BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS

BC Assembly of First Nations

Submission to

House of Commons Standing Committee on Environment and Sustainable Development

On Bill C-69

April 6, 2018

Introduction

The British Columbia Assembly of First Nations ("BCAFN") provides this brief to the House of Commons Standing Committee on Environment and Sustainable Development on both Part 1 of Bill C-69, the *Impact Assessment Act* ("IAA"), and Part 2 of Bill C-69, the *Canadian Energy Regulator Act.*

The BCAFN is the political lead organization on environmental assessment reform and related matters for the BC First Nations Leadership Council ("FNLC"). This submission is prepared with the support of the FNLC and the BC First Nations Energy and Mining Council ("FNEMC"). FNLC was created in 2005 by the BCAFN, the Union of British Columbia Indian Chiefs and the First Nations Summit. FNEMC is mandated by the FNLC, and Chiefs of BC, to assist and support First Nations to manage and develop energy and mineral resources in ways the protect and sustain the environment and the well-being of First Nations in the province. The BCAFN, as an advocacy organization holds to its mandates from First Nations Chiefs in BC:

- Advance the rights and interests of First Nations people in British Columbia;
- Restore and enhance the relationship among First Nations people in British Columbia, the Crown and people of Canada;
- Develop and promote policies and resources for the benefit of First Nations people in British Columbia including but not limited to economic, social, education, health and cultural matters; and
- Work in coalition with other organizations that advance the rights and interests of Indigenous People.

Part 1 – The Impact Assessment Act

These comments are provided in the context of the federal government's commitment to fully implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), its stated commitment to reconciliation with Indigenous Peoples, and its promise to restore public trust in impact assessments (the "Government Goals").[1] They are also framed with reference to the report of the federally appointed Expert Panel on Review of Environmental Assessment Processes ("Expert Panel").[2]

The bar set by the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012") was low. That legislation was rushed through Parliament as part of a massive omnibus bill developed with minimal Indigenous or public scrutiny. In contrast, expectations for this legislation are high, particularly given the important and long overdue Government Goals noted above. The Expert Panel further heightened the expectation that fundamental improvements to this broken system would be implemented by this government.

The IAA, as proposed, is disappointing. While it has strengthened some of the shortcomings of CEAA 2012 in terms of Indigenous principles and engagement, it falls far short of the expectations of Indigenous Peoples and does not meet the Government Goals nor the clear vision for Indigenous considerations set by the Expert Panel.

Environmental assessment is one of the key processes that engages Indigenous Peoples in resource development planning and decision-making, and has been a flashpoint for resource conflict and litigation

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[1] See Mandate Letter to the Minister of Crown-Indigenous Relations and Northern Affairs of October 4, 2017; see 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. This Report describes UNDRIP as the "minimum rights" of Indigenous Peoples in accordance with their own institutions, laws and customs, and the principle of free, prior and informed consent, p. 27.

throughout Canada, and particularly in BC.[3] The failure of the IAA to apply the standards set by UNDRIP, or even reference UNDRIP, is a broken promise. This omission is likely to perpetuate an ineffective, and ultimately litigious, approach to resource development decision-making. This core defect must be remedied. Many of the problems with this proposed legislation could be overcome with some foundational changes throughout the IAA.

The first option is for the IAA to recognize Indigenous decision-making authority with regard to their territories throughout the process and in the final decision, consistent with UNDRIP and the Government Goals. This core shift in approach in the legislation would serve to advance reconciliation and build trust.

The second option to make this process more acceptable would be to implement the Expert Panel recommendation that impact assessment ("IA") be conducted for *all* assessments, including energy projects, by an independent IA authority. This would ensure that the process is not proponent-led and, instead, would use consultants and experts retained by the IA authority and the IA authority would make the IA decision.[4] In circumstances where Indigenous groups choose to implement their own assessment process, this should be recognized and accommodated. We note that the Expert Panel envisioned that the IA authority and interested Indigenous groups "would create an appropriate co-operative approach."[5] While this approach may fall short of full Indigenous-led assessment and decision-making, a well-structured authority could ensure that Indigenous perspectives and consent are embedded in the process.

Either of these approaches would be a significant improvement over the largely status quo proposals presented in Bill C-69.

Nonetheless, we make the following recommendations below to strengthen the modest reforms that have been tabled by the government in this part of Bill C-69.

1. Indigenous Jurisdiction and Decision-Making

The IAA contains more references to Indigenous Peoples (and to Aboriginal rights and title) than CEAA 2012, but with notable limitations – decision-making at all points throughout the IA process is retained by the federal crown, with no recognition of Indigenous decision-making or the role of an independent authority.

The Expert Panel was clear about the shortcomings of this model that, in its view, contributes to conflict in resource development. It recommended that in the new IA regime, "Indigenous Peoples be included in decision-making at all stages of IA, in accordance with their own laws and customs."[6] That the proposed IAA does not institute a new decision-making framework for project decisions that acknowledges Indigenous decision-making authority is deeply problematic. The "beefed up" engagement provisions are not a substitute for such recognition, and do not align with the core principles of UNDRIP, which were considered in detail by the Expert Panel.[7]

***Recommendation 1*:** Make amendments throughout the IAA to fully recognize Indigenous jurisdiction and decision-making authority and reflect Government Goals, particularly with regard to UNDRIP implementation, including in the following areas:

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[3] As the Expert Panel noted at p. 27, "EA processes have increased the potential for conflict, increased the capacity burden on under-resourced Indigenous Groups and minimized Indigenous concerns and jurisdiction."
[4] Expert Panel Report, p. 51.
[5] Expert Panel Report, p. 52.
[6] Expert Panel Report, p. 30.
[7] Expert Panel Report, p. 29.

Preamble: The preamble must reference UNDRIP standards, including the right to self-determination, the right to participate in decision making, the right to make decisions over traditional territory, the right to free, prior and informed consent, the right to maintain and protect Indigenous knowledge and the right to financial assistance.

Definitions: "Indigenous peoples" and "jurisdiction" as well as references to Indigenous rights throughout the Act[8] should reflect the inherent jurisdiction and rights of Indigenous Peoples in international human rights law, as recognized in UNDRIP.

In particular, subsection (f) of the definition of jurisdiction should include a third component:

> (f) an Indigenous governing body that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project ….
> <u>(iii) under its own laws and inherent jurisdiction, where the Indigenous governing body has informed the Minister that it is a jurisdiction with powers, duties or functions in relation to impact assessment.</u>

Purposes: An additional purpose should be added in s. 6(1):

> <u>To implement the United Nations Declaration on the Rights of Indigenous Peoples in procedural and substantive decision-making related to impact assessment.</u>

General: The IAA should be amended to acknowledge Indigenous decision-making authority in their territories and the standard of free, prior and informed consent, including: a) a requirement for a conduct of assessment agreement to be concluded with Indigenous groups before commencing an IA; and b) that government-to-government agreements be established regarding the outcomes of an IA before project decisions are made. Impact benefit agreements should also be required.

1.a. Section 9 – Minister designates a project

Section 9 authorizes the Minister of Environment and Climate Change to designate projects that are not otherwise on the list to be subject to an IA. Section 9(2) requires that the Minister consider the interests of Indigenous Peoples when making this decision. There should be an additional provision that the Minister must designate a project where requested by an Indigenous group, based on potential impact to traditional use or lands, or section 35 rights.

***Recommendation 2*:** That an additional subsection be added to s. 9 requiring the Minister to designate a project when asked to do so by an Indigenous group based on potential impacts to traditional use or lands, or section 35 rights.

1.b. Section 12 – Cooperation in the planning phase

The IAA requires only that the Agency "offer to consult" with other jurisdictions and affected Indigenous groups during the planning phase. It contains no requirement for an assessment plan to be prepared, or for conduct of assessment agreements. This is in contrast with the Expert Panel, which recommended that the planning phase conclude with a project-specific conduct of assessment agreement to address matters such as:

[8] For example, paragraph (g) of the purposes set out in s. 6(1) could be amended to read: "(g) to ensure respect for the rights of the Indigenous peoples of Canada <u>as set out in the United Nations Declaration on the Rights of Indigenous People, including those</u> recognized and affirmed by section 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act;

- Studies to be conducted based on assessment factors and a sustainability framework,
- Who has responsibility for conduct of studies (proponent, Indigenous groups or others),
- Process integration for procedural and legislative requirements of other jurisdictions, including how joint review panels should be conducted, stating that the "IA authority should have broad authority to ensure that joint or co-operative reviews occur wherever possible. The process would also integrate Indigenous customs, laws and traditions",
- Timing and cost details, and
- The constitutional duty to consult.[9]

Recommendation 3: That an additional sub-section be added to s. 12:
(2) Prior to issuing a notice of commencement for an impact assessment under s. 18(1), the Agency must develop a conduct of assessment agreement in collaboration with jurisdictions and Indigenous groups referenced in section 12(1), informed by public comment provided under s. 11.

1.c. Section 16 – Agency decision regarding IA

This provision authorizes the Agency to make an early decision as to whether an IA of a designated project will be required. It operates as an administrative exemption from the Project List, and should be removed. If a project is potentially impactful enough to warrant being on the Project List, the IA should not be optional. Given that CEAA 2012 reduced the number of EAs previously conducted pursuant to CEAA 1992, the reach of environmental assessment has already been reduced. A narrow Project List ultimately diminishes the reach of impact assessment, making it more difficult to identify and evaluate cumulative impacts of projects across Indigenous lands and territories.

***Recommendation 4*:** This section should be removed altogether. If it is not removed altogether, then this decision making power must be removed from the Agency and given instead to the Minister, who is politically accountable.

1.d. Section 22 – IA Scoping Factors

Section 22(1) establishes the factors to be considered, or scoped, in the IA. These factors dictate the content of an IA. We note that four of the 22 factors are Indigenous focused but, ultimately, Indigenous rights, interests and perspectives are merely among the factors to be "considered", which is not in accordance with their constitutional priority. Put another way, the IAA fails to recognize the decision-making authority of an Indigenous governing body or jurisdiction regarding scope of the IA. As noted above, the IA scope should be agreed to in a conduct of assessment agreement with affected Indigenous groups to ensure that they are accorded separate status consistent with a government-to-government relationship.

Moreover, under s. 22(1)(q) it appears that where an Indigenous governing body seeks to have its own study considered, that study may only be one of the number of factors, and is not accorded any separate treatment or status (unless that Indigenous governing body is also a jurisdiction and there has been substitution under ss. 31-35). Thus, in circumstances where a study is prepared by an Indigenous group, there should be an assurance that it is appropriately considered.

The IAA does not provide a joint Indigenous role in determining the conduct of the IA. The Indigenous factors outlined in s. 22(1)(c), (g), (l), (q) do not make Indigenous interests core considerations in the scope, and therefore the conduct, of the IA.

[9] Expert Panel Report, p. 60.

***Recommendation 5*:** Where an Indigenous governing body conducts an assessment of effects under s. 22(1)(q), the recommendations from that assessment should be mandatory factors in the IA.

***Recommendation 6*:** "Traditional" knowledge in (g) should be replaced with "Indigenous" (see discussion of Indigenous knowledge below).

***Recommendation 7*:** Remove the phrase "and economically" from the consideration of alternatives provision in (e). Currently, only alternatives to the project that are "technically and economically feasible" would be considered, and could stifle innovation. In the Indigenous context, it could mean that innovative mitigation and solutions are not considered because of the cost, despite the fact that they may minimize project impacts on affected communities.

1.e. Section 63 – Public Interest Decision Factors

The decision to approve a project lies with the Minister or the Governor in Council (ss. 60-62), who are to apply a "public interest test". Section 63 establishes the public interest factors that must be "considered" in their decision, with impacts on Indigenous groups and Indigenous rights constituting just one of these factors. Again, this is inconsistent with the Government Goals, the Expert Panel recommendations, UNDRIP and the Crown's constitutional duties.

***Recommendation 8*:** A new "safeguard" provision should be added following s. 63 to ensure that adverse effects identified in an assessment may **not** be determined to be in the public interest absent Indigenous consent.[10]

2. The Process – Early Engagement, Agency Review, Panels

2.a. Early Engagement

The Expert Panel developed a schematic at page 75 of its Report that describes its overall vision of the process. In short, this vision is that the early stages of a review process have a very broad reach, and issues, impacts and engagement become increasingly narrower as the IA proceeds. The Expert Panel referred to this as the trust-building stage, as continued reliance on the status quo is not likely to remedy current challenges experienced by Indigenous groups. It's proposal that there be a conduct of assessment agreement at the end of the planning phase that can address indigenous issues is a transparent and credible means to deal with the shortcomings of the early engagement phase.[11]

The IAA does little to significantly change this status quo – the proposed planning phase is largely proponent driven, but with a longer timeline. Engaging Indigenous groups early, with scope to ensure a meaningful role in the conduct of the assessment is required to build trust and a framework for joint

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[10] Other potential safeguard or trade-off measures could be considered, such as: 63.1 The Minister, under paragraph 60(1)(a) or the Governor in Council's under paragraph 62, may not determine that adverse effects indicated in the report are in the public interest if:

a. they involve or are likely to result in infringements of Aboriginal or treaty rights, or Indigenous human rights, without the consent of the affected Indigenous group;
b. if they are inconsistent with the outcomes of a regional assessment conducted under paragraph 92 or a strategic assessment under paragraph 95;
c. they can reasonably be anticipated to result in exceeding an ecological limit;
d. they are likely to significantly hinder Canada's ability to achieve any domestic or international environmental or human rights obligations, including climate change obligations; or
e. they would result in a region, people or community, current or future, bearing a disproportionate share of adverse effects, risks or costs.

[11] Expert Panel Report, p. 61.

decision-making, At this early stage, there is no mechanism to ensure funding or capacity for an Indigenous group to undertake studies and engage communities, a critical component of early engagement.

***Recommendation 9*:** See 1.b.,"Cooperation in the Planning Phase" above.

2.b. Agency Reviews

We make no specific recommendations with respect to Agency reviews other than to note our two foundational recommendations could remedy flaws with respect to agency reviews wherein the Agency dictates the conduct of the IA.

2.c. Panel Reviews

Panel reviews will be designed specific to each project. The draft IAA makes the inclusion of someone with knowledge of Indigenous interests and concerns optional, not mandatory (s. 41(1)). Thus, there is no guarantee that Indigenous perspectives would be represented on a panel. Indigenous processes and Indigenous perspectives are distinct and incorporating them in process design is one way to move away from what the Expert Panel has referred to as an "almost exclusive reliance on Western science."[12]

***Recommendation 10*:** Amend s. 41 to require that an Indigenous person be among the appointed members on a panel.

2.d. Substitution and Cooperation

The BCAFN supports the principle of "one project, one assessment" only where Indigenous groups are a full partner and are represented in throughout the IA, which is not the case with the proposed IAA. We note that the *Memorandum of Understanding on Substitution between the BC Environmental Assessment Office and the Canadian Environmental Assessment Agency* was concluded on a bilateral basis between Canada and British Columbia and needs to be renegotiated on a tripartite basis with Indigenous groups.

In respect of substitution and Indigenous Peoples, the Expert Panel was clear that:

- there be early participation of Indigenous governments where they have assessment responsibilities, including the negotiation of tri-partite arrangements,
- where substitution is to occur the principles of UNDRIP, and specifically consent should be reflected in decision-making, and
- consideration of substituting another process, including an Indigenous process, should occur early.[13]

The substitution provisions (ss. 31-35) expand opportunities for Indigenous participation, though substitution is only available to jurisdictions that are recognized under Canadian law because it is limited to the definition of jurisdiction in the IAA (s. 33(1)(c)). Indigenous governing bodies are only eligible where they have a land claim agreement or a legislated self-government agreement or if the legal hurdles set out in s. 114 (see below) have been met. The reach of these provisions must be expanded.

Capacity is a key issue for substitution – without resourcing Indigenous groups won't be able to undertake studies or lead IAs. While there are some recent examples of Indigenous led assessments, such as the Tsleil Waututh Assessment of the Trans Mountain Pipeline Project and the Squamish Nation

[12] Expert Panel Report, p. 28.
[13] Expert Panel Report, p. 25.

Assessment of the Woodfibre LNG Project, the resources required for these efforts were significant and may well pose a real challenge for communities.

***Recommendation 11*:** Indigenous governing bodies must be included as entities that are eligible for substitution, regardless of whether they are formally recognized in Canadian legislation. Amend the definition of jurisdiction to add a third component to the definition at (f) as set out above.

***Recommendation 12*:** Amend the substitution provisions to ensure that where affected Indigenous Peoples are interested in undertaking a study, there is a funding mechanism to ensure sufficient capacity and resources. There should be a right of first refusal for Indigenous groups who wish to conduct the IA.

The cooperation agreement provisions in s. 114(e) that enable the Minister to enter into agreements with Indigenous governing bodies and exercise powers under the IAA may expand opportunities for Indigenous led or joint assessments. However, the Act falls short of recognizing the inherent jurisdiction of Indigenous Peoples to conduct assessments and make decisions about development in their territories, in the absence of agreement from Canada.

***Recommendation 13*:** Include all Indigenous governing bodies as eligible to enter into agreements, as indicated above.

***Recommendation 14*:** Remove the phrase "If authorized by the regulations" at the beginning of s. 114(e).

3. Duty to Consult

The Expert Panel indicates that the Crown's duty to consult and accommodate Indigenous groups would be partially satisfied through the development of a "conduct of assessment" agreement that would be concluded at the planning phase of the IA.[14] Section 155(b) indicates that the Agency is to play a role in consultation and the Crown is likely to rely on the IA process to fulfill the duty to consult.

Case law has confirmed the Crown's duty to consult and to accommodate Indigenous rights and interests; further, the federal government has committed to implementation of UNDRIP, including the standard of free, prior and informed consent. The failure of the IAA to address more clearly how these legal standards will be met may well result in further conflict and more litigation.

One issue of concern is that IAA purports to restrict the Minister from altering his or her decision about a project, even if the outcomes of consultation would require this to be done.

***Recommendation 15*:** Remove the second sentence from s. 68(1): "However, the Minister is not permitted to amend the decision statement to change the decision included in it."

4. Indigenous Knowledge

The Expert Panel report made important recommendations regarding Indigenous knowledge, calling for its integration in all phases of IA as well ensuring the permission and oversight of Indigenous groups.[15] Instead of using the terms in the Expert Report, the IAA uses "traditional knowledge", which is narrower than "Indigenous knowledge", the term used by the Expert Panel.

***Recommendation 16*:** Replace the phrase "traditional knowledge" with "Indigenous knowledge" throughout the IAA to more broadly capture and protect the scope of Indigenous information.

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[14] Expert Panel Report, pp. 60-61; see also p 30 where the Panel states that consent during an IA does not include government decisions that occur after the IA is concluded.
[15] Expert Panel Report, pp. 33-34.

The IAA contains provisions to protect the confidentiality of Indigenous knowledge in s. 119. However, the exceptions in s. 119(2) should be narrowed to better reflect the Expert Panel's observation that Indigenous groups must maintain control and ownership over Indigenous knowledge.[16] Section 119(2)(b) states that traditional knowledge can be disclosed for use in legal proceedings. Without additional clarification, this could mean that Indigenous information be disclosed in a legal proceeding by the Crown, despite concerns and objections of an Indigenous group. Further, s. 119(2)(c) refers to disclosure being authorized in prescribed circumstances but does not indicate what those circumstances may be.

***Recommendation 17*:** That the exceptions in (b) and (c) be removed from the IAA, or that the prescribed circumstances be identified in legislation in consultation with, and with the consent of Indigenous groups.

Recommendation 18: Amend s. 119 to include reference to the fact that Indigenous knowledge is owned by the Indigenous group to protect against unauthorized use.

Finally, these additional provisions regarding Indigenous knowledge are still insufficient to address the "almost exclusive reliance on western science in EA decision making", and the Expert Panel recommendation that IA should shift "from weighing individual knowledge sources against each other to an integrated approach that weaves all knowledge sources together. … (and that) … Indigenous knowledge and community knowledge should be used to scope baseline studies and analysis."[17]

***Recommendation 19*:** The IAA must enhance the use and consideration of Indigenous knowledge, ensuring the IA is conducted in such a manner as to integrate Indigenous knowledge. For example, s. 14 and s. 22(1)(g) both require summaries of Indigenous information in the IA, should be required to meaningfully integrate Indigenous knowledge into baseline data in the planning and scoping phases respectively.

5. Sustainability Assessment

The replacement of the "significance adverse environmental effects" test with sustainability measures is welcome as it will better enable the IAA to positively consider Indigenous interests. We note that the IAA would be stronger with a more robust definition of sustainability, that includes, for example, protecting and restoring ecological integrity, including the ecological basis for the meaningful exercise of Aboriginal and treaty rights and community health.

However, the Duties of Certain Authorities in Relation to Projects provisions in ss. 81 to 91 of the IAA continue to use the old and unacceptable significance test. These provisions essentially operate as a screening or lower level review for projects and activities that are not captured on the Project List, and do not require the rigour of an IA. Unless and until the Project List is expanded to broaden the reach of IA, it is important that these lesser reviews also consider the sustainability criteria in order to ensure that Indigenous interests are considered and reflected in these project decisions. It makes no sense that these reviews are subject to a different test than designated projects under the IAA.

For example, under these provisions, the Port of Vancouver, as a federal authority, makes hundreds of decisions each year under the parallel s. 67 provisions in CEAA, 2012 (almost all, if not all of which are determined to have no significant adverse effects). Each of these decisions is made individually, with no meaningful consideration of cumulative effects, meaning that the likelihood of there being a determination that a lesser project or activity's impacts will be "significant" is almost non-existent.

[16] Expert Panel Report, p. 46.
[17] Expert Panel Report, p 45.

***Recommendation 20*:** This inconsistency must be remedied and the significance requirement in this part must be removed, and replaced with sustainability criteria to be consistent with the rest of the IAA. Sustainability criteria should be further fleshed out as noted above.

7. Resourcing and Capacity

The capacity issue is critical and challenging to remedy exclusively within the legislative framework. Among the Expert Panel's observations are that:

- Indigenous groups should define for themselves their capacity needs (p. 32)
- capacity deficits in government IA practitioners hinder Indigenous engagement in assessment (p 31), and that Indigenous knowledge is not well understood (p. 45)
- capacity is complex and should be designed to reflect Indigenous jurisdiction (p. 32)

A key concern is that provisions in the IAA that would enable more Indigenous engagement (particularly Indigenous-led assessments) will never be operationalized because of insufficient resourcing and capacity. Longstanding concerns about adequate resourcing and community engagement are extant.

***Recommendation 21*:** The cost of capacity and resourcing should be borne by the proponent and that there has to be a fee schedule established in regulation for that purpose. The IAA should establish that the proponent pays; the fee schedule be established in partnership with Indigenous groups.

We note that the Agency expert committee and the advisory committee at ss. 157 and 158 require indigenous representation, but that the Minister's Advisory Council in s. 117 does not.

***Recommendation 22*:** That s. 117 be amended to require the inclusion of Indigenous representation.

10. Regional Impact Assessments

Regional impact assessments may be a valuable tool to address cumulative effects of sustained activities over time. The Expert Panel noted that RIAs are a means to build relationships.[18] Their use, with meaningful Indigenous engagement, would be a helpful tool to address landscape level impacts and planning.

We are concerned that without resourcing and capacity for Indigenous groups, the regional impact assessments in the IAA will be as underutilized in this legislation as they were in the predecessors CEAA 2012 and CEAA 1992. This is another area that requires resources and funding to enable Indigenous involvement. Further, the conduct of RIAs is discretionary, the IAA contains no requirements for the consideration of alternative scenarios for development in a region, to identify ecological limits through RIAs or for project assessments to be consistent with the outcomes of RIAs.

Recommendation 23: A new "safeguard" provision following s. 63 should be added to ensure that adverse effects identified in an assessment may **not** be determined to be in the public interest if they are inconsistent with the outcomes of a regional assessment conducted under s. 92 or a strategic impact assessment under s. 95, or if they can reasonably be anticipated to result in exceeding an ecological limit.

Part 2 – The Canadian Energy Regulator Act

[18] Expert Panel Report, pp. 77-78.

Similar to the IAA, the proposed *Canadian Energy Regulator Act* ("CERA") in Part 2 of Bill C-69 misses the mark for First Nations governments and communities who may be impacted by, or indeed may benefit from, CERA regulated projects.

Our submission comments on CERA and the Canadian Energy Regulator ("CER") through the lens of a multitude of submissions by Indigenous communities and organizations across Canada made to the National Energy Board ("NEB") Modernization Panel ("Modernization Panel") on the *National Energy Board Act* ("NEBA"). Our submission covers both what is included in Bill C-69 and what is excluded (where the legislation is silent).

Comparative comments on CERA and the IAA: Purposes

Parts 1 and 2 of Bill C-69 contain "purposes" clauses but the purposes clause of CERA is much shorter than the purposes clause of the IAA. Furthermore, unlike the IAA purposes provision (s. 6) the CERA provision makes no reference to the rights and interests of Indigenous peoples. The IAA contains the following provisions expressly referencing Indigenous interests.

> The purposes of this Act are:
>
> (e) to promote cooperation and coordinated action between federal and provincial governments, and the federal government and Indigenous governing bodies that are jurisdictions, with respect to impact assessments;
>
> (f) to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;
>
> (g) to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act;
>
> (j) to ensure that an impact assessment takes into account scientific information, traditional knowledge of the Indigenous peoples of Canada and community knowledge;

The IAA's "duty to ensure respect" "in the course of impact assessments and decision-making" (emphasis added) goes well beyond the language of the common non-derogation clause which is found in both parts of Bill C-69. Overall the language of Part 1 of Bill C-69 is more positive in fostering a respectful relationship than is the language in Part 2.

Comparative comments on CERA and the IAA: Relevant Considerations

Both IAA and CERA contain lists of relevant considerations for evaluating projects. The IAA has a single (long) list in s. 22 setting out factors to be taken into account in preparing an impact assessment for a designated project. There is a much shorter list of relevant considerations that inform the final political decision that is to be made (s. 63). CERA has different lists depending upon the type of project. The pipeline list is found in s. 183, the international power line list in s. 262, and the offshore renewables project list in s. 298. While the IAA list will apply to any CERA projects that are "designated projects", and while some provisions are common there are some provisions in s. 22 of the IAA which must be equally applicable to the lists in CERA:

> (l) considerations related to Indigenous cultures raised with respect to the designated project; …
>
> (q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project

These are not mentioned in Part 2 of Bill C-69. They must be.

Comparative comments on CERA and the IAA: Treatment of greenhouse gas issues

Part 2 of Bill C-69 makes no express reference to climate change considerations or greenhouse gas emissions. Section 22 of the IAA however has a specific clause dealing with Canada's greenhouse gas commitments which requires that an impact assessment consider "(h) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change". The CERA provisions by contrast have a much more general requirement to the effect that the CER must take into account "environmental agreements entered into by the Government of Canada" (CERA, ss. 183(2)(j), 262(2)(f) and 298(3)(f).

More importantly the reference to climate change commitments is also carried though into what might be called the ultimate approval provisions of the IAA. These are the provisions that address the determinations to be made at the political level by either the Minister or the Governor in Council as part of determining whether the project is overall in the public interest. Thus IAA s. 63 directs that

> 63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must include a consideration of the following factors ….
>
> (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

It is important to note that there is no provision in CERA that affords the Governor in Council any equivalent direction when deciding whether or not to require CER to issue a certificate for a pipeline. This is crucial in the context of assessing the impact of a project on s. 35 rights.

Comparative comments on CERA and the IAA: Treatment of s. 35 rights

As noted above, s. 22 of the IAA specifies the factors that must be taken into account in preparing an impact assessment for a designated project. The factors include an assessment of the project on s. 35 rights (as in CERA). While the factors listed in s. 22 must be considered in preparing an impact assessment, not all of those factors are carried through into the ultimate decision making provisions of the IAA. Indeed, s. 63 lists only five such factors of which one is the consideration of adverse impacts on s. 35 rights. Thus s. 63(d) provides that:

> 63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must include a consideration of the following factors: …
>
> (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

There is no equivalent direction in CERA s. 186 dealing with the decision to be made by the Governor in Council based upon the recommendation of the CER (or the IAA panel). An adverse impact on a s. 35 right is an infringement as defined by common law and must be justified if the Minister or the Governor in Council were to allow a project to proceed under those circumstances. Any such decision would require reasons and would be amenable to judicial review on a standard of correctness.

Bill C-69 Part 2 in Light of Indigenous Peoples' Submissions to the Modernization Panel

The following represents a synthesis of what First Nations reasonably expected would have been included in progressive, 21st century, new generation energy legislation.

Self-government

Canada's energy legislation must recognize the governance and jurisdiction role of Indigenous communities and nations with respect to energy infrastructure projects passing through their ancestral lands. Part 2 of Bill C-69 is silent on federal recognition of self-government rights. While the Preamble to both Bill C-69 as a whole and Part 2 reference Canada's commitment to reconciliation and to nation-to-nation and government-to-government relationships, Bill C-69 fails to recognize Indigenous self-governance interests and responsibilities for particular lands. Similarly, the operative provisions contain few references to Indigenous governance interests. The exceptions are the permissive and discretionary provisions in CERA sections 76 and 77 dealing with collaborative arrangements with Indigenous organizations and Indigenous governing bodies and some of the pollution provisions of CERA which also recognize at least some interests of Indigenous governing bodies.[19] Section 57 is another permissive and discretionary section which references "committees or programs" to be formed to enhance the involvement of Indigenous peoples with respect to matters falling under Part 2 of the Bill C-69 (Safety, Security and Protection of Persons, Property and Environment). Section 57 falls far short of recognizing, let alone building on a government-to-government relationship.

The absence of any significant recognition of Indigenous governance and Indigenous norms and laws is perhaps most obvious in the provisions of both the IAA and CERA dealing with the political dimension of project approval, that is decisions made by the Governor in Council (or the Minister under the IAA). While s. 63 of the IAA requires "consideration" of "adverse impact … on the rights of the Indigenous peoples" this is still a unilateral process informed by the Minister or Governor in Council's assessment of "public interest" with no apparent way of injecting Indigenous norms. As noted above, CERA is even weaker since it offers no guidance whatsoever as to the factors relevant to the Governor in Council's exercise of its discretion as to whether to accept CER's (the Commission's) recommendation to issue a certificate.

FPIC and Consultation

All Indigenous community submissions to the NEB Expert Panel addressed either or both of the concepts of free, prior informed consent ("FPIC") and the Crown's duty to consult and accommodate. FPIC is referenced on a number of occasions in the UN Declaration on the Rights of Indigenous, most importantly in Article 32 of the UN Declaration that provides:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Part 2 of Bill C-69 contains no reference to FPIC. The reference to consent is solely in the context of Indigenous territory in s. 317(1) which provides that "a company must not, for the purpose of constructing a pipeline or engaging in the activities referred to in paragraph 313(a), take possession of, use or occupy lands in a *reserve*, within the meaning of subsection 2(1) of the *Indian Act*, without the

[19] See CERA, ss. 137(1), 140 & 141(5). Note however that these provisions do not put Indigenous governments on a par with other orders of government in all respects. For example, while an Indigenous government can recover costs it incurs in engaging in cleanup activities, it cannot, unlike the federal or provincial governments (s. 137(9)), maintain a claim for loss of non-use values.

consent of the *council of the band*, within the meaning of that subsection." The provision is stated to apply despite s. 35 of the *Indian Act* which provides for the possibility that expropriation of reserve lands might be authorized by Order in Council. This is an isolated provision in CERA and it is confined to reserves. The provision is not an endorsement of FPIC. On the contrary, s. 317(2) expressly states that "for greater certainty, nothing in subsection (1) is to be construed as modifying the application of the other provisions of this Act."

Furthermore, sections 317(3) and 318 deal with situations under a series of land claim and self government agreements that contemplate that the Governor in Council might consent to the acquisition of land for pipeline purposes where the relevant Indigenous governance authority fails to do so.

More surprising is that Part 2 of Bill C-69 contains no reference to the Crown's duty to consult and accommodate. As a result it fails to clarify how the Government of Canada proposes to discharge its duties with respect to new energy projects. In the recent decisions of *Clyde River* and *Chippewas of the Thames First Nation*, the Supreme Court of Canada clarified that the Crown can in some circumstances rely on the procedures adopted by the NEB to discharge its obligation to consult and accommodate but there is nothing that requires the Crown to rely on that process.

Many of the Indigenous submissions to the Modernization Panel argued that the Crown should not fulfil its obligations through the NEB process or, at a minimum, that the new legislation should clarify how the Crown proposed to discharge its obligations. Bill C-69 does neither. While the Government of Canada's own March 2018 Technical Briefing presentation for Indigenous peoples states that CERA will "Clarify the role of the CER in supporting consultations" there is nothing in the proposed legislation to support this claim. CER may have an obligation to assess the effect of a proposed project on s. 35 rights (s. 183(2)(e), 262(2)(e) and 298(2)(e)) and thus may have an obligation to assess whether the Crown has discharged its obligation to consult and accommodate, but that does nothing to clarify how the Crown will discharge its duty or to clarify whether or not the Crown intends to continue to rely on the processes of the energy regulator as part of discharging its duty to consult and accommodate.

Important Considerations on Which we are Unable to Provide Submissions

Important considerations on which we are unable to provide fulsome submissions due to House Committee page restrictions include: (1) funding and capacity building, (2) timelines, (3) more opportunities for participation using non-adversarial processes but also opportunities for cross examination, (4) Elders Advisory Committees, (5) a conception of public interest that incorporates Indigenous rights and norms, (6) consideration of climate change, (7) strategic assessments, (8) marine shipping, (9) EAs should be conducted by CEAA not the energy regulator, (10) monitoring, and (11) clarification or abolishment of the s. 58 exemption.[20] Bill C-69 superficially addresses some of these concerns but in many cases the legislation offers little guidance or is simply silent.

Furthermore, Bill C-69 does not adopt or recognize the concept of Indigenous ancestral lands. It does recognize the significance of cumulative environmental effects (s. 183(2)(a) and 262(2)(a)). While Bill C-69 adopts a consent-based rule for new pipelines and transmission lines that require reserve land there is no similar rule for ancestral lands. This is an explicit omission and runs completely counter to reconciliation.

[20] NEBA s. 58 authorizes the Board to make orders exempting a pipeline not exceeding 40kms from certain sections of the Act including s. 31 which requires a party to have a certificate prior to commencing construction. In effect, the result of triggering s. 58 is that the NEB becomes the final decision-maker for that project. An example of such a project is Line 9 which was the subject the decision in *Chippewas of the Thames First Nation*.

Inexorably linked to Indigenous peoples ancestral lands is the importance of life-cycle regulation of energy projects as well as Indigenous involvement throughout the life of a project through monitoring and related activities. For the most part these ideas are not carried through in any obvious way in the legislation. Section 74 however does provide that the "The Regulator may establish processes that the Regulator considers appropriate to engage with the public — and, in particular, the Indigenous peoples of Canada and Indigenous organizations — on matters within the Regulator's mandate." But this is of course, as with many provisions in Bill C-69, completely discretionary and is not specific to monitoring or life-cycle regulation.

Conclusion

Regrettably, a once in a generation opportunity appears to be lost. We see nothing in Bill C-69 where the Crown works "hand in hand" with Indigenous peoples on impact assessment or energy regulation. On issues and matters of concern to Indigenous peoples and their ancestral lands, Parts 1 and 2 of Bill C-69 simply reinforce the regulatory status quo of CEAA, 2012 and NEBA.