving a Voice to Future Generations: Intergenerational Equity, Representatives of Generations to Come, and the Challenge of Planetary Rights" (2014) 1:1 *Austl J Environmental L* 37; Tremmel, "Four-Branches", *supra* note 3 at 766–72; Ward, *supra* note 102; Dirth, "European Approaches", *supra* note 84 ("[t]here is not a single country which is significantly protecting the interests of future generations, including those with institutions dedicated to this purpose" at 206).

¹³⁷ See e.g. Danielle Zwarthoed, "Political Representation of Future Generations" in Marcus Düwell, Gerhard Bos & Naomi van Steenbergen, eds, *Towards the Ethics of a Green Future: The Theory and Practice of Human Rights for Future People* (London, UK: Routledge, 2018) 79 at 80, 86–89; Tremmel, "Four-Branches", *supra* note 3 at 766–72.

Despite the inevitable challenges in providing effective representation to future generations, intergenerational equity demands that current generations adjust our institutions to help ensure that present interests and short-term political and economic benefits do not take precedence over conservation of the diversity and quality of, and access to, the Earth's natural resource base for future generations.¹³⁸ There is a significant body of experience and scholarship that was available for the government to draw upon in taking the world-leading step of establishing an Advocate or Parliamentary Committee for Future Generations, including extensive research conducted by the World Future Council on the value of guardians or commissioners for future generations and reports that such institutions are effective in inserting long-term thinking into government policy and decision making.¹³⁹ National institutions for future generations will need to be designed differently to address the unique political system and ecological, social, and economic realities of the particular country in which they are established.¹⁴⁰ Tremmel has argued, however, that such institutions should all have at least the right to initiate legislation and a collective leadership model.¹⁴¹ Referencing the experience of the Hungarian Commission for Future Generations, Eisen, Scott, and Mykitiuk have argued that "broad public consultation" ought to be one of the responsibilities of any institution, such as an Advocate, tasked with implementing intergenerational equity.¹⁴² The establishment or modification of national institutions will not, on its own, reduce the gap between current and future generations when it comes to the burdens of our current planetary crisis. However, these institutions can be strengthened by additional legislative, policy, and judicial mechanisms, including being "complemented by a clear indication that national courts will recognise, defend, and uphold these rights."¹⁴³

5. CONCLUSION

Canada claims to be a leader in sustainable development and to care deeply about the well-being of its children, grandchildren, and future generations. While these declarations have a righteous and encouraging ring, the prospect of effective change begins to unravel upon further examination. A review of the amendments to the *FSDA* related to intergenerational equity reveals an approach to national sustainable development in which concern for the needs and interests of future generations is not being sufficiently translated into obligations and effective implementation. This short-sighted approach is failing to steer Canada towards the sustainable future it so forcefully promotes.

Given the significant risks posed to the foundations of life on Earth by policy and business

¹³⁸ See Brown Weiss, "Sustainable Development", *supra* note 42 at 26.

¹³⁹ See e.g. Segger, Szabó & Harrington, *supra* note 3; *Intergenerational Solidarity*, *supra* note 60; Harrington et al, *supra* note 100 (the World Future Council has identified six criteria to maximize effectiveness of an advocate for future generations: independence; adequate resources; transparency (regular reporting); full access to government information; response to public concerns; and subject to external assessments); Hollis, *supra* note 100; Dirth, "European approaches", *supra* note 84; Brown Weiss, "Implementing IE", *supra* note 61.

¹⁴⁰ See e.g. Tremmel, "Four-Branches", *supra* note 3 at 776; Cordonier Segger et al, *supra* note 100 at 595.

¹⁴¹ Tremmel, "Four-Branches", *supra* note 3 at 776–79.

¹⁴² See Eisen, Mykitiuk & Scott, *supra* note 47 at 52.

¹⁴³ Cordonier Segger et al, *supra* note 100 at 577.

decisions made today, the Canadian government urgently needs to find ways to safeguard the rights of future generations and to give them a voice in the decision-making processes that impact the living conditions they will inherit. In the process of amending the *FSDA*, the Canadian government squandered an opportunity to strengthen its apparent commitment to future generations and operationalize intergenerational equity. On its face, the inclusion of the principle of intergenerational equity in the *FSDA* and a requirement for it to be considered in the development of the *FSDS* looks promising. The vague and impractical definition it has been accorded, however, will preclude true and effective implementation of the planetary rights and obligations of intergenerational equity. This shortcoming is exacerbated by the government's decision not to establish an advocate for future generations, which would have introduced an essential long-term perspective into political decision-making. Accordingly, without additional mechanisms to operationalize intergenerational equity, Canada's federal sustainable development framework under the *FSDA* will continue to fail to provide meaningful protection to the environmental rights and interests of future generations.

