Mining Association of Canada submission on the Impact Assessment Act (Bill C-69) to the Senate Standing Committee on Energy, the Environment and Natural Resources

Summary

The Mining Association of Canada (MAC) appreciates the opportunity to provide a submission to the Senate Standing Committee on Energy, Environment and Natural Resources for its study of Bill C-69, as it relates to the Impact Assessment Act (IAA).

In MAC’s submission to the House of Commons Standing Committee on Environment and Sustainable Development, we proposed two amendments that were critical to our industry, as follows:

1. **Transition**: Projects that are currently undergoing Agency assessment under the Canadian Environmental Assessment Act, 2012 (CEAA 2012), or those that will enter the process before the coming into force of the IAA, must be allowed to continue under CEAA 2012 unless the proponent requests transitioning to the IAA.

2. **Uranium mines and mills**: Designated projects that are uranium mines and mills, like any other designated mining project, should undergo Agency assessments with full access to provisions for cooperation with provinces and Indigenous governing bodies.

These amendments were largely addressed by the House of Commons and the amended bill appears before you now. Given this, MAC had not proposed any further amendments to Bill C-69 and urged the Senate to pass the bill in an expeditious manner. The IAA is complex and will be applied to a diverse set of projects in many jurisdictions, each of which has unique approaches. Adjusting the Act to work better in one set of circumstances may create problems in others. MAC is also concerned that if Royal Assent is delayed, there will be insufficient time to put all necessary regulations in place, effectively prolonging uncertainty by a year or more.

However, noting the intent conveyed by several Senators to propose amendments to Bill C-69, and given the evolving debate on this bill and new concerns raised by some MAC members,
MAC would now like to recommend a targeted set of amendments that should continue to maintain the overall framework of this bill that we support. Specifically, we urge the Senate to consider the amendment for how uranium mines and mills would be assessed under the IAA, as we originally asked of the House of Commons. Further, we recommend three additional amendments that would improve the functioning of the IAA for mining as well as for the energy sector.

With respect to uranium mines and mills, while amendments to Bill C-69 in the House of Commons addressed some concerns, uranium mining projects will lose the single-window integration of assessment and licensing processes provided by CEAA 2012. Under the IAA, a timely and workable process for such projects would depend on well-planned implementation of the Act and excellent coordination between the Impact Assessment Agency and the Canadian Nuclear Safety Commission. We expect this to be disproportionately and unjustifyably onerous for the expected size of uranium projects, since the IAA would impose review panels on all uranium projects regardless of the magnitude or complexity of the project or its potential impacts. It is important to emphasize that, as with other mines, the option of Agency panel reviews has always existed in the past and we are not aware of any public concern that this has been the case. Moreover, the Minister would retain the right to refer a project to a panel, if deemed appropriate.

MAC therefore recommends that designated projects that are uranium mines and mills, like any other designated mining project, should undergo Agency assessments, by amending section 43 of the IAA (with additional amendments to ss. 39(2)(a), 44(1), 46 and 67(1)) to remove the mandatory referral to review panel for designated uranium mining or milling projects.

In addition, MAC recommends:

- Section 18 of the IAA be adjusted to make clear that the Agency has the authority and obligation to scope the factors outlined in subsection 22(1) to ensure the tailored impact statement guidelines are tailored to each individual project and focus on relevant issues, and to clearly communicate the Agency’s scoping decisions at the end of the early planning phase;
- Subsection 6(1) of the IAA be amended to set out as one of the purposes of the Act to be to improve investor confidence, strengthen the Canadian economy, encourage prosperity and improve competitiveness.
- Subsection 7(1) of the IAA be amended to make clear that the proponent is not prohibited from acts or things that do not change the environment by deleting paragraph 7(1)(d) and incorporating the text as a new subparagraph 7(1)(c)(iv).

In general, we believe the proposed legislation addresses a number of major concerns that arose through the implementation of CEAA 2012. In particular, this submission comments on key provisions of the IAA that we view as critical to the good functioning of the federal assessment process: cooperation with provinces and Indigenous governing bodies; coordination with federal regulatory departments; legislated timelines; tailoring of factors to be considered in assessments; appropriately assessing and addressing cumulative effects; decision-making by elected officials; and care needed in cost recovery. With the addition of these four
improvements, MAC would continue to view the IAA as an improvement over CEAA 2012. We remain concerned that if additional, significant amendments are made in a manner that would undo the improvements over CEAA 2012 that MAC has identified, we would no longer be in a position to support this legislation. As the sector that makes up the vast majority of federal assessments, we urge the Senate to seriously consider this concern and the potential for continuing decline of mining investment.

**Mining and Impact Assessment**

The Mining Association of Canada (MAC) is the national organization representing the Canadian mining industry, comprising companies engaged in mineral exploration, mining, smelting, refining and semi-fabrication. Our members account for most of Canada’s production of base and precious metals, uranium, diamonds, metallurgical coal, and mined oil sands. Canada produces over 60 minerals and metals from more than 200 mines, providing more than 400,000 direct jobs and 190,000 indirect jobs.

MAC has been actively engaged in all stages of the review of federal assessment processes, including submissions to the Expert Panel, participation in the Multi-Interest Advisory Committee, comments on the Expert Panel Report and the government’s Discussion Paper, as well as active participation in the Parliamentary process.

Canada’s mining industry is a bedrock of the country’s economy and our interest in this review is profound. Its outcome will determine whether our industry will continue to generate value for Canadians or continue an erosion that is underway. Nearly all new mines and major expansions are subject to CEAA 2012 and are likely to be subject to a future federal assessment process. Data reported by the Major Projects Management Office (MPMO) in May 2017 showed mining projects represented 60% of all federal project assessments. For our industry to thrive in Canada, the process for reaching a decision on whether a mine can be built, and under what conditions, needs to be arrived at through a predictable, timely, coordinated, transparent and seamless process that continues to be grounded in meaningful consultation.

Canada’s mining sector has pioneered meaningful partnerships with Indigenous Peoples. Through mechanisms such as Impact Benefit Agreements, the sector has worked to involve and share the benefits of mining with Indigenous Canadians. Proportionally, the mining industry is the largest private sector employer of Indigenous Peoples, and a major partner of Indigenous businesses. The training programs, education support and job experience offered by mines open lifetime career paths for Indigenous youth, which can lead to multi-generational transformation.

Indigenous participation in the mining sector is growing significantly. Our sector’s continued contribution to economic reconciliation with Indigenous Peoples depends upon our ability to bring new mines into production.

Investment, whether foreign or domestic, is highly sensitive to unpredictability of process and timelines. Canada’s perceived attractiveness as an investment destination has been deteriorating in recent years, evidenced by, among other factors, our reduced global share of exploration spending, a halving of mining investment intentions and the relative decline of our
mining supply and services sector. Legislative and policy changes create uncertainty – poor design, transition or implementation of those changes could have long-lasting consequences for mining investment in Canada. The investment community is watching closely to see how this legislation will be transitioned and implemented. There has already been a significant investment chill in international investment into Canada.

Having reviewed the proposed Impact Assessment Act (IAA) with our members, and recognizing our extensive experience with federal environmental assessment, we must underscore that, unless carefully implemented, the IAA has the potential to further prolong assessment and permitting of mining projects. In turn, this will damage Canada’s investment climate and reduce our industry’s overall competitiveness with other jurisdictions. If implemented well, however, our members also believe that the IAA has the potential to be an improvement on recent experience.

We are therefore pleased that the government has allocated substantial resources to help ensure that the Agency has increased capacity to manage the transition to and implementation of the IAA.

MAC Comments on Key Provisions of the IAA

1. Importance of cooperation with other jurisdictions

Mining and other natural resource activities on provincial Crown land are constitutionally the responsibility of provinces. Each of Canada’s provinces has a distinct approach to how it discharges that responsibility, with a mix of generic and sector-specific legislative requirements, standards, guidelines and site-specific permits, as well as environmental assessment processes for new mines. In addition to requirements for the building and operation of a mine, provinces require mines to develop reclamation plans and provide financial assurance for their implementation.

Inter-jurisdictional cooperation is essential in the assessment of mining projects, in setting post-assessment conditions, and in the design and implementation of follow-up and monitoring programs.

MAC is therefore encouraged that the IAA enables a range of cooperative approaches, including substitution, cooperative assessments, joint review panels and delegation (such as sections 21, 29, 31 through 35, and 39). While MAC is further encouraged that these provisions have been extended to Indigenous governing bodies, it will be important that the Agency provide clarity on the process and factors to be considered leading to a Ministerial decision regarding delegation or substitution.

The effectiveness of these cooperative approaches would be improved through inter-jurisdictional agreements. MAC hopes that the Agency will use its augmented capacity and the provisions of the IAA (such as paragraphs 114(1)(c) through (f)) to proactively develop such agreements with provinces and Indigenous governing bodies. Having agreements in place would allow prospective project proponents to understand what assessment process would
apply in the project location, which is critical information when considering whether to proceed with a project.

In addition to cooperation in the assessment itself, it will be critical to ensure that post-assessment follow up and monitoring are integrated, and consistent with provincial and federal regulatory requirements.

Furthermore, conditions imposed on approved projects, developed pursuant to section 64 should be confined to residual matters not addressed by provincial or federal regulators and should be drafted to avoid impinging on their role. It is not realistic to expect an assessment at a single point in time to be relevant over the operating life of a project in the face of changing science, technology and society. A smooth transition of responsibility to the life-cycle regulator, which in the case of mining is the province, should be the goal. As noted elsewhere, the federal government has other legislative and regulatory means to protect federal interests that do not depend on impact assessment. Conditions should be developed in consultations with the life-cycle and other regulators as well as the proponent.

**MAC is therefore encouraged by the inclusion of paragraph 64(4)(a), which specifies that the conditions imposed on a project should not duplicate conditions that will be ensured by another jurisdiction. MAC also supports the inclusion of the ability to amend conditions (section 68), in recognition that unforeseen factors may arise after the conditions are finalized.**

2. Importance of coordination with federal regulatory departments

Beyond provincial assessment and permitting and federal assessment, many mines require other federal approvals. Integrating information gathering, Indigenous consultation and public participation for other federal approvals in the impact assessment of a project can reduce unwarranted duplication of consultation and comment requests, thus reducing the burden imposed on affected communities. Coordination can also improve timeliness by eliminating duplication of administrative processes.

**MAC therefore is encouraged by subsection 13(2), authorizing the Agency to request engagement by other federal authorities and related provisions of the IAA, that enable the integration of information and consultation requirements of other federal approvals in the impact assessment.**

3. Comprehensive legislated timelines

Legislated timelines are critical for industry and for the smooth functioning of assessment. It is our experience that process decisions can be postponed indefinitely in the absence of legislated timelines. Without an explicit driver to advance an assessment, it is inevitable that government capacity will be diverted to other priorities and difficult decisions will be postponed.
MAC is therefore encouraged that the IAA imposes legislated timelines for each phase of the assessment process, including early planning, impact assessment and decision-making (including by Governor-in-Council).

At the same time, MAC recognizes that flexibility is needed to adjust timelines to facilitate cooperation with other jurisdictions and to accommodate the unique circumstances of each designated project. However, such flexibility must be used appropriately within transparent constraints.

4. Tailoring of factors

Subsection 22(1) greatly expands the factors that the impact assessment “must take into account” and includes several that will not be appropriate for all designated projects. For example, while it is appropriate to consider alternative means for carrying out a mining project, it would not be appropriate to ask a mining project proponent to assess alternatives to building a mine (paragraph 22(1)(f)).

MAC’s understanding is that subsection 22(2) allows the Agency or the Minister to determine the scope of factors that must be taken into account thus addressing the degree to which a factor listed in subsection 22(1) is relevant to a specific designated project. It will be essential that the early planning phase results in factors tailored to each designated project. If not, the assessment process will be unworkable and overwhelming, particularly for smaller proponents.

5. Appropriately assessing and addressing cumulative effects

The mining industry is not the only user on the land base. Mining impacts are localized and, on most metrics of environmental effects, are dwarfed by other activities. CEAA 2012 is disproportionately applied to mining projects and not to the sources of most environmental effects. Thus, the project-by-project approach to addressing cumulative effects in CEAA 2012 is dysfunctional, penalizing responsible project proponents while failing to address cumulative effects resulting from activities that are not designated projects.

MAC is encouraged by the approach proposed in the IAA, which includes cumulative effects as a factor to consider (paragraph 22(1)(a)(ii)) but not as a sole factor in decision making (sections 60 through 63). The IAA appropriately rests the assessment decision on the merits of a project. The IAA also proposes to strengthen the provisions for regional and strategic assessment (sections 92 through 103).

Governments are better placed to undertake cumulative effects assessment on a regional basis than individual project proponents.

MAC agrees that the outcome of relevant regional and strategic assessments, as well as provincial or Indigenous studies or plans, should be considered in project impact assessment (paragraphs 22(1)(p), (q) and (r)). MAC also agrees that they should not delay, or be a prerequisite to, individual project assessments. It would be unreasonable and prohibitive to
Canada’s investment climate to delay projects while awaiting governments to address all relevant gaps.

While the revision of the regulations designating physical activities (paragraph 109(b)) is subject to separate consultations, MAC notes that our sector is concerned that the IAA will remain arbitrarily and disproportionately applied to our industry. Should this be the case, it will hamper our sector while not achieving the sustainability, public trust, and Indigenous reconciliation goals the IAA is purported to advance.

6. Decision-making by elected officials

The decision whether a project should proceed will be a complex and partly subjective balancing decision that will have to take a diversity of inputs into account. MAC therefore agrees that the decision should rest with elected officials as outlined in sections 60 through 62, based on factors specified in section 63. In particular, MAC is encouraged that the full merits of a proposed project, and the project’s contribution to sustainability, will be core factors in making the decision.

MAC agrees that, for Agency assessments, the Minister should make the decision or refer the decision to Governor in Council. The requirement for publication of the reasons for the decision (subsection 65(2)) will enhance transparency.

7. Care needed in cost recovery

While MAC does not oppose cost recovery in principle, we are concerned that implementation of sections 76 through 80 may be arbitrary and unreasonable. What is particularly concerning is that the aggregate of increased costs being contemplated by the IAA, the Fisheries Act and the Canadian Navigable Waters Act, together with cost increases expected from the Clean Fuel Standard and carbon price, will prove overwhelming to mining project proponents in Canada.

Canada is the only country that MAC is aware of that imposes on mining projects environmental assessments by two (and possibly three, including Indigenous) levels of government. Mining project proponents are required to pay cost recovery fees for provincial assessments and permitting, and to a federal regulator in the case of uranium mines. Imposing separate fees for the federal assessment process would constitute duplicate bills for what is promised to be “one project, one assessment”.

In considering cost recovery, MAC would therefore urge the government to ensure that any cost recovery be:

- Integrated with and not additional to provincial fees and cost recovery;
- Linked to performance guarantees, including timeliness;
- Set as a graduated fixed fee per assessment, with a small number of gradations;
- Reasonable so as not to discourage smaller companies without a revenue stream; and
• Based on expectations of average project-specific direct assessment costs, excluding overhead costs such as policy development or regional assessments.

Closing Summary

The *Impact Assessment Act*, if well implemented, offers the potential for addressing problems experienced with the implementation of CEAA 2012: insufficient range of options for inter-jurisdictional cooperation, inadequate coordination within the federal government, gaps in legislated timelines and a dysfunctional approach to dealing with cumulative effects.

Given the contribution of our country’s mining industry, and the significance of this legislation to our sector, we ask the Senate to expeditiously pass Bill C-69 and to:

• Amend section 43(a) of the IAA to except physical activities at uranium mines and mills from the physical activities subject to a review panel (with consequential amendments to ss. 39(2)(a), 44(1), 46 and 67(1)). This would create a consistent approach under the IAA for all designated mining projects.
• Amend section 18 of the IAA be adjusted to make clear that the Agency has the authority and obligation to scope the factors outlined in subsection 22(1) to ensure the tailored impact statement guidelines are tailored to each individual project and focus on relevant issues, and to clearly communicate the Agency’s scoping decisions at the end of the early planning phase;
• Amend subsection 6(1) of the IAA to set out as one of the purposes of the Act to improve investor confidence, strengthen the Canadian economy, encourage prosperity and improve competitiveness.
• Amend subsection 7(1) of the IAA to make clear that the proponent is not prohibited from acts or things that do not change the environment by deleting paragraph 7(1)(d) and incorporating the text as a new subparagraph 7(1)(c)(iv).
• Avoid any additional amendments that would detract or hamper the effective functioning of the IAA for the mining sector.

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**MINING PROJECTS - VALUE**

- Total Projects
- Metal Mines
- Non-Metal Mines
- Coal Mines
- Other

Chart: 5Y/10Y Global Grain Plots: Indexed 100.00

Source: [CHARTS]
The above tables illustrate the decline in Canada’s attractiveness as a destination for mineral investment. The first table is sourced from Natural Resources Canada’s Natural Resources: Major Projects Planned and Under Construction – 2017 – 2027 report, which found that:

- Total projects planned and under construction have decreased by more than 50% (or $86 billion) in value from June 2014 to June 2017; and
- Metal mines experienced the single largest drop, accounting for 81% or 40 of the 49 suspended projects, and 79% (or $68 billion) of suspended investment.

The second table – a global base-metals index (Source: S&P/TSX) – depicts a market rebound in January 2016, with upward price mobility persisting until early 2018. Together, the tables indicate continued downward trends in mineral investment in Canada despite a rebound in prices, suggesting that policy and regulatory uncertainty are impacting business investment more than market forces at current prices.