Supplemental Submission to the Senate Standing Committee on Energy, the Environment and Natural Resources re: Canada’s proposed Impact Assessment Act
April 23, 2019

The Senate Standing Committee requested additional information on two issues related to the First Nations Leadership Council’s (“FNLC”) submission dated March 25, 2019 (appended to this document). First, FNLC was asked to provide additional information on how, in the course of an Indigenous-led assessment, Bill C-69 can be implemented so as to resolve situations where more than one Indigenous nation has a varying and potentially conflicting interest in a project, and provide insight as to how BC’s new Environmental Assessment Act may address this. Second, FNLC was asked to provide additional information on other associated amendments that may be required to give effect to the amendments proposed in the March 25, 2019 submission.

1. How will the Impact Assessment Act and the BC Environmental Assessment Act address situations where more than one Indigenous Nation may have a varying and potentially conflicting interest in a project?

FNLC makes three points to address this question:

First, FNLC anticipates that situations where there are competing interests will be the exception not the rule. Many nations in BC have worked collaboratively with neighbouring nations for decades in pursuit of shared objectives. Organizations that operate in British Columbia such as the Coastal First Nations, Secwepemc St’Kemlups Nations, the Carrier Sekani Tribal Council, the Treaty 8 Tribal Association, the Northwest Tribal Treaty Association are all examples of regionally based Indigenous organizations that work to support First Nations to collaborate and achieve shared goals.

Second, both the proposed Impact Assessment Act and the BC Environmental Assessment Act have clearly defined early engagement intended to bring interests together at the planning stage to identify and resolve concerns around project design and operation. The Impact Assessment Act contains a Planning Phase (ss 10-20) and the BC Environmental Assessment Act contains an Early Engagement phase (part 4). In practice, these legislated phases are to work toward addressing Indigenous Nations and community concerns and are an opportunity to align interests and resolve potential concerns with respect to the proposed project.

The BC Environmental Assessment Act contains two additional components that support this approach. It uses the term Indigenous nation, and does not define it in the legislation, thus reflecting the principle of self-determination found in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. Under the BC regime, an Indigenous nation has more ability to determine whether to participate through an Indigenous-led assessment. In contrast, the proposed Impact Assessment Act only recognizes an Indigenous “jurisdiction” or
an “Indigenous governing body” for the purposes of Indigenous-led assessment where enabled by the Crown in some manner. Moreover, where there may be a conflict, including a conflict between nations in relation to an assessment, the BC Environmental Assessment Act enables a dispute resolution mechanism to resolve certain disputes (section 5). This mechanism is established in the legislation and will require a regulatory and policy framework to operationalize it between now and the fall, when the Act comes into force. The FNLC is currently working with the BC Environmental Assessment Office on a process to develop this framework to ensure that it involves Indigenous nations from the outset.

Given that BC is developing a mechanism to address these situations that would engage First Nations early and provide a clear path to dispute resolution where required, we would expect that this framework could be applicable in the federal context, as necessary.

2. How to address ancillary amendments to give effect to the spirit of FNLC’s proposed amendments.

FNLC notes that in order to give effect to the proposed amendments in items #1 and #3 of our submission, it may be that additional changes are required. These changes would ensure consistency across the application in the statute and we would encourage the Senate to recommend that the Act be subjected to an additional review by legislative drafters to ensure consistency with the spirit of the recommended amendments.