Comments 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

To the Standing Committee of Energy, the Environment and Natural Resources

April 2019
Comments of the Assembly of First Nations of Quebec-Labrador 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

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THE ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR (AFNQL)

Created in 1985, the Assembly of First Nations Quebec-Labrador (AFNQL) is the meeting place of the leaders of 43 communities of eleven First Nations in Quebec and Labrador. The AFNQL deals with many issues related to the protection of First Nations titles, their indigenous and treaty rights, federal and provincial government policies that undermine their customs and their way of life, government legislation and relations with both levels of government, economic development and other social, economic and cultural issues affecting self-government, national relations with government and international relations.

The AFNQL secretariat, in cooperation with its commissions and regional organizations, coordinates key priorities and representational activities of the regional chief, and implements the decisions made by the Chiefs in Assembly.

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Dear Members of the Senate,

The AFNQL, through the First Nations of Quebec and Labrador Sustainable Development Institute (FNQLSDI), as well as the First Nations of Quebec, have actively participated in the previous stages leading to the development of Bill C-69. During these various stages, we have proposed concrete measures to establish appropriate processes and engage Canada in the path of Reconciliation and Nation-to-Nation relationship with indigenous peoples. Some of these comments have been taken into account; however, several have been ignored.

In response to this review, we maintain as in our earlier responses, that Canadian Supreme Court jurisprudence and international agreements to which Canada is signatory confirm that Indigenous Peoples must be respected regarding project developments not only on their traditional lands and waterways but also in formulating Nation to Nation government legislative policies and actions. In the past Government has often avoided the importance of meaningful Indigenous consultation, especially regarding environmental processes. This constant failure of the processes has led to Bill C-69’s adoption of improved environmental policy around Indigenous engagement and consultation.

This is not a bad thing. In our view, Bill C-69 should be adopted by all concerned as progressive policy that promotes sustainable development while minimizing environmental impacts through deep and meaningful engagement with our peoples.

At this point in the history, effective environmental policy that meets the needs for all involved should be supported. The key is that Aboriginal consultation must be deep and meaningful and not avoided to solely facilitate industry and economic development. To create such policy, our trust in the process of consultation and impact assessment must be regained. Without trust that our concerns will be incorporated into policy decisions, there is no reason for our Nations or any party to engage in the process. Disengagement will not only result in suboptimal or damaging project delivery, but also guarantees that opposed projects could possibly be delayed by protest and/or litigation by our communities.

As such, the comments made in this document do not provide detailed amendments that have or have not already been made. However, we are open to further conversation while insisting at this crucial stage of the review, although not perfect, the AFNQL supports and prioritizes the adoption of the Bill C-69 by the Senate.

Indeed, if it dies on the order paper, it becomes a profound loss of months of meaningful engagement, work, review, and mobilization towards strengthening environmental and regulatory processes and reconciliation with Indigenous Peoples in Canada.
INTRODUCTION

As climate change events and human activities continue to impact ecosystems, the need for improved environmental policy that supports all future generations will only increase. However, the failure to embrace a future in meaningful collaboration as proposed in Bill C-69 could erode the trust in government needed to move forward. Government must now lead the way in deep and meaningful consultation, with our communities. There is no reason why inclusive, Indigenous knowledge and evidence-based environmental policies that allow our future generations to succeed in a rapidly changing world, cannot be implemented.

While Bill C-69 is not perfect, it proposes essential measures on how projects potential impacts on the environment, Aboriginal rights and UNDRIP provisions will be assessed. convinced that early engagement with Indigenous communities on project development in advance will not be detrimental to the Canadian economy, contrary to what the Industry would have us believe, and that they will facilitate government to meet its legal obligation the Assembly of First Nations Quebec-Labrador supports the adoption of Bill C-69. Changing the path Canada embarked on in 2012 by majorly rolling back environmental protections while marginalizing obligations to indigenous Peoples is no longer an option.

The AFNQL recognizes the efforts made by the current government to ensure greater consideration of Aboriginal rights and UNDRIP provisions through greater participation of Indigenous Peoples in environmental and regulatory processes.

We emphasize and support the Federal government’s commitment to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples and to legislative reforms that encompass UNDRIP as concrete actions towards Reconciliation. In this sense, we support Senate amendments to Bill C-69 to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples in concert with Bill C-262.

Supporting the adoption of the Bill C-69, the AFNQL will also propose the following improvements in the hope that the Committee will be able to include them in its future report, as well as regulations, policies and strategies that will specify the methods of implementing the Act

Some of the positive elements on the bill include:

- Assessment of impacts on Indigenous rights in decision-making processes, reflecting the requirements related to the scope of Indigenous consultation and accommodation;
- the opportunity for First Nations governments to guide project assessments;
- direct reference to the United Nations Declaration on the Rights of Indigenous Peoples
- the new planning phase in the project evaluation process allowing for early involvement of indigenous ;
- mandatory consideration of Indigenous knowledge.
Areas for improvement include:

- The language of "respect" and recognition of Indigenous rights is a minimum and often discretionary requirement, that should be replaced in the bill strictly as "protection" of Indigenous rights;
- Abandoning the “designated” project list
- Expanding Ministerial discretion to delegate the conduct of project assessments to Indigenous Peoples, in line with the self-determination referred to in Bill C-262 supporting government adoption of the United Nations Declaration on the Rights of Indigenous Peoples; including free, prior and informed consent of indigenous Peoples;
- Language to support agreement and consultation with Indigenous peoples on best approaches to returning lost protections to navigable waters and triggering environmental assessments in relation to them.

Furthermore, in the spirit of openness and collaboration please take note of the following general comments mainly concerned with Part I of Bill C-69, the part enacting the Impact Assessment Act.

More clarity needs to be established when using the terms «aboriginal" and "indigenous” within the legislation. For example, “to illustrate the pre and post contact identity distinctions between aboriginal rights treaty and title-holders--who are defined as "aboriginal" under Section 35 of the 1982 Canadian Constitution –versus “indigenous” as representing various Nations; such as Mi’kmaq, Abenaki, Cree, Innu, Anishinaabe, Haudenosaunee, Assiniboine, Dakota, Ktunaxa, Secwepmec, Carrier-Sekani, Dene, Salish, and Haida etc., who affirm histories, knowledge and relationships to their territories.” (Van Schie 2019)
COMMENTS OF THE AFNQL ON BILL C-69

As mentioned above, the AFNQL supports the adoption of Bill C-69, which, although imperfect, represents a significant step forward compared to the current situation. For each key theme related to specific First Nations issues\(^1\), the AFNQL presents:

- Its interpretation of the requirements of the Bill and the progress made in response to criticism from certain interested parties.
- The areas for improvement that will need to be addressed, particularly in the joint development of regulations, policies and strategies that will clarify the implementation of the law once it is adopted.

**Recognition and protection of First Nations rights**

In general, the Bill allows for a better consideration of Indigenous rights and strengthens the role of Indigenous Peoples in project assessments, which we welcome.

Throughout the Bill, it recognizes "the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982" and requires that they be taken into account in the assessment of activities.

While positive, it should be noted that these changes are only the necessary steps to ensure that the Act respects case law regarding Aboriginal rights. In this sense, the strong criticisms by some stakeholders that these changes related to Aboriginal rights and related to the involvement of Indigenous peoples in the processes would create uncertainty that is detrimental to the economy are not justified. On the contrary, by ensuring that Aboriginal rights are properly assessed and respected, a more favourable climate and greater certainty in processes will be allowed.

The Bill must ensure the full scope of Section 35 Aboriginal rights where recognition of the jurisdiction and authority of Indigenous Peoples is a minimum requirement. Without these requirements for impact assessment on Aboriginal rights, integration of Indigenous knowledge and the opportunity for First Nations to actively participate in processes, Canada is not meeting its constitutional obligations to adequately consult and accommodate Indigenous Peoples.

- **United Nations Declaration on the Rights of Indigenous Peoples**

The implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Reconciliation appeared to be at the heart of the Environmental and Regulatory Process Review. We welcome the House of Commons amendment that led to the Declaration being mentioned in the preamble of the Bill when the first version did not mention it. Since the UNDRIP was developed on the basis of existing standards in international law, it does not further constrain

\(^1\) The AFNQL does not detail here the environmental issues that several groups have developed in their own submissions.
Canada’s existing commitment in terms of human rights. The UNDRIP only reaffirms the inherent rights of Indigenous Peoples.

Although several stakeholders oppose it, the AFNQL insists on the need for the implementation of Bill C-262 which supports the Declaration and its principles, particularly free, prior and informed consent (FPIC), to be an integral part of Bill C-69 and the environmental and regulatory processes it oversees.

In particular, the preparatory and decision-making steps must include the establishment of clear mechanisms for obtaining consent.

Unfortunately, the government has not been able to reflect, in Bill C-69, its commitments and the legitimate expectations of First Nations regarding the proper integration of Bill C-262, UNDRIP and FPIC. Further consultations with Indigenous peoples will therefore be required after the adoption of the bill in order to clarify how the government's commitment to implement Bill C-262 in support of UNDRIP will be implemented.

- Protection of Aboriginal rights

The recognition of constitutional rights in Bill C-69 is merely a reminder of the Aboriginal rights already protected by the Constitution.

The proposed changes ensure that the Bill is consistent with Canadian case law on Aboriginal rights and its constitutional obligations (Section 35 of the Constitution Act, 1982). These elements are all the more necessary because in the Chippewas of the Thames decision, the Court ruled that Canada could rely on environmental and regulatory processes to meet its constitutional obligations to consult and accommodate Aboriginal Peoples.

In Bill C-69, the requirement to respect the rights recognized and confirmed by section 35 of the Constitution Act, 1982, is mentioned in the preamble, the objects of the laws, the parts relating to the elements to be considered in decision-making and the designation of activities. These requirements are not in any way an obstacle to development, it is merely a reminder of the government's obligations to provide more certainty to the processes in the interest of all Canadians.

In addition, the protection of Aboriginal rights necessarily requires a comprehensive assessment of the impacts of projects on these rights. There is nothing revolutionary about expanding the scope of environmental assessments, now including the assessment of effects on Aboriginal rights. Bill C-69 merely reflects the case law which indicates that for proper consultation and accommodation, the impacts of projects on Aboriginal rights and interests must be properly assessed (Haida Nation, para. 39: In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed).
Bill C-69 also proposes to include Indigenous rights and interests in the public interest assessment (s. 63). This notion brings its share of interpretation and would take place in a short time frame. Integrating Aboriginal issues into the public interest could mean that this assessment would be to our disadvantage. Our rights are unique and constitutionally protected, and can not be viewed as less in the face of other rights and interests, and above all, in the face of a short-term vision of economic development. The bill must provide language to the effect that meeting a public interest test should in no way limit or exclude deep and meaningful consultation as outlined in the Clyde River decision. In this sense, we support the application of the Sparrow test, which requires the Crown to demonstrate how the infringement is justified.

**The decision-making process and discretionary powers of the Minister and the Agency**

Section 63, which describes the justifications required of the Minister or the Governor in Council when making a decision on a designated project, appears to us to be positive.

> The Minister’s determination under paragraph 10 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council’s determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

> (...) (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;

The Bill retains an advisory role. Ultimately, the decision will be political and the government could continue to impose its preferences on Indigenous Peoples by making a unilateral decision. Even if an environmental assessment process is undertaken, the Governor in Council still has the power to override the rights of First Nations, as long as the reasons for its decision are provided.

Several important aspects of the Bill are subject to the discretion of the Minister and the future Impact Assessment Agency. While we can recognize the value of allowing some flexibility for the Minister, some of the wording raises concerns that it may be possible for the Minister or the Agency to override the rights of First Nations or not designate projects on our territories that require a full environmental assessment but would only be subject to a lesser proponent driven “environmental effects evaluation” as we have experienced in CEAA 2012.

In its current form, the bill does not require the consent of the indigenous people and does not give them any veto rights, as some opponents of the bill claim.

**Early Indigenous Engagement in the project planning phase**

The AFNQL welcomes the implementation of this new planning phase, which provides an opportunity for First Nations to be involved earlier and properly resourced financially to participate in the impact assessment process.
However, we would like to point out that we support this addition as it acknowledges current case law requiring the government to engage in a deep and meaningful dialogue before and during the consultation and accommodation processes.

This new phase, would alert proponents and CEAA to issues and impacts on indigenous rights that the projects under consideration may have. This will facilitate the other stages of consultation and evaluation of the project and reduce the risk of conflicts and have a positive impact on deadlines.

**Inclusion and protection of Indigenous knowledge**

Indigenous knowledge, traditional and contemporary, is at the heart of our identity and culture and must therefore be protected.

The integration of indigenous knowledge into processes does not replace science, it complements it and encourages the sharing of information. This integration will not in any way increase the burden on processes, but on the contrary, will enrich project evaluations and ensure that they are more complete and therefore more effective.

The addition of section 119.1 to protect knowledge is an improvement that we support, although concerns remain about the government’s ability to ensure the confidentiality of data shared by Indigenous Peoples.

*Confidentiality 119 (1) Any Indigenous knowledge that is provided to the Minister, the Agency, a committee referred to in section 92, 93 or 95 or a review panel under this Act in confidence is confidential and must not knowingly be, or be permitted to be, disclosed without written consent.*

**Collaboration and process substitution**

Under paragraph 114(1) (d) of Bill C-69, assessments may be conducted, in whole or in part, by First Nations who already have the authority to make assessments pursuant to agreements signed with Canada, such as self-government agreements or modern treaties (“jurisdictions”). Paragraph 114(1)(e) would allow First Nations to conduct assessments in whole or in part, even if they have not signed an agreement to that effect, but this remains at the discretion of the Minister. This deserves clarification, whether in the context of the bill or the future regulations that will result from it, to ensure that any First Nations in Quebec can be involved according to their needs, their means and their will in the assessment process.

We would like to mention that process substitution with the provinces must not be allowed without an agreement ensuring respect for indigenous rights and the highest standards of evaluation.

In his brief to the Senate Committee, dated February 5, 2019, the Quebec Minister de l'Environnement et de la Lutte contre les changements climatiques, Benoit Charrette, repeatedly asked that "in the territory of a province that so requests, only the procedure of that province be used for the assessment of intra-provincial projects that fall under the base of provincial jurisdiction.
The Government of Quebec's list of detailed comments begins as follows: "designated projects subject to the application of the Impact Assessment Act must be limited" He cites as an example the interprovincial and international power line projects that should be excluded from the list of projects subject to federal assessment and recommends that only projects whose risks are major under federal legislation should be included.

The AFNQL is firmly opposed to this position of Quebec. First, this position demonstrates the Quebec government's limited vision and lack of understanding of Bill C-69, which aims to broaden project assessments and no longer focus solely on environmental impacts. Then, the Government of Quebec considers that only major risk projects should be assessed, and this definition of risk is unilateral. Several projects, identified as having a low, negligible or moderate impact by the government, can have a significant direct, indirect and cumulative impact on both the environment and indigenous rights. Finally, despite Mr. Charrette's desire to make Quebec's new environmental authorization scheme ideal, we would like to point out that it is still under review and is still the subject of much concern by various stakeholders.

Bill C-69's proposed federal assessment method does not encroach any more than in the past on provincial jurisdictions.

The federal government must ensure that the best processes are followed and to do so, the act must not provide for automatic substitution of projects by the provinces.

**Specific elements of the amendments to the Navigation Protection Act**

The new Act respecting the protection of navigation in Canadian navigable waters proposed in Bill C-69 does not restore the protection that was lost for most lakes and rivers in Canada. As part of the review of this component, First Nations in Quebec and Canada have repeatedly emphasized the cultural, economic and environmental importance of protecting all navigable waters and retaining the trigger for environmental assessment within the proposed Canadian Navigable Waters Act.

In this sense, our First Nations must be informed and consulted for all types of work, even minor ones, on a watercourse, because the direct, indirect and cumulative impacts of small works can have consequences on our rights and our ability to exercise them.

Impact assessments must be required for any work that may interfere with navigation. We cannot rely solely on the list of designated projects that includes only major projects when smaller projects can have a significant impact, including cumulative effects on navigation and waterways and on sustainable practice of our Aboriginal rights.

Concerning the part “Owner’s Duty”, the following amendment must be made:

10.3(1) An owner of a work in, on, over, under, through or across any navigable water must immediately notify the Minister and any Indigenous governing body that may be affected.
if the work, or its construction, placement, alteration, rebuilding, removal or decommissioning, causes or is likely to cause a serious and imminent danger to navigation.

-In the “Obstruction” part:

15(1) The person in charge of an obstruction in a navigable water must immediately give notice of the existence of the obstruction to the Minister and to any Indigenous governing body that may be affected, in the form and manner, and containing the information, specified by the Minister.

Our First Nations will seek consultation and agreement on all regulatory provisions of the Canadian Navigable Waters Act and do support measures for our co-governance of waterways and the development of Ocean and Waterway Protection Measures as offered by Transport Canada.
CONCLUSION

In conclusion, the AFNQL reiterates its support for the adoption of Bill C-69. Indeed:

Bill C-69 is the result of several years of reflection and consultation with indigenous groups, but also with citizens, the scientific community and business. Putting this work to death on the order paper would be to deny democratic process simply under the influence of the Canadian economic sectors;

Although it is imperfect, Bill C-69 proposes significant improvements over the current situation. It promotes greater respect for and protection of indigenous rights that current environmental and regulatory processes do not guarantee.

These new requirements and improved consultation of indigenous people in processes will provide greater certainty and a more favourable climate for Canada's sustainable development for the benefit of all Canadians.

As presented in the previous sections, Bill C-69 does not impose any radical changes in the assessment of projects. It does not either propose any veto rights for Indigenous Peoples, nor does it seek to base decisions and assessments on Indigenous knowledge only, at the expense of science.

While we regret that Bill C-69 has not been able to advance provisions that are more ambitious on UNDRIP, language in the Bill must support the integration of Bill C-262 in its provisions. This is a significant step forward compared to Canadian Environment Assessment Act 2012 and reconciliation with Indigenous peoples in Canada.

We ask the Committee to be diligent, and to ensure that its report reflects all comments received and not only those made primarily by those who oppose the bill at this stage of the review.