THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Environmental Assessment Process Review

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

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I. INTRODUCTION

The Environment, Energy and Resources Law Section and Aboriginal Law Section of the Canadian Bar Association (CBA Sections) appreciate the opportunity to address the Expert Panel on ways to strengthen and improve the federal environmental assessment (EA) process.

The CBA is a national association representing approximately 36,000 jurists across Canada, including lawyers, notaries, law teachers and students, and its primary objectives include improvements in the law and the administration of justice. 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 Aboriginal peoples, Aboriginal and treaty rights, land claims, constitutional reform, administration of justice and traditional Aboriginal law.

The CBA Sections agree that the goal is to develop an EA process that incorporates scientific evidence, protects the environment, respects the rights of Indigenous peoples and supports socio-economic growth. As a general comment, we emphasize the importance of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), as well as sufficient funding and resources in meeting this goal. We will also comment on specific issues, including the purpose and role of the federal EA process, the scope of the process, regional studies and strategic EA, public participation and the role of Indigenous communities.

II. PURPOSES AND ROLE OF FEDERAL ENVIRONMENTAL ASSESSMENT

The CBA Sections believe that, except as described below, the purposes in section 4 of CEAA 2012 are appropriate. The challenge is actually achieving them in the context of project-by-project assessments and regional environmental assessments.

In addition, several purposes need to be strengthened or amended as follows:

- Section 4(1)(d) – The purpose of an EA Act must do more than "*promote communication and cooperation with aboriginal peoples with respect to environmental assessments*". As we discuss below, the mandate and

purpose of CEAA 2012 would be improved by explicitly recognizing the requirements of section 35 of the *Constitution Act, 1982*, and the process of fair dealing and reconciliation between Aboriginal Peoples and the Crown.

- Section 4(1)(h) – In the context of decision making, the government should explain the actions taken to promote sustainable development "*to achieve or maintain a healthy environment and a healthy economy*".
- Section 4(1)(i) – Simply encouraging the study of cumulative effects has not worked. To have sound science and fact-based assessments of environmental effects well-funded, long term regional baseline studies must underpin them. In addition, the legislation should give interested parties and Indigenous peoples (whose rights or title are potentially affected by a proposed project) the right to ask the Minster to order a regional study assessing cumulative effects. Further, the Minister would have to respond to the request with written reasons within a statutorily set time (e.g., 60 days).

The CBA Sections concur that federal EAs under CEAA 2012 should be required for all projects with the potential for significant effects in an area of federal jurisdiction. The current "project list" approach, opposed to the former "trigger" approach, gives useful certainty for all parties on the applicability and scope of the CEAA 2012. In addition, the Canadian Environmental Assessment Agency's (CEA Agency) ability to screen projects out of CEAA 2012 or the Minister's power to require an EA for non-listed projects are sufficient to ensure that all relevant projects are captured. It would be useful for all parties to have additional guidance from the government or CEA Agency on the types of projects to which CEAA 2012 is intended to apply to so that non-listed projects can be added on a case-by-case basis and listed projects can be screened out, as appropriate.

Current EA applications and processes can be very detailed and expensive. To reduce or limit the level of detail, it is important for an EA to first identify and address significant adverse effects that could be "show stoppers" due to a lack of mitigation measures, the unique aspects of a project, or impacts on Indigenous peoples [1]. In other words, it would be more efficient for all parties if the CEA Agency first considered whether the project should proceed (with the level of information submitted at this stage limited to what is needed for that preliminary determination), and then required more detailed information at a later stage of the permitting process to determine further design and mitigation requirements. In some instances with potential adverse effects on Indigenous peoples and their communities, greater details may be

[1] Use of the term "Indigenous people" in this submission refers to the Aboriginal peoples of Canada as defined in section 35(1) of the *Constitution Act, 1982*, including Inuit, Métis and First Nations peoples.

required up front. Subsequent permitting processes (similar to detailed route hearings at the NEB or permits on species at risk) should focus on how the project should proceed, not whether it should proceed. Regulators at this stage should not have the ability to directly or indirectly prohibit the project from proceeding.

Finally, to achieve the purposes of CEAA 2012, it is important to have an open and transparent monitoring and follow-up process for approved projects. One option to manage this issue and reestablish public trust in the EA process would be to require the relevant regulator to report online on the proponent's compliance with conditions post-approval, to be publicly accessible.

III. SCOPE OF FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS

Given that the provinces and territories also have EA regimes, the CBA Sections considered whether the current scope of federal project EAs is appropriate, and whether the substitution and equivalency provisions of CEAA 2012 are effective in reducing duplication.

A. Is the current scope of federal project EA appropriate?

The purpose of CEAA 2012 is to protect and preserve the components of the environment in the legislative authority of Parliament from significant adverse environmental effects caused by a designated project. EAs are conducted on listed or designated projects to evaluate significant adverse environmental effects likely to result from projects in federal jurisdiction as set out in CEAA 2012.

The Expert Panel notes that the core considerations for all federal project EAs are the effects of a project on fish, migratory birds, impacts of a transboundary nature, and impacts on Indigenous peoples resulting from a change in the environment. Additional factors, such as cumulative effects likely to result from the project in combination with other projects, effects of accidents and malfunctions, mitigation measures, and comments from the public must also be considered.

While the current CEAA 2012, including section 5 (environmental effects) and section 19 (factors to be considered) are reasonable and serve to limit the application of federal assessments, the CBA Sections believe that the scope of federal EAs needs to be clarified and expanded. Federal EAs should focus on projects with the potential for significant adverse effects in areas of federal jurisdiction to ensure that they are in the public interest, and should

take not only biophysical or environmental factors into account, but also economic, social, cultural, and health related factors.

B. Are equivalency and substitution provisions of CEAA 2012 effective?

Repetitive EAs for the same activity in the same regional environmental setting are inefficient, and the CBA Sections generally agree that projects should be subject to only one EA. To this end, greater coordination is required – both within the federal government and between federal, provincial and territorial governments – to better manage and avoid duplication of EA processes.

According to the 2014 Report of the Commissioner of the Environment and Sustainable Development, the CEA Agency has not yet developed practices or identified conditions that would qualify another jurisdiction's process as equivalent to the CEAA 2012. We understand that the CEA Agency may be of the view that it wants to gain experience with substitution arrangements before considering requests for equivalency. The CBA Sections recommend that parameters for qualifying conditions for equivalency should be identified.

The CBA Sections also believe that the current approach to substitution under CEAA 2012 is unclear. The federal government should develop guidelines setting out key elements leading to substitution agreements, which must include the views of Indigenous peoples on the proposed substitution and whether equivalent measures to ensure participation of Indigenous peoples exist in the provincial or territorial context. Further, decisions on substitution and equivalency should be made as early as possible to direct those involved in the EA process.

Where a project triggers federal involvement and there is also a provincial regulatory review process for that proposal, we recommend that the provincial process be substituted for the federal process. Clearly, an exception to this is in circumstances where the provincial process is not designed to address federal interests, such as a project with transboundary effects, a project of national interest, or where the provincial process does not meet the same standard for Indigenous participation as the federal process. In those cases, the federal government should jointly review the proposal with the province through a joint review panel.

IV. REGIONAL STUDIES AND STRATEGIC EA

The Expert Panel has asked under what circumstances EAs should be undertaken at the regional, strategic or project-level.

Regional studies and strategic EAs (Regional Studies) have always been authorized by the legislation, yet are rarely undertaken. There are, however, increasing calls for their use. For example, the Joint Review Panel Report on the Jackpine Mine Expansion Project noted:

> The Panel recognizes that numerous issues and challenges are related to the regional environmental effects of oil sands development. It is clear that critical issues about oil sands development are increasingly not project specific, and successful management of these issues is often not the sole responsibility of an applicant or proponent. As has been the case with other recent decisions on mineable oil sands development, many of the concerns and issues related to this proposal have to do with the pace of development of the mineable oil sands and the capacity of the regional environment to absorb these developments without creating effects that result in further development not being in the public interest. The Panel believes that a more integrated and comprehensive approach is required to adequately address cumulative effects of mineable oil sands development.[2]

The Expert Panel should consider how to strengthen this tool and increase or mandate its use, where appropriate.

Regional Studies in areas where development is occurring or anticipated are an important tool to address regional impacts and cumulative environmental change, including climate change. Regional Studies are more aligned with land and resource use planning models, and would clearly allow decision-makers and others to consider regional implications of a proposed project and to take a longer-term planning approach to cumulative impacts in the region.

The CBA Sections recommend that the Expert Panel develop a list of legislative triggers that require a Regional Study. Some suggested triggers include:

- the proposed project in a region or ecosystem that has a unique value (i.e., endangered species habitat);
- the region or ecosystem has already been subject to heavy development, or significant development is anticipated;
- cumulative effects expected and are of particular concern;

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[2] See Jackpine Mine Expansion Project Joint Review Panel Report, July 9, 2013, para 32. Accessed online Nov 29, 2016 at http://www.ceaa.gc.ca/050/documents/p59540/90875E.pdf

- the proposed project will likely have cross-boundary impacts, including climate change impacts beyond a certain threshold.

Where possible, these studies should be conducted in advance of project-specific EA applications. However, CEAA 2012 should be clear that the status of a Regional Study cannot be used to justify delaying, deferring, suspending or denying individual project applications.

In addition, CEAA 2012 should give interested parties and Indigenous peoples whose rights or title are potentially affected by a proposed project the ability to ask the Minster to order a Regional Study – along with a requirement for the Minister to respond to the request with written reasons in a set time (e.g., 60 days).

A proposed policy or legislative change with potential regional environmental impacts can trigger the duty to consult with affected Indigenous peoples.[3] Accordingly, both the decision on whether to conduct and conducting a Regional Study may require consultation, even if the study occurs in advance of an EA on a specific project. How consultation will occur in these contexts should be made clear at the outset. This approach is reinforced by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which recognizes the right of Indigenous peoples "*to determine and develop priorities and strategies for the development or use of their lands or territories and other resources*."[4]

Subsequent individual projects should be required to fit within a regional plan that has been developed for, or is the outcome of, a Regional Study. New projects must be required to justify any amendments to that plan. For each EA in that region, consideration also should be given to whether the regional plan needs updating with new information.

Monitoring plans must be developed to track projects' effects and whether the findings of a Regional Study need to be amended. Again, the Joint Review Panel Report for the Jackpine Mine Expansion found:

> The Panel believes that regional strategic monitoring plans are required for the oil sands region. The monitoring plans are required to assess observed levels of compounds against thresholds established in management frameworks. The Panel notes that Alberta and Canada have established the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring to provide a monitoring program for

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3 See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, para. 76 and *Mikisew Cree Nation v. Canada (Minister of Heritage)*, [2005] 3 SCR 388, para. 67 for the importance of the duty to consult at the strategic planning stage of government action.

4 UNDRIP, article 32(1).

> the oil sands to ensure environmentally responsible development of the oil sands resource. The Panel notes that funding has not yet been finalized for this plan. The Panel strongly urges that this be provided as soon as possible so that this plan can be implemented in a timely manner.
>
> This plan's monitoring data will provide information on air and water quality, aquatic ecosystem health, wildlife toxicology, and much more. Interested parties raised concerns regarding the above issues during the review process. The Panel recognizes the commitment from Alberta and Canada to implement this plan and provide for a transparent process. The Panel encourages governments to work with all stakeholders and Aboriginal groups to ensure this plan is effective. The Panel believes that information obtained during the monitoring must be made available to the general public in an understandable fashion.[5]

Given the planning importance of Regional Studies, the Expert Panel should also consider how Regional Studies should be funded, and who should be responsible for conducting them. In our view, it is unfair and potentially counterproductive for the first project proponent in a region to bear the full burden of conducting a comprehensive Regional Study. Government funding will be necessary to ensure a robust Regional Study and the participation of Indigenous peoples in particular. It may be possible to create a mechanism where the government can recover some of its expenditures from future proponents in the same region.

As for who should conduct Regional Studies, the goal should be to ensure an independent, well qualified and diverse panel or authority that has the public trust and confidence. In regions where Indigenous peoples live, the panels should have Indigenous representatives. If an independent body with this responsibility is established, and also tasked with responsibility to identify areas that should be the subject of Regional Studies, it should have diverse, qualified and experienced representation. It should also be sufficiently funded to ensure that science-based studies, as well as Indigenous studies, can be conducted well in advance of a proponent seeking approval for a particular project in the area.

V. PUBLIC PARTICIPATION

As suggested by the Expert Panel, public participation is a key part of an effective, credible and robust EA process. Our comments on public participation focus on three critical aspects – the importance of a tailored approach, who may participate in the EA process, and adequate funding.

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5 See Jackpine Mine Expansion Project Joint Review Panel Report *Ibid*, para 1838 & 1839.

A. A tailored approach

The CBA Sections believe that the current opportunities for public participation in federal EA processes are generally inadequate, and are failing the public, proponents and decision makers. Many members of the public are intimidated by the hearing process, and may not always be suited for the types of information that members of the public want to convey (i.e., information about local matters, local use or values). This information would be better obtained through facilitators with expertise in getting to the core of a public participant's view and summarizing their findings to assist other EA participants – including proponents and decision makers – to understand the local circumstances and values that may be affected (positively or negatively) by the project.

B. Who may participate

Our view is that the "interested party" test (as applied by the Review Panel in the New Prosperity EA) is appropriate for determining who may participate in an EA process, subject to the following two modifications:

1. If a member of the public can convey information about local matters, local use or values, that person should participate in the public participation process.
2. If a person can provide relevant expertise or information that will be provided by other persons as part of a hearing (as opposed to the mechanism tailored for public participation), that person should be required to participate as an "interested party". This is to make the process efficient, ensure that the resources are being used to assess the key parts of issues, and that decisions are timely.

C. Adequate funding

Adequate funding of interested parties, including Indigenous groups, is a key precondition for robust EAs that result in decisions "based on science, facts and evidence, and serve the public's interest." Without sufficient funding, interested parties cannot effectively and meaningfully participate in an EA. Given the importance of this funding, the EA substitution process (i.e., substitution of a provincial or territorial EA process for a federal EA process or vice versa) must not result in diminishing or inadequate funding for interested parties.[6]

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6 For example, subsection 58(2) of the CEAA says that funding is not required where the Minister has authorized substitution and yet equivalent funding is not explicitly a condition for substitution under subsection 34(1).

Each of these three aspects of public participation is critical to an effective, credible and robust EA process. The described tailored approach would encourage public involvement, while providing a clear, meaningful product for proponents (to refine their projects) and to decision-makers (to understand the scope and intensity of local circumstances and values). The EA "hearing aspect" must allow for effective participation by interested parties without creating an overly encumbered hearing process that is rendered ineffective by its slow process. This means streamlining the number of parties and appropriately funding them.

VI. ROLE OF INDIGENOUS COMMUNITIES

A. Meaningful consultation and participation in EA

In discussing the relationship between EA and the Crown's duty to consult and accommodate Indigenous people, it is helpful to return to first principles. The Crown's duty to consult and accommodate arises when the Crown contemplates action (including at a legislative or policy level[7]) that could have a potential impact on a claimed or established Aboriginal or treaty right, including Aboriginal title.[8] Although the Crown can delegate certain aspects of the duty to consult to a non-Crown entity, the delegation must be explicit, and the final duty remains with the Crown.[9] The level of consultation and accommodation falls along a spectrum that depends on the level of potential impact and the strength of the affected right.[10]

Although participation by Indigenous peoples in the federal EA process can contribute to the fulfillment of the duty to consult, it cannot replace Crown consultation with Indigenous peoples. A federal authority (be it CEA Agency, NEB or CNSC) charged with conducting EAs is not the proper entity to replace the Crown in fulfilling its duty to consult because it is not empowered to make the final decision on a project or to implement the types of accommodation that might be necessary for Indigenous peoples to minimize the impact of a project on their rights. However, a federal authority may be charged with certain "procedural aspects" of consultation.

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7 See *Mikisew Cree First Nation v. Canada*, 2014 FC 1244.

8 See *Haida* and *Mikisew*, *supra* note 2; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 SCR 650.

9 See *Haida, ibid; Rio Tinto*, *ibid. Neskonlith Indian Band v. Salmon Arm (City),* 2012 BCSC 499, confirmed on appeal : 2012 BCCA 379.

10 See *Haida, ibid*; *Taku River First Nation v. BC* (Project Assessment Director)[2004] 3 SCR 550.

Nonetheless, the federal government relies on information provided by Indigenous communities, the proponent and other participants in the EA process to assist with the assessment of the potential impact of a project on lands, resources and activities subject to Aboriginal and treaty rights, including Aboriginal title. If this practice is to continue, the EA process must ensure that it is accessible and adapted to Indigenous communities.

To the extent that the EA process is to be used as a component of Indigenous-Crown consultation, changes to CEAA 2012 should give full and meaningful expression to the duty to consult with Indigenous peoples under section 35 of the *Constitution Act, 1982* and to the principle of free, prior and informed consent articulated in the UNDRIP, neither of which was taken into account when the original CEAA was drafted.

The CBA Sections suggest several changes to this end.

These changes must start with the statement of mandate and purpose of CEAA 2012, which would be improved by explicitly recognizing the requirements of section 35 of the *Constitution Act, 1982* and the process of fair dealing and reconciliation between Aboriginal Peoples and the Crown. For example, the legislative mandate requiring the Cabinet to exercise its powers in the approval of major resource projects in a manner that protects the environment and human health and applies the precautionary principle should also meet the requirements of section 35 of the *Constitution Act, 1982*. Another example: the legislative purpose dealing with the rights and interests of Aboriginal peoples should be more than to promote communication and cooperation with Aboriginal peoples with respect to EAs (CEAA s. 4(b)). Instead, the purpose should ensure that CEAA 2012 will be carried out in a manner consistent with the process of fair dealing and reconciliation between Aboriginal Peoples and the Crown.

It is often unclear how consultation under section 35 of the *Constitution Act, 1982* and the EA process under CEAA 2012 work together in a particular project. While the duty to consult may be assessed and fulfilled, in part, through the EA process, it is not clear to what extent the EA is part of the formal consultation process, and what other consultation steps are envisioned during and following the EA process.

To address this, the CBA Sections recommend that CEAA 2012 be amended to:

- Require the federal government to outline the entire proposed consultation process in advance, explaining where and how the EA process fits into that consultation process; and

- Require the federal government to outline its role in the consultation process where substitution or equivalency takes place with a province.

The Courts have said that the duty to consult must be discharged prior to carrying out an action that could adversely affect a right.[11] The Supreme Court of Canada noted in *Haida Nation v. British Columbia*, that:

> the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims to resolution. Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.[12]

The CBA Sections recommend that CEAA 2012 be amended or more effectively implemented to achieve the following:

- Indigenous participation provided for in CEAA 2012 should not be perfunctory but in keeping with the Honour of the Crown and the principles of reconciliation.
- If it is a component of consultation, Indigenous participation in EA should not be rushed, and affected Indigenous groups must have the ability to request reasonable extensions of timelines with respect to their information sharing and participation.
- To determine potential impacts to Aboriginal rights, consultation should be a dialogue established with the Crown at the start of the EA process (i.e. at the scoping and screening stage) to determine potential impacts.
- The duty to consult must be discharged before the Cabinet's decision approving a project.
- Cabinet's decision or the Order in Council approving a project must expressly address the issue of whether Canada has fulfilled its duty to consult.
- In cases where a strong prima facie claim exists and the potential for significant infringement of those rights exists, deep consultation requires Cabinet's decision or the Order in Council be accompanied by a written explanation demonstrating how the Aboriginal group's concerns were considered and incorporated into the resulting decision.

In both the consultation process and the EA process, many Indigenous people lack the human and financial resources to participate meaningfully. Consultation and EA processes are

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11 See *Tsilhqot'in Nation v BC* [2014] 2 SCR 257 at para. 78.

12 See *Haida, ibid.*

technical and require legal and subject matter expertise, often not found in Indigenous communities. Little regular program funding is available to communities for consultation or EA participation. Funding tends to be available on an *ad hoc* basis, which fails to build ongoing capacity for timely, effective responses to these processes. The few resources are often used to address procedural issues or to identify the most obvious potential adverse impacts of which the proponent or government are already aware. When funding is provided, it may not take into account the needs of an Indigenous community for internal community discussion and decision-making. For example, technical material must be simplified and community meetings may be needed to reach consensus.

The CBA Sections recommend that the federal government ensure a more robust EA process by:

- Providing adequate, ongoing program funding to build capacity in Indigenous communities, and administrative support and infrastructure needed to allow for early and timely responses to requests for consultation and participation in the EA process;
- Creating a presumption that Indigenous groups who wish to participate in an EA of a designated project or a Regional Plan will require funding for legal representation and technical experts as well as to facilitate communication and decision making within the community;
- Providing independent taxing officers, some of whom would be Indigenous Canadians, to review funding decisions in the event of a dispute over the adequacy of funding;
- Amending CEAA 2012 to require proponents and the government to disclose to Indigenous communities as early as possible potential adverse impacts that they have already identified, to avoid duplicate impact assessments by Indigenous communities; and
- Ensuring adequate participant funding in substitution or equivalency decisions.

Lack of funding is not the only barrier to effective participation by Indigenous peoples in the EA process. Language and cultural barriers also play a role.

To remove these barriers the CBA Sections recommend changes to CEAA 2012 to:

- Consider Indigenous representation on review panels dealing with Regional Plans or projects where the duty to consult under s. 35 is triggered;

- Ensure adequate cultural competency training and Indian Residential School legacy training for all government personnel involved in the EA process;
- Simplify the language in CEAA 2012, rules of procedure, website and related documentation;
- Require technical documents be written or summarized at appropriate plain language levels;
- Require that documents be translated into Indigenous languages where necessary;
- Require simultaneous translation in applicable Indigenous language at public meetings and hearings where necessary; and
- Establish timelines in the EA process that consider Indigenous communities' capacity and internal community decision making processes.

B. Role and preparation of Indigenous community knowledge, including Aboriginal traditional knowledge

Indigenous community knowledge, including Aboriginal traditional knowledge (ATK), should continue to play an important role in assessing the significance of the environmental effects under CEAA 2012. Section 19(3) outlines the possibility of reliance on "community knowledge and Aboriginal traditional knowledge" as a factor to be considered in the assessment of the environmental effects of a designated project. ATK would be better valued if it were among the factors that *must* be considered under s. 19(1), and not potentially scoped out of the process by the Minister or responsible authority under s. 19(2). Similarly, consideration of Indigenous community knowledge, including ATK should be a requirement for Ministerial approval of provincial or other jurisdictional substitution under s. 34(1).

Indigenous communities might be more willing to provide information in the EA or authorization process if they knew the information would be protected from disclosure under the *Access to Information Act* (ATIA). However, First Nation band councils are not included in the definition of "aboriginal governments" in section 13(3) of ATIA and are therefore not afforded the same protection from disclosure of information provided in confidence to the federal government as other governments. There is no principled basis for this exclusion, particularly where the federal government is seeking to establish a nation-to-nation relationship with First Nations.

Given the role of ATK in the EA process, the CBA Sections recommend that proponents must have the ability to review and respond to ATK, if they provide written undertakings to keep the information confidential.

C. UNDRIP and decision-making

UNDRIP provides "minimum standards for the survival, dignity and well-being of indigenous peoples of the world" (Article 43). In interpreting UNDRIP article 19 , the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has noted that free, prior and informed consent (FPIC) is an objective for consultation processes in which the State engages in good faith with Indigenous peoples over legislative and administrative measures that affect them.[13] Working with this objective in mind should make consultation processes "*in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making…*".[14]

Mr. Anaya also notes that the extent to which FPIC should affect a good faith consultation process depends on the impact that the State measure will have on the lands and lives of the Indigenous peoples.[15]

If FPIC is to be available in a Crown-Indigenous consultation process in Canada and federal EA is going to be a piece in that process, the three qualities of such consent need to be considered in the consultation process:

- Is the process "free"? (i.e. can Indigenous peoples participate in it and does it take into account the historical imbalance of power between Indigenous peoples and the State?)
- Is the process "prior" enough to the measure that is being assessed that Indigenous peoples' participation can actually influence the outcome?
- Does the process adequately "inform" the Indigenous peoples participating in it of the measure at issue and the impact on them?
- To what extent have Indigenous peoples given their "consent" to the project proceeding?

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13 See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, HRC, 12th Sess., UN Doc. A/HRC/12/34 (2009) at para. 38-39.

14 *Ibid*. at para. 46.

15 *Ibid*. at para. 47.

Where the decision maker under CEAA 2012 determines that significant adverse effects are likely, the Governor in Council should give special consideration to whether the Indigenous peoples participating in the process consider those effects to be justified in the circumstances.

UNDRIP article 32(1) recognizes the right of Indigenous peoples "to determine and develop priorities and strategies for development or use of their lands or territories and other resources." Indigenous peoples, therefore, need to be better involved at the screening of designated projects as well as in regional and strategic EAs.

Finally, FPIC cannot be a principle reserved exclusively for Indigenous peoples who have obtained declarations of Aboriginal title by the courts or concluded comprehensive claims with the federal government. That threshold for FPIC will render the principle inaccessible to the vast majority of Indigenous peoples in Canada.

In addition to participation in EAs under CEAA 2012, Indigenous peoples across the country are increasingly conducting EAs of their own, whether as part of a modern treaty, land code or other initiative. The Expert Panel should consider how these other assessment bodies uphold principles in UNDRIP, including article 18 which recognizes that (emphasis added):

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves *in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions*.

Additionally, EA processes where Indigenous peoples are decision-makers are another way of fulfilling the principle in UNDRIP article 32(1) where 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.

The Truth and Reconciliation Report (TRC) called on all levels of government and sectors of Canadian society to adopt UNDRIP as a framework for reconciliation.[16] Acknowledging the existence of EA processes wholly or partly controlled by Indigenous people and strengthening their capacity is inherent in the process of reconciliation advocated by the TRC.

16 Truth and Reconciliation *Calls to Action*, paragraph 43 (June 2015); Final Report of the Truth and Reconciliation Commission of Canada, vol. 6, pp.16, 25-39.

VII. CONCLUSION

The CBA Sections underscore the importance of CEAA 2012, and of an adequately funded federal EA process that incorporates scientific evidence, protects the environment, respects the rights of Indigenous peoples and supports socio-economic growth. We appreciate the opportunity to recommend ways to strengthen and improve this process, and trust that our comments will assist the Expert Panel. We would be pleased to discuss them in more detail, and provide any clarifications that the Expert Panel requests.

VIII. SUMMARY OF RECOMMENDATIONS

Purposes and Role of Federal Environmental Assessment

1. The CBA Sections recommend that several purposes in section 4 of CEAA 2012 need to be strengthened and amended.
2. The CBA Sections recommend that CAE Agency provide additional guidance on the types of projects to which CEAA 2012 is intended to apply, so that non-listed projects can be added on a case-by-case basis, and listed projects can be screened out, as appropriate.
3. The CBA Sections recommend that CEA Agency make a preliminary determination of whether a project should proceed based on an appropriate initial level of information, and then require more detailed information at a later stage of the permitting process to determine further design and mitigation requirements. In some instances, where there is a potential impact on Indigenous peoples, greater details may be required up front.
4. The CBA Sections recommend that subsequent permitting processes should focus on how a project should proceed, and not whether it should proceed.
5. The CBA Sections recommend an open and transparent monitoring and follow-up process for approved projects.

Scope of Federal Environmental Assessment Process

6. The CBA Sections recommend that the scope of federal EAs be clarified and expanded.
7. The CBA Sections recommend that Federal EAs should focus on projects with the potential for significant adverse effects in areas of federal jurisdiction to ensure that they are in the public interest. They should not only take biophysical or environmental factors into account, but also economic, social, cultural, and health related factors.
8. The CBA Sections recommend that projects should only be subject to one EA, and that greater coordination is required – both within the federal

government and between federal, provincial and territorial governments – to better manage and avoid duplication of EA processes.

9. The CBA Sections recommend that parameters for qualifying conditions for equivalency should be identified.
10. The CBA Sections recommend that the current approach to substitution under CEAA 2012 be clarified.
11. The CBA Sections recommend that CEA Agency develop guidelines setting out key elements leading to substitution agreements, which must include the views of Indigenous peoples on the proposed substitution, and whether equivalent measures to ensure participation of Indigenous peoples exist in the provincial or territorial context.
12. The CBA Sections recommend that decisions on substitution and equivalency should be made as early as possible in the EA process.
13. The CBA Sections recommend that where a project triggers federal involvement and there is also a provincial process for that proposal, that the provincial process be substituted for the federal process. An exception to this is where the provincial process is not designed to address federal interests, in which case the federal government should jointly review the proposal with the province.

Regional Studies and Strategic EA

14. The CBA Sections recommend that CEA Agency should consider how to strengthen Regional Studies, and increase or mandate their use, where appropriate.
15. The CBA Sections recommend that CEA Agency develop a list of legislative triggers that require a Regional Study.
16. The CBA Sections recommend that regional studies should be conducted in advance of project-specific EA applications. However, CEAA 2012 should be clear that the status of a Regional Study cannot be used to justify delaying, deferring, suspending or denying individual project applications.
17. The CBA Sections recommend that CEAA 2012 should give interested parties and Indigenous peoples whose rights or title are potentially affected by a proposed project the ability to ask the Minster to order a Regional Study, along with a requirement for the Minister to respond to the request with written reasons in a set time.
18. The CBA Sections recommend that it should be made clear at the outset how consultation will occur in contexts where a proposed policy or legislative change with potential regional environmental impacts triggers the duty to consult with affected Indigenous peoples.
19. The CBA Sections recommend that subsequent individual projects should be required to fit within a regional plan that has been developed for, or is the outcome of, a Regional Study. New projects must be required to

justify any amendments to that plan, and consideration should also be given to whether the regional plan needs updating with new information.

20. The CBA Sections recommend that monitoring plans must be developed to track projects' effects and whether the findings of a Regional Study need to be amended.
21. The CBA Sections recommend that government funding is necessary to ensure a robust Regional Study and the participation of Indigenous peoples in particular. CEA Agency should consider how Regional Studies should be funded, and who should be responsible for conducting them.
22. The CBA Sections recommend that an independent, well qualified and diverse panel or authority that has the public trust and confidence and is sufficiently funded should conduct Regional Studies.

Public Participation

23. The CBA Sections recommend that opportunities for public participation in federal EA processes be improved to encourage public involvement, while providing clear and meaningful information for proponents and decision-makers.
24. The CBA Sections recommend streamlining the number of interested parties who may participate in a hearing process by using the "interested party" test, subject to modifications.
25. The CBA Sections recommend that adequate funding of interested parties, including Indigenous groups, is required for effective and meaningful participation in an EA process. Given the importance of this funding, the EA substitution process must not result in reduced funding for interested parties.

Role of Indigenous Communities

26. The CBA Sections recommend that to the extent that the EA process is to be used as a component of Indigenous-Crown consultation, changes to CEAA 2012 should give full and meaningful expression to the duty to consult with Indigenous peoples under section 35 of the *Constitution Act, 1982* and to the principle of free, prior and informed consent articulated in the UNDRIP.
27. The CBA Sections recommend that CEAA 2012 be amended to clarify how consultation under section 35 of the *Constitution Act, 1982* and the EA process under CEAA 2012 work together in a particular project.
28. The CBA Sections recommend changes to CEAA 2012 to remove barriers to effective and meaningful participation by Indigenous peoples, including lack of funding, language and cultural barriers.
29. The CBA Sections recommend that proponents have the ability to review and respond to Aboriginal traditional knowledge (ATK), if they provide written undertakings to keep the information confidential.

30. The CBA Sections recommend that where the decision maker under CEAA 2012 determines that significant adverse effects are likely, special consideration be given to whether the Indigenous peoples participating in the process consider those effects to be justified in the circumstances.
31. The CBA Sections recommend that Indigenous peoples be better involved in the screening of designated projects as well as in regional and strategic EAs.
32. The CBA Sections recommend that free, prior and informed consent (FPIC) cannot be a principle reserved exclusively for Indigenous peoples who have obtained declarations of Aboriginal title by the courts or concluded comprehensive claims with the federal government.
33. The CBA Sections recommend that CEA Agency consider how other assessment bodies formed by indigenous peoples conducting EAs on their own, whether as part of a modern treaty, land code or other initiative, uphold principles in UNDRIP.