



Submission to the Senate Standing Committee on Energy, the Environment and Natural Resources re: Canada's proposed Impact Assessment Act March 25, 2019

INTRODUCTION

The First Nations Leadership Council (FNLC) (the political executives of the BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs) makes this submission on Part 1 of Bill C-69, the proposed *Impact Assessment Act* (the "Act"), with a view to identifying key changes to this legislation for it to more meaningfully advance reconciliation with Indigenous peoples in Canada.

The federal government has committed to implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("UN Declaration")¹, and promised to restore public trust in impact assessments. The rights in the UN Declaration "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." The federal government's own Expert Panel for the Review of Environmental Assessment Processes ("Expert Panel") recognized this when it described the UN Declaration as setting out the "minimum rights" of Indigenous peoples.²

Important changes are required to this legislation for it to be consistent with the standards in the UN Declaration and restore public trust as intended. The Act should recognize the inherent jurisdiction of Indigenous peoples and the right to self-determination, and should allow for Indigenous consent at distinct points throughout the regime. This Act must exceed the existing standard of consultation. These are the minimum standards by which this Act should operate.

The review by the House of Commons' Standing Committee on Environment and Sustainable Development resulted in some amendments to strengthen recognition of Indigenous peoples within the Act:

1. The UN Declaration, which was absent in the earlier versions of the Bill, is now referenced in the preamble - though is still not reflected in the Act's substantive provisions.
2. The Act's purpose provisions now recognize the Government of Canada's commitment to respecting Indigenous rights.
3. Traditional knowledge is now referred to as Indigenous knowledge and its role in impact assessment is strengthened to better balance it with the role of western science.
4. First Nations, Inuit and Métis representatives will be on the Minister's Advisory Council (but Indigenous representatives are still not mandated in panel reviews).

The FNLC remains disappointed that this Act still does not provide for the deep reforms that would more fully give effect to the Government of Canada's commitments to Indigenous peoples.

This review by the Senate is the last opportunity to strengthen this law, and to better reflect and address Canada's commitments to Indigenous peoples. The FNLC, therefore, proposes the amendments below to start to build on the existing measures and advance reconciliation. These focus on:

- Recognizing Indigenous jurisdiction;
- Aligning the Act with new provincial environmental assessment legislation to support reconciliation; and
- Concluding a tripartite agreement to support Indigenous-led assessments and Indigenous substitution.

Strengthening the language of the Act in this regard will be an important step by Canada to live up to its commitment to the minimum standards set out in the UN Declaration and the promise of reconciliation.

British Columbia's Bill 51: *Environmental Assessment Act* Raises the Bar

Since the federal Act was introduced, the Government of British Columbia ("BC Government") has replaced its own deficient environmental assessment legislation. Bill 51, the BC *Environmental Assessment Act* (the "BC Act"), was passed in November 2018 and will be implemented this year.

¹ See [Mandate Letter to the Minister of Crown-Indigenous Relations and Northern Affairs of October 4, 2017](#); see also [Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, 2018](#); and see [Mandate letter to the Minister of Environment and Climate Change, November 12, 2015](#).

² [Building Common Ground: A New Vision for Impact Assessment in Canada, Final Report of the Expert Panel](#), Canadian Environmental Assessment Agency, 2017, p 27.

The commitments in the BC Act are in sharp contrast to the minimal advances proposed in the federal Act. The BC Act recognizes the inherent jurisdiction of Indigenous nations and sets out a structured process to ensure compliance with Indigenous engagement standards. It seeks to reduce conflict and result in better developed projects by meaningfully including First Nations at all stages of development. The wording in the BC Act is direct and specific and includes in its purposes to:

- “(ii) support reconciliation with Indigenous peoples in British Columbia by
- (A) supporting the implementation of the United Nations Declaration on the Rights of Indigenous Peoples,
 - (B) recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves...” (Bill 51, s. 2)

Indeed, it is the BC Government that has worked to genuinely implement the recommendations of the federal Expert Panel, which were largely ignored by the federal government. For example, in circumstances where Indigenous nations choose to implement their own assessment process, the Expert Panel recommended that this be expressly accommodated. It envisioned that the IA authority and interested Indigenous groups “would create an appropriate co-operative approach.”³ The BC Act lays the foundation for this in a meaningful way, while the current wording in the federal Act maintains a system whereby the federal authority retains full control over decision-making.

Key reforms found in the BC Act include:

1. An express obligation on the BC Environmental Assessment Office (“EAO”) to support implementation of the UN Declaration (Bill 51, s. 2);
2. Where an Indigenous nation provides notice that it intends to participate in an assessment, the EAO is required to include them (Bill 51, s. 14);
3. Where an Indigenous nation notifies the EAO that it intends to carry out an assessment, the assessment order must provide for it (Bill 51, s. 19);
4. The EAO must seek to achieve consensus with Indigenous nations at key stages in the process (Bill 51, ss. 16,(1), 19(1), 29(3), 32(7)); and
5. A dispute resolution process is established to resolve disputes with Indigenous nations (Bill 51, s. 5)

Given that many of Canada’s controversies surrounding failed environmental assessments have occurred in BC, the advances in the provincial legislation merit deeper consideration. Ideally, the federal Act would be revised to function harmoniously with the new BC environmental assessment regime. A regime which meaningfully includes First Nations and recognizes First Nation decisions will reduce conflict and result in a stronger foundation for development. For example, there are numerous situations in BC where project certainty is linked to Indigenous consent.⁴ Investment and project certainty in BC will be directly linked to the adequacy of Canada’s engagement with Indigenous peoples.

ISSUE 1: Indigenous Jurisdiction

While the Act purports to recognize Indigenous jurisdiction and anticipates that Indigenous peoples will conduct impact assessments, the ability for a nation to do so is at the discretion of the Minister. The Act intends to limit Indigenous jurisdiction to governing bodies established by or that hold powers under co-management regimes, land claims agreements, self-government agreements. An Indigenous jurisdiction that falls outside this narrow definition is only recognized at the discretion of the federal Minister through agreement. Furthermore, the Minister retains full discretion with regard to whether to delegate any aspects of the assessment to, or fully substitute the assessment for an assessment led-by, one of those jurisdictions.

This narrow and discretionary model does not uphold the standards in the UN Declaration around self-determination and self-government, and the standard of free, prior and informed consent. It is paternalistic and is inconsistent with the Government of Canada’s Principles respecting the Government of Canada’s relationship with Indigenous peoples, which includes Principle 1 – “The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.” It is an internal matter for Indigenous nations, not the Government of Canada, to identify their own governing structures.

³ Expert Panel Report, p. 52.

⁴ Situations where the lack of Indigenous support has contributed to project uncertainty include: Taseko’s Prosperity Mine, Kamloops Ajax Mine, Site C Dam, Enbridge Northern Gateway and the Trans Mountain Pipeline.

Amendment 1: Amend the definition of “jurisdiction” in s. 2 to include an “Indigenous governing body”, which is also a defined term in s. 2. This amendment would allow a self-determining nation to be recognized as a jurisdiction for the purposes of an impact assessment.⁵

Notably, the new BC Act, which also anticipates more Indigenous-led assessments, does not define “First Nations”, leaving scope for this to occur as circumstances require. Under the federal regime, Indigenous governing bodies’ should have the authority to undertake impact assessments in a manner in which they determine, rather than as dictated by agreements with the federal crown.

ISSUE 2: Align the purposes of the federal Act with BC’s Bill 51 to support implementation of the UN Declaration

The BC Act expressly states that the purposes of the BC EAO include supporting reconciliation with Indigenous peoples in British Columbia by: supporting the implementation of the UN Declaration; recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves; collaborating with Indigenous nations in relation to reviewable projects, consistent with the UN Declaration, and acknowledging Indigenous peoples’ rights recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of assessments and decision making under this Act.

The BC Act also contains a number of important mechanisms to advance this overarching purpose, including recognizing and making space for Indigenous-led assessments.

Given that “one project, one assessment” is a practical reality, and that reconciliation requires reconciliation of respective jurisdictions, it only makes sense to align the federal Act with the new BC regime for predictability and clarity.

Reforms to the BC regime were concluded in partnership and cooperation with First Nations. As that legislation comes into force, it would make sense that the federal Act be applied consistent with the law in BC, particularly given that substitution to the BC regime has been functionally the case since 2013.

Amendment 2: Include a reference to implementation of the UN Declaration in the purpose provisions that is consistent with the language in the BC Act:

#. To support the implementation of the UN Declaration on the Rights of Indigenous Peoples and recognize the inherent jurisdiction of First Nations to participate in decisions where their rights are affected, through representatives chosen by themselves.

ISSUE 3: Indigenous Substitution through Tripartite Agreement

Substitution has become a practical reality of environmental assessment in Canada. Currently, there is a Memorandum of Understanding (MOU) between BC and Canada on environmental assessment substitution that was reached in 2013. That MOU establishes a process whereby the two public governments may agree to substitute the BC environmental assessment process to meet federal requirements.

In light of the legislative changes at both the federal and provincial level, and commitments to Indigenous peoples, there must be a commitment to develop a tripartite substitution agreement that engages Indigenous peoples in BC if implementation of these regimes is to support reconciliation. This needs to include concluding tripartite arrangements supporting the three jurisdictions to interact in this regard. The Act anticipates substitution in respect of agency reviews (not panel reviews), but does not adequately account for situations where a First Nation seeks to conduct an impact assessment. Resourcing is a key requirement in relation to substitution – whether in legislation or policy. Ensuring the capacity of Indigenous nations to conduct impact assessments is critical. It is important that the Canadian Environmental Assessment Agency (CEAA) engage in tripartite discussions with BC and the FNLC to conclude a substitution agreement that will give effect to continued Indigenous-led assessments. Note that, in practice, Indigenous-led assessment have been increasing and that this trend will continue. In BC, Both the Ajax Mine and the Woodfibre LNG project were subject to Indigenous-led assessment processes, one of which was recognized under the Canada-BC Memorandum of Understanding on Substitution.

Amendment 3: Amend s. 33 which establishes the conditions whereby the Minister may approve substitution to require that the Minister must agree to substitution where an Indigenous jurisdiction, including an Indigenous governing body, intends to proceed with an assessment. This provision should also be extended to apply to both agency and panel reviews.

CONCLUSION

⁵ While the House of Commons made one change to enable Indigenous governing bodies to operate as jurisdictions in relation to the factors related to an assessment (s. 22(1)(r)), the core limitation of Indigenous peoples only being recognized as a jurisdiction contingent on federal Crown recognition remains.

The FNLC is committed to continually strengthening Crown laws to support, advance and achieve reconciliation. The federal *Impact Assessment Act* has significant potential as a step forward in this regard.

The task of the Senate is ensure that Canada's laws reflect the intentions of Parliament and the values of the country. The proposed amendments are the minimum required for impact assessment in Canada to signal a true commitment to reconciliation.