



Submission to the Standing Senate Committee on Energy, the Environment, and Natural Resources (ENEV) regarding Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*

April 30, 2019

1. Introduction

This is MiningWatch Canada's submission regarding Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*. Our focus is on Part 1, the *Impact Assessment Act (IAA)*. We make the same essential arguments as we did to the House of Commons Standing Committee on the Environment and Sustainable Development, but our recommendations are specific to the bill as amended by the House of Commons and the opportunities that the Senate now has to improve it.

MiningWatch Canada was created in 1999 as a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat, and community interests posed by irresponsible mineral policies and practices in Canada and around the world. We are supported by twenty-seven Canadian environmental, social justice, Indigenous, and labour organisations. MiningWatch has been an active member of the Canadian Environmental Network (RCEN) and its Environmental Planning and Assessment (EPA) Caucus since 1999, and I currently co-chair the Caucus along with Anna Johnston of West Coast Environmental Law. I also sit on the Minister's Multi-Interest Advisory Committee (MIAC), and I was a member of its predecessor Regulatory Advisory Committee (the RAC) almost continuously from its start in 1992 until its last meeting in 2008.

MiningWatch has worked on environmental assessments of dozens of mining projects, directly or in collaboration with affected communities and other groups, both Indigenous and non-Indigenous. We have been very active in trying to improve environmental assessment law, policy, and practice, working with administrative and legislative bodies and even litigating, when necessary, to protect the public interest and the integrity of the environmental assessment process, winning a landmark ruling in the Supreme Court of Canada in 2010.¹ We have seen examples of environmental assessment processes

¹ *MiningWatch Canada v. Canada (Fisheries and Oceans)*. [2010] 1 SCR 6 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7841/index.do>. Its effects were short-lived: within months, the government of the day amended the law to give the minister the discretion to make precisely the determinations that the court had ruled illegal.

working well, and we also have seen what doesn't work. We have consistently tried to identify and advocate ways to make the process work better.

Like many groups who work with communities affected by commercial development projects, and many members of those communities, we were greatly encouraged by the government's direction in reforming environmental assessment law, as well as the Expert Panel process that the government created to advance that agenda, notwithstanding its compressed time frame – both in the astonishing quantity and quality of participation from the public and Indigenous peoples, including experts as well as lay people, and in the depth of thought and consideration that the Expert Panel reflected in its report.²

Like many, MiningWatch was greatly disappointed in the government's response and the resulting draft legislation, and while some aspects were corrected through amendments in the House of Commons, others amendments made it worse, and of course the most significant failings of the bill could not be addressed just by amending individual clauses. It replicates the failed *Canadian Environmental Assessment Act* (CEAA) 2012 too closely, with a designated project list, a proponent-driven process, and artificial time limitations.

But it is important that Bill C-69 become law. It brings some important innovations, and takes at least first steps toward an impact assessment process to meet the 21st century. Among other things, it recognises Indigenous governing bodies; it makes sustainability a core element in decision-making; and it recognises gender-based analysis and related social factors as a critical component of assessment.

2. Regarding review of the Act itself

This is a long and complex bill. It contains innovative and important measures, but it also contains serious flaws both in design and execution. Some of those flaws can be fixed, and we urge the Senate to take the opportunity to make sensible and coherent amendments. However, some of those flaws are structural, for example, the absence of any involvement by review panels in the scoping of assessments before they are undertaken. The continued reliance on proponent-driven environmental impact statements could be argued to be another example. In order to allow for a more thorough evaluation of some of the critical structural aspects of the IAA, the Minister, through the new IA Agency (currently the CEA Agency), should undertake a short-term review of the new Act. In addition, the ten-year Parliamentary review will come much too late, and like any Parliamentary process, will almost inevitably be subject to delays and limitations in its scope.

Our experience with this bill, as well as with the five-year review of the original CEAA, illustrates that Parliament does not generally have the time and resources to undertake broader, more comprehensive investigations. Like the process followed by this bill (C-69), the parliamentary review of CEAA was confined to the "four walls" of the legislation, although the five-year review had been initiated by the Environment Minister and undertaken by the Canadian Environmental Assessment Agency, with the involvement of the Regulatory Advisory Committee, before eventually being brought to Parliament. The House Standing Committee of the day, chaired by the Hon. Charles Caccia, actually produced a supplementary report, "Beyond C-9"³ to acknowledge the broader issues covered in the ministerial

² Expert Panel for the Review of Environmental Assessment Processes. Final Report, *Building Common Ground: A New Vision for Impact Assessment in Canada*, 2017.

<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>

³ *Beyond Bill C-9: Report of the Standing Committee on Environment and Sustainable Development*, June, 2003.
<http://www.ourcommons.ca/Content/Committee/372/ENVI/Reports/RP1032309/envirp02/envirp02-e.pdf>

review and to recommend further work on the legislation – and further amendments – to address issues that were identified as critical but which could not be addressed in the parliamentary process. A ministerial process has the potential to be less politicised but also much more comprehensive, to be more participatory, and to engage more deeply with experts and practitioners. It could potentially open up tougher issues like federal-provincial cooperation on regional impact assessment and federal interagency cooperation in strategic assessment, for instance. The afore-mentioned Expert Panel is one example of a body established under ministerial authority (and did a remarkably effective, if extremely rushed, job); the MIAC is another.

The Committee should therefore change the statutory review requirement to a five-year ministerial review cycle, not a one-off ten-year parliamentary review,⁴ and the government should consider a short-term ministerial review that could develop a package of housekeeping and substantive amendments and bring it to Parliament within two years.

3. Decision criteria and justifications must be consistent and transparent.

Bill C-69 does make an important advance in including a broad consideration of economic and social factors in addition to environmental impacts. All of these factors are to be subject to public scrutiny, allowing decisions to be based on much more transparent reasons and justifications than has been the case until now. This is something we have advocated as critical to allowing an assessment of any proposal's contribution to long term sustainability. The bill's inclusion of gender-based analysis 'plus' is also important. However, its undefined "public interest" test leaves the door open for decisions to be made on the basis of political convenience. While it is understandable that the government would want to preserve the ability to make a final decision on any proposal, its discretion must have clear legal constraints (for instance, to uphold Indigenous rights and Canada's obligations under international treaties), and it must be made as transparent and accountable as possible.

The bill does not provide a clear legal link between the consideration of those factors and the justification for actual assessment decisions. Neither does it establish basic criteria to provide a solid

⁴ CEPA 1999, for example, provides for recurrent reviews:

Permanent review of Act

343 (1) The administration of this Act shall, every five years after the coming into force of this Act, stand referred to such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established for that purpose.

Review and report

(2) The committee designated or established for the purpose of subsection (1) shall, as soon as practicable, undertake a comprehensive review of the provisions and operation of this Act and shall, within one year after the review is undertaken or within such further time as the House of Commons, the Senate or both Houses of Parliament, as the case may be, may authorize, submit a report to Parliament thereon, including a statement of any changes to this Act or its administration that the committee would recommend.

CEAA 1992 provided for a Ministerial, not Parliamentary, review, which was undertaken by the Canadian Environmental Assessment Agency with the involvement of the Regulatory Advisory Committee before eventually being brought to Parliament in a much more limited form:

Review

72. (1) Five years after the coming into force of this section, a comprehensive review of the provisions and operation of this Act shall be undertaken by the Minister.

Report to Parliament

(2) The Minister shall, within one year after a review is undertaken pursuant to subsection (1) or within such further time as the House of Commons may authorize, submit a report on the review to Parliament including a statement of any changes the Minister recommends.

(and consistent or even predictable) base for those decisions. The enabling nature of the legislation allows for good decision making to take place, but does not guarantee it – and without clearer requirements for justification, doesn't even encourage it.

It has been pointed out that it is greatly helpful in understanding the application of discretion in legislation if one reads “the Minister may not” wherever it says “the Minister may.” Provisions that enable action also enable inaction, and do not increase predictability and certainty.

We note that the question of broad discretion under the IAA has been raised as a concern of all sectors – including industry representatives, Indigenous peoples, public interest groups, and environmental law experts – with varying degrees of emphasis on 3 factors:

1. **Certainty and clarity** – being able to know what the decision-making criteria are at the legislative level and how they will be established at the level of individual project assessments or regional and strategic assessments;
2. **Failsafe criteria** – assurance that where benefits cannot be assured for all types of impact, that trade-offs between areas (stereotypically, environmental damage to allow economic development) will be subject to defined weighting and limits; and
3. **Indigenous self-determination** – definitive protection for Indigenous rights, including implementation of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) so that impacts on Treaty and Indigenous rights, and the outcomes of Nation-to-Nation processes, are determinative – and so that the requirements are clear and knowable.

We therefore urge the Committee to pursue amendments to more closely tie the S.63 decision-making factors to the S.22 factors to consider in an assessment, including a requirement for regulations describing decision-making principles in each area and establishing a requirement for specific criteria for individual assessments, as well as separating and elevating the consideration of impacts on Treaty and Indigenous rights and the outcomes of Nation-to-Nation processes.

We further recommend including the addition of a clause under Cabinet's regulation-making powers in S.109 providing for a regulation setting out generic decision-making criteria as well as providing direction for specific criteria to be developed for project assessments or regional and strategic assessments.

4. Public participation potential needs to be made concrete.

Meaningful public participation depends not only on the assessment process offering appropriate opportunities, accessibility, and support for the public and public interest intervenors; it also hinges on that involvement having a real possibility of affecting the outcome of the process: not just improved designs or mitigation measures, but major changes in project design and execution, including the rejection of inappropriate or irredeemable proposals. Furthermore, public participation must be built into post-assessment monitoring and enforcement processes, to contribute to their management and their content, but also to ensure accountability.

The Act's early planning process is innovative and promising, and its stated purposes of public participation are helpful, but they are not backed up by the kind of concrete and consistent guarantees that would ensure that public participation is meaningful. Experience shows that good intentions and even good guidelines from the government are not enough to ensure that public participation is

adequately done; clear direction must be established by regulation, though obviously, the operational details have to be worked out case by case, based on Agency guidance – but to meet a legal standard.

Overly rigid timelines also present a challenge to public participation, which often varies according to seasonal economic and cultural activities, but which also varies according to the nature of the proposed project and the issues of public concern that it raises. Engagement by Indigenous communities in IA processes and Indigenous jurisdictions' own processes also require flexible timelines. Timelines should therefore be standardized to the extent possible for the sake of predictability, but with sufficient flexibility to allow for meaningful public participation. Again, for the sake of predictability for proponents and public alike, that flexibility should be exercised within a defined process and criteria; for example, timelines for an assessment could be established through the early planning stage, with justification provided for departing from defaults set out in regulation.

There is concern that open public participation will lead to thousands of interventions, derailing and delaying the process. This ignores the fact that this was the way it worked for almost 20 years without major problems. Even when there were large numbers of interventions, they seem to have been handled quite efficiently. It also ignores the fact that people and organisations who are not directly affected or are not deemed to have relevant expertise often have important questions, insights, and information, and there may be a real risk in not including them.

But if an environmental assessment – an inherently boring process – is attracting that much public attention, it is a clear indication of failure. The proponent may have failed to do adequate research or preparation, but it is often the case that the project has fallen into a policy void, where questions that go well beyond the scope of a project assessment become central issues because they are not being addressed anywhere else.

The way out of this is to ensure that there is active public engagement and solid evidence-based policy development on those issues, as well as effective long-range planning, and evaluation of different development scenarios and pathways, through regional and strategic assessment. Bill C-69 has at least basic provisions for such processes, and it includes an early planning phase (an important innovation) and improved public access to information, as well as stronger use of science and traditional knowledge.

The very purpose of modern impact assessment is to integrate public and community concern, knowledge, and priorities with technical and scientific considerations in order to make better decisions. Failing to make public involvement meaningful – or worse, curtailing it – puts at risk the integrity, and the legitimacy, of the whole process. Bill C-69 should be amended to re-cast arbitrary legislated timelines as performance objectives established by regulation, along with specific criteria to govern their application.

The Minister's regulation-making powers under S.112 should include an additional provision to make a regulation describing the requirements for meaningful public participation in impact assessment, regional assessment, or strategic assessment. The timelines mandated in the Act should be able to be modified by the Agency, based on information gathered in the early planning stage.

Transparency is critical, both in terms of public access to information and in terms of possible learning – not just during an assessment process, but across all assessment processes and including follow-up monitoring and compliance. Public access to assessment information as well as monitoring data should be guaranteed in legislation. **The Registry provisions for the Internet site, S.105, should match the S.106 provisions for the Agency's internal project files, which must contain "any reports relating to the impact assessment," as well as "any records relating to the design or implementation of any**

follow-up programs” and “any records relating to the implementation of any mitigation measures.”

As well, all scientific information submitted in the course of an impact assessment should be assumed to be public, unless it is explicitly designated confidential by the Agency in a publicly recorded decision.

S.107 should be deleted as it creates a reverse onus on publication, making information confidential, not public, by default. Project-related scientific information does not need to be made confidential under this Act in order to be protected if it is already proprietary and subject to all of the rules of the *Copyright Act*.

5. Indigenous peoples’ involvement in assessment processes must respect their self-determination.

It is important to note that this does not address Indigenous peoples’ involvement in assessment processes. As collective rights-holders and authorities in their own right, Indigenous peoples may decide to participate in assessment processes without prejudicing their own processes or decision-making authority. The Act does provide for harmonisation with, and even substitution of, Indigenous impact assessment processes, though it appears to take a very restrictive and colonial approach in defining what Indigenous groups and which Indigenous processes will be recognised.

The Act does not indicate how the Free, Prior, Informed Consent (FPIC) standard, or Indigenous self-determination more broadly, will be recognised and facilitated through the IA process. It also makes just one, general, reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – which Canada has ratified and the current government committed to implement in all of its legislations and policies. This does not necessarily mean that C-69 is incompatible with its implementation, but it that does, in fact, appear to be the case. In consistently referencing Indigenous rights as “recognized and affirmed by section 35 of the Constitution Act, 1982,” Bill C-69 as a whole appears to restrict the implementation of the UNDRIP, especially if the government chooses to interpret S.35 as an “empty box” of rights, only filled through recognition by the colonial Crown. While this may not be the intention of the present government, legislation should not leave room for interpretation and deliberate or inadvertent variation in implementation on matters this important.

IA decision-making criteria (S.63) should clearly state that significant violations of Indigenous and Treaty rights, or the withholding of FPIC by affected Indigenous peoples, will prevent the approval of a proposed project. S.39(2) even bans collaboration with all other jurisdictions for the assessment of energy projects and should simply be deleted.

The phrase “recognized and affirmed by section 35 of the Constitution Act, 1982” should be deleted throughout the Act. For example, S.6(1)(g) should simply read:

to ensure respect for the rights of the Indigenous peoples of Canada in the course of impact assessments and decision-making under this Act;

Likewise, SS.9(2) and 16(2)(c), as well as relevant portions of Part 2 (SS.56(1) and (2), and S.183(2)(e)) and Part 3 (S.48) of Bill C-69 should be amended in a similar fashion.

At the same time, the IA Act provides appropriate protection of traditional Indigenous knowledge (at S.119), though there is no parallel protection for sensitive community knowledge. **S.119 should be complemented by a clause providing appropriate protection for sensitive community knowledge, where the default would be that all material submitted to the IA process is public but knowledge-holders would be able to ask the Agency or Review Panel to keep portions of it confidential.**

6. There must be effective mechanisms to assess regional development impacts, as well as policies, plans, and programs, with strong links to project assessments.

MiningWatch has long advocated for a more coherent, comprehensive and planning-based approach to assessment, including strategic assessment as well as regional assessments and land-use planning processes. Individual projects do not affect the environment or communities in isolation. Decisions should be based on the best information and analysis available, including regional and cumulative impacts, but we have watched as even the inadequate tools that are available, like the Cabinet Directive on Strategic EA, or panel reviews of proposed projects, have been underused and even ignored.

One obvious example would be how mining, road and energy development in Ontario's "Ring of Fire" has been side-lined by the absence of a regional assessment or even a Panel review that would allow the affected communities, governments, and proponents alike to understand how the various proposed projects would combine to affect the region's environment, economy, and cultural life.

Less well known is the impact that mining *exploration* has already had in north-western Ontario. We know it has been extensive, but we have no idea how significant it has been, especially for sensitive species like caribou. Thousands of kilometres of seismic lines have been cut, thousands of test holes have been drilled, and dozens of work camps set up, without any assessment and without any environmental monitoring, so that any future assessment will not have a useful baseline to measure and predict impacts on wildlife and the First Nations of the region. The same could be said about many other regions in Canada, particularly during mining 'boom cycles' and near new discoveries. In fact, the North is the only region of Canada where mineral exploration programs are subject to assessment, through the comprehensive claims agreements and the Mackenzie Valley Environmental Impact Review Board, and it is also in a context of regional planning processes that allow Indigenous peoples to establish development priorities.

Mining development is not just about developing mines; it starts with prospecting and exploration and ends with decommissioned mines and immense piles of toxic wastes, some of which may be stable enough to not require careful monitoring for the rest of time – perpetual care. Individual project assessments are extremely important, but many of the really important issues around the need for and alternatives to the project, and compatibility with community needs and priorities, can only be dealt with by starting with land use planning and strategic assessment processes. Less-intensive assessment options should be available for smaller projects or initiatives that fit within known parameters, but they still need to be included. CEAA 1992 actually did provide for mechanisms like class assessments, but there was little incentive to use and develop them, and outside of Parks Canada, they did not prosper. Disappointingly, the IAA does not take this into account and omits the obvious link between impact assessment, on the one hand, and non-designated projects authorised under the *Fisheries Act* and the *Navigable Waters Act*, on the other, that would provide coverage, continuity, and consistency. Rectifying this is a complex proposition that is beyond the scope of our comments here, but which merits considerably more attention than the government has given it. **This is an area that should be subject to further work under the Minister's authority, with the aim of bringing a package of amendments to Parliament within a year or two, as described above.**

The Act does acknowledge the importance of cumulative effects assessment, but does not clearly distinguish between regional impact assessments, looking at potential development in a geographical region, and strategic assessments, of policies, plans, and programs that are not necessarily geographically defined. Despite the importance of strategic and regional assessments, there are a number of shortcomings in the IAA.

The Act does not clearly address the need to be able to move higher-level policy issues, including regional development questions, out of project-level assessment and into a regional or strategic assessment – even if it means putting the project proposal on hold (which would require the development and application of specific criteria). It does provide for the use of regional or strategic assessment to provide guidance on project assessments, based on regional and policy directions, where those assessments may even set out limits on where or what kind of development is appropriate and therefore worth evaluating at the project level, but it doesn't set out a process for prioritising and initiating them and it artificially narrows the potential range of applications.

The Act recognises the need for a cooperative approach to regional and strategic assessment across various jurisdictions, but fails to make a clear prescription that would allow the federal government to take the lead on funding and conducting assessments and making decisions within its own powers – even if it can only make recommendations and requests to other jurisdictions. This is especially important as making regional or strategic assessment work is probably more a question of motivation, facilitation, and coordination than it is a question of jurisdiction. The purpose is to better inform decision making at all levels, to provide useful integrated analysis; other jurisdictions don't need to participate or use the results, but they are more likely to join in if it is to their benefit and the resources have already been committed by the federal government. This approach obviously has funding and capacity implications for the federal government, but we are confident that it is worth it both in terms of a cost/benefit analysis that would include savings in coordinated, sustainability-enhancing, policy implementation and regional development, and in terms of being able to constructively address larger topics like climate change.

It is worth noting that Quebec is one jurisdiction that has been using strategic EA relatively successfully over the last 20 years, which has helped it to develop more appropriate policies, regulations, and guidelines for emerging industries or regions subject to new broad development proposals, for example on uranium mining,⁵ on water,⁶ and on shale gas development.⁷ Important lessons can probably be learned from this experience in terms of implementing strategic EA at the federal level.

The IAA should provide for funding to be set aside to be allocated for regional assessments to provide incentives for other jurisdictions (Indigenous, provincial/territorial, municipal) to participate.

The Committee should amend C-69 to require strategic assessment of federal policies, plans, and programs by the initiating department or agency – not just those relevant to conducting project assessments, and not just to assess the implications for project assessment of a given policy, plan, or program, but rather to evaluate their contribution to sustainability. This would not be initiated across government all at once, but starting with priority areas, as capacity is developed and priorities are established.

7. Collaborative processes and regulatory approvals

⁵ Quebec, Bureau d'audiences publiques sur l'environnement. "Rapport 308: Les enjeux de la filière uranifère au Québec". May 2015. <http://www.bape.gouv.qc.ca/sections/rapports/publications/bape308.pdf>

⁶ Quebec, Bureau d'audiences publiques sur l'environnement. "L'eau, ressource à protéger, à partager et à mettre en valeur". August 2000. <http://www.bape.gouv.qc.ca/sections/archives/eau/index.htm>

⁷ Quebec, Bureau d'audiences publiques sur l'environnement. "Rapport 142: Les enjeux liés à l'exploration et l'exploitation du gaz de schiste dans le shale d'Utica des basses-terres du Saint-Laurent". November 2014. <http://www.bape.gouv.qc.ca/sections/rapports/publications/bape307.pdf>

There is a need for a coherent national approach to IA, underpinned by a strong federal role to ensure transparency, consistency, and accountability to the extent possible within Canada's constitutional division of powers and the recognition and protection of Indigenous jurisdiction and authority, both through negotiated agreements with Canada and in a nation-to-nation relationship between Canada and Indigenous peoples. However, there are no compelling rationales for provincial EA processes to be substituted for federal ones, or for different federal processes where energy regulators are involved, or for projects on federal lands or outside Canada (and the complete exclusion of projects involving federal funding).

Addressing the role of energy regulators specifically – the Canadian Energy Regulator (CER), replacing the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC), and the Canada-Nova Scotia and Canada-Newfoundland and Labrador Offshore Petroleum Boards – while regulators have important expertise to bring to IA processes, they are not equipped or competent to actually administer them. While environmental assessments led by regulators (for example, uranium mine proposals being assessed by the CNSC) have been touted as successful by proponents, they are subject to strenuous objection from the public and widespread ridicule by public interest groups. Regulatory agencies have an integral role in the assessment process as regulators, not as assessors; they should be ensuring that all the relevant information and analysis is available to allow them to effectively regulate a project, and that assessment decisions and conditions can be effectively monitored and enforced.

In S.44(3), only one (not “at least one”) review panel member should be appointed from a roster of an energy regulator. We also reiterate our recommendation above that section 39(2) be deleted. In addition, SS. 81-91 (covering projects carried out on federal lands or outside Canada) should reflect the same IA process features as the rest of the Act, including the early planning process, public notice, and meaningful public participation.

8. Transboundary impacts and international obligations

The federal government has jurisdiction wherever environmental assessment touches on international issues or is subject to international agreements, either globally as with climate change and air emissions (eg. chlorofluorocarbons) or bilaterally with the United States of America or Greenland. A progressive and comprehensive assessment regime is a critical element in meeting Canada's climate commitments under the Paris Agreement, the Biodiversity Convention, and so on; this is a clear area of federal jurisdiction that may also help assert a clear federal role in EA. The new Act should help implement existing international benchmarks such as the Espoo Convention,⁸ the Aarhus Convention⁹ and the Akwé: Kon Guidelines¹⁰ as well as allowing for referrals to and from the International Joint Commission, etc.

⁸ United Nations Economic Commission for Europe (UNECE). *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo, 1991)

http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf

⁹ United Nations Economic Commission for Europe (UNECE). *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus, 1998)

<https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

¹⁰ Secretariat of the Convention on Biological Diversity (CBD). *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*. (CBD Guidelines Series). Montreal, 2004.

http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/akwekon.pdf

When it comes to actual assessments, we expect the federal government to uphold the highest standards of behaviour and the highest standards of application of international agreements – not least because we want to be able to claim similar treatment from our neighbours. Just as Canada should be seeking standing with respect to proposed copper mines in Michigan and Wisconsin in order to ensure that boundary waters (and the communities that depend on them) are protected, Canada should be ensuring that there is mandatory federal IA of proposed mines in northwestern B.C. – and that Alaskans downstream have standing in those assessments. The provincial government does not have the capacity or the ability to shoulder federal responsibilities and should not be left to do so on its own.

At the same time, IA and IA-based decision-making needs to be shielded from international investor-state dispute settlement mechanisms like chapter 11 of NAFTA, including other agreements like the Canada-China FIPA (Foreign Investment Promotion and Protection Agreement) and the not-yet-ratified Trans-Pacific Partnership (TPP) and Canada–EU Comprehensive Economic and Trade Agreement (CETA). The recent tribunal ruling under the North American Free Trade Agreement (NAFTA, chapter 11), challenging the EA of the White’s Point Quarry in Nova Scotia,¹¹ is an extremely worrying precedent, potentially restricting the ability of government to undertake any meaningful environmental review and make any kind of informed decision that does not conform with proponents’ expectations – or at least do so without risking compensation payouts of hundreds of millions of dollars.

In order to protect IA processes and decisions from investor-state dispute settlement, it is critical that decision-making criteria and trade-off rules be implemented in legislation, while preserving sufficient flexibility to allow them to be adapted and fine-tuned through guidance, as previously described.

9. Scientific integrity, mitigation, adaptive management, and follow up

Taseko Mines is currently taking the federal government to court over the environmental assessment of its proposed “New Prosperity” open pit copper-gold mine in T̓silhqot’in territory in British Columbia. A federal review panel had recommended rejection of the project in part because the proponent refused to provide detailed mitigation plans, preferring to simply assure the panel, the public, regulators, and the T̓silhqot’in and Secwepemc people that it would mitigate environmental impacts through “adaptive management.” We argued in court, as intervenors, that the integrity of the assessment process depends on all relevant details being presented and interrogated. The accuracy of impact prediction and any assessment of the effectiveness of proposed or potential mitigation measures depends on the breadth and depth of the information available, and the scientific integrity of its documentation and analysis.

However, our knowledge is never complete and predictions are never 100% accurate, so adaptive management – the ability to re-evaluate a situation based on new information and adjust project implementation and mitigation measures accordingly – is hugely important. The Act allows for project approval conditions to be modified (S.68), but without clear direction and without formal mechanisms for monitoring and enforcement efforts to feed back into re-evaluation and modification of approval conditions, or even to trigger a limited reassessment process. This power is also, irrationally, restricted to non-nuclear projects at S.68(4).

It is also very important that learning from monitoring and follow-up be integrated into future assessments. This is not a matter of legislation so much as a responsibility of the Agency and the Expert

¹¹ Janet M. Eaton. “Digby Neck Quarry Bilcon Case, Tribunal Decision and Dissent”. May 11, 2015. <http://www.sierraclub.ca/sites/sierraclub.ca/files/JANET201505.pdf>.

Committee, but it hinges on robust monitoring and follow-up, adequate resources for research and analysis, and formal feedback and learning structures for Agency staff as well as opportunities for sharing and learning with practitioners, researchers, public interest groups, and Indigenous groups.

We recommend that S.68(4) be deleted, and that the results of monitoring and follow up programs be explicitly referenced in the factors to be considered in S.22.

10. Conclusion

Bill C-69 contains many elements of a bold new impact assessment regime. Unfortunately, it does not provide clear enough direction on their implementation to give us much confidence that the promises it makes will be fulfilled. It also replicates many features of the existing, failed CEAA. We have provided recommendations in a few key areas, and we trust the Senate Committee to do its work to improve the bill.