Federal Responsibility over Climate and Impact Assessment

Joint Submission to the Standing Senate Committee on Energy, the Environment and Natural Resources on Bill C-69, Part 4, Division 28, *Impact Assessment Act*

May 29, 2024

Honourable Senators,

We are lawyers with experience and expertise in the *Impact Assessment* Act (IAA) and federal jurisdiction over environmental and climate matters. We have both been deeply involved in the IAA since its early conception, and both appeared before the Alberta Court of Appeal and Supreme Court of Canada in *Reference re Impact Assessment Act*. We are pleased to appear before the Committee on Energy, the Environment and Natural Resources to discuss amendments to the IAA introduced in Bill C-69, the *Budget Implementation Act, 2024, No. 1*.

We are concerned that with the proposed amendments to the IAA, the federal government has chosen to abdicate its responsibility over significant transboundary air pollution, including greenhouse gas emissions (GHGs), under the IAA. The Supreme Court of Canada did not say that the federal government lacks jurisdiction to assess transboundary pollution. Rather, it expressed concern about the *breadth* of transboundary impacts that the IAA claimed were "effects within federal jurisdiction," and said that Canada's lawyers had failed to show how even minor amounts of GHGs are a matter of national concern.[1]

Giving up on transboundary air pollution entirely instead of addressing the issues the Court identified has implications far beyond the IAA: put simply, it may undermine future

[1] *Reference re Impact Assessment Act*, 2023 SCC 23 at paras 183, 189.

opportunities for Parliament to play its proper and necessary role in dealing with serious emissions that the provinces alone cannot control.

We have drafted amendments to the IAA that would include significant transboundary air pollution as an adverse effect within federal jurisdiction. These amendments respect and adhere to the Supreme Court of Canada's direction while ensuring a proper federal role in addressing air pollution, including GHGs, of major projects. We have appended our proposed amendments to this brief.

Below, we explain how these amendments align with Supreme Court jurisprudence on federal jurisdiction over the environment. We also make the case for why the federal government not only has constitutional authority to consider and mitigate transboundary air pollution, it has a responsibility to Canadians to do so.

In addition, we recommend three discreet amendments that would fix arbitrary and unnecessary restrictions on federal jurisdiction over marine shipping pollution, transboundary waters and navigation.

We also urge you to observe that other amendments to the IAA respecting timelines and substitution go beyond what the Supreme Court said was necessary to ensure its constitutionality and may undermine the federal government's ability to ensure effective, fair assessments that respect Indigenous rights and jurisdiction.

Parliament Has Jurisdiction Over Transboundary Air Pollution

The IAA defined "effects within federal jurisdiction" as including "a change to the environment that would occur . . . in a province other than the one where the physical activity or the designated project is being carried out, or outside Canada."[2] This language – which was carried over from the *Canadian Environmental Assessment Act, 2012 (CEAA 2012),*[3] enacted by the previous government – encompassed marine and freshwater pollution, air pollution, and every other kind of environmental effect that crosses borders.

As the majority of the Supreme Court noted, the definition captured "an unlimited range of interprovincial environmental changes," including relatively minor levels of GHGs, which the Court found was too broad.[4] It is important to note that the Court did not say that the federal government lacks jurisdiction to assess *any* transboundary impacts. Previous cases

[2] *Impact Assessment Act*, SC 2019, c 28, s 1, s 2.
[3] SC 2012, c 19, s 52, s. 5(1)(b)(2).
[4] *Reference re Impact Assessment Act*, 2023 SCC 23 at para 184.

have confirmed federal jurisdiction over marine pollution[5] and transboundary waters,[6] and Canada has been regulating transboundary air pollution for decades under the *Canadian Environmental Protection Act* (CEPA).[7]

In the *Greenhouse Gas Pollution Pricing Act* reference, the Supreme Court of Canada confirmed that GHGs are a transboundary pollutant that pose a grave threat to humanity's future.[8] As the Court also held, the failure of one province to reduce their emissions would harm other provinces and undermine or even derail Canada's ability to do its part on the global stage in staving off the most catastrophic impacts of the climate crisis.[9]

In other words, the constitutional issue is not *whether* Parliament can assert jurisdiction over transboundary air pollution in impact assessment, it is *how* it defines that jurisdiction that matters. We believe that the solution is to impose a significance threshold. "Significance" has been a concept in environmental assessment law since its inception in the 1970s, and Impact Assessment Agency of Canada policy sets out detailed guidance on when effects should be considered significant.[10] It is a well-established threshold to ensure that assessments focus squarely on material impacts. Refining the scope of federal jurisdiction to focus only on *significant* transboundary air pollution would address the Court's concern about overbreadth while allowing the federal government to do its part in addressing the climate crisis.

We have consulted with other legal experts and are confident that significant transboundary air pollution meets the test set out by the Supreme Court for a matter of national concern and is therefore within federal jurisdiction to regulate. Out of an abundance of caution, we have also proposed two amendments that would serve as constitutional "guardrails" by ensuring that federal authorities do not regulate insignificant transboundary air pollution, and by requiring the Minister to consider provincial mechanisms for reducing air pollution before regulating the significant emissions of a designated project.

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[5] *R. v. Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC).
[6] *Interprovincial Co-operatives Ltd. v. The Queen*, 1975 CanLII 212 (SCC).
[7] 1999, SC 1999, c 33.
[8] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 2, 12.
[9] *Ibid* at paras 46, 61, 187, 190.
[10] Canada, "Guidance: Describing effects and characterizing extent of significance:" https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-describing-effects-characterizing-extent-significance.html.

Why the IAA Should Include Transboundary Air Pollution

Some have argued that it is not necessary for the federal government to consider GHGs in impact assessments because it has other regulatory tools for addressing climate change. Others argue that the federal government should defer to the provinces. With respect, neither of these arguments stand up to scrutiny.

The federal government has a responsibility to protect the components of the environment within its jurisdiction. There are major projects with emissions so high that they alone could hinder Canada's ability to meet its climate targets. The liquefied natural gas (LNG) project LNG Canada is expected to increase Canada's emissions by 0.57% over 2011 levels.[11] Together, the direct and upstream emissions from LNG Canada, Kitimat LNG and Woodfibre LNG would total 22.6 megatonnes in 2050[12] – the year Canada must have net-zero emissions. In Alberta, Suncor Energy Inc's Base Mine Expansion Project would emit over 3 megatonnes of GHGs per year, an amount that would also hinder Canada's ability to meet its international climate commitments.

Not all designated projects' emissions would be regulated, federally or provincially. The three linked road projects into the Ring of Fire in Ontario's Far North (designated projects under the IAA) would open the world's second largest carbon store to mining development, which could lead to the release of up to 250 megatonnes of GHGs.[13] None of the emissions from this peatland disturbance would be regulated by the federal or Ontario governments.

If the IAA included significant transboundary air pollution in its definition of adverse effects within federal jurisdiction, it would allow federal officials to continue to require project proponents to develop plans for achieving net-zero emissions by 2050, as it did for the Cedar LNG project approved under the IAA last year.[14] If GHGs are not included in the definition of adverse federal effects, federal authorities would no longer have that power. No provincial assessment processes require consideration of transboundary air pollution, and Ontario does not assess private-sector projects at all.

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[11] Environmental Assessment Office, LNG Canada Export Terminal Project (26 May 2016) at 61, Table 5-1: https://iaac-aeic.gc.ca/050/documents/p80038/101852E.pdf.

[12] Canadian Centre for Policy Alternatives and Corporate Mapping Project, *BC's Carbon Conundrum: Why LNG exports doom emissions-reduction targets and compromise Canada's long-term energy security* (July 2020) at 45: https://policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2020/07/ccpa-bc_BCs-Carbon-Conundrum_full.pdf.

[13] M Southee, K Richardson, L Harris & J Ray, *Northern Peatlands in Canada* (WCS Canada, 2020): https://storymaps.arcgis.com/stories/19d24f59487b46f6a011dba140eddbe7.

[14] The Honourable Steven Guilbeault, "Decision Statement Issued Under Section 65 of the *Impact Assessment Act* for the Cedar LNG Project" (15 March 2023): https://iaac-aeic.gc.ca/050/documents/p80208/146928E.pdf.

Given the catastrophic nature of the climate emergency and the urgent need for ambition, we cannot afford to wait for a future government to assert federal jurisdiction over significant transboundary air pollution. As the Supreme Court of Canada has acknowledged, climate change is an existential problem and the "undisputed existence of a threat to the future of humanity cannot be ignored."[15]

Additional Suggested Amendments

We recommend two additional amendments to the definition of adverse effects within federal jurisdiction. As currently drafted, the definition omits many effects that have been firmly established as being within federal jurisdiction. In our view, this omission is arbitrary and will risk having significant federal effects being largely overlooked.

The amendments are:

- Delete "and that would occur outside Canada" from the term "a non-negligible adverse change to the marine environment that is caused by pollution and that would occur outside Canada." The Supreme Court of Canada has made it clear that Parliament has authority over all marine pollution.[16] Limiting federal jurisdiction to only transboundary marine pollution is arbitrary, unnecessary and potentially problematic for the consideration of marine pollution in Canadian waters.
- Delete "that is caused by pollution" from the term "a non-negligible adverse change — that is caused by pollution — to boundary waters or international waters, as those terms are defined in subsection 2(1) of the *Canada Water Act*, or to interprovincial waters." Canada has jurisdiction over all adverse effects over transboundary waters, not pollution. Projects like hydroelectric dams and irrigation projects can have significant impacts on water flows and temperatures in transboundary rivers, and Canada has obligations under the Canada-US boundary waters treaty[17] respecting water flows. It is imperative that Canada be able to consider those effects, but as currently worded, the term would limit federal authorities' ability to do so.
- Add "navigation" to the term "a non-negligible adverse change — that is caused by pollution — to boundary waters or international waters, as those terms are defined in subsection 2(1) of the Canada Water Act, or to interprovincial waters." Canada

[15] *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 at para 167.
[16] *R. v. Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC), [1988] 1 SCR 401.
[17] *Treaty Relating to the Boundary Waters and Questions Arising Along the Border between the United States and Canada, United Kingdom-U.S.*, Jan. 11, 1909, 36 Stat. 2448, T.S. 548.

has exclusive jurisdiction over navigation and shipping under section 91(10) of *The Constitution Act, 1867*. Many major projects use or affect the navigability of Canada's waters, particularly navigation by Indigenous peoples. Because Parliament's jurisdiction over navigation is exclusive, provincial assessments are unlikely to address navigation impacts, and regulatory permitting under the *Canadian Navigable Waters Act* is inadequate for dealing with significant navigation impacts.

- Amend section 63(c) to ensure that considerations of projects' implications on sustainability are constitutional and not biased towards project approval.

Other Issues

Amendments to the IAA in the BIA make two other changes that are not necessary for making the Act constitutional and that undermine the federal government's ability to ensure rigorous, fair processes that respect Indigenous rights and authority. At the same time, we recognize that there may be reluctance to considerably amend the Budget Implementation Bill. Therefore, we urge the Senate to consider an observation that these amendments could negatively affect Indigenous peoples' ability to ensure their rights and authority are respected in impact assessments and could undermine the federal government's ability to protect areas within its constitutional authority.

The issues are:

- Amendments to sections 9, 16 and 31 would allow officials to rely on the non-assessment regulatory processes of provincial jurisdictions rather than carry out federal impact assessments. The amendments are problematic for a number of reasons. First, regulatory processes may not offer the same calibre of Indigenous engagement or public participation; there tends to be a lack of transparency, lack of access to information and lack of opportunities to comment on or discuss issues. Second, regulatory processes have narrower scopes, which means less ability and likelihood of considering interrelated and cumulative effects. Third, provincial experts are experts in provincial matters, not federal ones. While provincial regulatory processes may be able to protect provincial interests, it is highly unlikely that they will come close to adequately protecting federal ones.
- Amendments to sections 28, 37 and 65 would unnecessarily limit the Governor in Council's ability to extend timelines to only once. It is especially problematic in light of the federal government's duty to meaningfully consult Indigenous peoples and respect their rights, including their right to free, prior and informed consent. By arbitrarily restricting the Governor in Council's ability to extend timelines as needed

to ensure that Indigenous peoples have the ability to make free, prior and informed decisions, Canada could be exposing itself to legal challenge.

Conclusion

Amendments to the IAA introduced in Bill C-69 go beyond what is necessary to ensure compliance with the Constitution in accordance with the Supreme Court's ruling on the *Impact Assessment Act* and may pose challenges to Canada down the road. We urge the Senate to consider our proposed amendments so that the IAA can help Canada meet its international obligations and its commitments respecting climate change.

Anna Johnston
Staff Lawyer, West Coast Environmental Law Association

Joshua Ginsberg
Staff Lawyer, Ecojustice

Appendix – Proposed Amendments to Bill C-69, Part 4, Division 28, *Impact Assessment Act*

Former text	Bill C-69 amendments	Proposed amendments	Explanation
effects within federal jurisdiction means, with respect to a physical activity or a designated project, (a) a change to the following components of the environment that are within the legislative authority of Parliament: (i) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*, (ii) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*, (iii) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and (iv) any other component of the environment that is set out in Schedule 3;	**(3) Section 2 of the Act is amended by adding the following in alphabetical order:** ***adverse effects within federal jurisdiction*** means, with respect to a physical activity or a designated project, (a) a non-negligible adverse change to the following components of the environment that are within the legislative authority of Parliament: (i) *fish* and *fish habitat*, as defined in subsection 2(1) of the *Fisheries Act*, (ii) *aquatic species*, as defined in subsection 2(1) of the *Species at Risk Act*, (iii) *migratory birds*, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and	(3) **Section 2 of the Act is amended by adding the following in alphabetical order:** ***adverse effects within federal jurisdiction*** means, with respect to a physical activity or a designated project, ... (c) a non-negligible adverse change to the marine environment that is caused by pollution ~~and that would occur outside Canada~~; (d) a non-negligible adverse change ~~— that is caused by pollution —~~ to navigation, *boundary waters* or *international waters*, as those terms are	The SCC has confirmed that Parliament has jurisdiction over all marine pollution (per *R v Crown Zellarbach)*. This amendment removes the arbitrary limitation of the assertion of jurisdiction to only transboundary marine pollution. Parliament has jurisdiction all transboundary water impacts, and over navigation. This amendment reflects the true scope of federal jurisdiction.

Former text	Bill C-69 amendments	Proposed amendments	Explanation
(b) a change to the environment that would occur (i) on federal lands, (ii) in a province other than the one where the physical activity or the designated project is being carried out, or (iii) outside Canada; (c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological,	(iv) any other component of the environment that is set out in Schedule 3; (b) a non-negligible adverse change to the environment that would occur on federal lands; (c) a non-negligible adverse change to the marine environment that is caused by pollution and that would occur outside Canada; (d) a non-negligible adverse change — that is caused by pollution — to *boundary waters* or *international waters*, as those terms are defined in subsection 2(1) of the *Canada Water Act*, or to interprovincial waters; (e) with respect to the Indigenous peoples of Canada, a non-negligible	defined in subsection 2(1) of the *Canada Water Act*, or to interprovincial waters; ... (f) a non-negligible adverse change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; ~~and~~ (g) a non-negligible adverse change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3; and (h) a significant adverse change to the environment that is caused by air pollution and that occurs outside of Canada or in a province other than the	This is the most important amendment. It adds significant transboundary air pollution (including GHGs), which we

Former text	Bill C-69 amendments	Proposed amendments	Explanation
paleontological or architectural significance; (d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and (e) any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3. (*effet relevant d'un domaine de compétence fédérale*)	adverse impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; (f) a non-negligible adverse change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and (g) a non-negligible adverse change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.	<u>one in which the physical activity or the designated project is being carried out.</u>	believe meets the test for national concern under POGG as set out by the SCC in the GGPPA reference.

Former text	Bill C-69 amendments	Proposed amendments	Explanation
	In the case of a physical activity or a designated project that is carried out on federal lands or is a *federal work or undertaking*, as defined in subsection 3(1) of the *Canadian Environmental Protection Act, 1999*, this definition also includes the non-negligible adverse effects of that activity or project. (*effets négatifs relevant d'un domaine de compétence fédérale*)		
Proponent **7 (1)** Subject to subsection (3), the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any of the following effects: **(a)** a change to the following components of the environment that are within the legislative authority of Parliament:	**273 (1) Subsection 7(1) of the Act is replaced by the following:** **Proponent** **7 (1)** Subject to subsection (3), the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any <u>adverse</u> effects within federal <u>jurisdiction</u>.	**273 (1) Subsection 7(1) of the Act is replaced by the following:** **Proponent** **7 (1)** Subject to subsection (3), the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any <u>adverse</u> effects within federal <u>jurisdiction</u>.	

Former text	Bill C-69 amendments	Proposed amendments	Explanation
(i) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*, (ii) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*, (iii) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and (iv) any other component of the environment that is set out in Schedule 3; **(b)** a change to the environment that would occur		7(1.1) Subsection (1) does not apply to effects referred to in paragraph (h) of the definition *adverse effects within federal jurisdiction* in section 2 until the Minister has made a decision under section 60(1) or the Governor in Council has made a decision under section 62 that such effects are likely.	This amendment is a constitutional safeguard. Currently worded, the prohibition applies before assessments begin, when the significance of designated projects' transboundary air pollution might not be known. The amendment avoids that issue by saying that the prohibition does not apply to significant transboundary GHGs until after the significance determination.

Former text	Bill C-69 amendments	Proposed amendments	Explanation
(i) on federal lands, (ii) in a province other than the one in which the act or thing is done, or (iii) outside Canada; **(c)** with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or			

Former text	Bill C-69 amendments	Proposed amendments	Explanation
(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; **(d)** any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; or **(e)** any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3.			
Factors — public interest **63** The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that	**291 Sections 62 and 63 of the Act are replaced by the following:** **...** **Factors — justification in public interest**	**291 Sections 62 and 63 of the Act are replaced by the following:** **...** **Factors — justification in public interest**	

Former text	Bill C-69 amendments	Proposed amendments	Explanation
subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors: **(a)** the extent to which the designated project contributes to sustainability; **(b)** the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant; **(c)** the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;	**63** The Minister's determination under paragraph 60(1)(b), and the Governor in Council's determination under paragraph 62(b), must be based on the report with respect to the impact assessment of the designated project and a consideration of the following factors: **...** **(b)** the extent to which the effects that are likely to be caused by the carrying out of that project contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; and **(c)** the extent to which the effects that are likely to be caused by the carrying	**63** The Minister's determination under paragraph 60(1)(b), and the Governor in Council's determination under paragraph 62(b), must be based on the report with respect to the impact assessment of the designated project and a consideration of the following factors: **...** **(b)** the extent to which the effects within federal jurisdiction that are likely to be caused by the carrying out of that project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and commitments regarding effects within federal jurisdiction; and **(c)** the extent to which the effects within federal jurisdiction that are likely to be caused by the carrying out of that	This amendment allows decisions to consider the extent to which projects hinder Canada's ability to meet its climate commitments and environmental obligations by focusing the consideration on adverse effects within federal jurisdiction. Without the amendment, decision makers would only consider project *contributions*, not their hindrances.

Former text	Bill C-69 amendments	Proposed amendments	Explanation
(d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and **(e)** the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.	out of that project contribute to sustainability.	project hinder or contribute to the sustainability of matters within federal jurisdiction.	This amendment is not directly related to climate effects. We have put it in because we think that it is important to the constitutionality of 63(c), as well as to strengthen. As with our amendment to 63(b), it allows decision makers to consider the extent to which projects hinder sustainability by rooting the consideration in adverse effects within federal jurisdiction.
Mitigation measures and follow-up program **(4)** The conditions referred to in subsections (1) and (2) must include **(a)** the implementation of the mitigation measures that the Minister	**292 (2) Paragraph 64(4)(a) of the Act is replaced by the following:** **(a)** the implementation of the mitigation measures that the Minister takes into account in making any determination under subsection 60(1),	**64(5)** Before establishing conditions under s. 64 in relation to adverse effects that fall within s. 2(h) of the definition adverse effects within federal jurisdiction in section 2, the Minister must consider whether they are satisfied	This amendment helps ensure constitutionality of asserting jurisdiction over significant GHGs by acting as a backstop that considers provincial efforts to mitigate projects' emissions

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takes into account in making a determination under paragraph 60(1)(a), or that the Governor in Council takes into account in making a determination under section 62, other than those the implementation of which the Minister is satisfied will be ensured by another person or by a jurisdiction; and **(b)** the implementation of a follow-up program and, if the Minister considers it appropriate, an adaptive management plan.	or that the Governor in Council takes into account in making <u>any</u> determination under section 62, other than those the implementation of which the Minister is satisfied will be ensured by another person or by a jurisdiction; and	<u>that a jurisdiction referred to in paragraphs (c) to (g) of that definition will ensure measures that are equivalent to or more stringent than the proposed federal mitigation measures for those effects, or that such measures will be established before the project commences.</u>	(like the backstop in the GGPPA, which the Court upheld).