

**May 31, 2024**

Via email: [enev@sen.parl.gc.ca](mailto:enev@sen.parl.gc.ca)

Clerk of the Senate Standing Committee on Energy, the Environment and Natural Resources

**Re: Amendments to the Impact Assessment Act**

### **Introduction**

The Canadian Association of Petroleum Producers (CAPP), and its members appreciate the opportunity to provide input on the study of Division 28 of Part 4 of the Bill C-69, *An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024*. CAPP is a non-partisan, research-based industry association that advocates on behalf of our member companies, large and small, that explore for, develop, and produce oil and natural gas throughout Canada. Our associate members provide a wide range of services that support the upstream industry.

CAPP's members produce nearly three quarters of Canada's annual oil and natural gas production and provide approximately 450,000 direct and indirect jobs in nearly all regions of Canada. According to the most recently published data, the industry contributes over \$70 billion to Canada's GDP, as well as \$45 billion in taxes and royalties to governments across the country. CAPP is a solution-oriented partner and works with all levels of government to ensure a thriving Canadian oil and natural gas industry.

We strive to meet the need for safe, reliable, affordable, and responsibly produced energy, for Canada and the world. We are proud to amplify industry efforts to reduce GHG emissions from oil and gas production and support Indigenous participation and prosperity.

CAPP has a vested interest in the proposed amendments to the *Impact Assessment Act* (the Act or IAA) and is advocating for an efficient and predictable project approval process. Our members are significantly impacted by the current legislation and regulations' application to many types of projects, including but not limited to: mines and *in situ* oil sands facilities; offshore oil and natural gas production; pipelines; and liquefied natural gas facilities.

In addition to our feedback on the proposed amendments in this brief, we look forward to meaningful engagement and amendments to the Physical Activities Regulation,<sup>1</sup> or Major Project

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<sup>1</sup> SOR/2019-285

List, targeted in Budget 2024 for review this year.<sup>2</sup> We see opportunities to ensure the content of the regulation is aligned with areas of federal jurisdiction.

The current IAA faces two challenges: the Supreme Court of Canada's (SCC) opinion is that the legislation is largely unconstitutional<sup>3</sup> and, that the process itself is generally recognized to be slow, duplicative, unpredictable, and vulnerable to politicization. In *Reference re Impact Assessment Act* (the IAA Reference), where CAPP was an intervener, a majority of the SCC identified multiple aspects of the Act that exceeded federal jurisdiction. Multiple sources, including the Government of Canada, have identified the need to streamline and improve the Act.<sup>4</sup> Canada's approval process is one of the slowest and most complex among its peers,<sup>5</sup> driving investment to other jurisdictions. These amendments must make meaningful improvements to the Act, deliver the promise of "one project, one assessment",<sup>6</sup> and position Canada to attract global investment.

CAPP strongly supports efforts to amend the IAA to more clearly align it with the SCC opinion, streamline the approval process, and increase predictability. However, as currently proposed, the amendments do not make the necessary changes to accomplish these critical measures. **We ask the Committee to deliver more aggressive changes to the Act that provide constitutional certainty and deliver key improvements.**

### **The Impact Assessment Act must align with the Supreme Court of Canada's opinion.**

CAPP appreciates the Government of Canada's effort to amend the legislation to align with the SCC's opinion in the IAA Reference; however, we believe the tabled amendments are limited and may not be sufficient to align with the SCC's direction.

The SCC's opinion emphasized the need to ensure that the IAA focuses on project reviews and approvals, based only on effects that are explicitly within federal jurisdiction.<sup>7</sup> For example, the SCC specifically stated that a project's greenhouse gas emissions, and impacts to sustainability, are not

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<sup>2</sup> Canada, [Budget 2024, Fairness for Every Generation](#), Page 193

<sup>3</sup> [Reference re Impact Assessment Act](#), Supreme Court of Canada, 2023 SCC 23.

<sup>4</sup> Canada West Foundation, [Competitive Canada: Recommendations to improve federal assessment for major projects](#). 2023; Business Council of Alberta, [Future Unbuilt: Transforming Canada's Regulatory Systems to Achieve Environmental, Economic, and Indigenous Partnership Goals](#). 2023; Canada, [Budget 2023, A Made-in-Canada Plan: Strong Middle Class Affordable Economy Healthy Future](#), Page 92

<sup>5</sup> Advisian, [International Review of Environmental Regulatory Processes](#). 2023.

<sup>6</sup> Canada, [Budget 2023, A Made-in-Canada Plan: Strong Middle Class Affordable Economy Healthy Future](#), Page 92 and Canada, [Budget 2024, Fairness for Every Generation](#), Page 192

<sup>7</sup> [Reference re Impact Assessment Act](#), Supreme Court of Canada, 2023 SCC 23. Paras 181 to 189

justifications for a federal review or approval.<sup>8</sup> In contrast to the SCC's clear direction, the proposed amendments to the IAA continue to allow the Minister to base a project's decision on its impacts on climate change or sustainability.<sup>9</sup>

CAPP's position is supported by numerous leading Canadian law firms have publicly commented that the proposed IAA amendments may not fully address the SCC's direction. Osler, Hoskin & Harcourt LLP expects "the amended Act may again be challenged by the provinces as being unconstitutional".<sup>10</sup> Bennett Jones LLP describes the amendments as offering "minimal changes, and may leave the IAA once again ripe for constitutional challenges".<sup>11</sup> Fasken Martineau DuMoulin LLP comments that "the IAA, as amended, could again be challenged because of its vague connection with federal constitutional powers".<sup>12</sup>

It is critical that a good faith effort is made by legislators to align the Act with the SCC's direction in the IAA Reference. Failure to do so challenges the authority of the SCC, invites additional, unnecessary litigation, and prolongs uncertainty for future major projects. The failure of the amendments to align the legislation clearly and unequivocally with the SCC's opinion and to ensure its constitutionality is a missed opportunity. We encourage legislators to move quickly to clearly align the IAA with the SCC's direction to provide certainty to all stakeholders.

**Further amendments are required to achieve Canada's ambition to "Get major projects done".**

In conjunction with critical amendments to the IAA to align it with the SCC's opinion, there remains a need and opportunity to adopt key changes to improve the impact assessment and permitting process.

In Budget 2023, Canada acknowledged the need to "get major projects done" by making it a priority to streamline and expedite major project reviews.<sup>13</sup> That budget also committed to improving the efficiency of permitting processes for major projects, which will include clarifying and reducing timelines, mitigating inefficiencies, better tailoring assessment requirements, and improving engagement and partnerships. CAPP agrees that these are important priorities and

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<sup>8</sup> *Reference re Impact Assessment Act*, Supreme Court of Canada, 2023 SCC 23. Paras 178, 186 and 187

<sup>9</sup> Amendment 291 of Bill C-69, *An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024*, which proposes replacements for Sections 62 and 63 of the IAA.

<sup>10</sup> [Canadian Legislation & Regulations \(osler.com\)](https://www.osler.com/canadian-legislation-regulations)

<sup>11</sup> [Impact Assessment Act Amendments Announced: Many Questions Still Left Unresolved | Bennett Jones](#)

<sup>12</sup> [Federal Government Proposes Amendments to Impact Assessment Act to Comply with Supreme Court Reference | Knowledge | Fasken](#)

<sup>13</sup> Canada, *Budget 2023, A Made-in-Canada Plan: Strong Middle Class Affordable Economy Healthy Future*, Page 92

desirable outcomes. However, we do not believe the proposed amendments will achieve these desired outcomes.

Numerous papers have explored opportunities to improve the IAA process, and we support many of those messages. A leading report is *Future Unbuilt*,<sup>14</sup> which identifies both the opportunity for Canada if we start getting major projects done and outlines the necessary reforms. CAPP and its members recommend further amending the IAA, in line with that report's recommendations, to deliver:

### **Federal-Provincial Cooperation**

The federal government identified a goal of “one project, one assessment”.<sup>15</sup> CAPP strongly supports this objective, as substitution will accelerate the government's stated objectives to streamline process, remove duplication, and “get major projects done”.

Provincial substitution can be an effective mechanism to deliver robust project assessments and we recognize that the proposed amendments intend to facilitate more substitution in the future. However, the proposed amendments do not meaningfully and assuredly increase the use of provincial substitution. Collaboration between the federal and provincial governments is necessary to achieve the level of integration required with established provincial regulatory processes. The federal government must actively pursue and conclude agreements with other levels of government to eliminate duplication and realize efficiencies. As written, substitution retains federal authority over decision-making for the project, which in its truest sense is delegation of work rather than substitution. When provinces are best placed to make decisions, they should have that authority. Certainty for proponents will likely depend on the extent to which federal authorities can reach agreements regarding scope and procedure for impact assessments.

CAPP supports provincial substitution as the default, not simply an option: where an alternative jurisdiction has an existing and rigorous regulatory framework and is empowered to complete an assessment, that jurisdiction should undertake the review and approval. Provinces are the best-placed regulator for projects within their boundaries, with the clearest understanding of overall impacts, benefits, and stakeholder interests. A provincial approval under a substituted process would provide sufficient justification to progress a project and the presence of potential “adverse

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<sup>14</sup> Business Council of Alberta, *Future Unbuilt: Transforming Canada's Regulatory Systems to Achieve Environmental, Economic, and Indigenous Partnership Goals*. 2023

<sup>15</sup> Canada, *Budget 2023, A Made-in-Canada Plan: Strong Middle Class Affordable Economy Healthy Future*, Page 92

effects within federal jurisdiction” should not alone justify a federal decision to prohibit a project. Many impacts under federal jurisdiction can be addressed through permitting, as required.

We support the federal government working collaboratively with provinces to maximize the opportunities for comprehensive substitution: assessment to approval.

### **Impartiality**

CAPP supports independent and impartial project approvals that are evaluated on the overall merits and impacts of a project. Amendments to the IAA should focus on mitigating bias and political intervention in the approvals process. We support policy makers setting the national direction, but the implementation of those priorities should be executed by Federal regulators or capable subject matter experts. The current IAA, and the proposed amendments, task ultimate decision-making to the Minister and the Governor in Council. This can add unnecessary delays and complications to the major project process. It also results in a shifting and unpredictable investment environment.

In addition to ensuring impartiality in final decision-making, a predictable and efficient assessment process should minimize uncertainty related to which projects require assessment. The proposed amendments do not provide this certainty and continue to provide the Minister with broad discretion to designate a project for federal assessment.

Despite amendments, the Minister maintains the discretion to designate a project for review, “if, in the Minister’s opinion, the carrying out of that physical activity may cause adverse effects within federal jurisdiction”.<sup>16</sup> Continuing the Minister’s powers for such broad discretion and an easily overcome threshold perpetuates unpredictability for project proponents. The amendments also fail to codify the certainty and limited federal authority sought by the SCC, leaving the legislation open to further constitutional challenges. Clarity is best provided by an objective trigger, such as a real risk of significant adverse effects within federal jurisdiction, and not be reliant on unpredictable discretion triggered by the potential for any adverse effect.

### **Clarity and Predictability**

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<sup>16</sup> Amendment 275 of Bill C-69, *An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024*, which proposes replacements for Subsections 9(1) of the IAA.

Budget 2023 identified the need to clarify and reduce timelines. **CAPP strongly supports a predictable and timely process that provides certainty and consistency to build public trust and investor confidence.**

The timelines to obtain approval for a major project in Canada are some of the longest among our peers,<sup>17</sup> and Budget 2023 recognized that “it should not take 12 years” to execute a major project. Budget 2024 identifies a target of 5 years or fewer to complete a federal impact assessment and permitting process, but this timeline lacks ambition and is not achievable without significant tailoring of project assessments to focus on significant effects within federal jurisdiction. Canada’s peers are delivering major project approvals in an average of 3.5 years<sup>18</sup> and Canada has already shown that this timeline is possible for large and complex projects.

For example, Cedar LNG project approval illustrated that faster timelines are actually achievable. This should be the expectation for other Canadian projects.<sup>19</sup> That project was approved in 3.5 years and should set the upper bound for future approval timelines. Projects, with less complexity and potential for impacts, as well as projects with well-known best practices and mitigations, should have a clear path to appropriately scoped assessments and shorter timelines.

If approvals can be completed quickly, they should be, and the IAA must create the expectation that the Impact Assessment Agency complete assessments within 3.5 years. There may be cases where the proponent chooses to extend this timeline for external reasons but an ambitious approvals process is what Canada needs. Significant improvements to the IAA process will be required to make this possible.

To support predictable approvals, clear unambiguous terms must be used in legislation. The introduction of new terms such as “non-negligible adverse change” and “to some extent significant” create new uncertainties in the application of the legislation; failing to clearly delineate when a project will trigger federal assessment. Almost any impact could be reasonably perceived by an interested party as “non-negligible”, the inclusion of this term decreases predictability and merits amendment. This terminology has been identified as potentially failing to meet the criteria for federal jurisdiction in decision-making and therefore risks further constitutional challenges.<sup>20</sup> An appropriate test for federal assessments is a risk of “significant adverse effects” within federal jurisdiction. Introducing new, discretionary terms with potentially low thresholds fails to improve the legislation and may lead to further legal challenges.

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<sup>17</sup> Advisian, *International Review of Environmental Regulatory Processes*. 2023. Page 38

<sup>18</sup> Advisian, *International Review of Environmental Regulatory Processes*. 2023. Page 38

<sup>19</sup> See [Cedar LNG Project \(iaac-aeic.gc.ca\)](https://www.iaac-aeic.gc.ca)

<sup>20</sup> [Canadian Legislation & Regulations \(osler.com\)](https://www.osler.com)

There are additional opportunities to increase predictability and streamlining including a redesign of the project planning phase to more efficiently screen for potential effects within federal jurisdiction, and if present, determine whether an assessment is required. Currently, the planning phase can represent a significant investment of time and resources for project proponents even for projects that are not ultimately subject to federal assessments. Today, the planning phase for a project can last a year or more,<sup>21</sup> but following the SCC's direction on federal jurisdiction, there is an opportunity to create a fast-track that allows project proponents to immediately identify if a project requires federal assessment and focus on the critical information needed to support a decision.

### **Targeted Indigenous consultation**

CAPP and its members recognize the value of robust and targeted Indigenous consultation and support actions to ensure its efficacy and efficiency. Our members are routinely delegated by the Crown to execute the procedural aspects of consultation on their behalf in relation to Aboriginal and treaty rights.

Companies' engagement with Indigenous communities also often includes the provision of capacity funding to ensure that communities have the resources to engage in meaningful dialogue and to support traditional knowledge and Land Use Studies. These relationships are important to our industry and companies value their continued engagement and relationships with these Indigenous communities. Clear and predictable requirements for all parties are critical for an effective consultation process. Federally, a whole-of-government approach is needed, and when both federal and provincial governments are involved coordination procedures are needed to ensure both effectiveness and efficiency.

We understand that the federal government is soon undertaking an update of the *Guidelines for Federal Officials to Fulfill the Duty to Consult*.<sup>22</sup> As part of that process, we encourage broad engagement with provinces, territories, Indigenous communities, as well as industries who will be delegated to execute procedural components of the process, so all can ensure the Crown properly fulfills its duty to consult. CAPP member companies seek to have deep, positive, and prosperous relationships with Indigenous communities.

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<sup>21</sup> Canada West Foundation, [Competitive Canada: Recommendations to improve federal assessment for major projects](#). 2023. Page 25

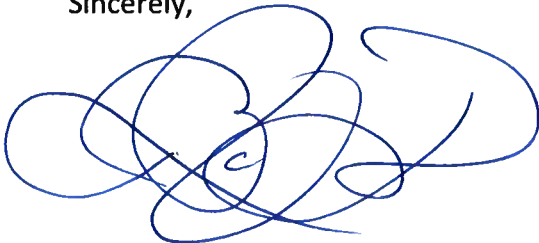
<sup>22</sup> [Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011 \(reacnc-cirnac.gc.ca\)](#)

We aim to support these relationships through the IAA process and we believe this is best accomplished when underpinned with predefined, clear, and specific direction identifying who must be consulted and the scope of consultation.

**Conclusion**

The proposed amendments to the IAA fail to unequivocally align the legislation with the SCC's opinion in the IAA Reference and will not deliver the reduced timelines, efficiency, and "one project, one assessment" goals previously announced by Canada. Significant additional amendments are necessary. CAPP welcomes the opportunity to further engage in opportunities to amend and improve the IAA, including the pending review of the Major Projects List.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Lisa A. Baiton', written in a cursive style.

Lisa A. Baiton, MBA, ICD.D  
President & CEO