Assembly of First Nations

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

Study on Impact Assessment Act, Canadian Energy Regulator, and Navigable Waters Act (Bill C-69)

April 4, 2019
Who We Are

The Assembly of First Nations (AFN) is the national, political organization of First Nations governments and their citizens, including those living on and off reserve. Every First Nation in Canada is entitled to be a member of the Assembly, and the National Chief is elected by the Chiefs in Canada, who are elected by their citizens. The AFN has 634 member nations within its assembly. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action, and to advance the aspirations of First Nations.

The AFN supports First Nations by coordinating, facilitating and advocating for policy change, while the leaders of this change are the First Nations themselves. Chiefs, and the First Nations they represent, must be an integral part of meeting the challenge of sustainable, transformative policy change. The AFN has been acting on this responsibility by coordinating Technical and Information Sessions over the past two-year engagement, leading to submissions to the Environmental Assessment Expert Panel, the National Energy Board Expert Panel, and the Standing Committee on the Environment and Natural Resources. The AFN is mandated by five resolutions, from the Chiefs-in-Assembly, since the beginning of this review in 2016. Most recently, in Resolution 69/2018: First Nations Full, Direct, and Unfettered Participation in Bill C-69 including Regulatory and Policy Co-Development, the Chiefs-in-Assembly resolved, among other things, to:

1. Direct the Assembly of First Nations (AFN) to urge the Senate to refer Bill C-69 to the Senate Committee on Energy, the Environment, and Natural Resources and ensure that rights holders participate in the hearing process in a timely manner that is respectful of their unique protocols, and processes, in order to complete the process before the next federal election.
2. Support the Athabasca Region First Nations (Athabasca Chipewyan First Nation, Chipewyan Prairie Dene First Nation, Fort McKay First Nation, and Mikisew Cree First Nation) position on the need for the ratification of Bill C-69 and for improvements to the Project List under Bill C-69 to include in situ projects and projects that may impact Section 35 rights, reserves, water quality and quantity, migratory birds, species at risk, the watersheds of places.
3. Call on Canada to engage in a focused dialogue with First Nations to substantively identify, recognize, and engage the protocols, elements, and processes to conduct joint regulatory and policy drafting.

The input that First Nations from across the country provided for this submission demonstrates how concerned First Nations are with the operation and functioning of Canada’s environmental laws. Getting this review right is an essential step on the journey towards reconciliation.

2 http://www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9885952/br-external/AssemblyOfFirstNations-e.pdf
3 For a concise description of issues and challenges that First Nations face in the current environmental assessment regime, please refer to Squamish’s submission to the Environmental Assessment (EA) Expert Panel.
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1. Introduction:

The Assembly of First Nations (AFN) appreciates the opportunity to provide a submission to the Senate Standing Committee on Energy, the Environment and Natural Resources (ENEV) for its study of Bill C-69, as it relates to the Impact Assessment Act (IAA), Canadian Energy Regulator Act (CERA), and the Canadian Navigable Waters Act (CNWA).

The federal government committed in the December 2015 Speech from the Throne to introduce new environmental assessment processes to ensure that “...Indigenous Peoples will be more fully engaged in reviewing and monitoring major resources projects”. Over the past two-years, First Nations have overwhelmingly participated in this process, contributing written and oral submissions to the Canadian Environmental Assessment Act (CEAA) Expert Panel, the National Energy Board (NEB) Expert Panel, on the federal Discussion Paper, and in comments/participation with the House of Commons Standing Committee on Environment and Sustainable Development (ENVI). Based on this direction from First Nations, the new Bill has taken an important step towards acting on the Government of Canada’s new approach to Indigenous Peoples, making important improvements to the CEAA and the NEB Act.

First Nations have welcomed many of the proposed changes that Bill C-69 would make. These include: (1) the mandatory consideration of Indigenous Knowledge; (2) a necessary assessment of impacts on rights in decision-making; (3) regulatory opportunities for First Nations governments to lead impact assessments themselves; and (4) the direct reference to the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).

In this submission, we attempt to bring clarity to what we feel is misinformation that is being circulated by some industry groups, ‘grassroots’ campaigns, and political representatives by focusing on what the legislation actually says and requires. In particular, we assert that the Indigenous focused changes in Bill C-69 are not to be feared, but simply represent a renewed articulation of existing jurisprudence on Section 35 rights, and the duty to consult and accommodate. During this two-year engagement, First Nations have, overwhelmingly, participated and signaled that these changes are necessary to ensure compliance with legal obligations, to protect Indigenous Knowledge and rights, and to recognize First Nations’ jurisdiction and authority. It is also clear that public servants and proponents need guidance – removing these sections from the proposed Acts will result in Section 35 rights not being properly assessed, and the duty to consult and accommodate not being fulfilled, which will result in court challenges, judicial reviews, and other situations like those already referenced above.

It is clear that First Nations expect more than just compliance with case law in a colonial court, but it is important to recognize that proponents against the Bill have been actively lobbying against key provisions that consider First Nations’ rights. To those who are concerned with the new process, consider the words of Yukon Regional Chief Kluane Adamek who has said: “When we’re talking about reconciliation in this country, it can no longer be, ‘We don’t like that or we haven’t done that before’. This is new, it’s uncomfortable and people feel vulnerable. And so when people feel vulnerable, they quite often get angry. … The point is, this is about advancing reconciliation in everything we do, from environment to socio-economic factors – this is building
a new relationship.⁴ In considering Regional Chief Adamek, we hope to give Senators the factual information required to “proceed to finalization”, to open up the space for true co-development with First Nations on the Bill’s regulations and policies, including on the Project List, and Information Requirements and Time Management.

In this submission, we begin by outlining how the proposed changes to Bill C-69 regarding Indigenous Peoples, rights, and knowledge are simply the required steps to ensure that the legislation is compliant with existing case law. Next, we discuss other elements of the Bills, such as climate change, gender, sustainability, and the United Nations Declaration on the Rights of Indigenous Peoples that have a direct impact on, and are important to, First Nations. We follow that section with an attempt to dispel some of the current misinformation being circulated by industry, ‘grassroots’ campaigns, and some political representatives, focusing on what the legislation actually says and requires. To conclude, we propose some amendments for all three Acts: i) move from a “Respect” for rights to “Protection”; ii) ensure the equality of protections for Indigenous Knowledge; iii) recognize culture as a separate pillar of sustainability; and iv) create a comprehensive Registry under the Canadian Navigable Waters Act.

2. Indigenous considerations found in Bill C-69 are necessary for the Acts to be compliant with Canada’s constitutional obligations

Bill C-69 does not bring revolutionary changes to environmental assessment, energy regulation or the protection of navigable waters despite the noise coming from some industry proponents and provincial governments. One noteworthy change is the provisions dealing with First Nations’ rights and interests. Although these provisions may signal a departure from the current state of affairs, these changes simply seek to harmonize the law on project assessment with Canada’s minimum constitutional responsibilities to First Nations. The Supreme Court of Canada has recently clarified that regulatory and environmental processes can be relied on by the Crown to fulfill the duty to consult and accommodate.⁵ Given this clarification, changes to the legislation are required to ensure that these Acts are compliant with this case law. By harmonizing the law, the proposed Acts provide guidance to proponents, governments, and First Nations. This ensures that all actors know how to meet the clearest standards set out by the Supreme Court of Canada with respect to the duty to consult and accommodate. Court decisions alone do not provide this certainty. For example, public servants are unaware of the case law, often to their detriment. It is Parliament’s duty to legislate these constitutional standards, not the Court’s.

Numerous cases have been brought before the courts because Crown officials have not satisfied the duty to consult and accommodate. If there is any hope to put an end to court challenges over the failure of the duty to consult and accommodate then its basic requirements need to be included in this legislation.

In the following section, we outline how the processes for impact assessment found in both the new Impact Assessment Act and the Canadian Energy Regulator Act have merely tweaked the current systems in order to be in alignment with the clearest constitutional standards set by the

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⁵ Chippewas of Thames
Court. We explore this in five areas: A) Broadened scope of assessment; B) Section 35 as part of the public interest test; C) Duty to give reasons; D) Increased engagement with First Nations; and E) Indigenous Knowledge.

A. Broadened scope of assessment

Bill C-69 broadened the scope of assessment by including adverse effects on Indigenous Peoples and on Indigenous rights, interests, and accommodation. Impacts on Indigenous rights and interests must be understood before they can be addressed. In *Haida Nation*, the Supreme Court of Canada stated:

>[T]he scope of the consultation required will be 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.  

The Bill reflects the Court’s guidance that consultation must consider all possible impacts on Indigenous rights and interests, however made. There is no room to not correctly understand these impacts. How can any mitigation or accommodation be adequate, if it is not based on a correct understanding of impacts?

B. Section 35 as part of public interest test

The proposed *Impact Assessment Act* (IAA) and the CERA lets everyone – proponents, governments, and First Nations – know that the public interest includes Indigenous rights and interests, despite push back from Industry. It brings clarity to an otherwise ambiguous concept, the “public interest”, and ensures that Indigenous rights and interests are considered before any decision is made. This is what is required by the *Constitution Act, 1982*, and the proposed Acts affirm this.

In *Clyde River*, the Supreme Court held that Indigenous rights and interests are a “special public interest” and “constitutional imperative” that supersedes other public interest concerns:

>Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights, and assess the Crown’s duty to consult (see R. Freedman and S. Hansen, “Aboriginal Rights vs. The Public Interest”, prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by

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6 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 68 (see also para. 39).
7 *Clyde River*, para. 25.
8 *Haida Nation*, para. 63.
9 For example, the Canadian Electricity Association in their submission to the Senate Committee recommended that “...while Indigenous groups rightly have a key interest in certain federal decisions, these interests should not override the societal needs of the Canadian public at large.” This is in direct contradiction to the above statement, as well as the current Government’s approach to “Nation-to-Nation”.


tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (ibid.).

C. Duty to give reasons

The IAA also legislates a duty to give reasons for Ministerial and Governor-in-Council decision-making during referrals to Governor-in-Council decisions and the final public interest test (Section 63), among other places. As the Court noted in Clyde River and Gitxaala, this is not always done by Crown representatives, even though the law has been clear since Baker was decided in 1999:

The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

In Clyde River, the Court required reasons as “a sign of respect […] comity and courtesy […] toward a prior occupying nation” and foster reconciliation:

Written reasons foster reconciliation by showing affected Indigenous Peoples that their rights were considered and addressed (Haida, at para. 44). Reasons are “a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation”. Written reasons also promote better decision making.

In Kainaiwa/Blood Tribe, cited with approval by the Supreme Court in Clyde River, the Court said that written reasons are important for explaining the basis for a decision, hopefully leading to less litigation:

Providing reasons is also important for a decision holding such significance to the Band as does this one. Of course there are also here the more common benefits from proper reasons, of revealing to the losing party whether they were properly understood, of the losing party learning why their thinking was not persuasive, and of enabling the losing party to consider whether to challenge the decision by legal process.

D. Increased engagement with First Nations

Bill C-69’s introduction of the Early Planning Phase provides an opportunity for First Nations engagement early in the process. However, this has been constitutionally required at the beginning of the project assessment process since Coastal First Nations:

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10 Clyde River, para. 40.
12 Clyde River, para. 41 [references removed]
13 Kainaiwa/Blood Tribe v Alberta (Energy), 2017 ABQB 107 at para. 117.
Consultation/accommodation [...] entails early and meaningful dialogue with First Nations whenever government has in its power the ability to adversely affect the exercise of Aboriginal rights.14

This phase allows the proponent, First Nations, and the Crown to co-develop a better understanding of the scope of a project’s potential impacts on the rights and interests of a First Nation. When Government enters “into the consultation process without a clear and full understanding… the process [cannot be] reasonable or meaningful”.15 Further, a failure to understand impacts can have an “inexorable effect on the consultation process”.16

Where the Crown fails to do this, it misses an opportunity to adequately address impacts to First Nations through mitigation and accommodation measures, which can result in court challenges and procedural delay. For this reason, the Court has emphasized the importance of early and continuous engagement, which has been reflected in the Early Planning Phase of Bill C-69.

E. Mandatory consideration of Indigenous Knowledge

Project assessments benefit from the incorporation of Indigenous Knowledge. First Nations often know the land on which they live better than anyone and are uniquely positioned to provide information to assist with things such as the prediction of impacts. Many proponents are relying on Indigenous Knowledge in the assessment process and their projects are the better for it. However, the incorporation of Indigenous Knowledge is not happening consistently, and direction is needed in the legislation to ensure the collection and integration of Indigenous Knowledge is mandatory.

In addition to generally benefitting projects, the incorporation of Indigenous Knowledge is required to ensure the views of Indigenous Peoples are understood and to be able to properly accommodate impacts.

3. Other considerations that impact First Nations

A. Gender based analysis

The proposed new IAA found in Bill C-69 includes a gender-based analysis that, although not directly targeted at Indigenous communities, could assist in addressing some of the impacts felt most heavily by Indigenous communities and, more specifically, Indigenous women and girls. We support the position of the Native Women’s Association of Canada (NWAC) in their recommendation to: “Ensure that the intersection of sex and gender with other identity factors is considered in the impact assessment processes and decision-making through culturally-relevant gender-based analysis” (p. 1).17 To that end, we would like to share the documents listed below for your consideration.

15 Enge (2013) para. 264
In 2009, the AFN developed a report *Gender Balancing: Restoring Our Sacred Circle* outlining an enhanced Gender Balanced Analysis (GBA) Framework which integrates the First Nations historical and cultural context, and perspective to provide for more responsive and effective policy and legislative development where First Nations are concerned.\(^{18}\)

*The Missing and Murdered Indigenous Women and Girls Interim Report* identified a "link between prostitution and resource extraction, as the culture and values associated with hyper-masculine industrial camps can make Indigenous women and girls more vulnerable to violence".\(^{19}\)

In 2017, the Lake Babine Nation and Nak’azdli Whut’en commissioned a report into the effects of industrial camps on women and their families.\(^{20}\) The researchers described how resource projects may reinforce and recreate patterns of violence against Indigenous women and girls:

> The model of the temporary industrial camp requires a mobile workforce that is disconnected from the region, and this reinforces and recreates historical patterns of violence against Indigenous women. [...] There are systemic and historic factors that lead to patterns of violence being perpetuated in Indigenous communities, primarily on the Indigenous women and children. Industrial camps are being placed, both temporarily and in the long-term, in these contexts without considering their cumulative social and cultural effects.\(^{21}\)

Specifically, the researchers found an increase in the sex trade and in sexual trafficking around resource projects:

> The sex trade and sex trafficking have both increased around sites of industrial extraction. In both Fort McMurray and Grande Prairie, there has been a sharp increase in both activities, attributed to the rise in increased income of young men, social isolation from families and relationships, and the hyper-masculine context of camps. The culture and values associated with industrial camps may serve to perpetuate cycles of violence, already present due to the process of colonization, and allow industrial camp workers to seek out sex workers and contribute to increased sex trafficking.\(^{22}\)

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\(^{18}\) Gender Balancing: Restoring our Sacred Circle (2009).

\(^{19}\) MMIW Interim Report, p. 31.


To address the gendered effects of Industrial camps in Indigenous communities, the researchers recommended that a change was needed to the focus of environmental assessment. A gender-based analysis would allow project assessment to identify some of the ways in which project development can have unique impacts on Indigenous women, and could assist in identifying the measures needed to address some of these concerns.

### B. Climate Change

For First Nations, our Elders tell us that Mother Earth is in a “climate crisis”\(^{23}\). They speak of changes in species migration, temperature, and irreversible impacts to the land. Echoing these teachings, recent reports urge the international community to limit global warming to 1.5°C due to irreversible impacts that could result from a 2°C global temperature increase. First Nations disproportionately experience these impacts, challenging their ability to exercise their inherent and constitutionally-protected rights to territories, resources, and ways of being. The challenge in an environmental assessment or energy regulation context is how individual project assessments should address these considerations, including how project assessment can work to ensure we stop the catastrophic climate crisis.

Despite opposition from Industry proponents, the AFN was happy to see that Bill C-69 includes a requirement in project assessment to consider the “extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.”\(^{24}\) The announcement that a strategic assessment was being called “to provide guidance to proponents, stakeholders, Indigenous Peoples, and decision-makers on how climate change should be considered in impact assessments” was equally welcomed. The terms of reference for this assessment make it clear; however, that the strategic assessment does not intend to address how we might use impact assessments to help us meet our targets. The terms of reference, rather, focus solely on how our targets might be considered. As a primary issue, we reiterate the questions submitted to the federal government during the initial engagement on the Strategic Assessment of Climate Change:

i) What do Canada’s international commitments under the Paris Agreement obligate Canada to do to meet its domestic Greenhouse Gas (GHG) reduction targets?

ii) In doing so, how will Canada’s domestic GHG reduction targets translate those commitments into the evaluations of particular projects?

These questions are essential to understanding the context in which the quantification of GHG emissions should occur.

Even more troubling is the fact that the Government of Canada is choosing not to conduct the strategic assessment collaboratively with First Nations. In an age of reconciliation, and particularly given climate change is felt most strongly by First Nations, the exclusion of First Nations from the planning and conducting of this assessment is unacceptable. Although the AFN


\(^{24}\) Sections 22(1)(i) and 63(e) of the proposed Impact Assessment Act.
welcomes the inclusion of climate change considerations in Bill C-69, it falls on the government of Canada to ensure that it follows through on these commitments responsibly.

4. Dispelling Myths

A. The reference to the UN Declaration provisions would create uncertainty

The AFN welcomes the inclusion of the UN Declaration in the preamble of the Impact Assessment Act and the Canadian Energy Regulator Act. However, there has been some push-back from industry, provinces, and some Senators on the implications of such a commitment. Examples from the Canadian Electricity Association cite that “despite the ruling and confirmation, ‘consent’ in the preamble of the Act in reference to the Government of Canada’s commitment to implementation of UNDRIP remains undefined”, or the Government of Manitoba which suggested that “the intent to implement the [UN Declaration] … could move well beyond established jurisprudence.”

The UN Declaration has legal effect in Canada. Canadian courts have established that declarations and other sources of international human rights law are “relevant and persuasive” sources for interpretation of human rights in Canada’s Constitution. What’s more, Canadian courts generally favour interpretations of domestic law that are consistent with Canada’s international obligations. Canadian courts and tribunals have already used the UN Declaration to help interpret Canadian laws and ensure that their interpretation complies with Canada’s international obligations.

The UN Declaration is a particularly powerful source of interpretation of Canada’s legal obligations with regard to Indigenous Peoples. The lengthy deliberations leading to its adoption, and the direct role that Canada and Indigenous Peoples played in its creation make the UN Declaration especially authoritative. Furthermore, all the provisions in the UN Declaration were developed on the basis of existing standards in international law. Many were already legally binding on Canada, either due to their acceptance as matters of customary international law, or because they are necessary to fulfil obligations under the human rights treaties that Canada has ratified.

For example, the right of self-determination of all peoples was already established in the UN Charter and in two core, legally-binding human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Inter-American Commission on Human Rights has concluded that the duty to protect the land rights of Indigenous Peoples is a matter of customary international law. And the UN Declaration’s provisions on free, prior and informed consent mirror how these and other

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25 Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples
international human rights instruments, such as the *International Convention on the Elimination of All Forms of Racial Discrimination*, have been interpreted by the very bodies set up by the UN to oversee their implementation.

Clearly, these perspectives from industry, some provinces, and others are not based in fact, rather, they are an attempt to continue to dismiss Indigenous Peoples, and their inherent and constitutionally-protected rights, in favour of other interests, including those that are economic. The *UN Declaration* must be understood as the floor, not the ceiling, with which to begin crafting a process that respects and reaffirms the inherent or pre-existing collective human rights of First Nations as well as the human rights of First Nations individuals.

**B. Bill C-69 will have a negative economic impact on Indigenous communities**

Certain groups have been urging Senators to oppose Bill C-69, because, they claim, it will “wreak havoc on Indigenous economic development in many parts of Canada”. With all due respect to the position of the Indian Resource Council (IRC) and similar groups, we feel these views are ill-informed.

The main concern of these groups seems to be centered around the idea that Bill C-69 will halt development, which will have a negative impact on those First Nations that have an interest in development. Both the proposed IAA and the CERA do not dramatically change the way project assessments are conducted. These Acts will not halt development. As discussed above, many of the changes are aimed at assisting the Crown in discharging its duty to consult and accommodate Indigenous Peoples. Changes aimed at better understanding impacts to First Nations and ensuring greater involvement of Indigenous Peoples in the assessment process can only serve to *increase* Indigenous economic development, not wreak havoc on it. Too often, First Nations attempting to partner with industry or negotiate impact benefit agreements are told that proposed projects do not impact their rights and, therefore, an industry proponent does not need to consider sharing the benefits of a project. The relatively small changes included in Bill C-69 will not serve to place Indigenous Peoples in a lesser position than that which they are currently in, if anything, they will lead to a modest improvement.

Among the misinformation being shared is the contention by these groups that by “eliminating the public standing test” Bill C-69 opens up project assessment hearings to absolutely anyone and the voices of those First Nations most impacted by projects, and potentially supportive of those projects, will not be heard. Firstly, although Bill C-69 does do away with the language of needing to be “directly” affected in order to participate in an impact assessment process, the Bill does not say any member of the public will be entitled to standing in a hearing. Rather, the Bill specifies that members of the public will be given an opportunity to participate in an impact assessment process.29 The Government of Canada has clarified that increased participation will be achieved by giving the public an opportunity to “provide comments”; however, this is a far cry from opening up the hearing process.30 Secondly, increased public participation does not change the fact that the duty to consult and accommodate is owed to affected First Nations and, as we

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29 See, for example, section 55 (1) of the proposed *Impact Assessment Act.*
30 [https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/neb-handbook-e.pdf](https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/neb-handbook-e.pdf)
know, that duty exists within a spectrum. Those communities who are most impacted must have their needs and concerns addressed over and above the general concerns of the public.

C. Loss of all NEB jurisprudence

The Senate committee has been told that accepting Bill C-69 would mean losing years of jurisprudence associated with the NEB, undermining jurisprudence around the duty to consult, and would introduce ambiguous terms that will encourage a new round of court interpretations.31 We do not know where to begin in addressing these concerns because they do not appear to be based in reality.

As highlighted above, the changes to project assessment found in Bill C-69 are largely aimed at making the legislation compliant with court decisions. The jurisprudence associated with the NEB, in cases such as Chippewas of Thames First Nation v. Enbridge Pipelines Inc.,32 and Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,33 is precisely the jurisprudence that led to these changes being proposed. To the extent that they are “lost”, it is because they are no longer needed.

It is true that the proposed changes found in Bill C-69 introduce terms and clauses that do not appear in the predecessor Acts. That is the nature of making amendments. The only way around this is to never make changes.

D. Lack of requirement to base decisions on science

At least one submission to the Committee34 has suggested that the inclusion of the requirement to “take into account” Indigenous Knowledge in decision-making under the IAA somehow undermines the emphasis on science within the Act or is likely to create confusion. With respect, this is a clear misreading of the Bill. The requirement to consider Indigenous Knowledge in decisions clearly supplements the consideration of science in decision-making. To the extent there is any confusion about this, s. 6(3) of the proposed IAA makes clear that anyone exercising authority under the Act must adhere to “the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy”.

To the extent s. 84(1) or 22(1) do not explicitly mention “science”, this is unnecessary in view of a purposive reading of Bill C-69, and s. 6(3) in particular. The entire scheme of the Bill is designed to gather information (including scientific analysis) for the various authorities under the Bill to make decisions in accordance with the purpose and the requirement to adhere to “principles of scientific integrity”.

The proposal to eliminate Indigenous Knowledge and to require consideration of “all relevant knowledge” according to the framework in R. v. Mohan would unduly complicate decision-making under the Act, and would undervalue Indigenous Knowledge and blithely dismiss

31 “We Can Get This Right”, Canada West Foundation, February 2019
32 [2017], SCC 41
33 [2017], SCC 40
34 Yves Gingras, “Brief submitted to the Standing Senate Committee on Energy, the Environment and Natural Resources responsible for examining Bill C-69” (24 Jan 2019).
legitimate concerns that First Nations may have about the protection of their knowledge. The AFN has two concerns with this stance.

First, importing the requirement for a comprehensive *Mohan* analysis every time anyone presents any information to the panel would be exhaustively time consuming and would exponentially increase the amount of time involved for everyone within the process, and add layers of additional analysis. That approach is ill-suited as there is a need for flexibility and efficiency in the impact assessment process. It may also be discriminatory. If Indigenous Knowledge can only be considered if it meets the *Mohan* test of “widespread” acceptance, this would seem to exclude on its face almost all Indigenous Knowledge since the nature of it is specific to First Nations or other Indigenous groups.

Second, the argument proceeds on the fallacy that all knowledge is the same. While there is often a significant amount of overlap between Western science and Indigenous Knowledge systems the two are distinct. The implicit suggestion that the consideration of Indigenous Knowledge is equivalent to consideration of “junk science” or unfounded “beliefs” is both deeply offensive and completely incorrect. Indigenous Knowledge systems have developed over thousands of years and are equally valid systems even though they may result in different conclusions to a question (much in the same way that analyzing a problem from distinct Western science disciplines may generate different conclusions). Further, as noted below, the law already recognizes a variety of protections for different kinds of knowledge or information, such as “commercially sensitive” or legally privileged information. There are important public policy reasons for this, as there are for the special protection of Indigenous Knowledge provided in confidence, which have been detailed in many submissions to the Expert Panel35 and elsewhere.

5. Further proposed amendments:

A. Move from a “Respect” for rights to “Protection”

The AFN was pleased to see a reference to the rights of Indigenous Peoples in the “purpose” sections of both the proposed IAA and the CERA, but believes that the Bill falls short of complying with the law. The Section 35 rights of Indigenous Peoples are guaranteed and protected by the *Constitution Act, 1982*. All Canadian legislation must comply with the Canadian *Constitution*. As such, the Acts should have as their purpose the protection of the rights of Indigenous Peoples, not merely respect for those rights.

Respect is not protection. From its Latin roots, respect means to “look back on”, while protect means “to cover”. In an environmental context, protection means to avoid interference and destruction. There is no generally accepted understanding for “respect”.

The AFN recommends the following amendment be made to the proposed IAA and CERA:

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35 See section 2.3.4 of the Expert Panel’s report: Building Common Ground: A New Vision for Impact Assessment in Canada
6 (10) (g): to ensure protection of the rights of the Indigenous Peoples of Canada recognized and affirmed by Section 35 of the Constitution Act, 1982, in the course of impact assessments and decision-making under this Act;

B. Equality of Protections for Indigenous Knowledge

While the addition of s. 119(2.1) is a significant improvement in the proposed IAA, the confidentiality protections for Indigenous Knowledge are still weak and well below the standards applied in both common law and legislation for the protection of other types of confidential information.

For instance, information asserted to be “commercially sensitive” is generally accorded very stringent protections in law and in practice. Robust statutory protections for the confidentiality of information related to oil and gas deposits are common, and in some cases the Crown prohibits disclosure of this information without the written consent of the owner of the data.\(^\text{36}\)

Even where disclosure may occur of this type of information, the balancing of interests in legislation favours the protection of the confidential information. For example, under s. 315 of the Canadian Environmental Protection Act, 1999, which states that the Minister may disclose information only where disclosure is in the interest of public health, public safety, or the environment \textit{and} where “the public interest in the disclosure clearly outweighs” the interests in keeping the information confidential.\(^\text{37}\) Under the Energy Corporation Act, a Crown Corporation can refuse to disclose confidential information for a list of reasons, including if the information provided is normally treated confidentially by a company or is “customarily not provided” to competitors or others.\(^\text{38}\)

In addition, the Supreme Court of Canada has held that confidential information provided to the Crown for a specific purpose must be used for that purpose only. The use of that information for other purposes by the Crown is a breach of confidence.

In establishing a breach of duty of confidence, the relevant question to be asked is, 'what is the confidee entitled to do with the information?' and not, ‘to what use he is prohibited from putting it?’ Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use.\(^\text{39}\)

The AFN proposes the following amendments to the legislation to bring it in line with common law standard:

Confidentiality


\(^{37}\) Canadian Environmental Protection Act, 1999, SC 1999, c 33, s. 314-315.

\(^{38}\) Energy Corporation Act, SNL 2007, c E-11.01, s. 5.4.

Despite subsection (1), the Indigenous Knowledge referred to in that subsection may be disclosed if the public interest in the disclosure clearly outweighs the Indigenous Peoples interests in the confidentiality of the information and:

(a) it is publicly available;
(b) the disclosure is necessary for the purposes of procedural fairness and natural justice in legal proceedings regarding the specific decision for which the Indigenous knowledge has been provided; or
(c) the disclosure is authorized in the prescribed circumstances.

... 

(2.2) Any disclosure in paragraph (2)(b) shall only be for the minimum amount necessary for the purposes of procedural fairness and natural justice, and only for that purpose.

(2.2) Indigenous knowledge provided in confidence to the Minister may be used only for the purposes for which it was provided and no other purpose without the written consent of the provider of the Indigenous knowledge.

C. Culture as a separate pillar of sustainability

One of the stated objectives of impact assessment according to Bill C-69 is to foster sustainability. This is a welcomed addition for many First Nations as a sustainable environment is necessary for First Nations survival. Sustainability is also defined as including components beyond the mere physical, but it does not include culture amongst its components. The protection of culture is essential in ensuring a sustainable environment for First Nations. Including "culture" in the definition of sustainability also helps ensure that First Nations’ rights and interests are considered and addressed as is required by the duty to consult and accommodate.

The AFN therefore proposes the following change to the definition of sustainability:

**Sustainability** means the ability to protect the environment, contribute to the social, cultural, and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations. (durabilité)

D. Improve safety protections under the *Canadian Navigable Waters Act*

Waterways are central to the lives of First Nations and the exercise of their Section 35 rights. First Nations should be able to use these waterways safely in summer and in winter. The proposed Canadian Navigable Waters Act (CNWA) improves on the current Navigation Protection Act, but there are still gaps that put First Nations users at risk.

1. First Nations must be notified of navigation dangers

First Nations are often most immediately and directly affected by dangers to navigation. Federal, provincial, and territorial authorities are often a long way away (e.g., the Ahousaht Nation near Tofino, in British Columbia, saving a capsized whale-watching boat because there were no
federal parties nearby). For this reason, the lack of a requirement to notify First Nations directly about risks to navigation puts both the rights and the safety of First Nations at risk because of the potential for a lag in time for First Nations to receive notice through Transport Canada channels. A direct notice requirement would not be onerous, and may save lives of the First Nation and other users.

The AFN recommends:

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 potentially affected Indigenous governing body 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.

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 any potentially affected Indigenous governing body, in the form and manner, and containing the information, specified by the Minister.

2. **Act must include clear protection for winter navigation**

As several First Nations noted in previous submissions to Parliament and to Transport Canada, First Nations rely on frozen waterways just as much, if not more in some areas for transportation and to access their Section 35 rights during the winter. The release of water in particular creates serious safety hazards for First Nation users. A number of harvesters from First Nations across Canada have died over the years because frozen lakes and rivers that they had travelled safely for many years, suddenly and unexpectedly became dangerous as a result of water flow changes. New works in a waterway (even minor ones) can also change currents and cause the same treacherous conditions during winter. AFN therefore suggests the following language:

**s. 2**

*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 reasonable likelihood that it will be used by:

(a) vessels, in full or in part, for any part of the year; or

(b) persons or vehicles, in full or in part, while the navigable water is frozen;

as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by Section 35 of the *Constitution Act, 1982*.

**s. 28(2)**

(e) respecting safety protections specific to navigation on frozen navigable waters.

3. **Narrowing the definition of “navigable waters” would both impede safety and be unconstitutional**
Some groups have suggested that the proposed definition of navigable waters should be further narrowed beyond its current definition. AFN is opposed to any further narrowing of the definition of navigable waters.

The current Navigation Protection Act limits protections to only those navigable waterways on the Schedule. This puts First Nations and other water users at risk because the scheme provides no mechanism by which the Minister can effectively intervene to deal with navigation problems on waterways outside the Schedule. A regulatory scheme that excludes at the outset the possibility of Ministerial intervention to address impacts on Section 35 rights is unconstitutional.

Further, the proposed Act includes wide discretion to make orders and regulations to address any legitimate concerns about overbreadth, including the power to exempt waters.

4. Notification process for works on non-scheduled waterways creates safety risks

The proposed amendments for works on non-scheduled waterways provide only a slight improvement over the opt-in regime that currently exists. The proposed timelines for notification are completely unrealistic for First Nations, and there is no requirement that affected First Nations be notified directly, only that a notice be “published”. For many remote First Nations, the combination of a lack of access to reliable internet and short timelines will almost certainly mean that many will not know about a proposed work until well after the deadlines have passed.

Even for communities with reliable internet, given the massive burden on First Nations with limited staff capacity to process notices regarding the duty to consult, a process based on short timelines and a requirement for First Nations to constantly check an online registry is doomed to fail. It also creates potential risks for First Nations users who may be unaware of changes to navigation, which may create safety problems.

5. Failure to track works that may impede navigation creates a safety risk

Many First Nations have expressed concerns about the lack of baseline data and monitoring under the current system. Cumulative impacts to navigation that interfere with Section 35 rights is a significant problem. This can occur even with minor works where a key fishing area becomes inaccessible as a result of proliferation of in-water works, such as docks, boat ramps, etc. There should be a basic requirement that all works (including major and minor works) be submitted to the public registry.

In addition, the failure to record and report this data means that First Nations users may be unaware of both the direct impact and the cumulative impact of minor works until confronted by those impacts directly. This is a significant safety concern for winter navigation when minor works can alter current patterns creating unseen risks for users of the waterway.
27.2 (1) The Minister must establish and maintain a registry in which information that he or she specifies is deposited, which shall include information on the location and type of all new major works, works, and minor works.

Providing these two pieces of basic data in advance (ideally in an online map) is a much cheaper and more efficient method of tracking cumulative impacts on navigation than requiring a retrospective study of all projects impacting navigation in a First Nation’s territory, and having a registry of these minor works would at least provide some warning to First Nations of potential navigation risks created by these works.