[CPEQ letterhead]

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Dear Deputy Prime Minister,
Dear Minister:

Subject: Bill C-69, An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024 - Proposed amendments to the *Impact Assessment Act*

The CPEQ has reviewed Bill C-69, An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024 (Bill C-69), particularly Division 28 of Part 4, which proposes to amend the *Impact Assessment Act*[1] (IAA) in response to the decision of the Supreme Court of Canada (SCC) in *Reference re Impact Assessment Act* (Reference).[2] We hereby submit our comments to you.

Founded in 1992 by representatives of Quebec's companies and main business sectors, the Quebec Business Council on the Environment (CPEQ) is the umbrella organization that represents the Quebec business sector on environmental and sustainable development issues and on important general and common interests by coordinating its member companies' objectives. The CPEQ's mission is to act as a spokesperson for Quebec companies on issues related to the environment and sustainable development. The CPEQ comprises more than 300 companies and associations among the most significant in Quebec that generate more than 300,000 jobs and report combined revenues of more than $45 billion.

1) Refocusing the IAA on adverse effects within federal jurisdiction

Bill C-69 proposes to refocus the scope of the IAA on the adverse effects of projects on areas within federal jurisdiction, primarily in the following ways:

➢ clarifying the long title of the IAA to include a reference to "significant adverse effects within federal jurisdiction";[3]

[1] S.C. 2019, c. 28, s. 1.
[2] 2023 SCC 23.
[3] Clause 269 of Bill C-69.

➢ emphasizing, in the definition of "adverse effects within federal jurisdiction," changes to the environment that occur outside Canada related to marine pollution rather than all changes to the environment that occur outside Canada;[4]

➢ specifying that the Minister of the Environment (Minister), when exercising the discretion to designate a project, must determine whether the carrying out of the physical activity "may cause adverse effects within federal jurisdiction" before assessing the other relevant factors;[5]

➢ specifying that the Impact Assessment Agency of Canada (Agency) may decide that an impact assessment is required for a designated project only if it is satisfied that the project may cause "adverse effects within federal jurisdiction" or "direct or incidental adverse effects";[6] and

➢ by specifying that the Governor in Council may exercise the authority to make regulations designating a physical activity only if the designated activity "may cause adverse effects within federal jurisdiction."[7]

We support this refocusing, which is consistent with the SCC's teachings.[8] However, the amendments proposed in Bill C-69 provide little additional clarity regarding how the Agency, the Minister and the Governor in Council will have to apply this refocusing on areas within federal jurisdiction in practice. For greater predictability and to avoid future legal challenges, we believe that the practical effects of refocusing the IAA on "adverse effects within federal jurisdiction" should be clarified in Bill C-69 or in the Agency's publicly available administrative tools.[9]

Furthermore, Bill C-69 provides little additional detail on the scope of adverse effects within federal jurisdiction concerning Indigenous peoples. Adverse effects within federal jurisdiction are deemed to be a non-negligible adverse change to physical and cultural heritage; the current use of lands and resources for traditional purposes; or to any structure, site or "thing that is of historical, archaeological, paleontological or architectural significance."[10] Given the vast range of effects that could be covered by these provisions, we are concerned that the federal government could use its jurisdiction over Indigenous peoples to regulate many provincial effects and thus circumvent the spirit of the SCC's decision. We therefore propose that further clarification be provided in Bill C-69 as to how the effects of a physical activity on Indigenous peoples will be taken into account under the IAA.

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[4] Subclause 271(3) of Bill C-69, amending section 2 of the IAA.
[5] Clause 275 of Bill C-69, replacing subsection 9(2).
[6] Subclause 277(3) of Bill C-69, adding subsection 16(2.1) to the IAA. It should also be noted that "direct or incidental adverse effects" are effects that are "directly linked or necessarily incidental" to a federal authority's exercise of a power or performance of a duty or function (subclause 271(3) of Bill C-69, amending section 2 of the IAA).
[7] Clause 296 of Bill C-69, replacing paragraph 109(b) of the IAA.
[8] See, in particular, paragraphs 135, 138 and 150 of the Reference.
[9] For example, the document Guidance: Describing effects and characterizing extent of significance.
[10] Subclause 271(3) of Bill C-69, amending section 2 of the IAA.

2) Refocusing the IAA on "non-negligible" and "significant" adverse effects

Bill C-69 proposes to refocus the scope of the IAA on "non-negligible" and "significant" adverse effects of projects on areas within federal jurisdiction, primarily in the following ways:

➢ by adding to the definition of "adverse effects within federal jurisdiction" the concept of "non-negligible adverse changes" to components of the environment that are within the legislative authority of Parliament;[11] and

➢ by specifying that the Minister or the Governor in Council must determine "whether the adverse effects within federal jurisdiction . . . are likely to be, to some extent, significant" before determining whether these effects are justified in the public interest.[12]

We are in favour of this refocusing. However, the amendments proposed in Bill C-69 provide little additional clarification regarding how the Agency, the Minister and the Governor in Council will have to apply this refocusing on "non-negligible" and "significant" effects in practice. Bill C-69 must therefore clarify the practical effects of refocusing the IAA on "non-negligible" and "significant" effects.

In addition, Bill C-69 uses two different expressions to refer to the notion of "materiality" of a physical activity's effects, namely "non-negligible" and "likely to be, to some extent, significant." For greater predictability, we believe that these expressions should be further clarified or defined.

3) Designated project list

As we mentioned above, Bill C-69 specifies that the Governor in Council may exercise the authority to make regulations designating a physical activity only if the designated activity "may cause adverse effects within federal jurisdiction."[13] However, Bill C-69 does not propose to amend the *Physical Activities Regulations*[14] (PAR) and instead states that the PAR are "deemed" to designate activities that cause "adverse effects within federal jurisdiction,"[15] even though the PAR are an important part of the scheme invalidated by the SCC.[16] Nevertheless, the amendment of the PAR to reflect the SCC's teachings will follow the schedule set out previously in the Agency's Forward Regulatory Plan. A consultation is planned for 2024 regarding the five-year review of the project list.

We want to emphasize the importance of revising the list of physical activities to exclude predominantly provincial projects from the list of projects subject to the IAA, in order to focus on projects that have significant adverse effects within federal jurisdiction and thus promote the principle of "one project, one assessment."

4) Public interest justification

Bill C-69 proposes to limit the factors that the Minister or the Governor in Council may consider regarding the public interest justification of a project's effects by focusing on the project's impacts on the

[11] Subclause 271(3) of Bill C-69, amending section 2 of the IAA.
[12] Subclause 289(1) of Bill C-69, replacing paragraph 60(1)(b) and adding subsection 60(1.1); Clause 291 of Bill C-69, replacing section 62 of the IAA.
[13] Clause 296 of Bill C-69, replacing paragraph 109(b) of the IAA.
[14] SOR/2019-285.
[15] Bill C-69, paragraph 316(c).
[16] Reference, paragraphs 204 and 215.

"rights of the Indigenous peoples of Canada," on "Canada's ability to meet its environmental obligations and its commitments in respect of climate change" and on "the extent to which the effects that are likely to be caused by the carrying out of that project contribute to sustainability."[17]

However, the definition of "sustainability" in section 2 of the IAA extends beyond effects within federal jurisdiction,[18] because it covers the protection of "the environment" as well as "social and economic well-being." In order for Bill C-69 to be consistent with the Reference, we believe that the notion of "sustainability" should be defined more narrowly to include only effects within federal jurisdiction, particularly in the context of determining the public interest. We therefore recommend adding, after the word "sustainability" in clause 291 of Bill C-69, which replaces section 63 of the IAA, the words "in areas that fall within federal jurisdiction."

5) Cooperation, harmonization and substitution

Bill C-69 provides for a number of elements facilitating cooperation and harmonization of the IAA impact assessment procedure with other existing procedures, including provincial environmental assessments, mainly:

➢ the Minister's consideration, when exercising the discretion to designate a project, of whether a means other than an impact assessment exists to address the adverse effects within federal jurisdiction that may be caused by the proposed activity;[19] and

➢ the Agency's consideration, when determining whether an impact assessment of the designated project is required, of whether a means other than an impact assessment exists to address the adverse effects within federal jurisdiction that may be caused by the proposed activity.[20]

We support these amendments, which are consistent with the SCC's teachings.[21] However, we believe that these amendments must be accompanied by sustained efforts with the provinces to enter into agreements that allow for the complete substitution of the federal impact assessment procedure with a provincial environmental assessment procedure where the provincial procedure is sufficient to study adverse effects within federal jurisdiction.

We also consider it essential, as noted above, to amend the PAR to ensure that only predominantly federal projects are subject to the IAA and that the provincial procedure can apply exclusively to predominantly provincial projects.

We also note that some proposed amendments, intended to facilitate collaboration between federal and provincial authorities, could have the effect of extending the timelines for impact assessments,[22] which we oppose. Cooperation between the authorities should result in a more efficient and faster impact assessment process, not to an increase in delays.

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[17] Clause 291 of Bill C-69, replacing section 63 of the IAA.
[18] See paragraphs 167 and 169 of the Reference.
[19] Bill C-69, clause 275, adding paragraph 9(2)(d) to the IAA.
[20] Bill C-69, clause 277, adding paragraph 16(2)(f.1) to the IAA.
[21] See paragraph 216 of the Reference.
[22] See subclauses 279(3), 283(1) and 293(4) of Bill C-69, replacing subsections 28(6), 28(7), 37(3), 37(4), 65(6) and 65(7) of the IAA.

6) Transitional provisions

Bill C-69 provides that everything done under the current IAA is deemed to have been done under the IAA as amended by Bill C-69.[23] Consequently, impact assessments initiated under the current IAA will continue under the IAA as amended by Bill C-69, which we support.

In addition, decision statements issued before the passage of Bill C-69 would remain valid, as would all the conditions contained therein.[24] However, some of those conditions would have been established under the current IAA, which lacks sufficient focus on adverse effects within federal jurisdiction. As a result, projects authorized before the entry into force of the amendments proposed in Bill C-69 will be subject to conditions that could relate to areas under provincial jurisdiction. We do not support this situation, which maintains conditions that are likely to exceed federal jurisdiction according to the SCC's judgment. This could give rise to new legal disputes.

We therefore find that Bill C-69 should include a transitional provision authorizing the Agency to revise the conditions of a decision statement issued before the entry into force of Bill C-69 to ensure that the conditions that are not sufficiently focused on adverse effects within federal jurisdiction are unenforceable against the proponent of a given project. This could lead to an amended decision statement, as indicated in the teachings of the Supreme Court of Canada in its Reference. The transitional provisions could set out a clearly defined procedure that includes validation by the Agency to provide some degree of predictability in the case of decision statements issued before the entry into force of Bill C-69.

Furthermore, Bill C-69 proposes to repeal section 184 of the IAA.[25] This section currently ensures that the minimum period within which a project subject to a decision statement must commence[26] does not apply to projects authorized under the *Canadian Impact Assessment Act, 2012*,[27] which was replaced by the IAA. Bill C-69 proposes that projects authorized under the 2012 Act be subject to a minimum period within which the project must commence once the Minister publishes a notice on the Internet site in order for the decision statement to remain valid under clause 306 of Bill C-69. We oppose this proposal, which adds new obligations that are binding and significant, in that they risk disrupting the timeline for projects that have already been authorized.

Conclusion

The CPEQ is of the opinion that Division 28 of Part 4 of Bill C-69 pertaining to the IAA should be improved as follows:

1) clarify the practical effects of refocusing the IAA on "adverse effects within federal jurisdiction";

2) further clarify how the effects of a physical activity on Indigenous peoples will be taken into account under the IAA;

3) clarify the practical effects of refocusing the IAA on "non-negligible" and "significant" effects;

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[23] Bill C-69, subclause 303(2).
[24] Bill C-69, subclause 303(2).
[25] Clause 300 of Bill C-69.
[26] Subsection 70(1) of the IAA.
[27] S.C. 2012, c. 19, s. 52.

4) clarify or define the expressions “non-negligible” and “likely to be, to some extent, significant”;

5) revise the PAR to exclude predominantly provincial projects from the list of projects subject to the IAA;

6) accompany Bill C-69 with sustained efforts with the provinces to enter into agreements that allow for the complete substitution of the federal impact assessment procedure with a provincial environmental assessment procedure where the provincial procedure is sufficient to study adverse effects within federal jurisdiction;

7) define the notion of “sustainability” more narrowly to include only effects that fall within federal jurisdiction;

8) prevent cooperation between authorities from leading to extended impact assessment timelines;

9) include a transitional provision authorizing the Agency to revise the conditions of a decision statement issued before the entry into force of Bill C-69 to ensure that the conditions that are not sufficiently focused on adverse effects within federal jurisdiction are unenforceable against the proponent of a given project; and

10) remove clause 300 of Bill C-69.

Thank you for considering our comments.

Yours sincerely,

[signed by]

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