



THE CANADIAN
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Bill C-69 – *Impact Assessment Act*

**CANADIAN BAR ASSOCIATION
ENVIRONMENT, ENERGY AND RESOURCES LAW SECTION
AND ABORIGINAL LAW SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Environment, Energy and Resources Law Section and the Aboriginal Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform Committee and approved as a public statement of the Environment, Energy and Resources Law Section and the Aboriginal Law Section.

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Bill C-69 – *Impact Assessment Act*

EXECUTIVE SUMMARY

The Environment, Energy and Resources Law Section and Aboriginal Law Section of the Canadian Bar Association (CBA Sections) comment on the *Impact Assessment Act*¹ (the Act). In general, the CBA Sections reiterate their strong support of a robust, predictable, timely and transparent federal impact assessment process that fosters reconciliation and respects the rights of Indigenous peoples.

1. Shift from environmental assessment to impact assessment

The CBA Sections support the proposed transition of an *environmental* assessment process to an *impact* assessment process, which expands the factors for consideration beyond the biophysical environment of water, land, air, fish and wildlife. We also support the requirement to recognize both adverse and beneficial effects of a designated project. These measures are consistent with how the Governor in Council has previously considered whether certain effects were justified in particular circumstances and will facilitate restoring public trust in the process.

Issues at planning phase: The CBA Sections recommend that consideration be given to whether additional guidance and clarity, including a list of specific factors (both adverse and positive), can be provided to the Agency and the Minister under sections 16 and 17, when determining if a designated project should not be subject to an impact assessment.

Mandatory factors: While the CBA Sections agree that the mandatory factors for consideration in impact assessments in section 22 reflect the robust and expansive scope of an impact assessment, the sections differ in their views of whether *economic impacts* should be added to these factors.

The CBA Sections are pleased to see the references to Best available technology economically available or feasible (BATEA) when discussing factors such as mitigation measures and alternative means of carrying out a project.

We recommend that the factor on the extent to which the effects of the designated project hinder or contribute to Canada's ability to meet its environmental obligations and climate change commitments be clarified. The role of provincial and territorial regulatory requirements and the Pan-Canadian Framework must be addressed. Further, the extent to which upstream and downstream greenhouse gas emissions ought to be considered during an assessment of a designated project, including with respect to oil and gas pipeline projects, must also be addressed.

¹

The Impact Assessment Act is part of Bill C-69, an *Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*

Section 22(2), Relationship between sections 22 and 63, and new conditions under section 64:
We recommend that additional guidance and direction be provided in subsection 22(2) to ensure the scoping of factors follows a defensible and predictable process.

The CBA Sections recommend that the relationship between the factors in sections 22 and 63 be clarified, to indicate what role, if any, the remaining factors in section 22 (not otherwise referenced in section 63) will have in a public interest determination.

We recommend that constraints be placed on the ability of the Minister or Governor in Council to include additional conditions not otherwise addressed in an impact assessment or, if addressed, not recommended by the Agency or Minister, with the exception of a condition required to fulfill the Crown's duty to consult with Indigenous peoples, under section 35 of the *Constitution Act, 1982*.

The CBA Sections recommend that Canada consider how to facilitate the development of Regional Cumulative Effects Assessment (RCEAs) in areas that do not currently have them.

2. Single agency concept

The CBA Sections support the greater consistency in impact assessments and the regulatory certainty and transparency afforded by the establishment of a single agency to conduct the impact assessments.

We are also pleased by the mandatory inclusion of panel members from other specialized regulators. However, we recommend a legislated requirement that members from the Agency represent a majority of all panels constituted with members of specialized regulators to strike a balance between ensuring continued input of the regulator and maintaining regulatory certainty and consistency.

3. Mandatory early planning/engagement phase

The CBA Sections support the mandatory early planning and engagement phase of the impact assessment process. However, we recommend ways to alleviate potential concerns that the early planning phase may create delays and undermine Canada's commitment to the "one project – one assessment" guiding principle.

4. Federal jurisdiction

The CBA Sections support the Act's use of a *project list* approach, as it gives greater certainty on when the new impact assessment process would apply. That said, we believe clear criteria and a transparent process should be established to periodically review and update the project list to ensure that projects with clear links to matters of federal interest are appropriately assessed.

Given Canada's complex constitutional framework, there is not surprisingly a wide range of views in the CBA Sections on the proper role of federal impact assessment in Canada. In any event, we believe that the Act must be clear on when federal impact assessment will be required, and look forward to participating in the consultations on the creation of the project list.

5. Shift from significant adverse environmental effects to the public interest

The CBA Sections generally agree with the driving principles of sustainability and precaution and more focus on health, social, economic, gender-based impacts and long-term impacts on Indigenous peoples. However, the expanded nature of the assessment of designated projects also necessitates an expansion of decision-making considerations. The Act introduces a much broader *public interest* test and focuses on the acceptability of the *adverse effects*.

Some CBA Section members express concern that this requires disproving the negative – a tougher test to meet – and does not allow the Minister or Governor in Council to consider both positive and negative effects of a project, as intended by the Act. Another concern is that the definitions of *effects* and *direct or incidental effects* are too broad and have the potential to recognize any possible concern that could be raised about a designated project.

While we agree that the public interest factors in section 63 are important, their contextual application appears elusive at this stage. There are no thresholds to guide the application of these factors, nor is there any objective guideline to assist in measuring and weighing each factor in the public interest determination. Application of these factors appears to be subjective and at the Minister's or the Governor in Council's discretion. The result will likely be uncertainty and inconsistency in the resulting decisions.

6. Indigenous issues

Indigenous Consultation, Accommodation and Engagement: While the Act makes explicit what the federal Crown has already been doing under current legislation: using environmental assessment as a point-of-contact for consultation and accommodation with affected Indigenous peoples, we recommend changes to clarify the relationship between the duty to consult and accommodate and federal impact assessment.

In addition, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the federal government's aim of early and inclusive engagement and participation at every stage, should be an objective of the consultation process. Similarly, the recognition of and support for Indigenous laws and inherent jurisdiction should be built into impact assessment governance processes.

More specifically, during the planning phase, the Agency should be required to share analysis of potentially unacceptable effects and commence consultations with Indigenous peoples. We are also concerned with the lack of guidance on consultation and the assessment process and recommend ways to improve and clarify the duty to consult and accommodate in the assessment process.

Funding: We recommend that the participant funding program established under section 75 make special measures to facilitate the meaningful participation of Indigenous groups at all stages of the assessment process.

Indigenous Traditional Knowledge: While we support the enhanced role for Indigenous traditional knowledge (ITK) in the federal impact assessment process, we suggest removing ITK from the list of factors that can be scoped out of an assessment by the Agency or the Minister under subsection 22(2). We also caution against "integrating" scientific information and traditional knowledge and suggest that equal weight be given to both systems.

The CBA Sections recommend that the exception to non-disclosure of ITK in subsection 119(2) be limited to the proponent rather than all assessment participants and any conditions proposed pursuant to subsection 119(3) be subject to input from the Indigenous knowledge-holding community who can withdraw their ITK evidence if dissatisfied with the terms of disclosure.

Indigenous jurisdiction for impact assessment: We recognize the potential for building the capacity for Indigenous governing bodies to undertake joint impact assessments in the definition of “jurisdiction” in section 2 of the Act. We look forward to monitoring the development of regulations on the recognition of Indigenous impact assessment jurisdiction.

The CBA Sections appreciate the opportunity to recommend ways to strengthen and improve Bill C-69 and the proposed *Impact Assessment Act*. We trust that our comments will assist the federal government and we would be pleased to discuss them in more detail.

I. INTRODUCTION

A. Background

The Environment, Energy and Resources Law Section and Aboriginal Law Section of the Canadian Bar Association (CBA Sections) appreciate the opportunity to comment on Bill C-69, an *Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*. Our comments focus on the *Impact Assessment Act* (the Act).

The CBA Sections comprise lawyers with in-depth knowledge of environmental, energy and natural resources law issues, as well as defining cases and legislation related to Indigenous peoples, Indigenous and treaty rights, land claims and traditional Indigenous law.

In December 2016, we made recommendations to strengthen and improve the federal environmental assessment process. In our submission to the Environmental Assessment Review Expert Panel (Expert Panel), we underscored the importance of an adequately funded federal assessment process that respects the rights of Indigenous peoples and supports socioeconomic growth.²

In August 2017, we responded to the Expert Panel Report and Discussion Paper.³ We reiterated the importance of a sufficiently funded and resourced federal impact assessment regime. Based on our extensive experience working on major resource projects across Canada, we said it would be necessary to increase capacity to provide credible scientific and technical advice required to support a timely and cost-effective process. Enhanced capacity in the permitting process, in addition to improvements in the impact assessment process, are essential to address stakeholder concerns of regulatory delay and uncertainty.

B. Impact Assessment Act

As a general comment, we reiterate our strong support of a robust, predictable, timely and transparent federal impact assessment process, that fosters reconciliation and respects the rights of Indigenous peoples recognized by section 35 of the *Constitution Act, 1982* (Section 35

² See Canadian Bar Association, Environment, Energy and Resources Law and Aboriginal Law Sections, Environmental Assessment Process Review (December, 2016), available [online](http://ow.ly/dVON30bgNlk) (<http://ow.ly/dVON30bgNlk>).

³ See Canadian Bar Association, Environment, Energy and Resources Law and Aboriginal Law Sections, Federal Impact Assessment Process Review: Response to the Expert Panel Report and Discussion Paper (August, 2017), available [online](https://bit.ly/2HdxSHe) (<https://bit.ly/2HdxSHe>).

rights). Any impact assessment process must be sufficiently funded and resourced to restore public trust.

We have organized our comments under six topics:

- shift from environmental assessment to impact assessment;
- single agency concept;
- early planning and engagement phase;
- federal jurisdiction;
- shift from significant adverse environmental effects to public interest;
- Indigenous peoples and impact assessment.

II. SHIFT FROM ENVIRONMENTAL ASSESSMENT TO IMPACT ASSESSMENT

The CBA Sections support the proposed transition of an environmental assessment process to an impact assessment process, which expands the factors for consideration beyond the biophysical environment of water, land, air, fish and wildlife. This change reflects a key recommendation of the Expert Panel and was supported by a broad range of stakeholders to ensure that social issues, economic opportunities, health impacts and cultural concerns would be considered by any new federal assessment process. We also support the requirement to recognize both adverse and beneficial effects of a designated project. Expanding the factors and including adverse and beneficial effects of a designated project are consistent with good decision-making principles, and how the Governor in Council has previously considered whether certain effects were justified in particular circumstances. These measures will facilitate restoring public trust in the process.

That said, we have several comments on how the proposed impact assessment process will be implemented and how the mandatory factors will be considered.

A. Impact Assessment Issues at Planning Phase

The impact assessment process involves a planning phase and an assessment phase. Under sections 16 and 17 of the Act, during the planning phase both the Agency and the Minister have discretion to decide if an impact assessment is required.

Under section 17, the Minister may order the Agency not to conduct an impact assessment for a designated project, effectively terminating the required regulatory approval process. Since this

mechanism prohibits the designated project from undergoing the required regulatory approval process, its repeated use may significantly tarnish proponents' views on the favourability of the investment climate in Canada. In contrast, under section 16, the Agency can effectively determine (subject to the Minister's decision) that a designated project will not be assessed under the Act and the project is permitted to proceed, effectively bypassing the impact assessment process. If section 16 is repeatedly used to advance contentious designated projects, this mechanism may undermine the public trust in the Act.

Unfortunately the list of factors the Agency must consider is limited and only explicitly refers to adverse effects rather than beneficial or positive effects, together with any other factor the Agency considers relevant. The guidance to the Minister is even more sparse, and restricted to the Minister's *clear* opinion that the designated project would cause unacceptable effects.

Some CBA Section members raise the concern that the lack of guidance and clarity on how and under what circumstances the Agency or the Minister can determine that no impact assessment is required detracts from the stated goals that the new impact assessment process will increase transparency and provide greater certainty.

RECOMMENDATION

- 1. The CBA Sections recommend that consideration be given to whether additional guidance and clarity, including a list of specific factors (both adverse and positive), can be provided to the Agency and the Minister under sections 16 and 17, when determining if a designated project should not be subject to an impact assessment.**

B. Mandatory Factors for Consideration

The mandatory factors for consideration in impact assessments in section 22 reflect the robust and expansive scope of an impact assessment. We support the explicit listing of factors to be considered, but note the following:

Economic impacts

The list of mandatory factors does not explicitly include economic impacts. The CBA Sections differ in their views of whether economic impacts should be added to section 22 of the Act.

The Environment, Energy and Resources Law Section (NEERLS) acknowledges that sustainability is referenced as a factor and the definition of *sustainability* includes the ability to

contribute to the economic wellbeing of the people of Canada. NEERLS also acknowledges that the definition of *effects* includes changes to social or economic conditions. However, as a key factor in the assessment and project development process, NEERLS recommends that the *economic impact* of a designated project be explicitly listed in section 22.

In the experience of NEERLS members, economic impacts have been an important consideration in Governor in Council decisions on designated projects under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and will continue to be an important consideration under the Act. The Act must reflect important common considerations and align with what the Governor in Council considers, if public trust in the assessment process is to be restored. Additionally, and specific to new pipeline projects, the economic issue pertaining to tolls and tolling is not included as a factor. Tolling issues often play an integral role in determining if a proponent will proceed with a pipeline project. For these reasons, NEERLS supports modifying the list of mandatory factors to explicitly include *economic impacts*.

The Aboriginal Law Section (NALS) supports the existing language of section 22, as the definition of *effects* includes economic effects. NALS does not support modifying section 22 as, in its view, it would place more emphasis on the economic component of sustainability than on other components of sustainability, with which NALS does not agree.

Best available technology economically available or feasible (BATEA)

The CBA Sections are pleased to see the references to BATEA when discussing factors such as mitigation measures and alternative means of carrying out a project and recommends that the description of these factors remains unchanged.

The extent to which effects of the designated project hinder or contribute to Canada's ability to meet its environmental obligations and climate change commitments

We are concerned with this factor's lack of clarity, and wonder if the effects will be assessed after taking into account the location of a designated project and the impacts of any provincial and territorial regulatory requirements and the Pan-Canadian Framework on Clean Growth and Climate Change on greenhouse gas emissions. Furthermore, the factor does not address upstream and downstream greenhouse gas emissions issues.

With a proposed new oil pipeline, for example, the greenhouse gas emissions of the construction and operation of the pipeline may not be that extensive. However, the upstream greenhouse gas emissions of the oil extraction and downstream emissions of tail pipe exhausts

may be quite extensive. This factor does not address this vexing issue. Clarity is required by project proponents and the public on whether upstream and downstream greenhouse gas emissions form part of the factors in the impact assessment of a designated project.

Even if the government develops a strategic assessment on this issue in future, clarity should be given on the elements of this factor now, in the regulatory framework.

RECOMMENDATIONS

- 2. The CBA Sections recommend that the concept of BATEA and the existing wording on mitigation measures and alternative means of carrying out a project remain.**
- 3. The CBA Sections recommend that the factor on the extent to which the effects of the designated project hinder or contribute to Canada's ability to meet its environmental obligations and climate change commitments be clarified. The role of provincial and territorial regulatory requirements and the Pan-Canadian Framework must be addressed. Further, the extent to which upstream and downstream greenhouse gas emissions ought to be considered during an assessment of a designated project, including with respect to oil and gas pipeline projects, must also be addressed.**

Scope of Factors to be Considered

Under subsection 22(2), the scope of the majority of an impact assessment is determined either by the Agency, or in the case of a Review Panel, by the Minister. However, there is no guidance on the extent of this scope. For example, it is possible for the Agency or Minister to determine that the scope of a factor is so minimal as to effectively scope-out that factor. Alternatively, the Agency or Minister could determine that the scope of a factor is so extensive that it dwarfs the other factors and effectively turns the impact assessment into a one-issue review process. To ensure continued transparency and predictability, additional guidance is required on the scoping process.

RECOMMENDATION

- 4. The CBA Sections recommend adding guidance and direction to subsection 22(2), to ensure the scoping of factors follows a defensible and predictable process.**

C. Relationship Between Sections 22 and 63, and New Conditions under Section 64

Sections 22 and 63

After a determination by either the Agency or Review Panel, a decision is ultimately made by either the Minister or Governor in Council to determine if a designated project is in the public interest. The relationship between the 22 factors of an impact assessment and the five factors of the public interest determination in section 63 (the majority of which form part of the 22 assessment factors) is not clear. For example, when and under what circumstances can the Minister or Governor in Council minimize or ignore the factors originally assessed under section 22 but not otherwise referred to in section 63 under the guise of public interest? Further, if the public interest determination can effectively trump the assessment review process so that certain of the assessment factors under section 22 can be ignored in a section 63 public interest determination, why assess those factors at all? If factors merit assessment in section 22, should they not be considered also in section 63?

Section 64

Section 64 enables the Minister or Governor in Council to impose additional conditions on a designated project that they consider appropriate. The difficulty with this section is that it allows for a myriad of conditions to be imposed, the consideration of which may or may not have been addressed during the impact assessment. Alternatively, the conditions may not pertain to the scope of factors in subsection 22(2). Granting this discretion to the Minister or Governor in Council, after a designated project has undergone an impact assessment, detracts markedly from the stated goals of the new assessment process to increase transparency and give greater certainty to proponents.

This concern does not apply to a situation where a condition must be imposed post-impact assessment to fulfill the Crown's duty to consult with Indigenous peoples, given that the scope of the duty to consult may be broader than the scope of a particular impact assessment.

Regional Cumulative Effects Assessment

Many regions in Canada do not have a Regional Cumulative Effects Assessment (RCEA) and the Act has no mechanism to trigger an RCEA. RCEAs can facilitate the consideration of future developments based on evidence (both scientific and Indigenous traditional knowledge), allowing more complete consideration of the public interest.

RECOMMENDATIONS

- 5. The CBA Sections recommend that the relationship between the factors in sections 22 and 63 be clarified, to indicate what role, if any, the remaining factors in section 22 (not otherwise referenced in section 63) will have in a public interest determination.**
- 6. The CBA Sections recommend that constraints be placed on the ability of the Minister or Governor in Council to include additional conditions not otherwise addressed in an impact assessment or, if addressed, not recommended by the Agency or Minister, with the exception of a condition required to fulfill the Crown's duty to consult with Indigenous peoples, under section 35 of the *Constitution Act, 1982*.**
- 7. The CBA Sections recommend that Canada consider how to facilitate the development of RCEAs in areas that do not currently have them, in support of decision making under section 63, and that this issue be addressed in the Act or in supporting regulations.**

III. SINGLE AGENCY CONCEPT

The CBA Sections support the greater consistency in impact assessments and the regulatory certainty and transparency afforded by the establishment of a single agency to conduct the impact assessments for all federally-designated projects. We are pleased by the mandatory inclusion of panel member(s) from other specialized regulators (such as the Canadian Nuclear Safety Commission and the Canadian Energy Regulator), when the designated project falls under the regulatory mandate of that specialized regulator.

However, while requiring respective regulatory bodies in impact assessment panels, the Act does not explicitly state that the majority of members of any panel must be from the Agency. To ensure continuity of the impact assessment process we recommend requiring that members from the Agency represent a majority of all panels constituted with members of specialized regulators. This legislated requirement would strike a balance between ensuring continued input of the regulator on the panel and maintaining regulatory certainty and consistency.

RECOMMENDATION

- 8. The CBA Sections recommend adding a requirement that Agency members represent a majority of a Review Panel that is also comprised of members from specialized regulators.**

IV. EARLY PLANNING AND ENGAGEMENT PHASE

The CBA Sections support the proposed mandatory early planning and engagement phase of the impact assessment process, which offers meaningful opportunities to advance many of the purposes of the Act. However, the early planning phase may undermine Parliament's stated purpose "to ensure that an impact assessment is completed in a timely manner"⁴ and may undermine Canada's commitment to the "one project – one assessment" guiding principle.⁵

A. The "One Project – One Assessment" Guiding Principle

While the Canadian Energy Regulator, Agency or Review Panel would not assess the same project, that is essentially where the guiding principle ends. Other federal authorities (e.g. Fisheries and Oceans Canada) would be able to conduct their own investigations prior to issuing any authorizations (e.g. the renewed HADD authorization).

The Act prohibits federal authorities from exercising any power or performing any duty or function conferred on it under any Act of Parliament (other than the Act) that could permit a designated project to be carried out in whole or in part unless the project completes the impact assessment process or is deemed to not require an impact assessment.⁶ Even where a project is authorized under the Act and federal authorities are permitted to exercise power or perform duties under other enactments, section 8 does not appear to dispense with carrying out any review or assessment processes arising under other enactments. Many projects to which the Act applies, such as pipelines, would require assessment under other Acts, such as the *Fisheries Act*. In those cases, the one project – one assessment guiding principle would not be met.

Subjecting projects to multiple assessments raises the potential for multiple regulatory and judicial challenges to approval or authorization of a single project. For example, it appears that pipelines requiring an impact assessment under the Act would be subject to proceedings under

⁴ Act, section 6(1)(i).

⁵ Government of Canada, "Environmental and Regulatory Reviews: Discussion Paper" (June 2017).

⁶ Act, section 8.

both the Act and the *Canadian Energy Regulator Act* because the former appears to grant no jurisdiction to hear or decide tolling or tariff matters.

In particular, pipelines required to undergo an impact assessment would automatically be referred to a Review Panel. The Review Panel would include one Commissioner appointed under the *Canadian Energy Regulator Act*.⁷ The Review Panel would have the powers of the Regulator's Commissioners "for the purpose of conducting an impact assessment [...] including preparing a report with respect to that impact assessment".⁸ The Review Panel's report would include conclusions and recommendations necessary for a certificate, order, permit, license or authorization to be issued under the *Canadian Energy Regulator Act*,⁹ but the Review Panel would have no power to inquire into tolling or tariff matters.

RECOMMENDATION

9. The CBA Sections recommend that reviews and assessments by federal authorities under other Acts be carried out concurrently, at the request of the proponent, with impact assessments under the Act. For example, a Review Panel's mandate under the Act could be expanded to include, at the request of a proponent, the Canadian Energy Regulator's mandate to decide tolling and tariff matters under Part 4 of the Canadian Energy Regulator Act.

B. Completion of Project Assessment in a Timely Manner

Both the Act and the *Canadian Energy Regulator Act* prescribe timelines, but do little to mandate project assessment in a timely manner. Some flexibility on timelines may be required to ensure that the Agency, Canadian Energy Regulator, Review Panel, Minister, or Cabinet get the information they need to make their decision. However, the expanded planning phase with longer timelines and new and potentially limitless discretion to extend time might prove problematic. The addition of a 180 day (or more) planning phase determination on whether an impact assessment is required for a designated project, while requiring broad public, Indigenous consultation and engagement with jurisdictions risks adding significant time and cost to the process. The CBA Sections look forward to addressing the issue of appropriately

⁷ Act, section 47(3).

⁸ Act, section 48.

⁹ Act, section 51(3).

balancing flexibility and timeliness – while ensuring an adequate public and Indigenous participation process – in consultations on the development of regulations supporting the Act.

V. FEDERAL JURISDICTION

Federal impact assessment must respect Canada’s Constitution, under which the federal government does not have exclusive jurisdiction over the environment. In our view, this means that federal impact assessment must be linked to federal constitutional powers.

The federal environmental assessment regimes prior to the CEEA 2012 used a *trigger* approach, which required a federal ground of jurisdiction to trigger the federal environmental assessment process (e.g., federal proponent, federal land, federal funding or federal permit). From a practical perspective, this generally meant that most private projects on private or provincial Crown lands would not be subject to the federal environmental assessment regime unless they required a federal permit. As a result, from 1973 to 2012, the projects that were assessed were generally those that fell squarely under federal jurisdiction.

CEEA 2012 replaced the *trigger* approach with a *project list* approach.¹⁰ CEEA 2012 created a screening process to allow the Agency to identify whether the designated project would involve any federal decision-making, though the terms of CEEA 2012 could permit an environmental assessment of a “designated project” even if no federal regulatory decision-making is engaged.¹¹ The Act proposes to continue to use the *project list* approach.¹²

The CBA Sections support the Act’s use of a *project list* approach, as it gives greater certainty on when the new impact assessment process would apply. The CBA Sections also recommended in the public consultations that it would be useful for all stakeholders to have additional guidance on the types of projects to which the Act would apply so non-listed projects could be added on a case-by-case basis and listed projects could be screened out, as appropriate. As a result, we support the proposal to establish clear criteria and a transparent process to periodically

¹⁰ CEEA 2012’s current project list is based on the “comprehensive study list” under the *Canadian Environmental Assessment Act (1992) (CEEA 1992)*. CEEA 1992 applied only to projects on the comprehensive study list if the project required a federal decision (e.g., a federal permit). However, under CEEA 2012, a designated project is directly subject to that Act (but limited to a narrower definition of environmental effects such as fish, fish habitat, aquatic endangered species, migratory birds, federal lands and certain effects on Indigenous peoples that result from a change to the environment).

¹¹ “Designated project” is defined in CEEA 2012 to mean one or more physical activities that: (a) are carried out in Canada or on federal lands; (b) are designated by regulation (i.e., the “project list”) or ministerial order; and (c) are linked to the same federal authority as specified in those regulations or that order. Under the Act, paragraph (c) has been deleted from the definition of designated project.

¹² Act, section 7 (which is similar to section 5(1) of CEEA 2012).

review and update the Act's project list to ensure that projects with clear links to matters of federal interest are appropriately assessed.

That said, given Canada's complex constitutional framework, there is not surprisingly a wide range of views in the CBA Sections on the proper role of federal impact assessment in Canada. In any event, we believe that the Act must be clear on when federal impact assessment will be required, and look forward to participating in the consultations on the creation of the project list. We expect that Indigenous peoples will also have adequate time and resources to comment on a proposed project list to the extent that the list will affect how development is exercised on land and resources over which they claim or exercise Aboriginal rights. As a result, the criteria-based approach to revising the project list is an important exercise to ensure that any designated projects are reasonably linked to matters of federal interest. This is particularly important given that the Act's *project list* approach does not necessarily engage a federal decision or other federal action.

Similarly, a second key change under CEAA 2012 was a list of environmental effects to be taken into account in relation to a federal assessment of a designated project.¹³ In general, we agree that the environmental effects in subsection 5(1)(a) and (b) (e.g., fish/fish habitat, aquatic species at risk, migratory birds) are in the legislative authority of Parliament. Under the Act, subsections 7(1)(a)(i) to (iii) and (b) prescribe the same list of environmental effects, which we agree have a clear link to matters of federal interest.

When a designated project is not federal in nature, we suggest that Parliament confirm the constitutional basis for including all of the effects listed in subsections 7(1)(c) and (d) with respect to Indigenous peoples (e.g., local air emissions, forests, terrestrial species at risk), as there is a possible argument that this regulation is overly broad (in that it is not necessarily linked to a federal power and would unreasonably impact provincial and territorial powers over resource development). Again, because the Act's *project list* approach does not necessarily engage a federal decision, it is important to ensure that the Act's proposed environmental effects on Indigenous peoples are in fact federal in nature (presumably under the federal constitutional power over "Indians, and Lands reserved for the Indians").

¹³ CEAA 2012, section 5.

VI. SHIFT FROM SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS TO PUBLIC INTEREST

One substantial change the Act makes to the regulatory assessment of major projects is the test (applied by the Governor in Council or Minister) to decide which designated projects may proceed.

A key purpose of the Act is an expanded and comprehensive impact assessment for designated projects. This is a significant shift from environmental assessment to impact assessment. The new focus is more inclusive of health, social, economic, gender-based and long-term impacts on Indigenous peoples. The driving principles emphasized in the Act are sustainability and precaution. Sustainability is defined in the Act as the ability to protect the environment, contribute to the social and economic wellbeing of the people of Canada and preserve their health in a manner that benefits present and future generations.¹⁴ The CBA Sections generally agree with these principles.

However, the expanded nature of the assessment of designated projects also necessitates an expansion of decision-making considerations. The Act significantly departs from section 52 of CEAA 2012 which broke the decision-making process into two steps with specific considerations: (i) whether the project was likely to cause significant adverse environmental effects and, if so, (ii) whether the likely adverse environmental effects were justified in the circumstances.

The Act introduces a much broader *public interest* test. The Minister or the Governor in Council, after considering the impact assessment report of a designated project, must determine if the adverse effects within federal jurisdiction and the adverse direct or incidental effects are in the public interest, in light of the factors in section 63. While the CEAA 2012 focused on the acceptability of the *project*, the Act focuses on the acceptability of the *adverse effects*.

Some CBA Section members have expressed concern that this requires disproving the negative – a tougher test to meet – and does not allow the Minister or Governor in Council to consider both positive and negative effects of a project, as intended by the Act.

Further, the Act defines *effects* as changes to the environment or to health, social or economic conditions and the consequences of these changes, and *direct or incidental effects* as effects directly linked or necessarily incidental to a federal authority's exercise of a power or

¹⁴ Act, section 2.

performance of a duty or function or provision of financial assistance that would permit carrying out, in whole or in part, a physical activity or designated project. These definitions, unlike in the CEAA 2012, lack specificity and focus. They are broad and have the potential to recognize any possible concern that could be raised about a designated project.

The public interest factors in section 63 to guide the decision on acceptability of the all-inclusive effects (direct and incidental) are:

- the extent to which the designated project contributes to sustainability;
- the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
- the implementation of the mitigation measures that the Minister or the Governor in Council considers appropriate;
- the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on Section 35 rights; and
- 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.

While we agree that these are important factors to be considered, their contextual application appears elusive at this stage. There are no thresholds to guide the application of the *extent* in these factors, nor is there any objective guideline to assist in measuring and weighing each factor in the public interest determination. Application of these factors appears to be subjective and at the Minister's or the Governor in Council's discretion. The result will likely be uncertainty and inconsistency in the resulting decisions.

VII. INDIGENOUS PEOPLES AND IMPACT ASSESSMENT

A. Impact Assessment and Crown-Indigenous Consultation and Accommodation

The Act makes explicit what the federal Crown has already been doing under current legislation: using environmental assessment as a point-of-contact for consultation and accommodation with affected Indigenous peoples. To this end, subsection 22(1)(c) makes impact on any Indigenous group and any possible adverse impact on Section 35 rights among the mandatory factors to be considered in an assessment. It seems highly inappropriate, however, to allow that impact to be scoped out of an assessment, as subsection 22(2)

empowers the Agency or the Minister to do without specifying conditions when this could occur (i.e. alternate consultation process).

The relationship between the duty to consult and accommodate and federal impact assessment has not been clarified by the Act and, in fact, the process appears largely the same as before.

Section 7(1) of the Act, for instance, does not list adverse impact on Section 35 rights among the prohibited impacts the Act is designed to assess. Instead, the same language of impact on “current use of lands and resources for traditional purposes” remains, which captures only partially the type of potential impact that triggers the duty to consult and accommodate. This ensures that, although impact assessment can consider certain Section 35 impacts, it remains an inadequate vehicle for full consultation and accommodation.

Furthermore, as long as the final decision on impact acceptability lies with the Minister or Governor in Council, the duty to consult and accommodate cannot be completely fulfilled by impact assessment. Consultation will necessarily be required after impact assessment and before the final Crown decision is made. Like the current status, the Act is silent on how this is to be accomplished.

To the extent that the Act fails to require the Crown to put forward to Indigenous groups potentially affected by a designated project a consultation plan indicating where the assessment process fits into the consultation process, it falls short of its goal of coordinating the consultation and assessment processes and insuring that the duty to consult is fulfilled. The Act should require the Crown to propose a consultation plan as part of the planning phase. In addition, potentially affected Indigenous groups should be given the opportunity to give input on the proposed consultation plan during this phase. The Act should also require the Crown to update the consultation plan, as necessary, throughout the impact assessment process.

RECOMMENDATION

10. The CBA Sections recommend that the impact assessment process include a consultation plan which indicates, among other things, where the assessment process fits into the process to fulfill the federal Crown’s duty to consult and accommodate.

B. Consultation on Designation of a Project

Section 9(2) of the Act introduces an important factor into the obligatory considerations of the Minister when deciding whether to designate a physical activity not otherwise subject to impact assessment: any adverse impact the physical activity may have on Section 35 rights. Presumably, the Minister will make that consideration by consulting with potentially affected Indigenous peoples. That decision clearly triggers a duty to consult. However, the Act is not explicit on how consultation occurs in this instance, particularly if the request for designation does not come from the affected Indigenous community.

C. Funding

Of further concern is funding to allow meaningful consultation at all stages of the assessment process, including the early stage and, to the extent it applies, under section 21. The Act does not require the Agency to ensure an Indigenous group has funding to participate in the assessment process, including at the preliminary stages where the Agency must decide whether an assessment will take place. While the Agency is obligated to offer to consult with affected Indigenous groups under section 12 in the pre-assessment phase, it is not obligated or authorized to fund an Indigenous group to allow its participation in the consultation.

Section 75 requires the Agency to establish a participant funding program to allow *public participation* in the preliminary (as well as later) stages of the assessment process. The need for capacity funding even before an assessment process is contemplated or triggered is absent in the Act. For example, Indigenous peoples require resources to collect data on historic and current use, occupation and areas of environmental vulnerability and cumulative impact prior to project-specific assessment. This data collection can allow project-specific issues on planning and assessment to be determined more easily. As a commitment to use impact assessment to facilitate federal consultation and accommodation of Section 35 rights, section 75 requires clearer language on funding for Indigenous groups.

RECOMMENDATION

11. The CBA Sections recommend adding to section 75:

“Such a funding program will make special measures to facilitate the meaningful participation of Indigenous groups as contemplated by the present Act, including but not limited to participation in any consultation process offered by the Agency or review panel.”

D. UNDRIP Principles and Decision Making

With respect to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the CBA Sections supported an approach to free, prior and informed consent as an objective for good faith consultation processes in the nature of “negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures.” While the federal government has stated that the Act is intended to set out early and inclusive engagement and participation at every stage, with the aim of securing consent through processes based on recognition of Section 35 rights, no reference to UNDRIP or that aim is found in the Act.

RECOMMENDATION

- 12. The CBA Sections recommend that UNDRIP, or the federal government’s aim of early and inclusive engagement and participation at every stage, should be referenced as an objective of the consultation process under the Act.**

E. Indigenous Laws

The Act fails to advocate for respect of Indigenous laws. The regulatory process must respect Indigenous peoples’ participation based on their own laws, practices and governance systems. The Act makes no mention of Indigenous laws.

RECOMMENDATION

- 13. The CBA Sections agree with the Expert Panel that “recognition of and support for Indigenous laws and inherent jurisdiction should be built into impact assessment governance processes.”**

F. Planning Phase

Under section 16 of the Act, the Agency has the discretion to decide if an impact assessment is required. Prior to making the decision, the Agency must conduct a planning phase. This phase reviews the proponent’s project to identify potential adverse effects to areas under federal legislative protection (such as environment, fish, and waterways), to public interest, and to the rights and interests of other jurisdictions and Indigenous peoples.

While the Act recognizes that it cannot derogate from the “rights of Indigenous peoples of Canada” and places the duty on the Agency to “offer to consult” with Indigenous groups, it is

the Minister who decides whether the project proceeds by considering “any adverse effects” on the rights of Indigenous peoples. However, it is unclear how impacts to Indigenous rights will be considered or weighted by the Minister. For example, if the Agency identifies at the planning phase that the proposed project will cause adverse effects to the rights of Indigenous peoples that cannot be mitigated, will the Minister stop the assessment at the planning stage and commence a separate consultation process to consider alternatives?

The Agency can identify adverse effects, but it cannot reference any degree of significance. Therefore, the Agency cannot make recommendations to the Minister on issues or concerns about unacceptable effects that could lead to a decision that a proposed project should not proceed. This exclusion is potentially troubling because the Agency benefits directly from the planning process and is closest to the breadth and scope of the information and perspectives from participants including Indigenous peoples and the general public. The Agency would be best informed and well positioned to appreciate the nature, extent and severity of the effects. Without the benefit of the Agency’s perspective or recommendation on unacceptable effects, the Minister’s discretion to reject a project would be vulnerable and prone to challenges.

RECOMMENDATION

14. The CBA Sections recommend that during the planning phase, the Agency be required to share analysis of potentially unacceptable effects and commence consultations with Indigenous peoples.

G. Assessment Phase

An offer to consult with affected Indigenous groups is explicitly required in the planning phase by section 12. The offer to consult must also be extended to “jurisdictions” as defined in the Act. Jurisdictions include certain Indigenous governing bodies, and we view the recognition of Indigenous jurisdictions as a positive development. However, during the impact assessment itself, section 21 seems to limit consultation to “jurisdictions”. There is no requirement to offer to consult with affected Indigenous groups, as in section 12. Section 12 correctly contemplates Indigenous groups that are not “jurisdictions” who may be affected by a project, and to whom a duty to consult is owed by the Crown. This adds uncertainty and confusion on the role of the Agency or Review Panel when consulting during the assessment phase.

Overall there is little guidance in the Act on consultation and the assessment process. Those who believe that the Act sets out a process for consultation and accommodation in the context

of impact assessments will be mistaken. We also suggest that the Act falls short of its goal to clarify the duty to consult and accommodate in the assessment process.

RECOMMENDATIONS:

15. The CBA Sections recommend that the Act expressly require the Agency or Review Panel to offer to consult with affected Indigenous groups as well as “jurisdictions” in the planning phase.

16. The CBA Sections recommend that the Act clearly state (perhaps in section 3) that it is not intended to diminish, define or codify the Crown’s duty to consult and accommodate.

17. The CBA Sections recommend that the Act explicitly state that where any part of the assessment process is intended to form part of a Crown consultation with Indigenous groups, the Agency has a duty to advise the Indigenous groups at the outset.

H. Indigenous Traditional Knowledge

While CEAA 2012 outlined that consideration of Indigenous traditional knowledge (ITK) was optional and gave some protections, the Act enhances ITK’s role in the federal impact assessment process. The CBA Sections have advocated for inclusion of ITK as an obligatory factor to be considered in impact assessments and the environmental effects assessments (ss. 22(1)(g) and 84(b)).

We suggest, however, removing ITK from the list of factors that can be scoped out of an assessment by the Agency or the Minister under subsection 22(2). A commitment to ITK in the federal assessment process should put it at least on an equal footing with “community knowledge,” which cannot be scoped out of the assessment process. This change would further serve the purpose of subsection 6(1)(j) that seeks to ensure inclusion of scientific, ITK and community knowledge in impact assessments.

We also propose a minor amendment to subsection 6(1)(j) which refers to taking scientific and traditional knowledge into account. Instead of “takes into account” we suggest that impact assessments should be “based on” scientific knowledge and ITK.

We caution against the use of “integrating” scientific information and traditional knowledge, as used in the preamble of the Act. Equal weight should be given to both knowledge systems.

Given the historical and current asymmetrical power relationships in impact assessments between Western and Indigenous knowledge systems, “integrating” could be problematic if it results in scientific knowledge taking precedence over ITK in cases of conflict. We suggest “considering on an equal footing” instead of “integrating.”

We support including confidentiality provisions to protect ITK from public disclosure when shared with an assessment body in the impact assessment process (section 119). The exceptions to non-disclosure in subsection 119(2) refer loosely to disclosure “for the purposes of procedural fairness and natural justice or for use in legal proceedings.” It is unclear, however, if this means disclosure to the project proponent or to all parties participating in the process. It should be limited to the project proponent, as disclosure to all participants could potentially render meaningless the confidentiality provision.

We also recommend that any conditions imposed on disclosure under subsection 119(3) be subject to input from the Indigenous community sharing its traditional knowledge with the assessment body. Notice of potential disclosure – conditional or otherwise – should also be given to the Indigenous community, so the community can choose to withdraw its ITK evidence if it is dissatisfied with the terms of disclosure.

RECOMMENDATIONS

18. The CBA Sections recommend that ITK be removed from the list of factors that can be scoped out of assessment under subsection 22(2)

19. The CBA Sections recommend that subsection 6(1)(j) be amended so that impact assessment does not “take into account” ITK and scientific knowledge, but rather is “based on” these knowledge systems.

20. The CBA Sections recommend that the exception to non-disclosure of ITK in subsection 119(2) be limited to the proponent rather than all assessment participants and any conditions proposed pursuant to subsection 119(3) be subject to input from the Indigenous knowledge-holding community who can withdraw their ITK evidence if dissatisfied with the terms of disclosure.

I. Indigenous jurisdiction for impact assessment

We see good potential for building the capacity for Indigenous governing bodies to undertake joint impact assessments in the definition of “jurisdiction” in section 2 of the Act. In addition to

the recognition of environmental assessment bodies created pursuant to modern treaties and self-government agreements – which already exists under CEAA 2012 – paragraph (g) of the definition of *jurisdiction* refers to the Minister’s power, pursuant to regulation, to enter into agreements with other Indigenous governing bodies to recognize their authority to perform duties or functions related to impact assessment over a given territory (s. 114(1)(e)). A similar provision is in subsection 77(1) of the new *Canadian Energy Regulator Act*.

We look forward to monitoring the development of regulations on the recognition of Indigenous impact assessment jurisdiction, which would necessarily require provisions for capacity and operational funding for the Indigenous jurisdiction. We expect that the application of those regulations would give Indigenous communities greater control over the assessment of impacts of development in their respective territories, a principle in line with articles 18, 20 and 26 of the UNDRIP.

A similar power to enter into arrangements with Indigenous governing bodies does not yet appear to be granted to the Canadian Nuclear Safety Commission, though we recommend that power be granted. UNDRIP mandates States to take “effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent” (article 29(2)). This favours the enhanced participation of Indigenous peoples in the assessment of storage and disposal projects in relation to nuclear control and safety.

RECOMMENDATION

21. The CBA Sections recommend that that the Minister responsible for the *Canadian Nuclear Safety Act* be empowered to adopt regulations (similar to the Minister responsible for the *Canadian Energy Regulator Act*) to enter into agreements with Indigenous governing bodies for purposes of the *Canadian Nuclear Safety Act* and to authorize any Indigenous governing body with whom an arrangement is entered into to exercise the powers or perform the duties and functions under the Act that are specified in the arrangement.

VIII. CONCLUSION

The CBA Sections appreciate the opportunity to recommend ways to strengthen and improve Bill C-69 and the proposed *Impact Assessment Act*. We trust that our comments will assist the federal government and we would be pleased to discuss them in more detail.

IX. SUMMARY OF RECOMMENDATIONS

The CBA Sections recommend that:

- 1. consideration be given to whether additional guidance and clarity, including a list of specific factors to be considered (both adverse and positive), can be provided to the Agency and the Minister under sections 16 and 17, when determining if a designated project should not be subject to an impact assessment.**
- 2. the concept of BATEA and the existing wording on mitigation measures and alternative means of carrying out a project remain.**
- 3. the factor on the extent to which the effects of the designated project hinder or contribute to Canada's ability to meet its environmental obligations and climate change commitments be clarified. The role of provincial and territorial regulatory requirements and the Pan-Canadian Framework must be addressed. Further, the extent to which upstream and downstream greenhouse gas emissions ought to be considered during an assessment of a designated project, including with respect to oil and gas pipeline projects, must also be addressed.**
- 4. guidance and direction be added to subsection 22(2) to ensure the scoping of factors follows a defensible and predictable process.**
- 5. the relationship between the factors in sections 22 and 63 be clarified to indicate what role, if any, the remaining factors in section 22 (not otherwise referenced in section 63), will have in a public interest determination.**
- 6. constraints be placed on the ability of the Minister or Governor in Council to include additional conditions not otherwise addressed in an impact assessment or, if addressed, not recommended by the Agency or Minister, with the exception of a condition required to fulfill the Crown's duty to**

- consult with Indigenous peoples, under section 35 of the *Constitution Act, 1982*;**
- 7. Canada consider how to best facilitate the development of RCEAs in areas that do not currently have them, in support of decision making under section 63, and that this issue be addressed in the Act or in supporting regulations.**
 - 8. a requirement that Agency members represent a majority of a Review Panel also comprised of members from specialized regulators be added to the Act.**
 - 9. reviews and assessments by federal authorities under other Acts be carried out concurrently, at the request of the proponent, with impact assessments under the Act. For example, a Review Panel's mandate under the Act could be expanded to include, at the request of a proponent, the Canadian Energy Regulator's mandate to decide tolling and tariff matters under Part 4 of the Canadian Energy Regulator Act.**
 - 10. that the impact assessment process include a consultation plan which indicates, among other things, where the assessment process fits into the process to fulfill the duties of the federal Crown to consult and accommodate.**
 - 11. the following paragraph be added to section 75:**

“Such a funding program will make special measures to facilitate the meaningful participation of Indigenous groups as contemplated by the present Act, including but not limited to participation in any consultation process offered by the Agency or review panel.”
 - 12. UNDRIP or the federal government's aim of early and inclusive engagement and participation at every stage should be referenced as an objective of the federal consultation process under the Act.**
 - 13. recognition of and support for Indigenous laws and inherent jurisdiction should be built into impact assessment governance processes.**

- 14. during the planning phase, the Agency be required to share analysis of potentially unacceptable effects and commence consultations with Indigenous peoples.**
- 15. the Act expressly require the Agency or Review Panel to offer to consult with affected Indigenous groups as well as “jurisdictions” in the planning phase.**
- 16. the Act clearly state (perhaps in section 3) that it is not intended to diminish, define or codify the Crown’s duty to consult and accommodate.**
- 17. the Act explicitly state that where any part of the assessment process is intended to form part of a Crown consultation with Indigenous groups, the Agency has a duty to advise the Indigenous groups at the outset.**
- 18. ITK be removed from the list of factors that can be scoped out under subsection 22(2)**
- 19. subsection 6(1)(j) be changed so that impact assessment does not “take into account” ITK and scientific knowledge, but rather is “based on” these knowledge systems;**
- 20. the exception to non-disclosure of ITK in subsection 119(2) be limited to the proponent rather than all assessment participants and any conditions proposed pursuant to subsection 119(3) be subject to input from the Indigenous knowledge-holding community who can withdraw their ITK evidence if dissatisfied with the final terms of disclosure.**
- 21. that the Minister responsible for the *Canadian Nuclear Safety Act* be empowered to adopt regulations (similar to the Minister responsible for the *Canadian Energy Regulator Act*) to enter into agreements with Indigenous governing bodies for purposes of the *Canadian Nuclear Safety Act* and to authorize any Indigenous governing body with whom an arrangement is entered into to exercise the powers or perform the duties and functions under the Act that are specified in the arrangement.**