Amending the *Impact Assessment Act* in response to Reference re *Impact Assessment Act*, 2023 SCC 23

Technical Submission

Assembly of First Nations

May 2024

Summary of Recommendations

Recommendation 1

With respect to the United Nations Declaration on the Rights of Indigenous Peoples:

> (1) The Government of Canada expeditiously adopt a cabinet directive or mandatory assessment tool on consistency of laws with the UN Declaration; and
>
> (2) The mandatory assessment tool be applied to the Impact Assessment Act (IAA), the proposed amendments, and any regulations made under the act.

Recommendation 2

With respect to First Nations jurisdiction in the IAA:

> (1) the Committee reference the importance of First Nations-led assessments in its report and encourage the Government of Canada to recognize and integrate First Nations systems of assessment that align with First Nations values and legal systems into the IAA; and,
>
> (2) the IAA be amended to include statutory affirmation of First Nations jurisdiction over Lands and Waters that may be impacted by designated projects and provide mechanisms for impacts on those Lands and Waters to be assessed pursuant to impact assessments conducted in accordance with the values and legal systems of First Nations.

Recommendation 3

The IAA be amended to provide an express reference to Indigenous decision-making in either section 6 or section 114, in order affirm that future *Indigenous Co-Administration Agreement Regulations* may include shared decision-making with First Nations jurisdictions.

Recommendation 4

The IAA be amended to limit disclosure of Indigenous knowledge without consent to non-public disclosure.

Recommendation 5

Section 22 of the IAA be amended to include a specific reference to the application of Indigenous knowledge to the assessment of project effects, as follows:

> 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
>
> (g) Indigenous knowledge provided with respect to the designated project and the application of that Indigenous knowledge to project effects.

Recommendation 6

With respect to proposed changes to the definition of “adverse effects within federal jurisdiction”:

> (1) the Government of Canada continue to assert a broad interpretation of section 91(24) of the *Constitution Act, 1867*; and

(2) the application of any thresholds relating to adverse effects on First Nations require consideration of First Nations perspectives when assessing the significance or severity of effects.

Recommendation 7

With respect to "adverse effects within federal jurisdiction," the new definition must capture direct or significant transboundary effects. The Assembly of First Nations recommends that the amended definition:

(1) add "direct or significant" to each mention of effects as well as to other direct or incidental effects;

(2) include a change to the environment that would occur from the emission of greenhouse gases;

(3) remove limitation of marine pollution to only transboundary pollution in (c) by striking "and that would occur outside Canada"; and

(4) remove "that is caused by pollution" from (d).

Recommendation 8

Section 7(1) reference to changes to the environment that would occur "in a province other than the one where physical activity or the designated project is being carried out" be maintained.

Recommendation 9

With respect to proposed changes to discretionary designation decisions:

(1) the reference to consideration of adverse effects on the Indigenous Peoples of Canada should be made mandatory;

(2) the evaluation of the potential for adverse project effects should involve the active and informed participation of First Nations and in considering adverse impacts to First Nations' rights, consultation with potentially affected First Nations should be made mandatory; and

(3) s. 9(2)(d) be removed.

Recommendation 10

With respect to proposed changes to the Agency's screening decision, s. 16(2)(f.1) be removed.

Recommendation 11

With respect to potential changes to the public interest decision:

(1) Maintain "hinder or" in s. 63(e) (current numbering); or

(2) revise the amendment to change "contribute" to "impact" or "effect" in order to permit the decision maker to consider both positive and negative effects of a designated project.

Assembly of First Nations

The Assembly of First Nations (AFN) is a national advocacy organization that works to advance the collective aspirations of First Nations individuals and communities across Canada on matters of national or international nature and concern.

The AFN hosts at least two Assemblies a year where mandates and directives for the organization are established through resolutions directed and supported by the First Nations in Assembly (elected Chiefs or proxies from member First Nations).

The mandate of the Assembly of First Nations to contribute to the *Impact Assessment Act* (SC 2019, c. 28, s. 1) ("IAA" or "Act") amendment process are set out in various resolutions. Those resolutions are summarized below:

- Call on Canada to ensure that regulatory and policy development fully respects the constitutional and other legal obligations of the Crown to First Nations and standards set by the *United Nations Declaration on the Rights of Indigenous Peoples* (Resolution 69/2018);
- Call on Canada to engage in focused dialogue with First Nations to substantively identify, recognize, and engage the protocols, elements, and processes to conduct joint regulatory and policy drafting (Resolutions 69/2018, 06/2019);
- Call upon Canada to meet or exceed precedent set in development and eventual passage of the *Species at Risk Act* – full, direct, and unfettered participation of First Nations (Resolution 73/2017);
- Continue to support and coordinate interventions and participation of First Nations, regional organizations, and provincial territorial organizations in the co-development process, including creating regionally specific processes to address specific concerns and support provisions as part of nation-to-nation relationships (Resolutions 73/2017, 07/2018, 69/2018);
- Advocate for adequate funding directly to First Nations for their full and effective participation (Resolutions 73/2017, 07/2018, 69/2018, 06/2019);
- Conduct regional information sessions to support First Nations, regional organizations, and provincial/territorial organizations in the process (Resolutions 73/2017, 07/2018, 69/2018); and,
- Demand that Canada obtain free, prior and informed consent and consult on all amendments to federal legislation which may affect First Nations rights pursuant to s. 5 of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("UNDA") and, advocate for the full implementation of the UNDA National Action Plan ("UNDA Action Plan") (Resolution 77/2023).

As part of fulfilling these mandates, the AFN advocates for upholding the Inherent and Treaty rights of First Nations and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration")*.

Introduction and Objectives

First Nations have exercised jurisdiction over the use and stewardship of First Nations Lands and Waters since time immemorial. The imposition of Crown sovereignty and the displacement of First Nations from those Lands and Waters have impaired the capacity of many First Nations to uphold stewardship responsibilities. Nonetheless, those responsibilities, and the Inherent jurisdiction required to fulfill those responsibilities, persist. First Nations remain actively engaged in the protection and caretaking of First Nations Lands and Waters in accordance with Inherent rights, responsibilities, and Indigenous legal systems. The analysis below recognizes that the displacement of First Nations authority is ongoing and inconsistent with the recognition and implementation of Inherent rights and Treaty relationships.

The *Impact Assessment Act* ('IAA or the Act') became law on June 21, 2019.[1] It repealed the *Canadian Environmental Assessment Act,* 2012[2] ("CEAA 2012") and put in place a new process to assess the impacts of major projects on matters falling within federal jurisdiction. First Nations overwhelmingly participated in parliamentary and other advocacy related to Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts,* demonstrating the importance of this legislation for First Nations. Specifically, the Assembly of First Nations made submissions to the relevant House of Commons and Senate committees.[3]

On October 13, 2023, the Supreme Court of Canada issued an opinion in *Reference re Impact Assessment Act* ("SCC Opinion").[4] A majority of the Court found most of the IAA and the underlying regulations to be unconstitutional. That same day, the Minister of Justice and Attorney General of Canada, the Hon. Arif Virani, and the Minister of Environment and Climate Change, the Hon. Steven Guilbeault, issued a statement expressing an intention to "work quickly to improve the legislation through Parliament."[5] On October 26, 2023, the Government of Canada issued a further statement with interim guidance on the administration of the Act pending legislative amendments.[6] The

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[1] *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, online: https://laws-lois.justice.gc.ca/eng/acts/i-2.75/.
[2] *Canadian Environmental Assessment Act 2012,* S.C. 2012, c. 19, s. 52, online: https://laws-lois.justice.gc.ca/eng/acts/c-15.21/20170622/P1TT3xt3.html
[3] Assembly of First Nations, "Submission to the Standing Committee on Environment and Sustainable Development, Study on Impact Assessment Act, Canadian Energy Regulator, and Navigable Waters Act (Bill C-69)," April 15, 2018, online: https://www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9885952/br-external/AssemblyOfFirstNations-e.pdf and Assembly of First Nations, "Submission to the Senate Standing Committee on Energy, the Environment and Natural Resources, Study on Impact Assessment Act, Canadian Energy Regulator, and Navigable Waters Act (Bill C-69)," April 4, 2019, online: https://sencanada.ca/content/sen/committee/421/ENEV/Briefs/AssemblyofFirstNations_e.pdf.
[4] *Reference re Impact Assessment Act*, 2023 SCC 23.
[5] *Statement by Ministers Guilbeault and Virani on the Supreme Court of Canada's opinion on the constitutionality of the Impact Assessment Act*, online: https://www.canada.ca/en/impact-assessment-agency/news/2023/10/statement-by-ministers-guilbeault-and-virani-on-the-supreme-court-of-canadas-opinion-on-the-constitutionality-of-the-impact-assessment-act.html.
[6] *Statement on the Interim Administration of the Impact Assessment Act Pending Legislative Amendments*, online: https://www.canada.ca/en/impact-assessment-agency/services/policy-

Government of Canada has proposed amendments to the IAA contained within Bill C-69, *An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024* (Budget Implementation Act 2024) at Division 28.[7]

The objective of this Technical Submission is to respond to the proposals put forward by the Government of Canada, and to ensure respectful engagement with the Inherent and Treaty rights, title, knowledge systems, and governance of First Nations, in line with mandates from the First Nations-in-Assembly. This includes consideration of Canada's commitments to fully implement the UN Declaration, UNDA and the UNDA Action Plan.

Scope of Amendments and Inconsistency with United National Declaration on the Rights of Indigenous Peoples Act

The UN Declaration Act requires the Government of Canada, in consultation and cooperation with Indigenous Peoples, to take all measures necessary to ensure that federal laws are consistent with the UN Declaration.[8] The Act also affirms that the UN Declaration can be used to interpret and apply Canadian laws, including the Constitution. This means that new laws and regulations or updates to existing laws or regulations that impact the rights of Indigenous Peoples should contribute to achieving the objectives of the UN Declaration. The IAA does, in fact, impact the rights of Indigenous Peoples and therefore any updates to the legislation should contribute to achieving the objectives of the UN Declaration.

The UNDA Action Plan committed the Government to "[d]evelop and implement a process and further direction for federal government departments and agencies to ensure bills and proposed regulations are consistent with the UN Declaration" through measures such as "Cabinet directives or mandatory assessment tools on consistency with the UN Declaration."[9] The Privy Council Office Treasury Board of Canada Secretariat is indicated as the responsible authority but it is AFN's understanding that no progress has been made on such a directive or mandatory assessment tool.

There has been no **public** analysis, rationale or explanation provided by the Government of Canada on how the amendments proposed in the Budget Implementation Act 2024 contribute to achieving the objectives of the UN Declaration. The failure to purposefully assess whether proposed legislation, in its entirety, is consistent with the UN Declaration impairs progress towards reconciliation and does not ensure the protection necessary to uphold the minimum standards for the survival, dignity and well-being of First Nations in Canada.

Recommendation 1

The Assembly of First Nations recommends that:

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guidance/practitioners-guide-impact-assessment-act/statement-interim-administration-impact-assessment-act-pending-legislative-amendments.html.

[7] Bill C-69, *An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024* https://www.parl.ca/DocumentViewer/en/44-1/bill/C-69/first-reading.

[8] *United Nations Declaration on the Rights of Indigenous Peoples Act, S.C.* 2021, c. 14 at s. 5.

[9] Government of Canada, "United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan" at page 25, online: https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf.

(1) The Government of Canada expeditiously adopt a cabinet directive or mandatory assessment tool on consistency of laws with the UN Declaration; and

(2) The mandatory assessment tool be applied to the Impact Assessment Act, the proposed amendments, and any regulations made under the Act.

First Nations and the Impact Assessment Act

New Opportunities for First Nations in the Impact Assessment Act: Co-Administration

The IAA includes many provisions which are specific and beneficial to First Nations. Most of the considerations are maintained in proposed amendments, although the process of federal impact assessment may be changed.

New opportunities for Indigenous led assessments are of particular interest to many First Nations. Section 114 of the IAA empowers the Minister of Environment and Climate Change ("Minister") to enter into agreements to authorize Indigenous Governing Bodies[10] to exercise powers or perform duties or functions in relation to impact assessments in connection with specified lands. In order for the Minister to enter into agreements under section 114 of the IAA, the Government of Canada must first adopt regulations.

Prior to the release of the SCC Opinion, the Agency initiated a seven-phase process to co-develop regulations in response to this section, called the *Indigenous Co-Administration Agreement Regulations*. The co-development of the regulations has been paused since the release of the SCC Opinion, but that work is anticipated to resume following amendments to the IAA.

It is important to note that section 114 of the IAA and the future *Indigenous Co-Administration Agreement Regulations* will not empower First Nations to conduct impact assessments in accordance with their own legal systems. Rather, First Nations seeking to co-administer the IAA will be required to align their processes with the IAA and fulfill the requirements of the Act as an exercise of delegated authority. The scope of First Nation decision-making power and discretion in administering the Act will be set out in the *Indigenous Co-Administration Agreement Regulations* and individual agreements with First Nations.

First Nations' Jurisdiction

The use of delegated authority for co-administration, through section 114 agreements, is a positive step forward from past impact assessment legislation, however, it fails to fully align with s. 5 of UNDA, and the related UNDA Action Plan. The limited scope of delegated authority available to First Nations under the IAA does not encompass First Nations rights to Lands, Waters, and territories, including the First Nation right to own, use, develop, and control First Nations territories, or the Inherent jurisdiction of First Nations over their Lands and Waters.

[10] IAA at s. 2. *Indigenous governing body* means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

In the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples,[11] the Government of Canada acknowledged that recognition of the Inherent jurisdiction and legal orders of First Nations is the starting point of discussions aimed at interactions among federal, provincial, territorial, and Indigenous jurisdictions and laws.

The AFN notes that the recent Supreme Court of Canada opinion in Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 ("SCC Child Welfare Opinion") and Bill C-61, *An Act respecting water, source water, drinking water, wastewater and related infrastructure on First Nation lands* ("Bill C-61") may provide helpful guidance on the potential tools that the Government of Canada could use to enhance cooperation with First Nations as governments with jurisdiction under the IAA.

Bill C-61 provides a clear affirmation that the Inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act*, 1982 includes jurisdiction in relation to water, source water, drinking water, wastewater and related infrastructure on, in and under First Nation Lands.[12] It also affirms First Nations jurisdiction over water and source water in a protection zone that is adjacent to the First Nation Lands if an agreement is in place.[13] Statutory affirmation of First Nation jurisdiction would provide a more effective foundation for cooperation and improved alignment with UNDRIP and Canada's section 5 consistency obligations than relying solely on delegated authority pursuant to regulations or agreements. Statutory provisions that affirm rights-based jurisdiction and recognize First Nations enactments as part of federal law would provide a much greater scope of discretion for First Nations to assess designated projects in accordance with their distinct traditions, customs, and practices.

The *SCC Child Welfare Opinion* also examined statutory affirmation of section 35 rights and confirmed the constitutionality of anticipatory incorporation by reference as a mechanism to recognize Indigenous laws as federal laws provided they align with federal legislative authority.[14] The use of anticipatory incorporation by reference[15] supported by statutory affirmation of jurisdiction would provide an effective foundation for First Nations to exercise authority in impact assessment processes pursuant to First Nations laws. The AFN encourages the Government of Canada to explore opportunities to move past co-

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[11] Government of Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples," online: https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html.

[12] Bill C-61, *An Act respecting water, source water, drinking water, wastewater and related infrastructure on First Nation lands, First Session*, Forty-fourth Parliament, 2024, s. 6(1)(a) [First Reading].

[13] *Ibid* at s. 6(1)(b)

[14] Paragraph 122 of the Supreme Court of Canada opinion in Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 states:

> [122] Section 21 of the Act is simply an incorporation by reference provision. It incorporates by reference the laws adopted by an Indigenous group, community or people and gives them the force of law as federal law. Moreover, because such laws may be amended, s. 21 incorporates the amendments that may be made to them in the future, on an *anticipatory* basis. Such an anticipatory incorporation by reference provision is constitutional.

[15] Incorporation by reference refers to provisions within a statute or regulation that permit laws or regulations that are not written into the text of the statute or regulation to apply as if they were part of the statute or the regulation. Anticipatory incorporation by reference refers to incorporating by reference laws or regulations that were not enacted at the time the law or regulation came into force.

administration of the IAA to recognize First Nations systems of assessment that align with First Nations values and legal systems.

Specifically, the AFN seeks statutory affirmation of First Nations jurisdiction over Lands and Waters that may be impacted by designated projects. Within the specific context of the IAA, the exercise of that jurisdiction would be subject to IAA regulations and individual agreements with First Nations. Once the *Indigenous Co-Administration Agreement Regulations* are promulgated, First Nations will have to choose between conducting independent impact assessments in accordance with their own customs, practices and legal systems or administering the IAA. The inclusion of a provision affirming First Nation jurisdiction would enhance inter-jurisdictional cooperation by providing opportunities for First Nations to apply First Nations approaches to the assessment of designated projects while still operating within the structure of the IAA. Statutory affirmation of jurisdiction, combined with flexible regulations and agreements would provide greater opportunities to align impact assessment processes with First Nations values strengthening the quality of the assessment, improving First Nations participation, and minimizing the risk of conflict between Indigenous and non-Indigenous systems.

Recommendation 2

The Assembly of First Nations recommends that:

(1) the Committee reference the importance of First Nations-led assessments in its report and encourage the Government of Canada to recognize and integrate First Nations systems of assessment that align with First Nations values and legal systems into the IAA; and,

(2) the IAA be amended to include statutory affirmation of First Nations jurisdiction over Lands and Waters that may be impacted by designated projects and provide mechanisms for impacts on those Lands and Waters to be assessed pursuant to impact assessments conducted in accordance with the values and legal systems of First Nations.

First Nations' Decision-Making Power

Section 114 of the IAA permits the Minister to delegate to Indigenous Governing Bodies the authority to exercise powers or perform duties or functions in relation to impact assessments under the Act. While the Agency has confirmed that section 114 permits the delegation of decision-making powers, there is no express reference to Indigenous decision-making powers in the Act.

The purposes of the IAA set out section 6 include the promotion of cooperation and coordination between the federal government and Indigenous Governing Bodies that are jurisdictions. The policy objectives of coordination and cooperation are also reflected in the requirement that the Government of Canada must, in consultation and cooperation with Indigenous Peoples, take all measures necessary to ensure that the laws of Canada are consistent with the *UN Declaration* as set out in section 5 of UNDA. The objectives of cooperation and coordination are best served through shared decision-making. By placing First Nations at the center of decision-making processes, the IAA would achieve a higher level of cooperation and coordination by requiring alignment with impacted First Nations on both outcomes and process. Impacted First Nations are best positioned to

evaluate and mitigate impacts on First Nations rights and interests. Shared decision-making between the Government of Canada and impacted First Nations also offers the highest possible degree of certainty to project proponents. Further, the high cultural priority placed on sustainability by many First Nations would help to prioritize protection of the environment in the application of the Act.

Recommendation 3

> **The Assembly of First Nations recommends that the IAA be amended to provide an express reference to Indigenous decision-making in either section 6 or section 114 of the Act in order affirm that future *Indigenous Co-Administration Agreement Regulations* may include shared decision-making with First Nations jurisdictions.**

Indigenous Knowledge

Protection of Indigenous Knowledge Systems

Indigenous knowledge systems carry sacred and confidential information. They extend across generations and form the foundation of many cultural activities and governance structures. The non-consensual disclosure of Indigenous knowledge can have detrimental impacts on First Nations and their members. It can also undermine trust in the Government of Canada. In the context of federal impact assessments, the risk of disclosure of Indigenous knowledge can force First Nations to have to choose between protecting Indigenous knowledge and sharing the information necessary to prevent or mitigate potential impacts on their rights and interests.

The Expert Panel for the Review of Environmental Assessment Processes recommended forcefully that "[a]t all times, Indigenous Groups must maintain control over Indigenous knowledge."[16] Unfortunately, that is not the case with the present version of the IAA. The IAA is subject to the *Access to Information Act*[17] ("*Access to Information Act*") and the protections offered to protect the confidentiality of Indigenous knowledge are subject to various qualifications.[18] The policy objectives that underly current disclosure requirements can be largely achieved without compromising confidentiality if any non-consensual disclosure of Indigenous knowledge is limited to non-public disclosure.

Recommendation 4

> **The Assembly of First Nations recommends that the IAA be amended to limit disclosure of Indigenous knowledge without consent to non-public disclosure.**

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[16] Expert Panel for the Review of Environmental Assessment Processes, "Building Common Ground: A New Vision for Impact Assessment in Canada," Ottawa, 2017 p. 46.
[17] *Access to Information Act*, R.S.C. 1985, c. A-1.
[18] IAA at s. 119(2). Pursuant to subsection 119(2), Indigenous knowledge is subject to disclosure if it is publicly available, necessary for the purposes of procedural fairness and natural justice or for use in legal proceedings; or the disclosure is authorized in prescribed circumstances.

Ethical and Equitable Engagement of Indigenous Knowledge

The effective protection of First Nations rights and interests from potential adverse effects from designated projects requires ethical and equitable engagement with Indigenous knowledge systems and western science. Section 22 of the Act requires mandatory consideration of Indigenous knowledge.[19] To further strengthen the ethical and equitable engagement of Indigenous knowledge within the impact assessment process, the impact assessment of a designated project should specifically take into account how Indigenous knowledge informs the assessment of potential impacts of a designated project. Enhanced specificity in the mandatory requirement to consider Indigenous knowledge would provide a foundation for improved engagement of Indigenous knowledge and science, serving as an impetus for strengthening methodologies over time.

Recommendation 5

> **The Assembly of First Nations recommends that section 22 of the IAA be amended to include a specific reference to the application of Indigenous knowledge to the assessment of project effects, as follows:**
>
> **22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:**
>
> **(g) Indigenous knowledge provided with respect to the designated project and the application of that Indigenous knowledge to project effects.**

Responding to the Amendments Proposed by the Government of Canada

First and foremost, the IAA should maintain, as a baseline, the protections and opportunities for collaboration afforded to First Nations in the current version of the Act. Any amendments to the IAA should result in protections or opportunities for collaboration that are as strong or stronger than the current protections afforded to the rights and interests of First Nations.

Adverse Effects within Federal Jurisdiction

The Budget Implementation Act 2024 proposes to replace the current IAA definitions of "effects within federal jurisdiction" and "direct or incidental effects" with new definitions for "adverse effects within federal jurisdiction" and "direct or incidental adverse effects."

The term "non-negligible adverse change" has yet to be interpreted judicially and the degree of materiality required to satisfy the threshold has yet to be established. The primary concern for many First Nations is the potential for the Government of Canada or the judiciary to overcompensate and narrow the scope of application of the IAA relating to First Nations beyond what is necessary to address the concerns set out in the SCC Opinion. The narrower the scope of application of the IAA to First Nations, the greater the likelihood that adverse impacts on First Nations will be overlooked or neglected. Federal responsibility for "securing the welfare" of Indigenous [P]eoples[20] ensures that specific

[19] IAA at s. 22(g).
[20] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 176.

consideration is given to the impacts of projects on First Nations and provides a counterbalance to matters of provincial concern that might otherwise be given priority. Many First Nations also understand federal responsibilities to emanate from treaty and trust-based relationships confirmed by treaties or other agreements. As such, federal decision-making shaped, in part, by federal responsibility for the welfare of First Nations is perceived by many First Nations to offer better protection for First Nations rights and interests than provincial systems.

The Assembly of First Nations is concerned that the use of terms like "trivial" and "negligible" in discussions surrounding project impacts may erode trust with First Nations and undermine efforts towards reconciliation. Understanding how First Nations may be impacted by designated projects requires the active participation of First Nations, particularly in relation to the assessment of the significance of any potential effects. We must be clear: there is **no** negligible impact on First Nations' Inherent or Treaty rights; all projects have impacts and any impact on rights is to be taken seriously. In **no circumstances** should adverse impacts to First Nations' rights be characterized as "negligible" and therefore ignored. Further, any characterization of impacts to First Nations' rights or interests should be done in full partnership with the First Nation themselves. It is inappropriate for the Agency, Ministers, Cabinet, etc. to make that determination unilaterally where the First Nations whose rights are at stake disagrees with the characterization.

Recommendation 6

In response to proposed changes to the definition of "adverse effects within federal jurisdiction," the Assembly of First Nations recommends that:

(1) the Government of Canada continue to assert a broad interpretation of section 91(24) of the *Constitution Act, 1867*; and

(2) the application of any thresholds relating to adverse effects on First Nations require consideration of First Nations perspectives when assessing the significance or severity of effects.

Climate Change

There is much to discuss when it comes to First Nations and climate change and a plethora of work that could be referenced. Rather than attempt to summarize key issues here, the Assembly of First Nations recommends the For Our Future: Indigenous Resilience Report[21] and the Assembly of First Nations National Climate Strategy (October 2023)[22] as two important resources.

[21] Reed, G., Fox, S., Littlechild, D., McGregor, D., Lewis, D., Popp, J., Wray, K., Kassi, N., Ruben, R., Morales, S. and Lonsdale, S. (2024). "For Our Future: Indigenous Resilience Report," Ottawa, Ontario, online: https://changingclimate.ca/site/assets/uploads/sites/7/2024/03/Indigenous-Resilience-Report_Final_EN.pdf.

[22] Assembly of First Nations, "National Climate Strategy," (October 2023), online: https://afn.bynder.com/m/77556e1d9da51db7/original/2023-Climate-Strategy-Report.pdf.

Recommendation 7

With respect to "adverse effects within federal jurisdiction," the new definition must capture direct or significant transboundary effects. The Assembly of First Nations recommends that the amended definition:

> **(1) add "direct or significant" to each mention of effects as well as to other direct or incidental effects;**
>
> **(2) include a change to the environment that would occur from the emission of greenhouse gases;**
>
> **(3) remove limitation of marine pollution to only transboundary pollution in (c) by striking "and that would occur outside Canada"; and**
>
> **(4) remove "that is caused by pollution" from (d).**

Further, the proposed amendments would remove the broad s. 7 prohibition against "a change to the environment that would occur…in a province other than the one in which the act or thing is done." Proposed changes would mean that greenhouse gas emissions cannot be used as a basis for triggering or decision-making for federal impact assessment and, as one scholar put it, "federal impact assessment as a useful climate change mitigation tool would evaporate under these amendments."[23] This change would restrict decision makers under the IAA from triggering an assessment or imposing conditions on a project based solely on GHG emissions effectively diminishing the role of the federal government in regulating some of the climate-related effects of designated projects. There may also be implications for the Physical Activities Regulation (Project List) and classes of projects included on the basis of their GHG emissions.

Recommendation 8

> **The Assembly of First Nations recommends that s. 7(1) reference to changes to the environment that would occur "in a province other than the one where physical activity or the designated project is being carried out" be maintained.**

Designation Decision

The discretionary authority of a Minister to designate a project is important to First Nations. The Project List sets thresholds for the designation of projects; however, those thresholds do not specifically address the potential for a project to have adverse impacts on First Nations. Given the unique and place-based nature of First Nations rights and jurisdiction, Project List thresholds may not capture all significant impacts on First Nations rights or values. Discretionary designation provides added protection for First Nations rights and interests that may not be effectively addressed through the Project List. However, it is extremely frustrating to First Nations when an application to designate a project for assessment is rejected. Such applications are time and resource consuming, and it is not in the interest of reconciliation to reject such applications by First Nations.

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[23] David V. Wright, "Constitutional Caution, Correction, and Abdication: The Proposed Amendments to the Impact Assessment Act" (10 May 2024), online: http://ablawg.ca/wp-content/uploads/2024/05/Blog_DW_IAA_Amendments.pdf.

The Budget Implementation Act 2024 proposes to amend the Minister's power to designate non-listed physical activities under the IAA if the activity may cause "adverse effects within federal jurisdiction" or "direct or incidental adverse effects." If the Minister is of the opinion that the project "may cause adverse effects within federal jurisdiction" or "direct or incidental adverse effects", in deciding to designate the project for assessment, they may consider the adverse impacts to Indigenous Peoples' rights. This seemly would create a two-step process for decision-making.

The express reference to consideration of impacts on the rights of Indigenous Peoples of Canada in subsection 9(2) of the IAA was an improvement over CEAA 2012. However, the provision is not mandatory. The option of considering potential impacts on the rights of Indigenous Peoples and consultation with potentially affected Indigenous groups should be made mandatory for all discretionary designation decisions.

The proposed addition of 9(2)(d) is of concern, given this provision seemingly would allow the Minister to justify declining a designation request for a project that may cause adverse effects in federal jurisdiction on the basis of "a means" that would "permit a jurisdiction" to address those effects; this captures any federal or provincial regulatory process that may in fact be weaker or less inclusive of First Nations than a federal impact assessment. However, it may also provide a mechanism to recognize First Nation jurisdictions processes. More information is needed to understand how the amendment would impact First Nations ability to exercise their jurisdiction. The Assembly of First Nations recommends this proposed amendment be removed until there is fulsome consultation and discussions with First Nations to better understand the implications.

Recommendation 9

In relation to proposed changes to discretionary designation decisions, the Assembly of First Nations recommends that:

(1) the reference to consideration of adverse effects on the Indigenous Peoples of Canada should be made mandatory;

(2) the evaluation of the potential for adverse project effects should involve the active and informed participation of First Nations and in considering adverse impacts to First Nations' rights, consultation with potentially affected First Nations should be made mandatory; and

(3) s. 9(2)(d) be removed.

Screening Decision

The amendments provide that the Agency cannot require an assessment unless it is satisfied that the carrying out of the designated project may cause non-negligible adverse federal effects. If so, other factors can be considered to determine whether an assessment is warranted, including an additional factor of whether other existing federal or provincial processes could address the potential adverse federal effects.

This proposed amendment is of concern because, like the designation decision, it would enable to Agency to defer to any federal or provincial regulatory process that may in fact be weaker or less inclusive of First Nations than a federal impact assessment and use this as justification to decide a federal impact assessment shall not be undertaken.

Recommendation 10

In relation to proposed changes to the Agency's screening decision, the Assembly of First Nations recommends that s. 16(2)(f.1) be removed.

Determination of Significance and Public Interest

The decision-making structures of the IAA were identified as a concern by the AFN during the legislative process for Bill C-69, noting that decision-making provisions should be strengthened to enable shared decision-making with impacted First Nations.[24] We maintain that decision-making in relation to major project impacts should be conducted in collaboration with impacted First Nations, based on their free, prior, and informed consent.

In proposing amendments, the Government of Canada has sought to revert back to an approach similar to that of the Canadian Environmental Assessment Act, 2012.[25] The proposed amendments would structure final decision-making to turn primarily on whether adverse effects within federal jurisdiction are likely to be significant, and if so, whether they are justified in the public interest. Amendment is also proposed to the s. 63 list of factors to be considered when the Minister or Cabinet is determining if the project's likely significant "adverse effects within federal jurisdiction" or "direct or incidental adverse effects" are justified in the public interest. Amended, those s. 63 factors would be: contribution to sustainability, s. 35 rights, and commitments in respect of climate change. The extent to which those three considerations can drive a final decision concluding that the adverse federal effects are not justified such as the project is rejected, would remain an open question under the proposed amendments. With respect to the climate change factor, it is alarming to see that where the original IAA provision included extent to which effects of the project "hinder or contribute," the amended version would remove hinder and leave only "contribute", suggesting that this provision will only be used as a positive factor for justification. Given the Government of Canada's other initiatives, this is likely geared toward approval of "clean" energy and critical minerals pathways.

Recommendation 11

In relation to potential changes to the public interest decision, the Assembly of First Nations recommends:

(1) Maintain "hinder or" in s. 63(e) (current numbering); or

(2) revise the amendment to change "contribute" to "impact" or "effect" in order to permit the decision maker to consider both positive and negative effects of a designated project.

Conclusion

First Nations across Canada are strengthening their capacity to participate in and lead impact assessments. It is critical that any amendments to the IAA result in protections and opportunities for First Nations that are as strong or stronger than those available in the present version of the IAA.

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[24] Canada, Standing Committee on Environment and Sustainable Development of the House of Commons, 42nd Parliament, 1st Session, Number 103 (April 17, 2018), 1235 (Acting Regional Chief Kluane Adamek).
[25] *Canadian Environmental Assessment Act, 2012* at s. 52.

The AFN seeks to collaborate with the Government of Canada to maintain existing protections for the rights and interests of First Nations in the IAA and to strengthen opportunities for collaboration in order to advance climate action and reconciliation in Canada. It is important to recognize that the internal capacity of First Nations to evaluate, assess and decide on designated projects is critical to major project development in Canada. The greater the capacity of First Nations to understand and respond to proposed projects, as interested parties, jurisdictions or co-administrators of the IAA, the more effective and efficient regulatory process will be. Current deficiencies in the internal capacity of many First Nations places a significant strain on First Nations, project proponents and regulators because it is harder for First Nations to do the work necessary to evaluate whether a project should receive their free, prior and informed consent. If the Government of Canada seeks to accelerate the transition to a net zero economy and improve regulatory systems, improving First Nations capacity and participation needs to be a top priority.

The presumptions underlying the legislative framework for federal impact assessments should be re-visited and revised to ensure consistency with Inherent and Treaty rights and the *United Nations Declaration on the Rights of Indigenous Peoples*. The changes proposed above offer a practical approach to strengthening the role of First Nations in impact assessments while achieving greater certainty for investors and a more efficient regulatory process for the assessment of designated projects.