Assembly of Nova Scotia Mi’kmaq Chiefs

Brief to Standing Senate Committee on Energy, the Environment and Natural Resources
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

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Submitted by:
Chief Roderick Googoo,
Assembly of Nova Scotia Mi’kmaq Chiefs
Lead Chief for Lands and Wildlife and Forestry Portfolios
on behalf of the Assembly of Nova Scotia Mi’kmaq Chiefs

C/O Kwilmu’kw Maw-klusuaqn Negotiation Office
75 Treaty Trail, Millbrook, NS  B6L 1W3
Ph: 902-843-3880  Fax: 902-843-3882
info@mikmaqrights.com  www.mikmaqrights.com
Please accept this as the submission of the Assembly of Nova Scotia Mi’kmaq Chiefs (ANSMC) 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.

The ANSMC is an unincorporated association consisting of all 13 Chiefs of the 13 Mi’kmaw First Nation communities in Nova Scotia. It meets on a monthly basis to deliberate on issues common to all 13 Mi’kmaw communities, and is the aggregate governance institution for the Mi’kmaq in the Province. Its work includes providing direction to the Mi’kmaw Negotiating Team in the “Made-in-Nova Scotia” negotiation process concerning Mi’kmaw Aboriginal and treaty rights governed by the Framework Agreement entered into by Canada, Nova Scotia and the Mi’kmaq on February 23, 2007. The ANSMC also has delegated authority from 11 of 13 Chiefs and Councils to conduct formal consultation with the Crowns under the Terms of Reference for Mi’kmaq-Nova Scotia-Canada Consultation Process entered into by the three parties on August 31, 2010. The ANSMC has a developed a portfolio system and the Lead Chief for Lands and for Wildlife and Forestry is Chief Roderick Googoo of We’koqma’q.

In 2012, the Canadian Environmental Assessment Act, 2012 repealed the previous Canadian Environmental Assessment Act. The 2012 legislation was disturbing as it narrowed the definition of interested party and, by taking a “project list” approach to environmental review, limited the number of projects which are subject to review. We are concerned that the project list approach will be maintained in the new Impact Assessment Act and we urge the Crown to reconsider its position and to reinstitute assessments being triggered by federal decision-making.

In general, we commend the federal government for proposing the repeal of the CEAA, 2012 and its replacement with the Impact Assessment Act, although we continue to have concerns, particularly as they relate to the potential effects of the Act on Mi’kmaw title and rights.

This submission makes the following points on the proposed Impact Assessment Act:
1. **Engagement and Consultation:** Let us be clear: we view s.12 of the Act as confirmation of the Crown’s constitutionally required duty to consult. *However,* we would prefer to see that duty extended to include, as per the wording of s.11, an instruction to the Impact Assessment Agency to ensure affected Indigenous groups are enabled to participate meaningfully in the preparations of a possible impact assessment. This includes capacity funding and training to ensure meaningful input into the screening process.

2. **Indigenous Governing Bodies:** We submit that while the definition of “Indigenous governing body” in s.2 is, of itself, sufficiently broad to recognize bodies such as the ANSMC; however, that broadness appears narrowed by in the definition of “jurisdiction” in s.2 where “(f)” states that jurisdiction means:

   An Indigenous governing body that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project
   (i) under a land claim agreement referred to in section 35 of the *Constitution Act, 1982,* or
   (ii) under an Act of Parliament other than this Act or under an Act of the legislature of a province, including a law that implements a self-government agreement;

The following subsection “(g)” provides that jurisdiction means “an Indigenous governing body that has entered into an agreement or arrangement referred to in paragraph 114(1)(e)”.

Will this process of entering an agreement or arrangement be cumbersome? How long will it take? Why is it necessary to have an arrangement or agreement? Principle 1 of *Principle Respecting the Government of Canada’s Relationship with Indigenous Peoples*¹ states that

   The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.²

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¹ Canada. Department of Justice, (Ottawa: Justice, 2018).
² *Principles,* p.5.
Principle 4 affirms that the Government of Canada recognizes that Indigenous self-government is part of Canada’s cooperative federalism system and “distinct orders of government.” We submit that in keeping with the Principles 1 and 4, the “jurisdiction” definition of Indigenous governing body must mirror the definition of Indigenous governing body in s.2. It is not role of the Crown to decide which self-governing Indigenous governing bodies it will or will not recognize.

Further, the emphasis on land claims agreements neglects or ignores the evolving Crown – Indigenous Peoples relationships through Rights Reconciliation Arrangements and the work underway at the Recognition of Indigenous Rights and Self-Determination discussion tables.

3. **Protection of Rights and Title:** Our Mi’kmaw people have constitutionally protected Aboriginal and treaty rights and we have asserted our title to all the lands and waters in and off Nova Scotia. These rights, we submit, are paramount. The new Impact Assessment Act, by moving from a standard of determining whether a project will cause significant adverse effects to determining whether a project is in the public interest – with effects on Indigenous groups and their rights and title as but a factor in the public interest determination – fails to recognize and protect our rights and title. The Crown has an obligation to ensure that our rights are not infringed without lawful justification. Treating our rights as merely a factor in determining where the “public interest” lies does not meet the honour of the Crown. It also fails to meet the principles of the Act which include ensuring respect for the rights of the Indigenous people of Canada (s.6(1)(g)).

4. **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):** The Impact Assessment Act is silent on UNDRIP. In the Principles the federal government affirms that it “must take an active role in enabling [Indigenous] rights to be exercised. The Government will fulfill its commitment to implementing the UN Declaration through the review of laws and policies...” The commentary on Principle 6 states that the importance of free, prior, informed consent extends beyond title lands and the Crown

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3 *Principles*, p.9.
4 *Impact Assessment Act*, ss.60-63, particularly s.63(d).
5 *Principles*, p.3.
will look for opportunities to build processes and approaches aimed at securing consent. We submit that by failing to incorporate UNDRIP into the proposed Impact Assessment Act the Crown is failing to meet its own standards for its relations with Canada’s Indigenous Peoples.

5. **Offshore Exploratory Drilling**: Offshore exploratory drilling projects are currently subject to CEAA 2012. We submit that offshore exploratory drilling projects must remain on the impact assessment project list, even in the case when the exploratory drilling project will take place in an area that has been subject to a Regional Assessment. Each exploratory drilling project takes place in an offshore environment which is unpredictable and prone to accidents as we have seen repeatedly in the Atlantic offshore. It is crucial that there be strong regulatory oversight and meaningful Indigenous consultation on projects that have such a high level of potential impact on Indigenous rights. A Regional Assessment should be a tool to consider the cumulative effects of multiple offshore drilling projects in an area, not a tool to reduce regulatory oversight and Indigenous consultation. Furthermore, the Impact Assessment Act should keep Impact Assessments and regulatory processes separate. The Act should not require two members of the CNSOPB be included on any impact assessment review panel for drilling projects offshore Nova Scotia. Instead Mi’kmaw representation should be required on these review panels. This would help protect the independence of the assessment process and strengthen Indigenous consultation and participation.

6. **Timelines and Meaningful Consultation**: The Impact Assessment Act proposes that the deadline for completing the Planning phase be 180 days, and, upon receiving the Impact Statement Guidelines from the Agency upon completion of the Planning phase, the proponent has a maximum 3 years to submit the Impact Statement to the Agency. Upon receipt of the Impact Statement from the proponent, the clock will begin to run on the Assessment phase. An assessment of the Statement must be made by the Agency within 300 days of receipt of the proponent’s Statement or within 600 days if the if the review of the Statement is undertaken by a Review Panel. The Minister has up to 30 days

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6 *Principles, pp.12-13.*

7 *Impact Assessment Act, ss.18, 19(1).*
to make a decision; the Governor in Council up to 90 days.\(^8\) While there is an initial effort under the new Impact Assessment to engage Indigenous groups, the regulatory assessment by the Agency has been drastically shortened from 24 months to 300 days. The suspension criterion has become much more stringent, making it more difficult for Indigenous groups to potentially suspend the timelines to address impacts. Although s.75 of the Act mandates participant funding, how can we be sure that sufficient monies will be set aside for Indigenous communities, many of which lack the financial and human capital to participate fully in impact assessments.

We have had experience in Nova Scotia with complicated projects which have the potential to affect our title and rights and our social, cultural, economic and medical health. We were concerned about the timelines from application to decision in CEAA, 2012 and we are equally concerned about the tightened deadlines in the Impact Assessment Act. We have had more than 500 years of relations with incomers and few of our interactions have positively affected us. May more have had deleterious consequences. We submit that an Indigenous norm should drive impact assessments: they take as long as they take to do it right. While proponents may not favour a less defined approach to submitting, doing, completing and making a decision on an impact assessment; it is, we submit, the only way to ensure our rights and title are protected and our societies are able to survive and thrive. In this age of human engendered climate change, we must all work together to ensure that everything necessary to protect our lands and waters is done.

In recognition of Mi’kmaw title and rights, wela’lioq (thank you) from the Mi’kmaw Nation of Nova Scotia.

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\(^{8}\) *Impact Assessment Act*, ss.28(2), 37, 65(3) and (4).