THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Federal Impact Assessment Process Review: Response to the Expert Panel Report and Discussion Paper

CANADIAN BAR ASSOCIATION
ENVIRONMENT, ENERGY AND RESOURCES 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 Legislation and 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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I. INTRODUCTION

The Environment, Energy and Resources Law Section and Aboriginal Law Section of the Canadian Bar Association (CBA Sections) appreciate the opportunity to respond to the Review of Environmental Assessment (EA) Processes Expert Panel Report, *Building Common Ground: A New Vision for Impact Assessment in Canada*, and the *Environmental and Regulatory Reviews: Discussion Paper* (EA Expert Panel Report)[1] The CBA Sections agree that the goal of these reviews should be to develop an impact assessment (IA) process based on the five pillars of sustainability – incorporating meaningful public participation, best available scientific information and Indigenous and community knowledge, while protecting the environment.

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 Indigenous Peoples, Aboriginal and treaty rights, land claims, constitutional reform, administration of justice and traditional Aboriginal law.

As a general comment, we emphasize the importance of implementing a robust federal IA regime that is sufficiently funded and resourced, to achieve the overall objectives of restoring public trust in the IA process, introducing new, fair processes, and getting resources to market. We also comment on specific issues in the EA Expert Panel Report and the Discussion Paper. These include projects subject to the federal IA process, the scope of the IA process, cooperation with other governments, governance, conducting regional IA studies, public participation, and the role of Indigenous communities. Finally, we comment on the federal

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[1] *See,* Environmental Assessment Review Expert Panel, *Building Common Ground: A New Vision for Impact Assessment in Canada*, (April 2017), available online (http://ow.ly/C34N30eNgQ6). *See also,* Government of Canada, *Environmental and Regulatory Reviews: Discussion Paper* (June, 2017), available online (http://ow.ly/iVWk30eNgSx)

government's review of the National Energy Board (NEB), the *Fisheries Act* and the *Navigation Protection Act* (NPA).[2]

RECOMMENDATION

1. **The CBA Sections recommend that the goal of the federal impact assessment process review should be to develop a robust and sufficiently funded IA process based on the five pillars of sustainability – incorporating meaningful public participation, best available scientific information and Indigenous and community knowledge, while protecting the environment.**

II. PROJECTS SUBJECT TO FEDERAL IMPACT ASSESSMENT (IA)

In our December 2016 submissions, the CBA Sections agreed that federal IAs should be required for all projects with the potential for significant adverse effects in area(s) of federal jurisdiction.[3] We noted that, "the current 'Project List' approach, as opposed to the former 'trigger' approach, gives useful certainty for all parties on the applicability and scope of the [Act]". We went on to state that the Canadian Agency's (CEA Agency) ability to screen projects out of the Canadian Environmental Assessment Act, 2012 (CEAA 2012), or the Minister's power to require an IA for non-listed projects, would be sufficient to ensure that all relevant projects are captured.[4] However, as the Discussion Paper suggests, projects should only be designated or excluded from IA under certain conditions based on clear criteria and a transparent process. The CBA Sections also agree with the Discussion Paper recommendation to consider establishing clear criteria and a transparent process to periodically review and update the Project List.

The Expert Panel recommends two other triggering mechanisms for establishing a new Project List:

(i) Statutory criteria that would require an IA of projects that have the potential to impact present and future generations in a way that is consequential; and

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2 *See Fisheries Act,* R.S.C., 1985, c. F-14, available online (http://laws-lois.justice.gc.ca/eng/acts/f-14/). *See also Navigation Protection Act*, R.S.C., 1985, c. N-22, available online (http://laws-lois.justice.gc.ca/eng/acts/N-22/)

3 Canadian Bar Association, *Environmental Assessment Process Review* (December 2016) available online (www.cba.org/Our-Work/Submissions-(1)/Submissions/2016/December/Environmental-Assessment-Process-Review). Canadian Bar Association, *Environmental Assessment Process Review Follow-Up* (December 2016), available online (http://ow.ly/xT0v30eNgWm)

4 *See Canadian Environmental Assessment Act, 2012,* R.S.C. 2012, c. 19, s. 52, available online (http://laws-lois.justice.gc.ca/eng/acts/c-15.21/index.html).

(ii) Provisions for proponents (or any person or group) to request that a project require a federal IA. Instead of the Minister deciding whether an IA should be ordered, the decision would rest with an independent IA authority.

With mechanism (i), relying on the development of criteria that would automatically require an IA of projects with a potential consequential impact on present and future generations would introduce a subjective element that would undercut or erode the certainty associated with the applicability of a Project List. Project proponents would be left to forecast whether their projects would meet the criteria and hence be subject to the federal IA process.
With mechanism (ii), we are of the view that decision making should rest with an elected and politically accountable person, such as the Minister.

RECOMMENDATIONS

2. **The CBA Sections recommend that clear criteria and a transparent process should be established to periodically review the Project List for federal IAs.**
3. **The CBA Sections recommend that decision making should rest with an elected and politically accountable person, such as the Minister, and not with an independent IA authority.**

III. FEDERAL IA PROCESS TIMELINES

In our December 2016 submissions, we also observed that current IA applications and processes can be very detailed and expensive. To reduce or limit the level of detail, the CBA Sections recommended a two-stage process, with the first stage identifying 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.

It would be more efficient for all parties if a body such as the CEA Agency first considered and recommended to the Minister whether a project should proceed (with the level of information submitted at this stage limited to what would be needed for this preliminary determination). The Minister would make a determination and provide detailed written reasons for the decision. Assuming there were no show stoppers, the IA process would proceed to the next stage with more detailed information submitted for the permitting process to determine further design and mitigation requirements.

The Expert Panel recommends that federal IA comprise three phases: a Planning Phase; a Study Phase and a Decision Phase. According to the Expert Panel, the Planning Phase "is intended to bring parties to face-to-face meetings and open up discussion on proposed activities early, before critical elements are decided." All interested parties would be able to identify their issues of concern to the proponent, provide input to the project design and establish terms for the assessment. The Planning Phase would provide a place to build trusting relationships. It would also enable early use of scientific knowledge, Indigenous knowledge and community knowledge. While the purpose of the Planning Phase is laudable, it is not clear when this Phase would commence. The federal government's Discussion Paper also recommends an early planning and engagement phase, but likewise does not indicate when this Phase would formally commence.

A good starting point would be when the proponent submits a preliminary project description. It would also be important for this stage of the process to be proponent-led – as opposed to leaving it in the hands of an independent IA authority, as envisaged by the Expert Panel. The proponent should retain management of its project with an independent IA authority or agency having an oversight role.

The Discussion Paper supports a proponent-led process, but goes on to suggest that at the Early Planning and Engagement Phase that the proponent should "seek consensus" on the project assessment process. Again, while this is a laudable objective, going to the next phase of the IA process should not be contingent on achieving consensus on the entire IA process. The Expert Panel also recommended a complex IA process, with multiple steps, committees, groups and panels where no timelines are proposed for each stage. To the extent there are timelines, they would be determined on a project-by-project basis.

The CBA Sections prefer and support the Discussion Paper recommendation of maintaining legislated timelines to provide clarity and predictability, while allowing ministerial approval to depart from the timelines in special circumstances. Statutory timelines are important, and serve to inform parties at the outset what is a reasonable time for each step of the IA process. The statute should provide a mechanism (similar to the one currently available in CEAA 2012) for departing from these timelines under certain conditions.

While we share the Expert Panel's view on the importance of a transparent post-IA phase (including effective enforcement), delays and lack of transparency in the current federal permitting process have become a fundamental challenge for project sponsors. In our view, subsequent permitting processes should focus on how the project should proceed, not on whether it should proceed. Regulators at the permitting stage should not have the ability to directly or indirectly prohibit the project from proceeding.

For the IA process to be (and perceived to be) fair, it will also be necessary to increase the federal capacity to provide credible scientific and technical advice needed to support a predictable, timely and cost-effective permitting process. Without this enhanced capacity in the post-IA permitting process, no amount of investment in the IA process is likely to result in resources getting to market.

RECOMMENDATIONS

4. **The CBA Sections recommend a two-stage IA process. The first stage should be proponent-led and identify if a project should proceed (considering significant adverse effects). The second stage should determine further project design and mitigation requirements.**
5. **The CBA Sections recommend that the level of information submitted at the first stage of the IA process should be limited to what is required for a preliminary determination, with more detailed information submitted for the second stage.**
6. **The CBA Sections recommend maintaining legislated timelines for the IA process to provide clarity and predictability, with a statutory mechanism (similar to the one currently available in CEAA 2012) allowing ministerial approval to depart from the timelines in special circumstances.**
7. **The CBA Sections recommend that the post-IA permitting process should be fair, transparent, predictable, timely and cost-effective. It should focus on how the project should proceed, and not on whether it should proceed.**

IV. SCOPE OF THE FEDERAL IA PROCESS

The Expert Panel confirmed that sustainability should be central to federal IA. To meet the needs of current and future generations, the Expert Panel recommended that federal IA should provide assurance that approved projects, plans and policies contribute a net benefit to environmental, social, economic, health and cultural well-being. This is a major shift from the current focus on the significance of adverse environmental effects.

The Discussion Paper does not reference a sustainability test. Instead, the recommendation is for expanding the scope of IA to include key elements of sustainability such as environmental, economic, social and health to support more "holistic and integrated decision making in areas of federal jurisdiction". We support this expansion of the scope of IA, but also recommend the inclusion of cultural considerations and an assessment of long term impacts that are likely to affect future generations. This reflects the principle in Indigenous traditions of considering the next seven generations in decision making.

RECOMMENDATION

8. **The CBA Sections recommend expanding the scope of IA to include key elements of sustainability such as environmental, economic, social and health, and cultural considerations, as well as and an assessment of long term impacts that are likely to affect future generations.**

V. COOPERATION WITH OTHER GOVERNMENTS

The Expert Panel properly endorsed the principle of "one project, one assessment" as central to implementing IA around the five pillars of sustainability. However, it also recognized that, for most projects, potential impacts on the five pillars of sustainability would include areas beyond federal authority. As a result, to achieve the goal of one project, one assessment, the Expert Panel endorsed revisiting cooperation agreements between governments to ensure that they achieve the principle of "harmonization upward", meaning cooperation that meets the highest standard of IA.

In addition to cooperative agreements, the Expert Panel recommended that substitution agreements (on a project-by-project basis) should remain an option in an enhanced federal IA process. The CBA Sections are pleased that the Discussion Paper also recommends legislation

to allow for substitution of project assessments with provinces and territories as well as with Indigenous governments. However, as with cooperation agreements, the federal government should ensure that substitution requirements are strengthened to ensure that the principle of "harmonization upward" is implemented, and that the highest standards of IA are met.

In contrast, for equivalency arrangements, the Expert Panel concluded they would not advance or meet matters of federal interest, and therefore should not be pursued under a new IA regime. The Discussion Paper does not reference equivalency arrangements. We suggest that in following the principle of "one project, one assessment," equivalency arrangements may have a place in certain circumstances concerning certain projects.

RECOMMENDATION

9. **The CBA Sections recommend using the principle of "one project, one assessment" based on the principle of "harmonization upward" to ensure cooperation that meets the highest standard of IA.**
10. **The CBA Sections recommend that equivalency arrangements may continue to be of use in certain circumstances for certain IA projects.**

VI. GOVERNANCE

The EA Expert Panel Report recommended the establishment of a single, quasi-judicial, IA authority. This authority would be responsible for, manage, and make all decisions on project assessments, and would also discharge the Crown's duty to consult Indigenous Peoples (with the option of an appeal to Cabinet on the IA authority's final decision). The multiple proposed roles of the IA authority as manager, reviewer and judge of IAs will inevitably create conflicts.

Vesting significant final decisions with unelected officials is also problematic. As the Discussion Paper recommends, IA decision making would be more appropriately undertaken by Ministers or by Cabinet in certain circumstances. The basis on which these decisions are taken needs to be clear, with written reasons given. The Discussion Paper simply states that decisions must be taken on whether projects are in the public interest. This test is too vague and needs to be clarified. We recommend that decision making should be done using the sustainability test referenced above, as well as applying Gender-Based Analysis Plus as set out in the Discussion Paper.

RECOMMENDATIONS

11. **The CBA Sections recommend that the multiple proposed roles of a new IA Authority as authority as manager, reviewer and judge of IAs will inevitably create conflicts.**
12. **The CBA Sections recommend that vesting significant final decisions with unelected officials is problematic, and that IA decision making would be more appropriately undertaken by Ministers or by Cabinet in certain circumstances.**
13. **The CBA Sections recommend that decision making should be done using a sustainability test (incorporating meaningful public participation, best available scientific information and Indigenous and community knowledge, while protecting the environment), and not simply based on the vague concept of public interest.**

VII. CONDUCTING AND FUNDING REGIONAL IMPACT ASSESSMENT STUDIES

The Expert Panel and the Discussion Paper support regional IA studies. The EA Expert Panel Report concluded that, "in addition to being well-equipped to address the sustainability of development in various regions, particularly in relation to cumulative impacts, regional IA can also streamline project IA to the benefit of proponents and communities alike." The Discussion Paper stated that to achieve a deliberate approach to the assessment and management of cumulative effects, regional assessments are a necessary pre-requisite. However, neither the EA Expert Panel Report nor the Discussion Paper elaborate on how regional IA studies should be funded.

As the CBA Sections stated in our December 2016 submissions, there needs to be an express consideration of how regional IA studies should be funded and who is responsible for conducting them. In our view, it would be unfair and potentially counterproductive for the first project proponent in a region to bear the full burden of conducting a comprehensive regional IA study. Federal government funding will be necessary to ensure that robust regional IA studies involve the participation of affected communities. It might be possible to create a mechanism where the federal government could recover some of its expenditures from future proponents seeking to develop projects in regions that have been the subject of regional IA studies.

We recommend that regional IA studies be conducted by independent, well qualified and diverse panels or authorities that have the public trust and confidence. In regions where Indigenous Peoples live, the panels should have Indigenous representatives (as recommended in the Discussion Paper). If an independent body with this responsibility is established, and also tasked with the responsibility of identifying areas that should be the subject of regional IA 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.

RECOMMENDATIONS

14. **The CBA Sections recommend that federal government funding is necessary to ensure that robust regional lA studies involve the participation of affected communities.**

15. **The CBA Sections recommend that regional IA studies be conducted by independent, well qualified and diverse panels or authorities that have the public trust and confidence. In regions where Indigenous eoples live, the panels should have Indigenous representatives.**

16. **The CBA Sections recommend that if an independent body with responsibility for regional IA studies is established, it should also be tasked with the responsibility of identifying areas that should be the subject of these studies. It should have diverse, qualified and experienced representation, and be sufficiently funded.**

VIII. PUBLIC PARTICIPATION

The CBA Sections stated in our earlier submissions that the "interested party" test (as applied by the Review Panel in the New Prosperity EA) would be appropriate for determining who may participate in an IA process. The Expert Panel took a different view concluding that meaningful public participation should include all those wanting to be in involved in a project IA. Further, the Panel went on to state that, "adequate funding is required to address assessment needs throughout all IA phases and ongoing capacity development". This was picked up in the Discussion Paper with the recommendation of improved participant funding programs for Indigenous Peoples and the broader public.

We agree that adequate funding of interested parties, including Indigenous groups, is a key precondition for robust IAs that result in decisions based on "science, facts and evidence, and serve the public's interest." Without sufficient funding, interested parties cannot meaningfully participate in an IA process. However, neither the Expert Panel nor the Discussion Paper identifies who should be responsible for adequate funding, including participant funding programs. One can only assume that in all instances, the proponent would bear this responsibility. Imposing this burden solely on the project sponsor may adversely affect its willingness to develop projects in Canada. To avoid this result, it will be important to ensure that the IA process is sufficiently and fairly resourced by the proponent as well as the federal government and other jurisdictions to ensure meaningful participation.

The Expert Panel also recommended that every step of the assessment process should be based on consensus, and should be predicated on achieving consensus. As the Mining Association of Canada (MAC) pointed out in its submission, this requirement is not realistic. While consensus-building is desirable, enhancing collaboration, inclusion and engagement is a more realistic approach for a legislated project assessment process. Other than the reference to seeking consensus on the project assessment process at the Early Planning and Engagement Phase, the Discussion Paper has wisely adopted the position articulated by MAC.

RECOMMENDATIONS

17. **The CBA Sections recommend that the IA process be sufficiently and fairly resourced by the proponent as well as the federal government and other jurisdictions to ensure robust IAs and meaningful public participation.**

18. **The CBA Sections recommend an approach to the IA process that enhances collaboration, inclusion and engagement.**

IX. ROLE OF INDIGENOUS COMMUNITIES

The CBA Sections commend the Expert Panel for its extensive consideration of the role of Indigenous communities and groups in its vision for a new IA process. Although the focus of our comments here is on how the EA Expert Panel Report addresses issues raised in our original submissions, we recognize that the Expert Panel made concerted efforts to address many of the deficiencies identified by Indigenous groups with respect to the current federal IA process.

A. Meaningful consultation and participation in assessment

Consultation and accommodation

As the Expert Panel recognized, meaningful implementation of the principles recommended in its Report with respect to Indigenous Peoples requires a "broader discussion" between the Government of Canada and Indigenous Peoples about, among other things, their nation-to-nation relationship and the goal of reconciliation. The Discussion Paper contemplates "a single federal government agency to assess impacts and *coordinate* consultation and accommodation with Indigenous Peoples for federally designated projects" (our emphasis). Under the section on Impact Assessment in the Discussion Paper, it appears that the federal government is considering empowering the agency charged with all IA to also coordinate Indigenous consultation and accommodation. Although coordination may imply activity other than carrying out consultation and accommodation, the Expert Panel recommended consultation and accommodation be conducted by the IA entity, and we assume this is what the federal government also intends.

However, in its timely decision in *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, 2017 SCC 40, the Supreme Court of Canada answered in the affirmative the question of whether the Crown can rely on a federal government tribunal or agency to carry out the Crown's obligation to consult with and, if necessary, accommodate, Indigenous Peoples.[5] The Crown could rely on the single federal government assessment agency contemplated in the Discussion Paper to conduct consultations with Indigenous Peoples and, where necessary, accommodate Indigenous Peoples in a project or other matter before the agency. But, for the Crown to rely on an agency to carry out the duty of consultation and accommodation, the agency must have the powers to conduct the consultation and the means to implement accommodation measures. The Supreme Court of Canada noted some of the required attributes of such an agency.

To conduct adequate consultation, the agency must have an express or implied mandate to do so. It must be given broad discretion to inquire into the subject matters that may arise during consultation. This includes the power to conduct hearings, compel evidence and issue orders for providing information and undertaking studies. Importantly, the agency must have the ability to grant participation funding to affected Indigenous Peoples in appropriate circumstances.

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5 *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, 2017 SCC 40, available online (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16743/index.do)

The ability to accommodate requires that the agency be given the power to place pre-conditions before granting an approval and to impose terms and conditions on approvals. Accommodation also requires that the agency be able to deny an approval or reserve a decision pending further proceedings. The agency must also have the capacity, institutional experience and ability to conduct the consultation, assess the impacts and understand the options for accommodation.

The assessment process may or may not comprise the entire consultation and accommodation process in a particular case. It follows that it is not enough for the Crown to establish a general mandate for the agency to carry out the Crown's duty to consult and accommodate, and expect Indigenous groups to figure out the role of the agency in a particular case. The Supreme Court emphasizes that the Crown must advise the affected Indigenous group in advance that it intends to rely on the agency to fulfil its duty to consult in whole or in part and, where necessary, to accommodate. The agency itself, or another representative of the Crown, could be responsible for notifying the affected group of the process the Crown intends to follow in each case.

If the entire consultation and accommodation process is not going to be carried out by the agency as part of its assessment process, the Indigenous group must be advised in advance as to what other consultation and accommodation processes the Crown will follow.

This information must be provided in advance so the affected Indigenous group can express its concerns about the adequacy of the proposed consultation and accommodation process, including the proposed participation of the Indigenous group in the process. It follows that an effective mechanism must be put in place to allow for an appeal or review of a decision about the consultation process. The process should allow concerns to be brought to the attention of the appropriate Crown representatives outside the agency when necessary.

Practically speaking, this responsibility entails positive actions on the Crown to provide clear confirmation to the affected Indigenous groups of which entity (for example, the IA entity, a minister or minister’s representative, or a combination) will carry out the consultation process on behalf of the Crown. Equally important about this early engagement is the opportunity for the Crown to facilitate a joint development with the affected Indigenous groups of the form and substance of the consultation and accommodation process. We recommend that the process be

more focused in its scope and have funding in addition to that available for participation in the assessment process itself.

We agree with the federal government that its role in consultation needs to be "clear and consistent," as well as clarified in regulatory processes. In the CBA Sections' submission to the Expert Panel, we recommended fostering meaningful consultation with Indigenous Peoples, including by requiring the federal government to outline:

- the entire proposed consultation process in advance, explaining where and how the IA process fits into that consultation process; and
- its role in the consultation process where substitution or equivalency takes place with a province.

The objective of achieving an adequate process for consultation and accommodation is important, but a more critical objective is to achieve meaningful consultation. In the context of early planning for IA, the federal government has proposed direct engagement between the Crown and Indigenous Peoples to discuss and understand potential impacts, and to facilitate early planning and issue identification. As noted in our earlier submissions, early engagement with Indigenous Peoples in the IA process alone is not adequate consultation if the federal government continues to rely on IA as a first step in the consultation and accommodation process. This engagement must be throughout the IA process, and must occur in recognition that participation requires time and resources for potentially affected Indigenous Peoples.

We recommend that when an affected Indigenous group raises concerns that the regulatory process being relied on by the Crown does not achieve adequate consultation or accommodation, the IA legislation should specify that the regulatory agency must consider these concerns in a timely manner – and if adequate consultation or accommodation has not been achieved, take or cause to be taken additional or new measures to meet the Crown's duty. As indicated by the Supreme Court, these measures "might entail filling any gaps on a case-by-case or more systemically through legislative or regulatory amendments" or "might require [the Crown] making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement [of an IA decision] in order to carry out further consultation in a separate process before the [IA] decision is rendered."

We recommend that the engagement with Indigenous Peoples in the determination of preliminary impacts – if this is, in fact, the level of impact that is to be assessed at the early engagement stage – should also take into account new information concerning potential impacts during the course of the IA process. In particular, if further information on impact is to be provided by Indigenous Peoples at a subsequent stage of the process, IA legislation should have the appropriate mechanisms to require further consultation and accommodation that reflects t the level of impact identified by the affected Indigenous Peoples.

RECOMMENDATIONS

19. **The CBA Sections recommend that for the federal government to rely on a single agency to carry out the duty of consultation and accommodation for Indigenous Peoples in the IA process, the agency must have the powers and means to do so.**
20. **The CBA Sections recommend that the early engagement stage of the IA process be focused in its scope and have funding in addition to that available for participation in the assessment process itself.**
21. **The CBA Sections recommend that in order to foster meaningful consultation with Indigenous Peoples, the federal government's role in consultation needs to be clear and consistent as well as clarified in regulatory processes.**
22. **The CBA Sections recommend that when an affected Indigenous group raises concerns that the regulatory process being relied on by the Crown does not achieve adequate consultation or accommodation, the IA legislation should specify that the regulatory agency must consider these concerns in a timely manner – and if adequate consultation or accommodation has not been achieved, take or cause to be taken additional or new measures to meet the Crown's duty.**
23. **The CBA Sections recommend that the engagement with Indigenous Peoples in the determination of preliminary impacts – if this is, in fact, the level of impact that is to be assessed at the early engagement stage – should also take into account new information concerning potential impacts during the course of the IA process.**

Enhancing Capacity

The CBA Sections have recommended that the federal government provide adequate and ongoing program funding to build capacity in Indigenous communities, as well as the administrative support and infrastructure to allow for early and timely responses to requests for consultation and participation in IA process. While we welcome the federal government's consideration of improving participant funding programs for Indigenous Peoples and the broader public by streamlining applications and expanding eligible activities, this does not address the levels of funding that need to be made available for participation.

We support the Expert Panel recommendations for strengthening the capacity of Indigenous communities when it comes to IA both through "long-term, ongoing IA capacity development" and programs designed to support Indigenous groups during all phases of a specific IA process. We also recommend more equitable principles for funding Indigenous communities in IA and regulatory reviews, some of which we referred to in our earlier submissions. In terms of public participation, the Expert Panel recommended funding "commensurate with the costs." At a minimum the same language should also be used for Indigenous participation funding. The term "commensurate" would take into account the communication, decision making and administrative needs of an Indigenous group in addition to its legal, advocacy and technical expertise required at each phase of the process. As noted above, one of the factors that allowed the Supreme Court to conclude that the NEB was suited to carry out the Crown's duty to consult and accommodate in the *Clyde River (Hamlet)* case was the NEB's ability to issue participant funding to ensure consultation was adequate.

RECOMMENDATIONS

24. **The CBA Sections recommend that the federal government provide adequate and ongoing program funding to build capacity in Indigenous communities, as well as administrative support and infrastructure to allow for early and timely responses to requests for consultation and participation in the IA process.**

25. **The CBA Sections recommend strengthening the capacity of Indigenous communities to participate in the IA process through long-term, ongoing capacity development, and programs designed to support Indigenous groups during all phases of the IA process.**

26. The CBA Sections recommend more equitable principles for funding Indigenous communities in IA and regulatory reviews, which is, at a minimum, commensurate with the costs for participation.

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

The CBA Sections recommended that Indigenous community knowledge, including Indigenous traditional knowledge (ITK), should continue to play an important role in IA. We support the federal government's consideration of incorporating Indigenous knowledge alongside other sources of evidence, including by providing better support for Indigenous knowledge and considering it more systematically.

We stress, however, that an "open science and data platform" for information collected in the assessment process should not undermine the protection of confidentiality of ITK where appropriate for the Indigenous knowledge-holders. Harvesting sites, for example, can be just as appropriate for protection as sacred sites.

In its Discussion Paper, the federal government asks "how do we respectfully and meaningfully incorporate Indigenous knowledge (into the assessment and regulatory processes)?" We repeat some of the legislative reforms recommended in our December 2016 submission, including:

- making the consideration of Indigenous community knowledge, where provided, mandatory with respect to all IA decisions;
- ensuring that substitution or equivalency criteria include the capacity for considering Indigenous community knowledge; and
- protecting information provided in confidence to the federal government by all Aboriginal governments, including First Nation band councils, from disclosure under the federal *Access to Information Act*.[6]

RECOMMENDATIONS

27. The CBA Sections recommend that Indigenous community knowledge, including Indigenous traditional knowledge (ITK), should play an important role in IA, and receive better financial support from the federal government.

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6 *See Access to Information Act,* R.S.C., 1985, c. A-1, available online (http://laws-lois.justice.gc.ca/eng/acts/a-1/).

C. UNDRIP Principles and Decision Making

With respect to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the CBA Sections adopted an approach to free, prior and informed consent (FPIC) developed by the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. This approach sets Indigenous 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."

We also advised that, where significant adverse effects are determined to be likely in an IA process, the decision-maker should afford special consideration as to whether the Indigenous Peoples participating in the process consider those effects to be justified in the circumstances. We support the federal government's proposal to adopt as a guiding principle to its reforms, that Indigenous Peoples are included in decision making at all phases of the IA process. This is consistent with federal government's commitment to UNDRIP and to reconciliation. The goal would be consultation and accommodation on all decisions made in the course of IA in the spirit of reaching "mutually acceptable arrangements" and special consideration of the significance of environmental impacts from the perspective of the potentially affected Indigenous Peoples.

We also support improving how assessment and regulatory processes recognize Indigenous jurisdiction, laws, practices and governance systems, and incorporate them into IA and regulatory decision making. It is critical that the regulatory processes recognize the importance of Indigenous Peoples' participation and Indigenous laws, practices and governance systems. One way of doing this is to support greater participation of Indigenous Peoples with expertise in such matters on assessment boards and review panels (an approach which has been considered by the government).

On UNDRIP articles 18 and 32(1), we recommended that the federal government consider the existence of IA processes wholly or partly controlled by Indigenous Peoples and recommended strengthening their capacity. We also recommended that Indigenous assessments could be coordinated with federal or provincial assessments to offer one assessment if the Indigenous assessment body agreed. This might require that members of the Indigenous assessment body participate in deciding on the conclusions and recommendations of the final assessment report.

We support the idea of "Indigenous-led assessments" as raised in the Discussion Paper, including the possible substitution (based on clear conditions of equivalency) of project assessments to Indigenous governments. We also support the principles recommended by the Expert Panel in this regard, including the development of "tri-partite arrangements for the conduct of regional or project assessment within their traditional territory, treaty settlement lands and/or Aboriginal title lands," and use of federal assessment structures to support Indigenous jurisdictions, where support is requested.

RECOMMENDATIONS

28. The CBA Sections recommend that Indigenous Peoples be included in decision making at all phases of the IA process.

29. The CBA Sections recommend that a free, prior and informed consent (FPIC) approach to Indigenous consent be adopted for the IA process.

30. The CBA Sections recommend that where significant adverse effects are determined to be likely in an IA process, the decision-maker should afford special consideration as to whether the Indigenous Peoples participating in the process consider those effects to be justified in the circumstances.

31. The CBA Sections recommend improving how assessment and regulatory processes recognize Indigenous jurisdiction, laws, practices and governance systems, and incorporating them into IA and regulatory decision making.

32. The CBA Sections recommend that the federal government consider the existence of IA processes wholly or partly controlled by Indigenous Peoples, and recommended strengthening their capacity. Indigenous assessments could be coordinated with federal or provincial assessments to offer one assessment if the Indigenous assessment body agrees.

33. The CBA Sections recommend Indigenous-led assessments, including the possible substitution (based on clear conditions of equivalency) of project assessments.

X. NATIONAL ENERGY BOARD, FISHERIES AND NAVIGATION

A. INTRODUCTION

We turn now to the federal government's comprehensive review of the NEB, as well as on restoring lost protections and incorporating modern safeguards under the *Fisheries Act* and the NPA.

The CBA Sections emphasize the importance of implementing a robust federal energy regulatory regime that is sufficiently funded and resourced to achieve the overriding objectives of restoring public trust in the NEB, ensuring the equal application of a fair, independent and impartial regulatory process under the law, and getting resources to market.

In this part we identify areas of alignment between the CBA Sections' views and recommendations in the Expert Panel on the Modernization of the National Energy Board (NEB Expert Panel Report), and consider how recommendations in the NEB Expert Panel Report can be reconciled and adopted together with the EA Expert Panel Report, the federal government's June 2017 response to the Fisheries and Oceans Committee's February 2017 report, *Review of Changes Made in 2012 to the Fisheries Act: Enhancing the Protection of Fish and Fish Habitat and the Management of Canadian Fisheries,* and the federal government's June 2017 response to the Transport, Infrastructure and Communities Committee March 2017 report, *A Study of the Navigation Protection Act* [7]

B. THE DISCUSSION PAPER

The Discussion Paper outlines legislative, policy and program changes that the federal government is considering to restore public trust in the NEB, lost protections of fish and fish habitat, and lost safeguards respecting navigation on our waterways. It describes the recommendations of the expert panel reports and responses the federal government may implement. However, the Discussion Paper does so without explaining the whole legislative framework in which changes may be implemented.

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[7] *Supra* note 1. *See also* Expert Panel on the Modernization of the National Energy Board, *Forward Together: Enabling Canada's Clean, Safe and Secure Energy Future* (May, 2017), available online (www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf). *See also* House of Commons Standing Committee on Fisheries and Oceans, *Review of Changes Made in 2012 to the Fisheries Act: Enhancing the Protection of Fish and Fish Habitat and the Management of Canadian Fisheries* (February 2017), available online (www.ourcommons.ca/DocumentViewer/en/42-1/FOPO/report-6). *See also,* Standing Committee on Transport, Infrastructure and Communities, *A Study of the Navigation Protection Act* (March 2017), available online (www.ourcommons.ca/Content/Committee/421/TRAN/Reports/RP8839580/tranrp11/tranrp11-e.pdf.

While the CBA Sections commend the federal government for continuing to engage stakeholders who will be affected by changes to the federal government's IA and regulatory review process, we are concerned that the limited detail in the Discussion Paper creates challenges for stakeholders who wish to provide further input on the proposed changes. If input from stakeholders is to be meaningful, it must be informed engagement that occurs before legislative, policy or program changes are made. The changes being considered by the federal government should be explained in greater detail.

C. MODERN ENERGY REGULATION

The Discussion Paper refers to several recommendations set out in the NEB Expert Panel Report, and affirms the federal government's view "that any major project needs to go through an open, transparent, inclusive, and thorough environmental, social and economic assessment process". The Discussion Paper states that the federal government is considering amending the *National Energy Board Act* (NEB Act) to vary the NEB's mandate, governance, Indigenous representation, decision making powers, and operations, in light of the NEB Expert Panel Report.[8]

NEB Mandate

The federal government is considering whether to make the NEB and the new IA agency jointly responsible for conducting the IA process for federally-designated pipeline projects. The NEB would be solely responsible for assessment of non-designated pipeline projects, issuing export and import licenses, and varying or transferring certificates and licenses. However, the Discussion Paper does not distinguish between pipeline projects of "national consequence", "significant projects" or "lower risk" projects, as recommended by the NEB Expert Panel Report. There is no endorsement of the Panel's proposed two-part review process for projects of national consequence, and no explanation of when the federal Governor in Council (GIC) would determine whether a designated project is in the public interest. These questions must be answered to rebuild public trust in the project assessment system.

The Discussion Paper also does not indicate how the federal government will reconcile the inconsistent recommendations advanced by the NEB and EA Expert Panels:

(i) The NEB Expert Panel Report recommended that the GIC make a preliminary national interest determination on a proposed project at the beginning of the

[8] *See National Energy Board Act,* R.S.C., 1985, c. N-7available online (http://laws-lois.justice.gc.ca/eng/acts/N-7/).

review process, before detailed design, regulatory review and IA are completed. By contrast, the Expert Panel recommended that the GIC be involved only at the end of the process to hear any appeals from the IA authority's decision.

(ii) The NEB Expert Panel Report recommended a single, detailed regulatory review process for "major projects" that integrates the IA with the Canadian Energy Transmission Commission (CETC)-led technical review, rather than parallel review processes. The Expert Panel recommended the opposite – that the IA be separated from the technical review.

These inconsistencies are fundamental and require an explanation of how they will be reconciled.

The Discussion Paper leaves other questions unanswered arising from the NEB Expert Panel Report. What will trigger the need for a preliminary national interest determination, and how will the determination be made? What detailed information will be required for preliminary decisions? How can Crown consultation with Indigenous Peoples be meaningful prior to national interest determinations? What transitional legislation is the federal government considering until the new regulatory review scheme comes into force? The absence of detail in the Discussion Paper on these matters will impair stakeholder consultation, as the federal government's proposed legal framework is not well understood.

Based on the Discussion Paper, stakeholders have no knowledge of the timelines governing the completion of IA and regulatory review of projects. Timelines are said to be project-specific and established following an early planning phase. However, elsewhere timelines are said to be legislated. Uncertainty about applicable assessment and review timelines could undermine the overriding goal of introducing certainty to modern energy regulation.

The Discussion Paper suggests that projects can still be designated or excluded from assessment under certain conditions, based on clear criteria and a transparent process. The uncertainty about what the clear criteria would be introduces a subjective element that will erode the overriding goal of providing proponents with certainty as to whether the assessment or regulatory schemes apply to their projects.

Modern and Effective NEB Governance

The federal government is considering whether to separate the roles of Chief Executive Officer and Chair of the Board, creating a corporate-style executive board to lead and provide strategic

direction to the organization. It is also considering creating separate hearing commissioners to review projects, increasing Indigenous representation among the Board and Commissioners, maintaining the NEB in Calgary, and eliminating the Calgary residency requirement for the Board and Commissioners. The CBA Sections agree that these changes would advance the aim of restoring public trust in the NEB.

RECOMMENDATIONS

34. The CBA Sections recommend that the proposed NEB governance changes will advance the aim of restoring public trust in the NEB.

NEB Decision Making

The federal government is considering increasing public participation opportunities in technical hearings, including enhancing support available to all participants to help them navigate regulatory processes. The CBA Sections agree that adequate funding of parties with standing, including Indigenous groups, is a key precondition for robust regulatory reviews that result in decisions based on science, facts and evidence, and serve the public's interest.

The government is also considering eliminating the test for standing enacted under the NEB Act. We are of the view that the present standard for determination of party standing should continue to apply. To achieve the goal of providing certainty in modern energy regulation, including project decisions within defined timelines, the NEB must retain discretion whether to admit a party to a proceeding and decide what level of participation a party should have.

The introduction of an advocate for landowners in the NEB process is also being considered. More detail is required about what role and powers this advocate would have. The answers to these questions cannot be assumed, particularly given that existing advocacy groups routinely provide landowners with a strong voice in NEB proceedings. This advocate could also be empowered to administer a fund for landowners to obtain legal advice. However, the Discussion Paper does not identify who should be responsible for supplying that fund.

Finally, alternatives to adjudication in NEB processes, such as alternative dispute resolution (ADR) are being considered. We agree that ADR should be available in appropriate cases. However the existing legislation does not bar parties from resolving disputes by ADR. The Discussion Paper does not say whether the federal government is considering empowering the NEB to require parties to engage in ADR – and if so, when this may occur and if it would have any impact on legislated or project-specific timelines governing project approval.

RECOMMENDATIONS

35. **The CBA Sections recommend adequate funding for parties with standing, including Indigenous groups.**
36. **The CBA Sections recommend that the NEB retain discretion over whether to admit a party to a proceeding, and to decide what level of participation a party should have.**
37. **The CBA Sections recommend that the proposed advocate for landowners be empowered to administer a fund for landowners to obtain legal advice, and that the source of the fund should be identified.**
38. **The CBA Sections recommend that ADR should be available in NEB processes in appropriate cases, and note that the existing legislation does not bar parties from resolving disputes by ADR.**

Indigenous Participation in NEB Processes

The federal government is considering whether: to enact opportunities for dialogue with Indigenous Peoples on energy policy; build capacity funding to participate in regulatory review and Crown consultation; expand the role of Indigenous Peoples to monitor pipelines and other energy infrastructure from construction to decommissioning; increase Indigenous representation among the Board and Hearing Commissioners; and require expertise in Indigenous knowledge.

The CBA Sections commend the federal government for considering these expansions to the role of Indigenous Peoples in modern federal energy regulation. These changes reflect a concerted effort by the federal government to address deficiencies identified by Indigenous groups regarding the present federal energy regulatory scheme governing NEB proceedings.

RECOMMENDATIONS

39. **The CBA Sections recommend that the role of Indigenous Peoples in modern federal energy regulation be expanded.**

NEB Operations

The federal government is considering encouraging development of cooperation agreements with interested jurisdictions, improving public access to online project information and

incident reports, and enhancing safety and security measures to protect energy infrastructure. The CBA Sections agree that these measures would advance the objective of restoring public trust in the NEB regulatory review process.

RECOMMENDATIONS

40. The CBA Sections recommend that proposed operational measures, such as developing cooperation agreements with interested jurisdictions, improving public access to online project information and incident reports, and enhancing safety and security measures to protect energy infrastructure, would advance the objective of restoring public trust in the NEB regulatory process.

D. RESTORING LOST PROTECTIONS TO *NAVIGATION PROTECTION ACT*

The federal government considers that 2012 amendments to the NPA shifted legislative intent away from safeguarding navigation on our waterways to approving works and undertakings on waterways. To restore lost protections, provide a meaningful role for Indigenous Peoples, and enhance regulatory transparency, the federal government is considering:

(i) Improving the process for adding navigable waters to the Schedule;

(ii) Regulating obstructions and certain classes of works on all navigable waters in the federal government;

(iii) Developing a complaint mechanism for works on unscheduled navigable waters;

(iv) Working with Indigenous Peoples to incorporate Indigenous knowledge in decision making;

(v) Engaging Indigenous Peoples early and regularly in *NPA* processes, and monitoring, enforcing, and making decisions in respect of traditional lands;

(vi) Improving access to information about projects subject to the *NPA*; and

(vii) Requiring proponents to provide notice and consult before constructing works on navigable water.

The CBA Sections support each of these goals and amendments to the *NPA* in concept. However, we are concerned that without proper integration with the environmental regulatory changes, proposed changes could undermine the overriding principles of "one project one review" and "one project one assessment", which are the cornerstones of environmental and energy regulation.

RECOMMENDATIONS

41. The CBA Sections recommend proper integration of proposed amendments to the NPA with other proposed environmental regulatory changes in order to support the overriding principles of "one project one review" and "one project one assessment", which are the cornerstones of environmental and energy regulation.

E. ENHANCING PROTECTION FOR CANADA'S FISH AND FISH HABITAT

The federal government considers that 2012 amendments to the *Fisheries Act* shifted legislative intent away from protecting fish habitat to managing threats to the federal government's commercial, recreational and Aboriginal fisheries. To restore lost protections, the federal government is considering:

(i) Enhancing participation of Indigenous Peoples in the conservation and protection of fish and fish habitats;

(ii) Incorporating Indigenous knowledge into decision making under the *Fisheries Act*;

(iii) Enabling proactive identification of important fish habitats;

(iv) Identifying key fish habitat restoration and rebuilding priorities;

(v) Considering cumulative effects, the precautionary approach, and ecosystem-based management of fish habitat;

(vi) Prohibiting harmful alteration, disruption or destruction (HADD) of fish habitat;

(vii) Clarifying when *Fisheries Act* authorizations are needed for projects;

(viii) Developing standards of practice to mitigate harm to habitat;

(ix) Enhancing enforcement powers;

(x) Clarifying the factors to be considered in decisions about approvals;

(xi) Building capacity and expertise to protect fish and habitat;

(xii) Partnering and collaborate with others to advise on protection of fish and habitat; and

(xiii) Providing Canadians transparent access to information about projects impacting fish and habitat.

The CBA Sections support each of these goals and amendments to the *Fisheries Act* in concept. However, as with proposed amendments to the NPA, proposed changes *Fisheries Act* could undermine the overriding principles of "one project one review" and "one project one assessment".

RECOMMENDATIONS

42. The CBA Sections recommend proper integration of proposed amendments to the *Fisheries Act* with other proposed environmental regulatory changes in order to support the overriding principles of "one project one review" and "one project one assessment", which are the cornerstones of environmental and energy regulation.

The federal government's response to Fisheries and Oceans Canada's review of the *Fisheries Act* supports many recommendations that would require significant expanded funding for more research dedicated to ecosystem science, habitat protection staff across the federal government, fisheries conservation and enhancement projects in cooperation with Indigenous and other communities, re-establishing local offices in each province and territory, and Indigenous groups to participate in the review of the *Fisheries Act*. The Discussion Paper does not refer in detail to these funding commitments, or specify when or to whom additional funds will be provided.

XI. CONCLUSION

The CBA Sections commend the expert panels and federal government for their efforts in reviewing Canada's environmental and regulatory processes. We appreciate the opportunity to recommend ways to strengthen and improve these processes, and trust that our comments will assist the federal government. We would be pleased to discuss them in more detail.

XII. SUMMARY OF RECOMMENDATIONS

FEDERAL IA PROCESS

The CBA Sections recommend:

1. **that the goal of the federal impact assessment process review should be to develop a robust and sufficiently funded IA process based on the five pillars of sustainability – incorporating meaningful public participation, best available scientific information and Indigenous and community knowledge, while protecting the environment.**
2. **that clear criteria and a transparent process should be established to periodically review the Project List for federal IAs.**

3. **that decision making should rest with an elected and politically accountable person, such as the Minister, and not with an independent IA authority.**
4. **a two-stage IA process. The first stage should be proponent-led and identify if a project should proceed (considering significant adverse effects). The second stage should determine further project design and mitigation requirements.**
5. **that the level of information submitted at the first stage of the IA process should be limited to what is required for a preliminary determination, with more detailed information submitted for the second stage.**
6. **maintaining legislated timelines for the IA process to provide clarity and predictability, with a statutory mechanism (similar to the one currently available in CEAA 2012) allowing ministerial approval to depart from the timelines in special circumstances.**
7. **that the post-IA permitting process should be fair, transparent, predictable, timely and cost-effective. It should focus on how the project should proceed, and not on whether it should proceed.**
8. **expanding the scope of IA to include key elements of sustainability such as environmental, economic, social and health, and cultural considerations, as well as and an assessment of long term impacts that are likely to affect future generations.**
9. **using the principle of "one project, one assessment" based on the principle of "harmonization upward" to ensure cooperation that meets the highest standard of IA.**
10. **that equivalency arrangements may continue to be of use in certain circumstances for certain IA projects.**
11. **that the multiple proposed roles of a new IA Authority as authority as manager, reviewer and judge of IAs will inevitably create conflicts.**
12. **that vesting significant final decisions on unelected officials is problematic, and that IA decision making would be more appropriately undertaken by Ministers or by Cabinet in certain circumstances.**
13. **that decision making should be done using a sustainability test (incorporating meaningful public participation, best available scientific information and**

Indigenous and community knowledge, while protecting the environment), and not simply based on the vague concept of public interest.

14. **that federal government funding is necessary to ensure that robust regional lA studies involve the participation of affected communities.**
15. **that regional IA studies be conducted by independent, well qualified and diverse panels or authorities that have the public trust and confidence. In regions where Indigenous peoples live, the panels should have Indigenous representatives.**
16. **that if an independent body with responsibility for regional IA studies is established, it should also be tasked with the responsibility of identifying areas that should be the subject of these studies. It should have diverse, qualified and experienced representation, and be sufficiently funded.**
17. **that the IA process be sufficiently and fairly resourced by the proponent as well as the federal government and other jurisdictions to ensure robust IAs and meaningful participation.**
18. **an approach to the IA process that enhances collaboration, inclusion and engagement.**

ROLE OF INDIGENOUS COMMUNITIES

The CBA Sections recommend that:

19. **that for the federal government to rely on a single agency to carry out the duty of consultation and accommodation for Indigenous Peoples in the IA process, the agency must have the powers and means to do so.**
20. **that the early engagement stage of the IA process be focused in its scope and have funding in addition to that available for participation in the assessment process itself.**
21. **that in order to foster meaningful consultation with Indigenous Peoples, the federal government's role in consultation needs to be clear and consistent as well as clarified in regulatory processes.**
22. **that when an affected Indigenous group raises concerns that the regulatory process being relied on by the Crown does not achieve adequate consultation or accommodation, the IA legislation should specify that the regulatory agency**

must consider these concerns in a timely manner – and if adequate consultation or accommodation has not been achieved, take or cause to be taken additional or new measures to meet the Crown's duty.

23. **that the engagement with Indigenous Peoples in the determination of preliminary impacts – if this is, in fact, the level of impact that is to be assessed at the early engagement stage – should also take into account new information concerning potential impacts during the course of the IA process.**
24. **that the federal government provide adequate and ongoing program funding to build capacity in Indigenous communities, as well as administrative support and infrastructure to allow for early and timely responses to requests for consultation and participation in the IA process.**
25. **strengthening the capacity of Indigenous communities to participate in the IA process through long-term, ongoing capacity development, and programs designed to support Indigenous groups during all phases of the IA process.**
26. **more equitable principles for funding Indigenous communities in IA and regulatory reviews, which is, at a minimum, commensurate with the costs for participation.**
27. **that Indigenous community knowledge, including Indigenous traditional knowledge (ITK), should play an important role in IA, and receive better support from the federal government.**
28. **that Indigenous Peoples be included in decision making at all phases of the IA process.**
29. **that a free, prior and informed consent (FPIC) approach to Indigenous consent be adopted for the IA process.**
30. **that where significant adverse effects are determined to be likely in an IA process, the decision-maker should afford special consideration as to whether the Indigenous Peoples participating in the process consider those effects to be justified in the circumstances.**
31. **improving how assessment and regulatory processes recognize Indigenous jurisdiction, laws, practices and governance systems, and incorporating them into IA and regulatory decision making.**

32. **that the federal government consider the existence of IA processes wholly or partly controlled by Indigenous Peoples, and recommended strengthening their capacity. Indigenous assessments could be coordinated with federal or provincial assessments to offer one assessment if the Indigenous assessment body agreed.**
33. **Indigenous-led assessments, including the possible substitution (based on clear conditions of equivalency) of project assessments.**

NATIONAL ENERGY BOARD, FISHERIES AND NAVIGATION

The CBA Sections recommend that:

34. **that the proposed NEB governance changes will advance the aim of restoring public trust in the NEB.**
35. **adequate funding for parties with standing, including Indigenous groups.**
36. **that the NEB retains discretion over whether to admit a party to a proceeding, and to decide what level of participation a party should have.**
37. **that the proposed advocate for landowners be empowered to administer a fund for landowners to obtain legal advice, and that the source of the fund should be identified.**
38. **that ADR should be available in NEB processes in appropriate cases, and note that the existing legislation does not bar parties from resolving disputes by ADR.**
39. **that the role of Indigenous Peoples in modern federal energy regulation be expanded.**
40. **that proposed operational measures, such as developing cooperation agreements with interested jurisdictions, improving public access to online project information and incident reports, and enhancing safety and security measures to protect energy infrastructure, would advance the objective of restoring public trust in the NEB regulatory process.**
41. **proper integration of proposed amendments to the NPA with other proposed environmental regulatory changes in order to support the overriding**

principles of "one project one review" and "one project one assessment", which are the cornerstones of environmental and energy regulation.

42. **proper integration of proposed amendments to the *Fisheries Act* with other proposed environmental regulatory changes in order to support the overriding principles of "one project one review" and "one project one assessment", which are the cornerstones of environmental and energy regulation.**