Quebec City
April 26, 2019

Rosa Galvez, Chair
Michael L. MacDonald, Deputy Chair
Standing Senate Committee on Energy,
the Environment and Natural Resources
Senate of Canada
Ottawa, Ontario K1A 0A4

Dear Ms. Galvez and Mr. MacDonald:

I am writing to supplement the Government of Quebec’s comments and recommendations concerning Bill C-69, which were sent to you on February 5, 2019, and which I presented to your Committee. Please find enclosed a brief describing in detail Quebec’s concerns regarding the Impact Assessment Act, the Canadian Energy Regulator Act and the Canadian Navigable Waters Act. The brief includes suggestions for legislative amendments to Bill C-69.

Yours truly,

BENOIT CHARETTE
Minister of the Environment and the Fight against Climate Change

Encl.
1. **Introduction**

Where important public issues that concern our two levels of government are involved, Quebec favours government-to-government discussions, which reflects our respective statuses as constitutional actors. If the Government of Quebec is appearing before a Senate committee, it is because those discussions were unproductive or because they simply did not take place. The latter scenario is what happened in the case of Bill C-69. While Quebec conveyed its concerns to the federal government, there was no real government-to-government dialogue on Bill C-69, which will enact two new statutes, the Impact Assessment Act (IAA) and the Canadian Energy Regulator Act (CERA), and make substantial amendments to the *Navigation Protection Act*, which we refer to in this brief by its new title, the Canadian Navigable Waters Act (CNWA). This brief deals mainly with the IAA; our concerns about the CERA and the CNWA are described in sections 7 and 8.

One of the Senate’s overarching purposes is to champion the interests of the provinces and the regions in the federal legislative process. It is important to emphasize the fact that the Constitution gives the provinces all the necessary powers to protect the environment within their boundaries and manage their resources autonomously. Yet the federal government is increasingly taking it upon itself to create duplication in areas that fall under provincial jurisdiction and are already governed by provincial laws. Moreover, Bill C-69 gives the federal government substantial powers—the equivalent of a veto—over Quebec’s economic development and the management of its natural resources. The vitality and future of the Québécois identity are inextricably linked to the exercise of its legislative powers. The way in which the Government of Quebec chooses to develop its resources, manage its lands, protect the environment and uphold the principles of sustainable development is a central aspect of our identity.

Since 1995, when the first federal environmental assessment Act came into force, experience has shown that the federal process needlessly duplicates Quebec’s pre-existing regime. This duplication of processes, particularly for projects that fall under Quebec’s jurisdiction, such as energy and mining projects, causes many problems, including coordination of timelines, the requirement for project proponents to meet two sets of conditions and federal government control over the development of provincial projects owing to the potential impacts on an area of jurisdiction that is ancillary to the execution of the project itself (which is why it is important to distinguish between the provincial nature of a project and the impact on matters of federal jurisdiction). The duplication is burdensome and complex for project proponents, increases the time it takes to obtain approvals and impedes Quebec’s development. Furthermore, it undermines Quebec’s ability to develop and use its lands autonomously by making Quebec’s environmental assessment process subordinate in practice, weakening its credibility and calling its environmental concerns into question. In addition, because they are subject to federal environmental assessment legislation, some project proponents have felt that they do not have to comply with requirements of Quebec’s *Environment Quality Act* (EQA) and have argued before the courts, with the federal government’s support, that their projects, including those situated entirely within Quebec, are exempt from provincial assessment.

In view of the flexible nature of the division of powers, the Supreme Court of Canada has indicated that “[t]he task of maintaining the balance between federal and provincial powers falls primarily to governments.” Yet it is often difficult for Quebec to persuade the federal government to respect our autonomy. Past experience shows that federal environmental legislation has created an imbalance. Consequently, it is time to restore balance in the way the two governments exercise their environmental assessment powers and make it more consistent with the principle of federalism.

As the federal government seeks to pass the new IAA, Quebec’s key recommendations are as follows:

1. the IAA should provide that Quebec’s assessment process alone can apply to projects that, because of their nature, fall mainly under provincial jurisdiction;

2. the IAA should clearly state that no project under federal jurisdiction that is situated partly or entirely within a province should be exempt from provincial environmental laws for the simple reason that it is subject to the IAA; and
3. the IAA should respect existing land claim agreements and expressly state that it does not apply to provincial projects to be carried out within the area covered by the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement.

Broadly speaking, Quebec’s view is that the IAA in its present form does not solve the two main problems caused by previous federal environmental assessment legislation: the needless duplication created by the federal environmental process for projects that fall primarily under provincial jurisdiction, and non-compliance with the provincial legislative and regulatory framework for the environment even when a project is carried out entirely or partly within Quebec and Quebeckers are the ones affected.

2. Considerations related to the division of powers and the problem of duplication

In 1992, the Supreme Court handed down its decision in the Friends of the Oldman River case, which dealt with the constitutional validity of the Guidelines Order of 1984, which at the time was the main federal environmental assessment instrument. Following that decision, the federal government passed its first environmental assessment Act. The issue in the case was whether the federal government could conduct an environmental assessment of a provincial project (a dam). The Supreme Court ruled that provincial projects fall under provincial jurisdiction, but that Parliament may enact legislation concerning such projects if it is demonstrated that the activity in question impinges on an interest allocated to the federal government by the Constitution. However, the court indicated that there are limits to Parliament’s ancillary power. Specifically, the federal environmental assessment process cannot be invoked “every time there is some potential environmental effect on a matter of federal jurisdiction.” The judge who wrote the reasons for the decision also stated the following:

I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the Guidelines Order as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction. However, on my reading of the Guidelines Order the “initiating department” assigned responsibility for conducting an initial assessment, and if required, the environmental review panel, are only given a mandate to examine matters directly related to the areas of federal responsibility affected. Thus, an initiating department or panel cannot use the Guidelines Order as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power.

However, most of the projects covered by federal legislation, including the current Canadian Environmental Assessment Act, 2012 (CEAA 2012), are projects that fall mainly under provincial jurisdiction. Although the list of affected projects is unavailable at the moment, it seems likely that the IAA will also largely concern itself with activities that generally come within provincial jurisdiction under sections 92 and 92A of the Constitution Act, 1867.

Hence, federal power over the environmental assessment of provincial projects ought to be limited. In practice, however, that can be a complex matter because of the holistic approach taken to environmental assessments.

First, the federal impact assessment process includes an information-gathering mechanism (the assessment) that can involve a plethora of factors that go well beyond the scope of federal jurisdiction. Second, the federal government may decide, on the basis of that information, to approve or not to approve the project. If it approves the project, it may impose conditions and mitigation measures, which must be directly related to areas of federal jurisdiction. Thus, it is mainly at the decision-making stage that federal involvement is constitutionally vulnerable, as the federal government’s decision and the conditions it imposes should not, in principle, surreptitiously regulate matters of provincial jurisdiction, especially since the federal decision could take precedence over the provincial decision.

Admittedly, it can be a complex matter to determine whether the federal decision and the mitigation measures imposed after such a broad impact assessment in fact relate to areas of federal jurisdiction. The factors considered by the federal decision-maker have to be connected in some rational way to its decision, which must deal with an effect that falls within an area of federal jurisdiction. Therefore, the provisions of the CEAA 2012 or the IAA that confine decisions and mitigation measures to matters of federal jurisdiction are useful on paper, but are very
difficult to apply and monitor in practice. In addition, they are not protected from court challenges.

That is partly why federal environmental assessment legislation provides for cooperation measures: the existence of legislative provisions allowing for cooperation with the provinces relieves the federal government of the need to address the issue of the constitutional validity of its decision-making power over projects that fall under provincial jurisdiction. In its 2016 final report, the Expert Panel established to review environmental assessment processes wrote the following:

The Panel recommendation to focus IA [impact assessment] on the five pillars of sustainability may present challenges for a federal decision on a project. There is broad federal authority to gather relevant information on all five pillars; however, the same breadth of authority does not also apply to imposing legally binding conditions of approval on a project. The ability to set conditions on a project depends on constitutional authority, and for many matters relevant to IA and sustainability, the federal government’s constitutional authority is limited. This means that full implementation of a sustainability model for federal IA will benefit from, if not require, co-ordination among jurisdictions. (p. 64, our emphasis)

Coordination is therefore essential to ensure there is no doubt about the constitutionality of the federal decision and mitigation measures pertaining to a provincial project. However, the provinces cannot be forced to accept coordination measures that are not based on the principle of the equality of the levels of government and subordinate the provincial level to the federal level.

The provinces must have the flexibility to determine the assessment regime best suited to projects that fall primarily under provincial jurisdiction. However, the federal environmental assessment laws do not provide that flexibility; in fact, they lead to a federal practice of ignoring provincial assessment processes and giving precedence to the federal process. Where federal legislation prescribes intergovernmental cooperation measures, those are the measures that must be used, under the terms specified in the federal law. In particular, federal authorities are bound by the enabling legislation, and it is difficult to restore the balance between the responsibilities of the various levels of government by means such as an agreement.

The following example from the Memorandum of Understanding for the Cabinet Directive on Implementing the Canadian Environmental Assessment Act (CEAA 2012) illustrates, in our view, how disproportionate the role that the federal government assumes in the environmental assessment of provincial projects is compared with the potential effects on an area of federal jurisdiction.

For example, if wetlands might be affected by a proposed development, the federal interest in wetlands would stem from impacts on the wetlands which may have a subsequent impact on migratory bird habitat and subsequently migratory birds, which pertain to federal jurisdiction.

On this basis, the federal government is assuming the authority to carry out an extensive impact assessment of a development project that falls under provincial jurisdiction (alone or “cooperatively”), to assess the project’s pros and cons, and to reject the project or approve it with legally binding conditions that may impinge on areas of provincial jurisdiction.

One solution is to establish a regime in which provincial projects are subject only to a provincial process. Such a solution does not prevent dimensions that fall under federal jurisdiction from being considered; the opposite is true. First, project proponents must obtain from federal authorities the necessary permits and approvals under sectoral laws, such as the Fisheries Act and the Navigation Protection Act. In fact, Bill C-68 (Fisheries Act) and the other parts of Bill C-69 show how extensive federal approvals will be. The federal government does not need to intervene further with an impact assessment.

Most importantly, however, the provinces own the natural resources within their boundaries that do not belong to the private sector. They may intervene to protect the provincial public domain, which includes the soil, the subsoil, watercourses, forests, energy, minerals, flora, the habitats of fauna, including migratory birds, and all other aspects of the environment. Although fisheries fall under federal jurisdiction, the Supreme Court expressly confirmed in 1988 that the provinces have the power to protect fisheries that belong to them as part of their authority to administer their public domain. In short, this means that provinces have all the powers and expertise required to carry out comprehensive environmental assessments of provincial projects. They are fully competent to impose legally binding conditions and decide whether a project can proceed.
or not. This power is plenary and includes the project’s impacts on resources that fall under federal jurisdiction. As explained later in this brief, Quebec is actually exercising its plenary powers through its Environment Quality Act.

In addition, Quebec may consult the federal government under its environmental assessment process so that features that pertain to a project’s effects on matters of federal jurisdiction can be taken into account and, if necessary, information about them can be collected.

Lastly, it is essential to keep in mind that Quebec, like Canada, must fulfill its constitutional duty to consult and accommodate Indigenous communities, where applicable. That obligation cannot be transferred between the two governments, since the two Crowns are separate. Bill C-69 perpetuates a situation that is likely to generate two distinct consultation processes, needlessly increasing the workload for the communities concerned and potentially affecting project approval timelines. Note that Quebec has developed effective government-wide tools that guide each provincial department in order to fulfill that obligation. Specifically, since 2009, the Quebec Department of the Environment and the Fight against Climate Change has had a consultation guide that outlines the consultation requirements for its areas of activity. It has also established a centre of expertise in Indigenous consultations that ensures thorough and consistent compliance with the constitutional duty to consult. For each project that falls under the southern environmental assessment process, that centre is responsible for assessing the required consultation effort and applying it in every phase of the process. It also coordinates the consultation process for all Quebec government ministries, for projects subject to Quebec’s environmental assessment process.

In summary, it is essential for Quebec to limit instances of federal intervention from the outset, where it is unnecessary, since the very presence of the federal government in areas of provincial jurisdiction creates de facto and de jure subordination of provincial governments. In the area of environmental assessments of provincial projects, Quebec cannot understand why the federal government persists in giving itself inordinate authority that complicates the problem of duplications, which are troubling and create many intergovernmental issues.

As for projects over which Parliament can exercise primary rather than ancillary power, the repercussions for provincial jurisdiction remain substantial, for the simple reason that the projects are situated within the province and have a significant impact on local residents. For this reason, Quebec urges that the IAA recognize the fact that Quebec’s environmental legislation applies to such projects when they are within Quebec’s boundaries. It is unconscionable that the provinces constantly have to take legal action to ensure compliance with their laws for minimizing environmental impacts and take part in the decision-making on projects within their boundaries that affect their natural resources. Indeed, Quebec is currently in litigation because the federal government is supporting project proponents that are refusing to comply with provincial environmental legislation. This is a senseless situation where cooperation is non-existent. Yet Bill C-69 does nothing to prevent similar situations from occurring in the future.

For projects over which Parliament can exercise primary rather than ancillary power, duplication is to be expected, since projects are always located entirely or partly in a province, and the provinces are always the main parties concerned. In other words, the provinces must always be stakeholders: for such projects, duplication will occur, but it will have to be resolved by cooperation measures in which the provinces play a key role. But when the provinces have the power to carry out a comprehensive project assessment, it is the federal government that, by requiring a second assessment for such projects, creates pointless, costly, inefficient duplication and, most importantly, imposes subordinate status on the provinces, particularly in cooperation and coordination mechanisms, which give the federal government ultimate decision-making power over the projects.

3. Federal environmental assessment interventions since 1992 and the failure of cooperation

The Quebec government’s position is not new; it has been the same since the federal government passed its first environmental assessment Act in 1992, almost 15 years after Quebec’s 1978 legislation was passed. That position was made clear in the presentation on Bill C-13 that Quebec’s Minister of the Environment made before your Committee in June 1992. All of the concerns raised by Quebec at the time have materialized over the last 25 years. Bill C-69 merely exacerbates them.

Before 1992, there was no federal law, and the federal government followed the Guidelines Order of 1984. This facilitated cooperation, which was based on each government’s level of
involvement and the degree of responsibility in the decisions to be made. This approach, which recognized Quebec’s experience and powers, worked well. It was true cooperative federalism. Then the 1992 decision by the Supreme Court endorsed Parliament’s legislative intervention through Bill C-13, which became the first federal environmental assessment Act.

The cooperation measures specified in Bill C-13 were presented at the time as a way of ensuring respect for the division of powers. Nevertheless, because of the major impacts that bill was expected to have, Quebec and other provinces had requested that the bill be amended to include the possibility of exempting certain projects and recognize the equivalence of provincial processes of equal value for joint projects. The federal government ignored the provinces’ concerns. The federal statute came into force in 1995.

In 1998, Quebec refused to sign the Canada-wide Accord on Environmental Harmonization, because it did not resolve the matter of overlapping actions by the Quebec and federal governments. Quebec then considered entering into a bilateral agreement with the federal government, provided it was recognized that only Quebec’s process would apply to all projects that fell primarily under its jurisdiction. But the federal government of the time would not budge.

The Canada-Quebec Agreement on Environmental Assessment Cooperation, first signed in 2004 and renewed in 2010, provided only for the exchange of information and the coordination of some steps in the process, but problems persist for the simple reason that there is overlap between the two processes. Under the cooperation agreement, the two governments apply their legislation in parallel, making an effort to coordinate actions and decisions, in keeping with the two parties’ legislative and regulatory provisions, regarding timelines, public participation and so on. It also provides for partial coordination of processes when a joint review panel is established. Nevertheless, two decisions have to be made at the end of the process.

In 2012, Parliament introduced the possibility of recognizing a province’s environmental assessment process as equivalent to the federal process, for a particular project. In response to a “substitution” request for a given project, the Minister may recommend to the Governor in Council that the project be exempted from the application of the federal Act. Consequently, no final decision by the federal authority will be necessary. This is an “equivalent assessment,” which is subject to the same binding conditions as substitution. Although this process is useful in eliminating duplication, the federal government is still assuming the authority to examine provincial environmental assessment legislation. Moreover, this process is applied on a case-by-case basis and therefore requires substantial resources.

4. Quebec’s environmental assessment process

A process backed by extensive experience

The Government of Quebec established an environmental impact assessment and review process in 1978, and the associated regulations came into force in 1980. The process was successful in protecting the environment and in ensuring public participation. The experience acquired in following this environmental assessment process for almost 40 years has given Quebec the expertise and resources it needs to carry out environmental assessments for all projects planned within its boundaries, on the environmental, economic and social levels.

The public consultation role of the Bureau d’audiences publiques sur l’environnement (BAPE) is a special feature of Quebec’s process which ensures full participation by concerned groups, municipalities and individuals. The latter can question the project proponent and government officials in attendance at public meetings and subsequently submit briefs. The BAPE report contains opinions that affect the Minister’s recommendation to the Governor in Council on the same footing as the environmental assessment report prepared by the Quebec Department of the Environment and the Fight against Climate Change.

A modernized process

In the last two years, Quebec has updated its process by passing the Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund. Quebec’s environmental assessment process not only meets the highest environmental protection standards but is also now more efficient and predictable, provides greater transparency and ensures diversity of public participation. In particular, the legislative and regulatory changes resulted in the establishment of the Environmental Assessment Register, new public consultation opportunities and methods (electronic consultations on project issues, targeted consultations and mediation), and analysis timelines for all project types.
In addition, Quebec’s environmental assessment process is consistent with Quebeckers’ values and expectations.

The new approach to determining which projects are subject to the process is based on the level of environmental risk so that assessment efforts can be focused on projects with high environmental risks. Other approval processes designed for activities that present a lower risk to the environment have been put in place.

In practice, when projects that are subject only to Quebec’s environmental impact assessment and review process raise issues pertaining to areas of federal jurisdiction (for example, fisheries or migratory birds), Quebec consults with the federal government departments and agencies concerned. The federal departments and agencies can thus contribute to the analysis of the impact study prepared by the proponent and attend the public hearings held by the BAPE when their presence is required.

Indigenous peoples

As a result of the Haida and Taku River decisions by the Supreme Court in 2004, the Government of Quebec, like the federal government, has a duty to consult Indigenous communities, and in some circumstances accommodate them, when it is contemplating actions that may have adverse effects on an ancestral or treaty right that is established or the subject of a credible claim. Since those rulings, the Quebec Department of the Environment and the Fight against Climate Change has been playing a prominent role in this area, particularly with regard to projects subject to the environmental impact assessment and review process. The Department’s consultation practices meet, and in some cases exceed, the standards set by the Supreme Court.

New agreement opportunities

Following the modernization of its environmental assessment process, Quebec has the legal authority to enter into an agreement to coordinate environmental assessment processes or even establish a unified process (Environment Quality Act, s. 31.8.1). This legislative provision allows certain modifications of Quebec’s assessment process to facilitate coordination for federal projects.

5. Bill C-69 and the new Impact Assessment Act

Quebec has many concerns about the IAA. Quebec’s specific recommendations in this regard, together with suggestions for legislative amendments, are presented in section 6.

General comments

In general, there is no acknowledgement of the fundamental role that the provinces have in environmental assessments, as they are the parties primarily concerned with the environmental assessment of projects.

The IAA establishes a new impact assessment process that, though not completely different from the current process under the CEAA 2012, makes a number of important changes that will expand the federal government’s control over the environmental assessment of projects. With the many factors and criteria to be considered in an impact assessment (compared with an environmental assessment) and project sustainability considerations, the federal government is giving itself the authority to determine whether projects are appropriate on the basis of elements that go far beyond its jurisdiction over the project.

As regards making projects subject to the IAA, there are two issues: how to provide project proponents with adequate predictability, and how to avoid needlessly duplicating Quebec’s process. The federal government is giving itself broad regulatory authority to determine what activities and projects are subject to its environmental assessment process (para. 109(b)). Although Quebec supports keeping a list of projects to make the application of the law more predictable, this provision in no way restricts the possibility of including projects that fall primarily under provincial jurisdiction. Nor does it provide for exempting designated projects or physical activities from application of the Act. Under section 9, the Minister has broad discretionary power to designate a physical activity that is not on the list. There is a similar provision in the CEAA 2012, but by expressly stating that the Minister may receive requests to use this discretionary power, the IAA makes it more likely that the Minister will come under public pressure to do so. With a view to providing maximum predictability for project proponents, as is
specified in the EOA, this type of power should be used on an exceptional basis and only by the government. In addition, where the project is in an area of provincial jurisdiction, the Minister should be required to consult with the provinces and consider the fact that the project or activity is already subject to a provincial assessment process.

Coordination mechanisms in the IAA

As mentioned above, federal environmental assessment laws have always included coordination mechanisms. However, that has not prevented duplication problems and failure to achieve the “one project, one assessment” goal in a way that respects provincial autonomy. That will not change under the IAA. The coordination mechanisms in the Act do not reflect a genuine desire to ensure that federal and provincial processes are complementary and to eliminate duplication. In fact, it is worth noting that under the IAA, the various coordination mechanisms will be used on a case-by-case basis, which makes implementation of the “one project, one assessment” principle much more cumbersome and complex, particularly for the provinces.

The federal government says it wants to implement the “one project, one assessment” principle. Yet the mechanisms it is proposing do not help to make that plan a reality and are not suitable for attaining that goal. They substantially reduce the chances that the principle will be put into practice, increasing the likelihood that the environmental processes put in place by the provinces will be applied. As a result, the burden of reducing duplication falls on the provinces, since the mechanisms involve the provincial process being eclipsed by the federal process, or the provincial regimes being transformed to adhere to the federal regime. This situation is particularly worrisome for projects that are subject to the federal environmental assessment process but are mainly in areas of provincial jurisdiction.

Taken as a whole, these provisions have the effect of allowing the federal government to take over a large portion of the environmental assessment of projects by promoting the application of the federal process under the “one project, one assessment” principle, to the detriment of provincial environmental assessment processes that predate the federal one, have proven their effectiveness and are better suited to the assessment of local projects.

Equivalence mechanism

The IAA eliminates a provision of the CEAA 2012 that allows the Governor in Council to exempt a project from application of the Act. This is the equivalence process, which, subject to conditions, allows a province to have its environmental assessment regime recognized as equivalent. There are equivalence processes in various federal laws, including the Fisheries Act. What is important in this equivalence process, and is not present in the IAA’s other mechanisms, is that there is to be only one decision at the end of the process, the decision by the provincial authorities. However, the equivalence process in the CEAA 2012 gives the federal government an overly important role and is not described in sufficiently broad and flexible terms to solve the problem of overlapping federal and provincial processes.

Delegation mechanism

Under the delegation process, a “jurisdiction” can be assigned to carry out all or part of the impact assessment of the project designated under the federal Act and prepare the project’s impact assessment report. The report is then submitted to the federal minister for a decision. For a province, this amounts to administering the federal Act on the federal government’s behalf, with no decision-making power and no possibility to adapting the federal Act to its own environmental assessment regime. Moreover, the province would also have to carry out its own assessment and make its own decision on the basis of provincial legislation. Hence there would be one project, two assessments and two decisions. It is hard to see how this mechanism would reduce overlap between federal and provincial processes.

Substitution mechanism

Substitution is a mechanism that has very limited scope and whose use requires considerable effort and adjustment by the provinces. Substitution is more like a form of supervised delegation than a mechanism that recognizes the provinces’ environmental assessment authority and expertise. Moreover, it does not help to achieve the “one project, one assessment” goal.

First, substitution applies only to assessments that would be carried out by the Impact Assessment Agency of Canada, not to assessments performed by a review panel. Under paragraph 32(b), substitution is not permitted for assessments of projects that include activities regulated under the Canada Oil and Gas Operations Act or the Canada Transportation Act. In
particular, assessments for all projects that include physical activities regulated under the Nuclear Safety and Control Act (para. 43(a)) or the Canadian Energy Regulator Act (para. 43(b)) must be referred to a review panel, which would exclude the possibility of substitution.

Hence, substitution assessments would probably be done only for smaller, less risky or less controversial projects. If the federal minister decides to refer an assessment to a review panel rather than to the Impact Assessment Agency of Canada, the minister must do so after considering the extent to which the project’s expected effects are adverse (para. 36(2)(a)) and public concerns related to those effects (para. 36(2)(b)).

Furthermore, substitution is not possible for section 81 projects within Quebec. In fact, substitution is possible only if the federal minister judges that Quebec has powers for assessing the effects of a designated project.

Substitution is much less easy to obtain under the IAA than under the current Act, which limits the Minister’s discretionary power to refuse substitution requested by a province. Now, before approving the substitution, the Minister will have to publish a notice requesting public comments and take those comments into account in deciding whether to approve the substitution.

Furthermore, the Minister may approve the substitution only if the Minister is satisfied that certain conditions will be met (s. 33). Those conditions are restrictive and do not provide the necessary flexibility to recognize assessment processes previously put in place by the provinces. Apart from the difficulties of harmonizing the powers of the various authorities regarding assessment management and timelines, particularly in relation to public participation, the conditions and factors that must be taken into account amount to an obligation to carry out the assessment under the terms of the federal Act.

In addition to this limited application of the substitution mechanism, it is important to bear in mind that the burden of implementing the mechanism rests completely on the provinces’ willingness and ability to carry out an assessment that meets the federal criteria, entirely at the expense of the province’s government.

Joint review panel mechanism

The review panel mechanism is, originally, specific to the federal assessment process. Quebec established the Bureau d’audiences publiques sur l’environnement for the purpose of holding consultations with the public and stakeholders. The BAPE report complements, but does not replace, the environmental analysis work done by Quebec ministries and agencies.

Composed of independent experts, the federal review panel has a broad mandate that includes both environmental analysis and public participation. The review panel is also part of the federal process described in the IAA, for which specific timelines have been established.

In other words, review panels are still part of the application of the federal impact assessment process. The Act simply states that, as a coordination mechanism, an agreement to jointly establish a review panel may be made with a jurisdiction. This suggests that Quebec might be able to select some of the experts serving on the panel. While that mechanism is not part of Quebec’s process, the latter would nevertheless apply in principle, and so it would be difficult to coordinate the two processes. For example, the time limit for a panel is 600 days under the IAA, whereas the limit for a BAPE public hearing is 120 days. As a result, there would still be one project and two assessments whose timing would be difficult to coordinate.

Section 114 “agreements” mechanism

Under paragraphs 114(1)(c) and (f), the Minister may “enter into agreements or arrangements with any [province] … respecting assessments of effects” and “enter into agreements or arrangements with any [province] for the purposes of coordination, consultation, exchange of information and the determination of factors to be considered in relation to the assessment of the effects of designated projects of common interest”. However, as we have seen with the 2004 Canada-Quebec Agreement, such agreements or arrangements may attempt to coordinate processes, but they cannot, in that form, eliminate the duplication that results from having two assessment processes. In addition, they cannot override the binding provisions of the Act and regulations, nor can they re-establish a way of exercising responsibilities that is more respectful of the division of powers. It is also difficult to determine how such agreements or arrangements will align with the provisions concerning other coordination mechanisms, since the mechanisms can be used by a number of bodies. In this regard, it would seem essential that Quebec be consulted on any agreement or arrangement made with other jurisdictions pertaining to projects carried out within its boundaries. In addition, several questions remain unanswered.
at this point. Will this be a first-come, first-served system? Could a section 114 agreement prevent the federal government from entering into a substitution agreement with another jurisdiction? Such agreements do not have any binding legal force.

One project, two decisions

Crucially, none of these coordination mechanisms resolves the issue of there being, in the end, one project and two decisions. This is particularly problematic since the federal government, by virtue of the broad discretionary and regulatory powers it is giving itself, can decide to unilaterally terminate a project that falls primarily under provincial jurisdiction, on the basis of factors that go far beyond the areas of federal jurisdiction affected by the project and on the basis of its own understanding of the project’s sustainability. In addition, although a provincial decision will have to be made regarding the same project, the two decisions and the associated conditions may be different or even contradictory.

Moreover, in addition to driving up public expenditures, this duplication of assessment processes has adverse effects on the costs of projects by increasing the fees to be paid and the number of documents that the project proponent has to produce.

In addition, there is no guarantee that one of these coordination mechanisms can be used for all projects that fit the definition of a “designated project” in section 2 or the definition of a “project” in section 81.

6. Quebec’s recommendations regarding the IAA

The IAA must include a provision that, within a province, only that province’s process may be used for the environmental assessment of provincial projects that are primarily in areas of provincial jurisdiction. Such projects are those over which the federal government does not have direct jurisdiction but for which it is carrying out an impact assessment because of the projects’ repercussions (incidental effects) for an area of federal jurisdiction (e.g., a mining project that affects a body of water and in which the federal government is intervening because of its jurisdiction over fisheries/fish habitats; large wind farms because of their effects on migratory birds).

For this kind of provincial projects, the federal government would intervene solely on the basis of its sectoral legislation (such as the Fisheries Act). It would not carry out an impact assessment under the IAA, and it would not have to grant any approvals under the IAA. Hence, Quebec would be the only government to carry out an environmental assessment and issue an approval certificate following the assessment. This would be the most acceptable application of the “one project, one assessment” principle.

In the same vein, the IAA would apply only to projects over which the federal government has primary jurisdiction and not simply ancillary jurisdiction over the work or the activities. Thus, the federal government could carry out an environmental assessment, and where applicable, grant approval, only for this type of project. In this context, the IAA should make it clear, to avoid misinterpretation and needless litigation, that this type of project is not exempt from Quebec legislation.

The aim of this recommendation is to minimize the number of projects subject to the IAA within Quebec and to allow Quebec to fully exercise its exclusive legislative powers to develop its lands and carry out environmental assessments (public lands, local private business, property and civic rights, municipal institutions, natural resources, non-renewable resources).

In Quebec’s view, it is essential to redefine the role that the federal government should play in environmental assessments to ensure that this legislation does not repeat the same mistakes as previous federal laws. Accordingly, Quebec cannot accept Bill C-69 in its current form, unless it is amended to include the elements described below.

Main proposals

(1) The IAA should provide for the possibility that Quebec’s assessment process alone will apply to projects that fall mainly under provincial jurisdiction. To that end,

• restrict the definition of “designated project” by stating that it does not cover projects that fall under provincial jurisdiction as defined in the Constitution Act, 1867, unless there are no provincial regulatory requirements that deal with the projects, and adjust the regulatory power pertaining to the list of projects accordingly (s. 2 and s. 109);
OR, failing that,

- require the Agency, when it has to decide whether an impact assessment is needed for a designated project, if the project is of a provincial nature as defined in the Constitution Act, 1867, to provide the province’s government with the option of applying only its impact assessment process to the project. Where applicable, the Agency shall inform the proponent that no federal impact assessment will be carried out (s. 16);

OR

- add a clause that states that the IAA does not apply to physical activities and classes of physical activities that fall under provincial jurisdiction because of the nature of the activities within the meaning of the Constitution Act, 1867, and are to be carried out entirely within the boundaries of a province, when there is an agreement to this effect with the government of that province (s. 4).

(2) The IAA must make it clear that no project that falls under federal jurisdiction and is located partly or fully within a province is exempt from provincial environmental laws, and the IAA must set out federal/provincial cooperation measures for such projects. To that end,

- add a clause stating that, notwithstanding section 21, the Agency, or the Minister if he has referred the impact assessment to a review panel, shall consult the provincial government body responsible for impact assessments in a province and offer to cooperate with that body in the impact assessment for any project that is subject to the IAA and is carried out entirely or partly within that province.

AND/OR

- add a clause stating that decisions made by the Minister or the government in respect of all projects subject to the IAA shall, in the public interest, consider the decision made by a province following the provincial impact assessment and consider the fact that the project does or does not comply with the province’s environmental laws. (s. 63/s. 84)

**Supplementary proposals**

- add a flexible, adaptable equivalence agreement mechanism that allows provincial provisions of similar effect to apply in place of the provisions of the IAA, including final decision-making authority.

- add to the IAA’s preamble or purposes a statement to the effect that the provinces, because of their constitutional responsibilities, must be able to play a key role in environmental assessments for projects located entirely or partly within their boundaries.

- modify the Minister’s discretionary power to designate a physical activity that is not on the list (s. 9) by making it a power that is used on an exceptional basis and only by the government (on recommendation of the Minister).

**Application of the IAA within the area covered by the James Bay and Northern Quebec Agreement**

Comprehensive review and assessment processes under special environmental and social protection regimes are already provided for in Sections 22 and 23 of the James Bay and Northern Quebec Agreement (JBNQA) and Section 14 of the Northeastern Quebec Agreement (NEQA). It is important to respect existing treaties and maintain the balance that they provide to ensure that enactment of the IAA does not jeopardize existing processes, especially since the processes in place in the area covered by the JBNQA allow for participation by Indigenous communities in project assessment and review and address the federal government’s desire for Indigenous involvement.

The environmental assessment regime in the JBNQA allocates environmental assessment powers on the basis of the provincial or federal nature of the projects. To respect this treaty, it is important to ensure that the IAA does not make provincial projects subject to the federal process in the area covered by the JBNQA. Under the IAA (s. 109(d)(ii)), the Governor in Council may exclude any requirement set out in the Act or the associated regulations as it applies to physical activities to be carried out on lands covered by a land claim agreement. However, that provision gives the federal government free rein to determine how to apply its impact assessment process on those lands. This situation does not immediately recognize the importance of respecting land claim agreements and results in a lack of predictability that is detrimental to all parties involved (Government of Quebec, Indigenous peoples and project proponents). For the sake of
comparison, it is worth noting that a specific part of the EQA (Title II) deals with the application of Sections 22 and 23 of the JBNQA in the area to which they apply through special processes and exempts that area from Quebec’s environmental impact assessment and review process. The “Moinier” region south of the 55th parallel and east of the 69th meridian is also covered by a special process, in accordance with the terms of the NEQA.

Proposals

- Amend the IAA so that it clearly states the obligation to respect, in its application, the land claim agreements referred to in section 35 of the Constitution Act, 1982.
- Add a provision exempting provincial projects to be carried out in the areas covered by the JBNQA and the NEQA from the application of the IAA.

7. Canadian Navigable Waters Act

It is impossible to determine the future regime’s overall impacts without knowing the combined content of all the orders that establish its scope: (1) Major Works Order, (2) Minor Works Order, and (3) Order on the Construction, Placement, Alteration, Rebuilding, Removal, Decommissioning, Repair, Maintenance, Operation, Use and Safety of Works. The fragmented, step-by-step consultation approach is not very helpful, since the impacts need to be able to be assessed as a whole and not piece by piece. To ensure that the public consultation exercise is meaningful and really helps to enhance the future regime, all draft orders should be published before the Act comes into force.

Application to works and operations

The situations in which approval will be required will be unpredictable because of the introduction of a complex approval regime that varies with the nature of the operation or the status of the body of water concerned, which may delay investment projects, increase project costs and delay operations on existing works.

The Canadian Navigable Waters Act (CNWA) should not treat upkeep and maintenance operations on existing works the same as the construction or placement of new works. Upkeep and maintenance activities are carried out to ensure the continuity of works, safety of the public and protection of the environment. They must therefore be carried out quickly with as little regulatory and administrative hindrance as possible so as to provide favourable conditions for maintaining the safety of the public and navigation.

Logically, this kind of activity also has fewer substantial impacts on navigation, since they are temporary activities and the work is already in place. It should be noted that federal power to pass such a law relates to the right to navigate the waters and not to the waters themselves. The Act should also reintroduce a provision to exempt works for which the waiver right has been exercised from its approval regime.

In the same vein, the obligation specified in the CNWA to record in a registry all works carried out on a navigable water should be relaxed so that it applies only to works subject to the approval regime set out in the Act. The increase in administrative workload that implementation of this obligation, as currently written, would generate is inordinate compared with the actual impact of certain operations on navigability and the current and foreseeable use of the watercourse for navigation.

Whether works and activities are subject to the approval regime set out in the Act should be based on just one criterion: the potential impact of a work on navigability.

In this regard, expanding the definition of navigable waters to include waters that are not actually navigable is worrisome, in our view. At the very least, works in such waters should not be subject to federal approval. Furthermore, in general, type of work is an inadequate criterion for identifying projects that are at higher risk of having a negative impact on navigability. Using type of work as the criterion for determining whether the Act applies would necessarily result in excessive generalization and would ignore important factors such as geographic location and the scope of the work (for example, dams and flow regulation works should not be considered major works on the basis of their size alone but rather only if they completely block navigation of the main stream of the watercourse).

Lastly, in our opinion, adding a reference to navigable waters to the schedule should remain the prerogative of the Governor in Council and should not be done by a simple ministerial order.
Moreover, the fact that anyone can ask the Minister for such an addition is worrisome, in our view, especially since the Act contains no mechanism for consulting the provinces.

8. **Canadian Energy Regulator Act**

The new Part 5 of the Canadian Energy Regulator Act (CERA), which deals with offshore renewable energy projects and offshore power lines, raises territorial issues that are important and worrisome for Quebec.

With regard to the electricity approval process, the bill does make the desired changes. It should have been streamlined, made more predictable and revised to reflect the industry’s current reality. In addition, it should focus on federal issues pertaining to the electric power industry (e.g., lack of effects on neighbouring electricity grids, reliability and safety) and leave it up to the provinces to manage other matters that fall primarily under provincial jurisdiction (e.g., location, environment and acquisition of rights).

Unless there is a genuine redesign of the electricity approval process, the amendments described below should be made.

**International power lines**

For permit applications, the provision requiring the provincial government to designate the provincial regulatory authority should be repealed (s. 251). Obtaining the required approvals from provincial bodies is sufficient, as is the case in the current National Energy Board Electricity Regulations, which require “a description of the provincial requirements and associated review process that must be satisfied.”

Quebec appreciates the federal government’s intention to introduce a faster, more predictable decision-making process. Nevertheless, a time limit for the process of obtaining a permit should be set. It should be shorter than the time limit for obtaining a certificate. In addition, the provision (s. 258) that allows the Regulator to revoke a permit that has already been issued, even 45 days later, or make an order requiring international power lines to obtain a certificate substantially undermines the predictability of the process. Such a delay and its unpredictability seriously jeopardize the timelines of intertie projects. These provisions should be removed from the Act, or at the very least restricted and used only at the beginning of the permit application process.

Furthermore, the project proponent should not have the option of requesting that the federal statute be used for such matters as route selection and placement, impact assessment, environment protection and land acquisition (including expropriation), instead of the provincial statute. There is no reason for this option, and it should be removed. The CERA provision that gives precedence to the permit and certificate conditions and federal public policy legislation should be sufficient.

**Interprovincial power lines designated by order**

It would be a good idea to remove, or at least restrict, the power to require a certificate for interprovincial power lines and the new power given to the Commission to modify, on its own initiative, any permit or export licence issued.

Lastly, energy projects always have major local impacts. For this reason, the Government of Quebec would like the Act to include the obligation to inform the province concerned before the federal regulator makes any decisions or recommendations.

9. **Conclusion**

The first federal environmental assessment Act was passed in 1992, and since then, the federal government has continually stepped up its interventions in that area to the detriment of provincial regimes, including Quebec’s pre-existing regime. The result has been federal-provincial disagreements, needless duplication that has been costly to taxpayers and an accountability problem.

The federal government has carried on with these same problems since 1992, and now, with Bill C-69, it is creating new problems, which will only aggravate the situation. Moreover, in contrast to what the federal government is saying, the IAA does not put the “one project, one assessment” principle into practice. Accordingly, Bill C-69’s proposal to expand federal powers in environmental matters will have a major impact on Quebec.
A two-review process is not always necessary, but it becomes necessary when the project falls under federal jurisdiction, which is an exception to the rule that works in a province are, in principle, under provincial jurisdiction. In that case, a federal project is subject to both federal and provincial environmental laws, and effective cooperation measures are needed. This is true because the provinces are the main parties concerned by the environmental impacts of projects carried out within their boundaries.

The Parliament of Canada has the opportunity to demonstrate that it is interested in protecting the environment, embracing a brand of federalism that respects provincial powers and pursuing the goals of efficiency and effective use of resources. The Government of Quebec has the legislative and regulatory instruments, the experience and expertise, and the constitutional authority it needs to assess the impacts of any project carried out in the province. The other parts of Bill C-69 – the Canadian Energy Regulator Act and the Canadian Navigable Waters Act – also raise important issues for Quebec. The solutions we propose would remedy the bill’s major drawbacks.
APPENDIX

EXAMPLES OF DUPLICATION OF ENVIRONMENTAL ASSESSMENT PROCESSES WITHIN QUEBEC

Arnaud Mine
- A provincial project subject to the federal process because an ancillary power was brought into play by fish habitat destruction, for which a permit under the *Fisheries Act* was required, and because an explosives permit was needed (the CEAA 2012 regime);
- Duplication of environmental assessment processes;
- Different applications and information requirements;
- Predictability affected and timelines lengthened: federal approval came six months after approval by Quebec; and
- The environmental concerns are much the same for the two levels of government, and nothing is gained by carrying out two processes simultaneously, especially since Quebec’s process allows for consultations with federal departments and agencies.

Akasaba Mine
- A provincial project subject to the federal process because it is covered by the *Regulations Designating Physical Activities*;
- Duplication of environmental assessment processes; and
- Approved by Quebec in June 2018; application completed in March 2018. The delay was due to the need to wait for approval from the federal Privy Council.

Blackrock Mine
- A project in the territory covered by the JBNQA;
- Submitted for federal environmental assessment under the Transitional Comprehensive Study regime (before 2012). The triggers were fish habitat destruction requiring a permit under the *Fisheries Act* and the need for an explosives permit;
- Predictability affected and timelines lengthened: federal approval came one year after approval by Quebec;
- Duplication of Indigenous consultations: the federal government held consultations by mail and by Internet one month after COMEX (provincial process) held its public consultations; and
- The environmental concerns were much the same, and nothing was gained by carrying out both processes.

Ports
- A project that has impacts on areas of provincial or shared jurisdiction;
- The Government of Quebec and the federal government are currently involved in a legal battle over the application of certain parts of the *Environment Quality Act*, including the environmental assessment process, for certain port projects;
- However, the federal government should confine the scope of its approvals and requirements to the limits set out in the CEAA 2012. Since the federal environmental assessment deals only with areas of federal jurisdiction, the issues pertaining to areas of provincial jurisdiction are not taken into account in the decision and are not covered in the approval conditions, where applicable:
  - issues associated with the delivery of services in industrial/port areas (transportation network, energy distribution system, etc.);
  - land use issues (e.g., loss of farmland); and
  - social, health and quality-of-life impacts (e.g., safety, noise, other types of pollution).
- The public consultation process carried out by the federal entities responsible for environmental assessment of projects does not meet the standards of the Quebec process carried out by the BAPE, whose credibility is recognized by Quebecers;

- The fact that there is no provincial approval limits the province’s ability to intervene at the activity monitoring stage, in the project construction or operation phases, even in the event of complaints from residents affected by the project (e.g., Port de Québec, development of an industrial/port zone); and

- Non-compliance with environmental statutes in areas of shared or provincial jurisdiction: for example, new EQA provisions for the protection of wetlands and bodies of water, the Clean Air Regulation and the Act respecting threatened or vulnerable species.