By Email to ENVIP@parl.gc.ca

April 29, 2019

Senate Standing Committee on Energy, the Environment and Natural Resources
Senate of Canada
Ottawa, ON K1A 0A4

Dear Standing Committee on Energy, the Environment and Natural Resources:

RE: Written Submission on 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

Introduction

We write to provide you with the Dene Nation’s submission to assist the Committee with its study of 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.¹

The Dene Nation is located in the Denendeh, meaning “the land of the people,” which covers the majority of the NWT and is comprised of the Gwich’in, Sahtu, Deh Cho, Tlicho and Akaichito regions. There are approximately 15,000 Dene in the North, who are signatories to Treaty 8 signed in 1899, and Treaty 11 signed in 1921, as well as Modern Treaty Agreements. Self-determination in this region is widespread, and many public Indigenous governments and co-management authorities have been established through modern land claim and self-government agreements. The spirit and intent of Treaty includes: clean air, clean and abundant water that can sustain all living things, and land that is healthy and can sustain all that live on it, including the

¹ Canada, 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, 3rd Sess, 42nd Parl, 2015 (as passed by the House of Commons 20 June 2018) [Bill C-69].
Dene. This is what existed when our ancestors signed the treaties and this is what we have both the right and the responsibility to protect to this very day.

The Dene Nation and its member Nations have been active participants in the environmental legislation review and recommendations process. Now, as Bill C-69 moves into the final phase of review, it is extremely important that the Dene are involved in both the drafting of regulations and implementation. Dene traditions, laws and perspectives must be included in Bill C-69 and any subsequent regulations. If this is not properly set out in the Bill, the key work on the lands and waters cannot be successful. The regulations and the implementation by various programs will require a strong Act. There is more work to be done to recognize the historic role of the Dene as stewards of the lands and waters.

Now is the time to renew the relationship with the Dene and to recognize and support our existing and future self-governing agreements, Treaty rights, and inherent governance rights and systems.

This brief is divided into three sections of Dene Nation recommendations with respect to:

- the *Impact Assessment Act*;
- the *Canadian Energy Regulator Act*; and
- the *Navigation Protection Act*.

I. **Impact Assessment Act**

1. **Respect and Meaningful Consultation for Impact Assessments**

Section 12 states that during the planning phase of a potential impact assessment, the Agency must offer to consult with any Indigenous groups that may be affected by the carrying out of the designated project.² Section 21(b) also speaks to consultation and cooperation during the impact assessment; however, *this section must be drafted more broadly to include any “Indigenous governing body” and not just:

- An Indigenous governing body that has powers, duties, or functions related to impact assessments under a land claims agreement or act or parliament or legislature; or

- An Indigenous governing body that has entered into an agreement with Minister to exercise powers, duties, or functions related to impact assessments. Note that it is

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² Bill C-69, *ibid*, Part I, cl 12.
possible that not all Indigenous governing bodies will enter into agreements with the Minister. However, all Indigenous governing bodies must be approached to be consulted.

It is important that going forward, the Government must actively consult with and involve the Dene on impact assessments in order to ensure that engagement is meaningful. This provision speaks to the duty to consult where Indigenous interests are at stake, pursuant to s 35 of the Constitution Act, 1982.

Furthermore, consultation and accommodation with the Dene must be comprehensive and meaningful. In describing the Minister’s powers, s 114(1)(b) states that the Minister may, “establish research and advisory bodies ... including with respect to the interests and concerns of Indigenous peoples of Canada ...”3 This Ministerial power must include research and advisory committees that fully incorporate Indigenous interests into the research developed under the Impact Assessment Act (“IAA”). The best way to do this is to establish a Dene Compliance Office and Indigenous Knowledge Secretariat to support the diverse Dene Nations.

2. Decision-Making – Whether Impact Assessments are Required

The Dene Nations have the inherent authority to govern their lands, waters, and environment. As such, they must jointly make decisions with the Minister under sections 15 and 16 of the Impact Assessment Act, which relate to the Agency’s decision of whether an impact assessment is required. The Dene must be primary decision-makers in determining whether the proponent has provided sufficient information and whether an impact assessment is required.

The Dene cannot be sidelined at this critical juncture of determining whether an impact assessment will proceed. The Dene must be co-decision makers with the Agency in evaluating the proponent’s detailed project description and determining whether an impact assessment is required. It is not enough that the proponent’s detailed project description will be published online. The Dene must be the ones to evaluate environmental claims related to their lands.

In the event of disagreement between the Dene and the Agency, the precautionary approach should dictate that an impact assessment will be required if either the Agency or the Dene finds that it is necessary. An impact assessment would not be required only in cases where both parties agree it is not necessary.

3 Bill C-69, ibid, Part I, cl 114(1)(b).
3. Require Impact Assessments for all Development Projects

The Impact Assessment Act continues to operate on the principle that there are designated projects requiring environmental assessments. The Dene want all development projects that change the lands and waters, regardless of size, to be tracked and monitored, and to undergo a preliminary impact assessment that respects Dene rights and interests.

The Minister has the ability under section 9, to designate physical activities that have not been designated in the regulations. The practical problem with this provision is that it is unclear when the Minister would be notified of physical activities not already outlined in the regulations, that affect lands and waters. Under the Act, Proponents are entitled to undertake activities that are not listed in the regulations, although the effects and adverse impacts of those activities could be highly detrimental. Therefore, the Minister is unlikely to be aware of contemplated activities and projects that are not captured in the regulations, and for which the Minister will receive no notice.

Furthermore, designated projects are not guaranteed to receive impact assessments. The Agency retains the discretion under section 16 to decide whether an impact assessment of the designated project is required.\(^4\) The Act, its schedules and regulations, must clearly direct proponents to notify the Crown of any proposed activities or projects so that communication, transparency, coordination, and participation with Indigenous groups is achieved.

The language of section 9 does not provide a clear opportunity for Indigenous groups like the Dene to be consulted on the creation of new designated physical activities. The Dene must have an active role in consulting and advising the Minister in all new potential designations. This should be outlined in the Act and achieved through a formally funded role and relationship among the CEAA, the Minister, and the Dene. In all cases, the Dene should be very involved and lead the determination of the “designated projects” list in the North.

4. Effects on Indigenous People

The Impact Assessment Act emphasizes the consideration of the public interest in decision-making.\(^5\) While this concept may seem aspirational, it has also been used to justify infringements on the Aboriginal rights of Indigenous people. Policy and guidance documents must dictate that significant weight must be given to Indigenous peoples’ rights. This is especially important given the IAA’s requirement to consider “economic conditions” in section 22 and in definition of

\(^4\) Bill C-69, ibid, Part I, cl 16.
\(^5\) Bill C-69, ibid, Preamble; Bill C-69, Part I, cl 63.
“sustainability”, which potentially abrogates and derogates from the rights of Indigenous peoples.

To strengthen the consideration of Indigenous rights in decision-making, the definition of “effects within federal jurisdiction” must be amended to mention section 35 Aboriginal and Treaty rights. The Impact Assessment Act is replete with references to the physical and cultural environment of Indigenous people and respecting the commitment to rights. However, without acknowledging section 35 rights in the definition of “effects,” the commitments in the IAA are hollow.

Sections 81 to 90 include another definition of effects, called “environmental effects,” which are defined as “changes to the environment and the impact of these changes on the Indigenous peoples of Canada and on health, social or economic conditions.” This must be broadly interpreted by governments and clearly set out in regulations. We also submit the new definition of “environmental effects” should be broadened to include any change that could potentially have an adverse impact on asserted or established rights or interests of the Dene.

Impact assessments must meaningfully consider a broad mandate of issues and consider how the activity or project will impact or worsen the current state of the environment. Cumulative effects must include both short and long term effects that may result from the project.

5. Broad Government Discretion

Based on the new provisions in the Impact Assessment Act, the Minister still retains broad discretionary control over decision making.

Within the different sources of discretion, the Minister has a wide range of decision making powers, including the power to regulate. The Dene should be an integral part of co-drafting in the ways outlined by s. 112 for the creation of all regulations.

We submit that the Act should be amended to provide that any Ministerial authority is to be exercised in conjunction with Dene leadership. The Dene must lead and co-draft regulations and be included in the development of any guidelines or practices related to their lands and waters. The Dene must also be included in any research and advisory bodies.

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6 Bill C-69, ibid, Part I, cl 22, cl. 22(1)(a).
7 Bill C-69, ibid, Part I, cl 2.
8 Bill C-69, ibid, Part I, cl 81.
6. Timelines for Indigenous Consultation

There is a gap in the Impact Assessment Act on the issue of Dene consultation. Rather than shorter timelines, assessment timelines must be lengthened and very flexible.

In the event that the impact assessment is coordinated with other jurisdictions and timelines must harmonized, the least restrictive timelines must prevail. Indigenous groups must not be constrained by externally imposed timelines in matters that affect Treaty and Aboriginal rights. Every jurisdiction must be able to extend timelines or “stop the clock” on timelines if consultation or studies with Indigenous groups take longer than the legislation anticipates. We submit that whenever the Dene request to stop the clock for consultation or other purposes, the regulations must provide for additional time. This will ensure respect of Dene protocols and our collective internal processes.

7. Participation in Impact Assessments

If Indigenous groups are not leading the impact assessment through substitution, then the alternative process must be the joint review panel, as opposed to an Agency or regular review panel assessment. Agency assessments and review panel assessment do not allow for sufficient input directly from the relevant Indigenous groups. For example, the review panel only requires one person who has knowledge of Indigenous interests and concerns; this does not mean that this person is an Indigenous person from the potentially affected lands. If impact assessments are to be conducted by the Agency or review panel, they must always include members from the potentially affected areas of the impact assessment.

Dene engagement, participation, and decision-making is required, especially after the impact assessment is finished. Consultation is required under section 70(1), which currently states that the Minister is only required to consider the views provided by the proponent when determining when the project must begin. The Dene must have a say in when the project can begin.

8. Indigenous knowledge (IK)

The IAA does not provide adequate protections for IK, given that the standard to withhold evidence from publication is extremely high. Sections 30 and 53(4) state that if the Agency or review panel is satisfied that the disclosure of evidence, such as IK, would cause specific, direct, and substantial harm to an Indigenous group, then the Agency or review panel must not allow the information to be disclosed, without authorization. This standard is extremely high and it is

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\(^9\) Bill C-69, *ibid.*, Part I, cl 41(1), 42(d).
\(^10\) Bill C-69, *ibid.*, Part I, cl 30, 53(4).
determined from the perceptive of the Agency or review panel, rather than the Indigenous group. This standard does not value or respect the laws and protocols of Indigenous groups. Instead, the Agency or review panel forces Indigenous groups to translate and quantify the effects of broken and disrespected protocols into discrete instances of anticipated harm. This does not respect the potentially private and sacred nature of IK.

Furthermore, there are many instances where IK could be disclosed even if it were shared in confidence.\(^{11}\) If IK is disclosed in the context of a legal proceeding, it would also likely become publicly available. This would preclude IK from further protection and would lead to a gradual erosion of protected IK. Section 108 outlines that no proceedings lie against the Agency, Minister, or Crown for the disclosure of any IK or the consequences that flow from the disclosure, or the failure to give the required notice under the Access to Information Act.\(^{12}\) This paints a picture of a situation where IK was disclosed because the Indigenous group could not articulate a particular substantial harm, thereby leading to disclosure and then actual harm, for which the Crown would not be legally responsible. This potential scenario does not promote reconciliation. Indigenous participation and ownership in impact assessment necessitate higher protections for IK. Disclosure of IK should not be governed by sections 30 and 53(4). This standard is too strict and too rigid to apply to IK, which should be subject to a more flexible provision.

IK sharing and consideration must be the continually revisited through an ongoing relationship between the Crown and Indigenous groups. IK sharing and plans for usage must be co-drafted with each Indigenous group to reflect each group’s distinct protocols towards IK.

9. **Advisory Councils and Committees are not sufficient**

The Minister’s advisory council, as outlined in section 117-118, and the Agency’s Indigenous peoples advisory committee, as outlined in section 158, are not sufficient mechanisms to obtain the views and perspectives of the Dene \textit{vis a vis} activities and projects that may affect their lands and rights. Indigenous people are not a melting pot; First Nations, Modern Treaty Nations, historic Treaty Nations, Indigenous Governments, Métis, and Inuit Nations are distinct and have differing and sometimes opposing views. One individual could never represent all the combined interests of First Nations. Furthermore, it would be inappropriate to seek a recommendation for an appointee from only one Indigenous governing body. A permanent and functional Indigenous advisory council or committee requires representation from Indigenous groups across Canada, including the diversity of Dene Nations. Furthermore, the advisory council must also meet more

\(^{11}\) Bill C-69, \textit{ibid}, Part I, cl 119(2).

\(^{12}\) RSC, 1985, c. A-1.
frequently than once per year. Given the timelines of impact assessments, major decisions must be made within short timeframes. If the advisory council is to contribute timely advice to the Minister, it must meet at least quarterly.

Pursuant to section 114(1)(b), a permanent and funded Dene institution must be established to ensure that the Dene are included in decision-making at all stages of the assessment process in accordance with their own laws and customs.

10. Financial Support for Compliance Office and Indigenous Knowledge Secretariat

Bill C-69’s emphasis on Indigenous involvement underscores the role for a constitutional rights compliance office. Overall, the Bill provides the basis to fund and support an Indigenous Compliance Office and Indigenous Knowledge Secretariat.

A Compliance Office in the region is required; this is where Dene leaders will be providing capacity. There are 32 Bands within Denendeh with distinct histories, cultures, and knowledge. The Dene are not homogeneous. The Dene cannot meaningfully be consulted or participate in impact assessments if Dene institutions are not funded and the locus of power remains in Ottawa. There must be a regional Dene compliance office to coordinate among the diverse Dene Nations and other governments. Federal officials must meet with the Dene in Denendeh to promote cooperative Nation to Nation decision-making. Decisions cannot be made in secrecy in Ottawa. Our Dene Elders, Chiefs and technical experts will rely on a regional office and funding for all matters under the purview of Bill C-69. The Dene Nation is of the view that section 35 requires a Compliance Office to monitor and protect Denendeh.

It is important that going forward, a critical recommendation from the CEAA Report is followed: the Report indicated that the development of a funding program is needed to provide long-term support that is responsive to the diverse contexts of Indigenous groups.\(^\text{13}\) Dene Nations that seek


-a **funding program** be developed to provide long-term, ongoing IA capacity development that is responsive to the specific needs and contexts of diverse Indigenous Groups.
to or currently operate an Impact Assessment authority must be properly supported in their endeavor to exercise their inherent governance rights, and to ensure full implementation of a successful model.

This approach would ensure that the Dene are included in decision-making at all stages of the assessment process in accordance with their own laws and customs. This would reflect the principles of UNDRIP Article 18. This recommendation is a priority.

II. **Canadian Energy Regulator Act**

1. **Engage First Nations at Higher Strategic Levels**

The proposed legislation references a number of opportunities for engagement with First Nations. These include creating a Board of Directors meant to provide “strategic direction and advice to the Regulator.” At least one of the directors on the Board of Directors must be an

-IA-specific funding programs be enhanced to provide adequate support throughout the whole IA process, in a manner that is responsive to the specific needs and contexts of diverse Indigenous Groups.

The Panel recommends that a funding program be developed to provide long-term, ongoing IA capacity development that is responsive to the specific needs and contexts of diverse Indigenous Groups.

There are many costs to engaging in IA, and current participant funding falls far short of what is required for Indigenous Groups to meaningfully engage in IA processes and decision-making. Indigenous communities should have the capacity to play an active role in information gathering and analysis. Large volumes of complex information are common to IA. All parties involved in an IA should co-operatively assess the resources that will be required throughout the process and develop a plan for meeting these needs so participation is adequately supported in a predictable and transparent manner and all involved can expend their capacity in a way that best meets their own needs and contributes to the IA overall.

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**Article 4.** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions;

**Article 18.** Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions

**Article 29 1.** Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination

15 Bill C-69, *supra* note 2, Part II, cl 17(1).
Indigenous person and the Canadian Energy Regulator ("CER") is also to include at least one full-time Indigenous commissioner.\(^\text{16}\) The Commission is also required to consider traditional knowledge of Indigenous peoples that are relevant to pipeline projects.\(^\text{17}\)

Bill C-69 sets out processes to create collaborative processes, such as under section 76, which states that “the Regulator may enter into arrangements with any government or Indigenous organization to establish collaborative processes”. One important tool would be the creation of a “Joint National Energy Policy Secretariat” to provide greater Dene representation on an ongoing basis.

2. Ensure the Commission Includes Dene Representation

As per s 26(2), the new Commission requires that at least one full-time member be an Indigenous person.\(^\text{18}\) Implementing this standard increases the likelihood that more than one Indigenous person could be on the Commission.

However, additional Dene appointees should be included on hearing panels for applications involving Dene territory. The Board of Directors making appointments must include Dene representation. Our northern and Dene protocols and experiences cannot be provided by any other Nation.

3. The Commission Must Consider s 35 Constitutional Obligations before the "Public Interest"

Under s 56(1), the Commission is required to consider s 35 constitutional rights.\(^\text{19}\) However, there is no requirement that s 35 considerations should come before the public interest. Designated officers have the same responsibility.\(^\text{20}\)

Overall, the Regulator is tasked with ensuring the involvement of Indigenous people in regulatory programs.\(^\text{21}\) The Dene Nation submits there should be an Indigenous program and Committee set up in the North to ensure involvement and the respect for s 35 throughout the region.

\(^\text{16}\) Bill C-69, supra note 2, Part II, cl 14(2), 26(2).
\(^\text{17}\) Bill C-69, supra note 2, Part II, cl 183(2).
\(^\text{18}\) Bill C-69, supra note 2, Part II, cl 26(2).
\(^\text{19}\) Bill C-69, supra note 2, Part II, cl 56(1).
\(^\text{20}\) Bill C-69, supra note 2, Part II, cl 56(2).
\(^\text{21}\) Bill C-69, supra note 2, Part II, cl 57.
Obligations under s 35 of the *Constitution Act, 1982*, must be a primary, mandatory consideration before the Commission makes a recommendation to issue a certificate for any pipeline. The Supreme Court of Canada has already declared s 35 a “special public interest” in cases like *Rio Tinto*\(^{22}\) and *Clyde River*\(^{23}\). The Act must be interpreted to require consideration of s 35 constitutional obligations before either the public or national interest.

4. **Restore the Decision-Making Power of the Board**

The Governor in Council still has ultimate review powers over specific recommendations proposed by the Commission. The Dene seek an amendment to provide the Commission with the power to decide, rather than advise the Governor in Council, whether applications should be approved or denied.

This must be in conjunction with increased Dene representation

5. **Dene Regulation Issues**

As per s 26(2), the Bill requires at least one Indigenous member on the Commission.\(^{24}\) The CER is to have a Commission which must include at least one full-time Indigenous Commissioner. As well, the regulator may enter collaborative processes with Indigenous peoples at any point. However, it is at the Minister’s discretion.\(^{25}\)

The Dene must have the opportunity to have substantive involvement in a collaborative process with the Commission for impact assessment purposes. The Bill should be modified to make collaborative processes with the Dene in any Territory mandatory rather than discretionary.

6. **The Commission’s Jurisdiction over Duty to Meaningfully Consult and Accommodate**

The jurisdiction of the Commission is clearly outlined in s 32 of the legislation. This is the same provision that was outlined in s 12 of the *National Energy Board Act*.\(^{26}\) We submit that the Bill must be amended to confirm the Commission’s jurisdiction over the constitutional duty to consult and accommodate.


\(^{24}\) Bill C-69, *supra* note 2, Part II, cl 26(2).

\(^{25}\) Bill C-69, *supra* note 2, Part II, cl 76.

\(^{26}\) *National Energy Board Act*, RSC 1985, c N-7, at 12.
III. Dene Nation Recommendations for the Navigation Protection Act (NPA)

1. Overarching Requirements

It is critical that there is a fully operational and well-funded Indigenous Rights Compliance Office in the North that is ready to participate in consultations, apply for the addition of Dene waterways to the list of scheduled waters, and participate in consultations and facilitate collaborative processes and partnerships. The Dene require a dedicated mechanism in the amended Navigation Protection Act (proposed Canadian Navigable Waters Act (CNWA)) that allows waterways added to the Schedule at the request of Dene governance bodies and based on Dene rights and interests. Without structure, capacity and funding, the purposes of the Bill will be left unfulfilled.

The Bill includes a provision requiring any decisions under the CNWA to take into account adverse effects on Indigenous rights, as well as the traditional knowledge of Indigenous peoples where provided. No mechanisms were introduced that would coordinate the regulation of navigable waters via collaborative decision-making processes or that follow the laws of Dene self-governing bodies.

Now is the time to finally embed the principles of UNDRIP into the Canadian legal framework. The objectives of the Bill must be updated to move towards reconciliation in accordance with the principles of UNDRIP. The Dene Nation insists that the Minister use existing power to enter agreements and arrangements with any persons and organizations (s. 27) to begin entering collaborative agreements with Dene throughout the North.

2. CNWA’s definition of navigability

Concerns:

The new definition of a navigable water in section 2 of the CNWA is much narrower than the previous common law test of navigability from Canoe Ontario v Reed.27 This new definition means that a significant number of lakes and rivers that had legislative protection prior to 2012 will not regain protection in 2019.

The temporal element of the new definition of navigable water ("used or where there is a reasonable likelihood that it will be used...for any part of the year") narrows the use of the waterbody to the present time and excludes possible uses of waterways in the future. This is

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27 Canoe Ontario v Reed, 1989 CanLII 4237 (ONSC).
highly problematic, particularly given that climate change will impact navigability, and that the effects of climate change are especially magnified in the North.

The new definition of a navigable water in section 2 of the CNWA places undue emphasis on the type of title holding in riparian areas. This creates an incentive for individual landholders to deny or challenge public access and fails to recognize Dene land uses and access across private land. Furthermore, the protection of waterways based on the method of land holding is short-sighted; it only considers the waterway at a single point in time and fails to consider future land holdings and how that will impact the protection of that waterway.

The new definition of a navigable water in section 2 of the CNWA places undue emphasis on defining navigation as a means of transportation only. Navigability is about more than just the ability to move on water; it entails a right to safe navigation on clean waters in a healthy environment. Given that the proposed CNWA purports to value and protect the rights of the Indigenous peoples, the CNWA must promote a Dene definition of navigability, which incorporates the environmental, social, and cultural values of waterways.

Section 28(3)(g.1) of the proposed CNWA states that: “The Governor in Council may, for the purposes of this Act, make regulations… “excluding any body of water that the Governor in Council considers to be small from the definition navigable water in section 2”. This is highly problematic because small waterways have been, and continue to be, vital year-round access and transportation routes for the Dene. The size of the waterway does not affect whether the waterway is navigable under section 2. This provision is inconsistent with the CNWA, it undermines the spirit of the legislation, and it adversely impacts Indigenous peoples.

Solutions:

Restore the broader common law of navigability to the CNWA. Remove parts (a) to (c) of the definition of navigable water.

In the alternative, revise the wording of the definition in section 2 of the CNWA: replace the words “reasonable likelihood” with “possibility” and remove the words “for any part of the year”. The definition would then read:

Navigable Water means a body of water, including a canal or any other body of water created or altered as a result of the construction of any work, that is used or where there is a possibility that it will be used by vessels, in full or in part, as a means of transport or travel for commercial or recreational purposes, or as a means of access and transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the Constitution Act, 1982....

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The new definition of navigable water should incorporate the common law test as well as specific Dene considerations. The following considerations will promote the protection of all navigable waters:

a. Indigenous knowledge of traditional waterways;
b. Proximity of waterways to traditional territories;
c. Whether waterways are used for subsistence, communal, economic transport, ceremonial and other spiritual purposes;
d. Mandatory public notice for all projects that impact navigability of waterways.

Section 28(3)(g.1) of the CNWA must be removed.

3. Navigable Waters Schedule

Concerns:

The seven factors to be considered by the Minister in section 29 create additional barriers to protecting navigable waters. The only requirement to being listed on the Schedule should be to meeting the test for a navigable water found in section 2.

Furthermore, the Minister’s consideration of the seven factors is not a transparent process. There is no indication of the weight or importance given to each factor in determining the final outcome. Transport Canada’s website suggests that “applications wouldn’t need to meet all 7 factors”; however, it is unclear what type of answers would successfully “meet” each of the factors. The Dene Nations’ critiques of the seven factors are as follows:

- Subsection (a): The reference to the nautical chart places undue emphasis on trade and high-traffic waterways, which fails to prioritize Dene uses of waterways.
- Subsection (b): It is unclear which physical characteristics of the water would be determinative. For example, despite section 28(3)(g.1), the size of a waterway should not affect its navigability.
- Subsection (c): This factor unduly values the transportation aspect of navigation over the ecological aspect of navigation. Even waterways that do not connect to other waters must be protected. Navigability means more than just an absence of an obstruction; it is imperative that the waters are environmentally safe for passage.
- Subsection (e): “[A]nticipated navigation” must take into account the uncertainties of climate change. Also, if a waterbody is currently navigable, then past usage should not sway the Minister’s decision. The Minister must not value or protect transportation-
dense waterways more than the rural or low-volume usage waterways that are found throughout Dene traditional territory.

- Subsection (f): This section speaks to Indigenous peoples’ usage of navigable water in the exercise of their section 35 rights. There is no clear indication of the weight given to this important subsection vis a vis other subsections, such as the interests of commercial navigation reflected in subsection (a). Given that this act must not abrogate or derogate from the rights of Indigenous peoples, this subsection must be paramount. The Supreme Court of Canada established, in the case *R v Van der Peet*, that s.35 rights carry an inherent priority over ordinary legal principles. The Court stated: “a right of constitutional significance may loosely be defined as a right which has priority over ordinary legal principles”. Thus, in order to uphold constitutional obligations under section 35, Regulations should provide that if the Crown has actual or constructive knowledge of a recognized or potential section 35 right in relation to the waterway in question, this factor must have paramount significance in the Minister’s decision. If Regulations fail to recognize this constitutional priority, the regulatory mechanism for adding waters to the Schedule may be found unconstitutional.

Solutions:

The protections that used to exist under the previous environmental regime of the *Navigable Waters Protection Act* must, at a minimum, be restored. All navigable waters must be protected. This can include either abolishing the current Schedule, or adding all navigable waters to the Schedule. It is in the interests of environmental justice, reconciliation, and the Honour of the Crown for the federal government to take a proactive role in restoring protections to waters rather than shifting the burden to the Dene to claim protection for each waterway through a bureaucratic process.

As part of the process for adding navigable waters to the Schedule, the Ministry must publish notices of its final decisions to either approve or deny each application for additions to the Schedule. This includes denials of applications following the 30-day public comment period, and those applications that did not proceed to the 30-day public comment period. It is crucial to publish each decision denying additions to the Schedule in order for applicants to monitor the Ministry’s process and its treatment of navigable waters. Each decision denying an application must also be accompanied by written reasons from the Ministry, citing the factors considered and the Ministry’s evaluation of those factors. Written reasons from the Ministry promotes transparency and accountability. The CNWA or Regulations should also provide a mechanism to challenge a Ministerial decision that denies an application for an addition to the Schedule.

The Ministry must clarify the impact of an addition to the Schedule on works that are in place or in progress. This is another reason why the Ministry must track the all works, including minor works, on navigable waters.

4. Minor works

Concerns:

Section 28(2)(a) defines minor works as any works that are likely to slightly interfere with navigation. However, “slightly interfere” cannot be exhaustively defined as this will always depend on the context and particularities of the navigable water, including the use of the navigable water in the exercise of Indigenous rights. Without Ministerial oversight, owners will never be able to judge whether the impact of a proposed work is minor. An owner’s characterization of a work is simply a value judgment that will lead to inconsistent results and potential infringements on Dene rights.

It is problematic that owners have the authority under the CNWA to decide whether their work is properly considered a minor work. There is an inherent incentive for owners to prefer characterizing their proposed works as minor in order to avoid engaging with the Ministry or potential objectors to their works. For example, the definition of a work includes dumping, excavation, and dredging. These activities may seriously impact navigation and Dene rights, although this may not be apparent to a non-Indigenous owner. For example, dredging could destroy portaging routes. The Ministry must approve minor works rather than trust owners to effectively assess the impact of proposed works that are generally in their interests to pursue.

The Ministry must require information about a proposed minor work’s impact on patterns of freezing and thawing of ice on waterways that normally freeze during winter months. Even small and seemingly simple works can pose grave threats to safety of the Dene and the ability to exercise rights during the winter months. For example, a dock might appear to be a minor work. However, that dock may affect water currents, which can impact the formation of ice around the dock, thereby affecting the safety and security of all users of the frozen waterway. Furthermore, smaller waterways often serve as tributaries to major waterways. The cumulative impacts of works on smaller waterways could drastically change the composition of long stretches of traditionally frozen navigable waters. The Dene must be notified of any work that may cause a change in patterns of winter transport. The Dene are best suited to provide this knowledge to the Ministry, and must be properly notified.
The Ministry does not require an application or approval for minor works, nor does it track or compile information about minor works under the CNWA. Without tracking minor works, there is no way for the Ministry or owners to gauge and assess the cumulative impact of minor works.

Solutions:

The Ministry must approve minor works rather than allow owners to unilaterally approve their own works and commence construction. The Ministry must also track information about minor works under the CNWA in order to assess cumulative impacts. The Ministry should initiate an application process for owners to submit information about the navigable water and the proposed work to the Ministry. The Ministry can then cross-check this proposal with other information at its disposal, including information about previous works, environmental issues, and input from Indigenous peoples. The Ministry must always inquire into the proposed work’s impact on the freezing and thawing of water and how that will impact Indigenous people and their rights and livelihoods. Information gleaned from this process would be tracked in a public record, such as in an expanded version of the Registry, detailed in section 27.2 of the CNWA.

The Ministry must be empowered to deny an approval of a minor work.

If a minor work adversely affects the exercise of the rights of the Dene, there must be a dedicated and accountable mechanism in the CNWA or Regulations to allow for the Dene to share concern with the Ministry and for the Ministry to take action to potentially deny a proposed work or remove a work, based on the concerns expressed.

5. Major works

Concerns:

Section 28(2)(b) defines major works as any works that are likely to substantially interfere with navigation. According to sections 5-7, the Minister can allow an application to proceed without any public consultation or input if the Minister decides that the work would not interfere with navigation. This is problematic because all of the information about the navigable water and proposed work is coming from the owner, who may have a narrow perspective on how the waterway is used for navigation and the possible impacts of the proposed project. Given that a major work is likely to substantially interfere with navigation, proposed major works should not be allowed or approved without public notification and consultation with the Dene. Major works must be subject to a public process where the Dene are informed of a proposal prior to construction. Without notification and consultation, there is no possibility for potentially impacted Dene Nations to be meaningfully consulted about a proposed work that may affect navigation. This exercise of Ministerial discretion over Dene waters without consultation would
violate the Crown’s duty to consult and the international duty of free, prior, and informed consent.

Free, prior, and informed consent and the Crown’s duty to consult means that Indigenous peoples must be informed and properly consulted about all works prior to approval. Section 7(13) enables the Minister to approve a major work after the construction has already begun. This is antithetical to the CNWA’s commitment to upholding the rights of Indigenous peoples, as well as the Crown’s duty to consult, and the United Nations Declaration on the Rights of Indigenous Peoples.

Section 7(3) requires the owner to publish a notice, unless the Minister exempts the owner from this requirement. The CNWA or Regulations must provide further guidance on how and where these notices will be placed to ensure that they are accessible to the Dene on Dene territories.

Section 7(7) outlines nine factors that the Minister must consider in determining whether to issue the approval of a major work. The Minister’s consideration of the nine factors is not a transparent process. There is no indication of the weight or importance given to each factor in determining the final outcome. It is also problematic that the environmental impact of the proposed major work does not constitute one of these nine factors. Furthermore, it is impossible to assess cumulative impact, as mentioned in subsection (e), given that the Ministry does not track minor works.

The CNWA does not address winter navigation issues. Canada is a northern country with significant winter transport on waterways. Many of these waterways get both winter and summer use. The CNWA must always consider the effect of works on frozen navigable waters. The Dene use waterways within the Territory for snow mobile and dog-team routes in exercising our constitutional rights. Works that do not pose any threat to safety or navigation during the summer can cause deadly results during the winter. For example, dams that release water during winter have no impact on summer travelers but such water releases during winter can change ice conditions to dangerously thin ice; as a result, Dene trappers, such as Morris Kluzi and Morris Basel, have lost their lives. Therefore, the CNWA must specifically contemplate the effects of works on wintertime uses of navigable water by Indigenous people.

Solutions:

The Minister must engage in meaningful consultation with Dene Nations who occupy and have jurisdiction over the territory containing the navigable water in question when rendering a decision under Sections 6 and 7(1) as to whether a proposed work interferes with navigation.
The application process for a major work must be public. Either the owner should submit this application through a public platform, or the Minister must publish the application. The public and Dene Nations need to be notified of new proposals. Furthermore, Dene Nations residing in the drainage basin area of the navigable water in question must be actively notified by Ministry and be consulted on the impact of the proposed major work.

The Minister must publish its decisions to approve a work under 7(6). It must also publish its decisions to allow a work to proceed without an approval under section 6. This publication from the Ministry would provide a basis for complainants to challenge the Ministry's decision.

Section 7(13) must be removed. The Ministry cannot allow the construction of a work to proceed prior to approval because this is a direct violation of the Honour of the Crown, the Crown's duty to consult and concept of free, prior, and informed consent.

The public notice should be published on an online system, such as the Registry system contemplated in section 27(2) as well as physically displayed on the land in a manner that is visible and accessible to the public and Dene Nations. This may include posting a physical notice in Dene dialects. This may also include posting physical notices throughout Dene traditional territory and within the drainage basin area to inform affected Dene Nations downstream from the navigable water in question.

The period for public comment must be longer than 30 days. This problem can be remedied by publicizing the entire application process, as contemplated above.

Section 7(7) must include a factor that specifically considers whether the proposed project impacts section 35 Indigenous and/or Treaty rights.

The Ministry must require information about a proposed major work's impact on patterns of freezing and thawing of ice on waterways that normally freeze during winter months.

The CNWA and Regulations must be updated to require the Minister to consult with Dene Nations before allowing or approving a proposed major work.

6. Works (not major or minor) in non-Scheduled waters

Concerns:

Section 10 relates to the waters that have lost their protections under the 2012 omnibus bill and are not currently listed on the proposed Schedule. This category of works presents the highest potential for interference with navigation and the environment and Dene rights.
Section 10(b) states that the owner must publish a notice. The CNWA or Regulations must provide further guidance on how and where these notices will be placed, such that they are accessible to the Dene.

Section 10.1 and 10.2 are problematic provisions that fail to uphold the Honour of the Crown. The Ministry must approve all works on navigable waters and discharge its duty to consult with Indigenous people. The Ministry is abdicating its responsibilities by forcing the Dene to resolve potential rights violations with the violators. The comment period contemplated in this section requires interested persons to submit their comments to the owner, as opposed to the Minister. The owner then decides whether the concern relates to navigation or not, and may commence work if he or she deems the comment to be unrelated to navigation. This process allows owners to be the gatekeepers of feedback that oppose their projects. This is inherently and procedurally unfair. This process is ripe for procedural abuse by owners and jeopardizes environmental health and Indigenous rights. It runs counter to the precautionary principle and unjustly places the procedural burden on the “interested person” to defend the environment and Indigenous rights. Furthermore, it is unclear what recourse Dene rights holders have if the owner determines that the comment does not relate to navigation.

The regime for authorizing a work on non-Scheduled waters is unduly lengthy and bureaucratic and does not protect or promote the rights of Indigenous peoples. The process for objecting to a work through the public comment process is complex and time consuming. The short deadlines of 30 days and 15 days are burdensome, and can only result in a procedural outcome to require the owner to apply for an approval for the proposed work. The Ministry is abdicating its responsibility to effectively monitor public navigation. The Ministry is also failing to uphold the Honour of the Crown by failing to discharge its duty to consult on projects that may affect Indigenous rights and by forcing the Dene to resolve potential rights violations with owners.

Solutions:

All works on navigable waters, irrespective of the Schedule, must be tracked and approved by the Ministry. This will enable the Ministry to issue a well-informed approval and this will enable the Ministry to discharge its duty to consult with potentially affected Dene Nations.

All works must require applications to the Ministry, which must be published through a publicly-accessible registry system and a physical notice on the land. The Ministry must actively notify and consult with potentially impacted Dene Nations in whose traditional territory the proposed work would take place.
Owners cannot be the judge and jury of the public’s concerns that challenge or oppose owners’ projects. The Ministry must assert ownership over proposed projects on all navigable waters and eliminate the adversarial obstacles between owners and the public.

7. Other Concerns

The proposed CNWA does not restore the requirement that previously existed under the Navigable Waters Protection Act to conduct an environmental assessment when there is an interference with navigation. There is no reference to conducting an Impact Assessment in the proposed CNWA.

Section 24 of the CNWA contemplates that upon application, the Governor in Council may exempt certain waters from the application of section 21-23 (relating to depositing sawdust, stone, and dewatering) if it is determined to be in the public interest. This provision lacks detail around the form of application, who can apply, what factors will be taken into consideration, whether there will be a public comment or consultation process, or why this would be in the public interest.

The CNWA fails to explicitly mention or require consultation with Indigenous peoples by the Ministry. There is also a lack of clarity and accountability surrounding the Minister’s use of Indigenous knowledge. Section 2.3 outlines how the Minister must consider any adverse effects on Indigenous peoples in making any Ministerial decision. This entails a unilateral exercise by the Minister, rather than Nation-to-Nation consultations with the affected Dene Nations. Section 2.3 does not specify the methods or means by which the Minister will solicit or utilize Indigenous knowledge. There is also no mechanism for the Dene to review or challenge the use of Indigenous knowledge by the Minister. It would be a grave injustice if the Minister’s consideration of Indigenous knowledge could insulate the Minister’s decisions from review, making them harder to overturn.

The Bill requires the Minister to establish and maintain a registry related to navigable waters available to the public. The registry is limited to contain only publicly available records, or records that would be accessible via an Access to Information Act request. The Dene Nation cannot be kept in the dark. The Bill must require the Minister to ensure public registry information is made available in remote Northern communities. Information affecting navigable waters in remote areas must systematically be shared with all communities.

There is nothing in the CNWA that enables the Minister to solicit views, information, or knowledge from Indigenous peoples; the act only speaks to information provided to Ministry.

29 Bill C-69, supra note 2, Part III, cl 27.2(3).
This places the burden on Dene Nations to anticipate the Ministry’s needs for information, which they cannot do if they are not informed about proposed projects.

Section 26.2 specifies that any Indigenous knowledge that is provided to the Minister in confidence is confidential, unless it needs to be disclosed for procedural fairness. If disclosed information is then considered publicly available, this would lead to an eventual erosion of the protection of Indigenous knowledge.

The CNWA does not embody the principles of the United Nations Declaration on the Rights of Indigenous Peoples. The CNWA does not mention the Declaration nor does it incorporate the principles of free, prior, and informed consent. Instead, the CNWA places the burden on Indigenous peoples to be the voice for environmental protection and Indigenous rights.

Solutions:

Impact Assessments must be mandatory for all works that are not minor. The Minister must also maintain discretionary power to require Impact Assessments in situations where they are not mandatory.

Section 24 of the CNWA contemplates that upon application, the Governor in Council may exempt certain waters from the application of section 21-23 (relating to depositing sawdust, stone, and dewatering) if it is determined to be in the public interest. This provision requires details around the form of application, who can apply, what factors will be taken consideration, whether there will be a public comment or consultation process, or why this would be in the public interest.

The Minister must actively consult with the Dene regarding the consideration and application of Indigenous knowledge to Ministerial decisions. The resulting decision must be reviewable on the ground of improper consideration of Indigenous knowledge.

The Minister should be explicitly empowered to reach out to Dene Nations to solicit Indigenous knowledge; however, the Minister cannot mandate any Indigenous group or persons to provide Indigenous knowledge to the Ministry.

The Ministry must introduce mechanisms to coordinate collaborative decision-making processes between government and Dene governing bodies.

The Ministry must establish a fully operational and publicly funded Dene rights compliance office that is ready to participate in consultations and facilitate collaborative process and
partnerships. Without structure, capacity, and funding, the purposes of the act and its Regulations will be left unfulfilled.

All Regulations must be drafted with the Dene to ensure that Dene rights are protected. This is the customary approach in the north and it must be respected.

**Conclusion**

We call on the Standing Committee to fulfill the promise of the Prime Minister to achieve reconciliation. A renewed Nation-to-Nation relationship can begin when the Bill recognizes and respects the constitutionally protected rights and interests of the Dene. The Dene and Canada can cooperatively protect our Dene territory as partners to accomplish this goal.

Yours very truly,

Chief Norman Yakeleya
Dene National Chief