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CANADA'S PROPOSED *IMPACT ASSESSMENT ACT*: HOW TO REGAIN PUBLIC TRUST THROUGH APPROPRIATE AMENDMENTS

Submissions of the Canadian Environmental Law Association to the Standing Committee on Environment and Sustainable Development regarding Part 1 of Bill C-69 (*Impact Assessment Act*)

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Abstract: *In February 2018, the Government of Canada introduced Bill C-69, which, if enacted, repeals the Canadian Environmental Assessment Act, 2012 (CEAA 2012), and replaces it with the Impact Assessment Act (IAA). In general, the proposed legislation is intended to restore public trust, protect the environment, advance reconciliation with Indigenous peoples, and get natural resources to market. In accordance with these goals, the IAA contains some potentially useful provisions that may incrementally improve the assessment of environmentally significant undertakings that could affect areas of federal interest. However, the IAA suffers from many of the same fundamental flaws as CEAA 2012, and therefore requires substantive revisions to its proposed information-gathering and decision-making requirements. In addition, the IAA contains several provisions which directly conflict with the well-founded recommendations from the 2017 final report of the federally appointed Expert Panel on environmental assessment processes. In this brief, the author reviews some of the serious shortcomings of the proposed legislation, and identifies key amendments that are necessary to establish an effective, efficient and equitable assessment process under the IAA.*

PART I - INTRODUCTION

The Canadian Environmental Law Association ("CELA") welcomes this opportunity to provide written submissions to the Standing Committee on Environment and Sustainable Development in relation to Bill C-69.

The 350 page Bill contains several different Parts which repeal *CEAA 2012*, enact the *IAA*, repeal the *National Energy Board Act*, enact the *Canadian Energy Regulator Act*, amend the *Navigation Protection Act*, and revise a number of other federal statutes. However, this CELA brief focuses solely on the *IAA*, as currently proposed in Part 1 of Bill C-69.[1]

We acknowledge that the Standing Committee has issued a news release "recommending" that written submissions on Bill C-69 should not exceed 10 pages.[2] However, given the length, complexity and considerable public importance of the proposed *IAA*, CELA respectfully submits that this suggested page limit is unrealistic and unjustifiable. In our view, the recommended page limit might be appropriate if the *IAA* only required minor tinkering prior to its passage. However, CELA's overall conclusion is that the *IAA* needs to be extensively amended before the law is enacted by Parliament.

Nevertheless, for the purposes of streamlining our submissions and assisting the Standing Committee in its review of Bill C-69, this CELA brief does not provide a detailed clause-by-clause analysis of every provision in the 90 page *IAA*. Instead, these submissions are limited to a sub-set of critical matters that, in our opinion, require substantive amendments before the *IAA* is passed and proclaimed into force.

For the convenience of the Standing Committee, a consolidated list of CELA's recommendations and proposed *IAA* amendments is set out below as Appendix A to this brief.

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[1] Bill C-69 was introduced in the House of Commons for First Reading on February 8, 2018, and received Second Reading on March 19, 2018. This CELA brief focuses on the version of Bill C-69 that has been referred to the Standing Committee on Environment and Sustainable Development.

[2] http://www.ourcommons.ca/DocumentViewer/en/42-1/ENVI/news-release/9709936.

(a) Background

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental and public health issues.

Since our inception, CELA's casework, law reform and public outreach activities have involved countless environmental assessment ("EA") matters at the provincial and federal levels. For example, CELA has participated in various administrative and legal proceedings[3] under *CEAA 2012* and its predecessors, *CEAA 1992* and the *Environmental Assessment and Review Process* ("*EARP*") *Guidelines Order*.

In addition, CELA lawyers have made submissions to, and appeared as witnesses before, various Parliamentary committees in relation to federal EA legislation, including the original enactment of *CEAA 1992* and its implementing regulations. In 2016, CELA participated in the consultations held by the independent Expert Panel that was appointed by the Government of Canada to review and report upon existing EA processes at the federal level. CELA also participated in the public consultations on the modernization of the National Energy Board, and filed a detailed brief, and several supplementary submissions, on the proposals contained within the federal government's 2017 *Discussion Paper*.[4]

(b) Overview of CELA's Comments on the IAA

On the basis of our decades-long experience in assessment matters, CELA has carefully considered the *IAA* from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

For the reasons outlined below, CELA's overall conclusion is that in its current form, the *IAA* will not achieve the federal government's stated objective of establishing federal assessment processes that "regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous persons, ensure good projects go ahead, and resources get to market."[5]

In reaching this conclusion, CELA acknowledges that the proposed law contains some potentially useful provisions, such as:

- establishing a new single authority (the Impact Assessment Agency of Canada) to conduct and coordinate impact assessments for designated projects;

- mandating an early planning phase intended to seek Indigenous and public input on various aspects of the proposed project and the particulars of the upcoming impact assessment process;

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[3] For example, CELA intervened in *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6, and has served as counsel for other environmental groups involved in federal EA cases in the Federal Court and Federal Court of Appeal.

[4] CELA's submissions on federal EA reform are available at the CELA website: http://www.cela.ca/collections/justice/canadian-environmental-assessment-act. Many of the comments in this brief reiterate and expand upon CELA's previous submissions to the Expert Panel and to the Government of Canada.

[5] *Discussion Paper*, page 3.

- broadening the scope of impact assessment by requiring the evaluation of the need for, and alternatives to, the proposed project, and by reviewing potential changes in health, social, and economic conditions, rather than just environmental effects;

- setting out statutory considerations for decision-making under the Act, including whether the project makes a "contribution to sustainability"; and

- requiring reasons for decisions that approve (or reject) projects under the Act.

Nevertheless, CELA's ongoing review of the *IAA* has revealed a number of unresolved concerns, and a paucity of necessary implementation details, about virtually all aspects of the new assessment processes for projects, plans, programs and policies. The most serious problems are discussed below in more detail, and CELA submits that they must be rectified by Parliament through timely and appropriate amendments to the *IAA*.

At the same time, CELA remains highly concerned that the *IAA* carries forward many of the same problematic[6] provisions found in *CEAA 2012*, rather than starting afresh with a new comprehensive statute advocated by many participants in the Expert Panel and *Discussion Paper* consultations.

In this regard, CELA has prepared and web-posted a table of concordance[7] that sets out a side-by-side comparison of *CEAA 2012* provisions with their relevant counterparts in the *IAA*. This comparative chart readily demonstrates that there are far more similarities than differences between the two laws.

Accordingly, CELA concludes that the proposed *IAA* is not pioneering legislation that will usher in a bold new era of "next generation" sustainability assessments at the federal level. To the contrary, the *IAA* largely replicates the same discredited information-gathering and decision-making structure that currently exists under *CEAA 2012*.

In CELA's opinion, replacing one deficient statute with a substantially similar – and equally deficient – statute is not in the public interest, nor does it satisfy the commitments made by the current federal government in relation to this law reform initiative.

In addition, we note that most participants in the Expert Panel consultations agreed that the EA process under *CEAA 2012* was broken, inequitable and unacceptable. The Expert Panel itself offered a highly critical indictment of *CEAA 2012*'s numerous problems:

> Added to this is the controversy surrounding *CEAA 2012* itself which, in many ways, is a far cry from what came before it. While *CEAA 2012* improved EA process for some, it also sowed the seeds of distrust in many segments of society: it imposed unrealistically short timelines for the review of long, complex documents by interested parties; it vastly reduced the number of projects subject to review; and it placed more accountability for some assessment decision-making in the political realm.[8]

In light of these and other well-founded criticisms from its own Expert Panel, it remains unclear why the Government of Canada has elected to use the previous government's *CEAA 2012* as the foundational basis of the proposed *IAA*. Accordingly, CELA objects to the *IAA*'s attempt to impose even shorter review timelines, continue its limited application to a small handful of major projects, and perpetuate the politicized decision-making that occurs under *CEAA 2012*.

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[6] For example, the Expert Panel found that "current assessment processes under *CEAA 2012* are incapable of resolving disparate points of view" about the purpose, scope and content of federal EA requirements: see Expert Panel Report, page 10.
[7] https://www.cela.ca/CEAA-vs-IAA.
[8] Expert Panel Report, page 12. See also Meinhard Doelle, "*CEAA 2012*: The End of Federal EA As We Know It?"(2012), 24 JELP 1.

(c) Benchmarks for Evaluating the IAA

In evaluating the proposed *IAA* and determining the nature and extent of necessary amendments, CELA has considered the findings and recommendations of the Expert Panel report, as well as the key commitments made by the current federal government. These benchmarks include:

- the current government's election platform commitments;[9]
- the Prime Minister's 2015 mandate letter to Minister McKenna which, among other things, directs the Minister to review EA processes in order "to regain public trust";[10]
- the Terms of Reference approved by the federal government for the Expert Panel;[11] and
- the *Discussion Paper* principles that were intended to guide the development of "system-wide" changes to Canada's EA and regulatory processes.[12]

Viewed against this backdrop, CELA concludes that the *IAA* falls considerably short of the mark, and that it is clearly insufficient for the purposes of keeping the above-noted commitments. In our view, in order to create a credible assessment process, restore public trust, and facilitate meaningful public participation, then Parliament must amend the *IAA* in a number of key areas.

PART II – APPROPRIATE AMENDMENTS TO THE *IAA*

It is beyond the scope of this brief to comment upon all of the key provisions in the proposed *IAA* that require careful review and/or revision by the Standing Committee. Instead, this Part of CELA's brief highlights our main concerns about the following matters under the *IAA*:

- interpretation, application and purposes of the Act (sections 2-6);
- designation of physical activities (section 9);
- early planning phase (sections 10-20);
- impact assessments by the Agency (sections 21-30);
- substitution of other assessment processes (sections 31-35);
- impact assessments by review panels (sections 36-56);
- decision-making by the Minister or Cabinet (sections 60-64);
- projects on federal lands or outside of Canada (sections 81-91); and
- regional and strategic assessments (sections 92-103).

[9] https://www.liberal.ca/realchange/environmental-assessments/.
[10] http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter.
[11] Expert Panel Report, pages 108 to 112.
[12] *Discussion Paper*, page 7.

Each of these matters is examined in more detail below, together with our proposed amendments to the *IAA* that, if enacted, would start to address CELA's main concerns about the legislation. These amendments have been put forward in a plain language format, and are intended to serve as drafting instructions to legislative counsel if they are adopted by members of the Standing Committee.

It should be further noted that CELA's recommended reforms should not be cherry-picked or viewed in isolation from each other. This is particularly true since there are numerous inter-related components within the *IAA*, and changes to certain provisions will inevitably require corresponding changes to other provisions within the Act. Therefore, CELA's proposed amendments are designed to be implemented as an integrated package of improvements to the *IAA*.

(a) Interpretation, Application and Purposes of the Act

For the most part, the definitions in the proposed *IAA*[13] duplicate the definitions found in *CEAA 2012*. In CELA's view, these definitions are straightforward and generally acceptable, with the following exceptions.

First, the definition of "effects" refers to "changes to the environment or to health, social or economic conditions and the consequences of these changes." We are unclear why cultural conditions are not expressly included in this definition. CELA notes, for example, that the Expert Panel included culture as the fifth "pillar" of sustainability, and the Panel recommended that it be examined within the assessment process, particularly when evaluating impacts to Aboriginal and treaty rights and interests.[14] We concur with this recommendation, and commend it to the Standing Committee for consideration.

RECOMMENDATION #1: The section 2 definition of "effects" should be amended to include cultural conditions.

Second, the *IAA* defines "effects within federal jurisdiction" in an unduly narrow matter. For example, the proposed definition refers to certain heads of federal jurisdiction (e.g. fisheries, aquatic species, migratory birds, or Indigenous peoples), and to other environmental components or "health, social or economic matters" in the legislative authority of Parliament set out in Schedule 3 (which remains blank at the present time). For the most part, this definition simply duplicates what currently exists in subsection 5(1) of *CEAA 2012*. Similarly, leaving Schedule 3 blank creates additional vagueness and uncertainty about the scope and application of the *IAA*.

RECOMMENDATION #2: The Government of Canada's proposed content of Schedule 3 of the *IAA* should be publicly disclosed as soon as possible.

On the threshold issue of which activities or facilities should trigger the *IAA*, CELA agrees with the Expert Panel that under Canada's *Constitution Act, 1867*, the federal impact assessment regime cannot apply to "every project or every decision that may affect the environment," but it should apply to projects, plans or policies with "clear links to matters of federal interest."[15] The Expert Panel went on to find that these federal interests include not only the above-noted matters outlined in the *IAA*'s definition, but also extend to general matters (e.g. federal lands, federal funding and federal proponency) and other specific items, such as:

- species at risk;

[13] *IAA*, section 2.
[14] Expert Panel Report, pages 20 to 21.
[15] Expert Panel Report, page 18.

- marine plants;
- greenhouse gas emissions of national significance;
- watershed or airshed impacts crossing provincial or national boundaries;
- navigation and shipping;
- aeronautics;
- activities or works crossing provincial or national boundaries; or
- activities related to nuclear energy.

These triggers for impact assessments are discussed in more detail below in relation to the designation of projects by regulation (section 109(b)) or by Ministerial order (section 9). If CELA's recommendation regarding *IAA* triggers are accepted by the Standing Committee, then it will be necessary to revise the current definition of "effects within federal jurisdiction" accordingly.

RECOMMENDATION #3: The section 2 definition of "effects within federal jurisdiction" will require amendments if the *IAA* triggers for impact assessment are expanded to include all relevant areas of federal interest.

Third, the proposed definition of "sustainability" appears to update the existing definition of "sustainable development" used in *CEAA 2012*. At this time, CELA makes no specific submissions on potential ways to improve or expand the "sustainability" definition. However, given the central importance of sustainability to the *IAA*'s overall information-gathering and decision-making process,[16] CELA submits that considerably more implementation detail and/or explicit criteria should be set out in the Act (and supplemented by regulation) in order to assist all persons in understanding when a particular project is – or is not – "fostering" or "contributing to" sustainability, as described below.

Fourth, CELA supports the *IAA*'s omission of the definition of "interested person" found in *CEAA 2012*. In our view, this narrow standing test has no place in an impact assessment statute that includes "meaningful public participation" as one of its purposes.[17] Accordingly, CELA strongly recommends that the Standing Committee should reject any requests from proponents (or other stakeholders) to reinstate this concept or definition within the *IAA*.

RECOMMENDATION #4: The concept and definition of "interested party" should not be reinstated in the *IAA*.

In terms of the proposed geographic application of the *IAA*, section 4 provides that the legislation does not apply to "physical activities to be carried out wholly within lands described in Schedule 2." This is a new provision that does not exist in *CEAA 2012*, and is presumably intended to identify lands subject to land claim agreements where the *IAA* would be inapplicable. The *IAA* also contains a new non-derogation clause aimed at preventing the *IAA*

[16] For example, section 63 of the *IAA* requires decision-makers to consider "the extent to which the designated project makes a contribution to sustainability." However, this key phrase remains undefined in the proposed *IAA*.
[17] *IAA*, subsection 6(1)(h).

from being construed in a manner that negatively affects the constitutionally protected rights of Indigenous peoples in Canada.[18]

In CELA's view, the proposed non-derogation clause is similar to those found in other federal statutes, but it does not obviate the need for the *IAA* to expressly refer to the UNDRIP, including the FPIC principle. The *IAA*'s failure to mention either of these important matters is both puzzling and unacceptable, and this omission must be immediately addressed through appropriate amendments to the *IAA*. Moreover, in order to receive full force and effect, these amendments must be set out in the purposes and/or text of the Act, not in its unenforceable preamble.

RECOMMENDATION #5: The purposes and/or text of the *IAA* should be amended to expressly refer to, and fully incorporate, the UNDRIP, including the FPIC principle.

The *IAA* empowers Cabinet to add, replace or delete the Schedule 2 descriptions of lands "covered by a land claim agreement referred to in section 35 of the *Constitution Act, 1982*."[19] However, Schedule 2 remains blank in the Second Reading version of the *IAA*. For the purposes of greater certainty, CELA submits that Schedule 2 must be completed as soon as possible so that Indigenous communities can review its contents to ensure that all eligible lands are accurately described.

RECOMMENDATION #6: The Government of Canada's proposed content of Schedule 2 of the *IAA* should be publically disclosed as soon as possible.

In relation to the proposed purposes of the *IAA*, CELA submits there is room for considerable improvement in section 6. As a matter of law, well-articulated legislative statements of purpose are important not only because they set out the overall tone, direction and scope of the statute, but they also serve as interpretive aids for administrative officials, decision-makers and the courts, particularly when construing ambiguous provisions within the statute.

However, it appears to CELA that the *IAA* statements of purpose do not materially differ from those currently set out in *CEAA 2012*. We note, however, that the *IAA* is now intended "to foster sustainability"[20] instead of *CEAA 2012*'s goal of encouraging "sustainable development." This is a modest step in the right direction, but CELA concludes, for the reasons set out in this brief, that "sustainability" is unlikely to be achieved under the proposed *IAA* unless the Act is substantially amended. Moreover, as a wordsmithing suggestion, CELA recommends that this *IAA* aim should be recast to "ensure" sustainability, rather than merely "foster" it.

We further note that several paragraphs within section 6 attempt to narrowly pin down the *IAA* to certain matters – or adverse effects – that are confined within the exclusive legislative authority of Parliament.[21] For the reasons outlined above, CELA submits that federal jurisdiction is being defined and relied upon in the *IAA* in the same narrow and highly objectionable manner as *CEAA 2012*, and the proposed purpose statement must therefore be revised accordingly to reflect a broader range of federal interests.

On this point, we note that the less prolix statement of purposes in *CEAA 1992*[22] was not burdened or undermined by the self-limiting recitals of federal legislative authority now proposed in the *IAA*. Instead, *CEAA 1992* was properly predicated on the relevant areas of federal interest that should trigger appropriate types of assessment

[18] *IAA*, section 3.
[19] *IAA*, section 110.
[20] *IAA*, subsection 6(1)(a).
[21] *IAA*, subsections 6(1)(b) and (d).
[22] *CEAA 1992*, subsection 4(1).

(e.g. federal lands, federal funding, federal approvals, and federal proponency[23]), and supplemented by various regulatory lists (e.g. Comprehensive Study List, Inclusion List, etc.). In our view, these broad triggers should be reinstated in the *IAA* through the various amendments outlined in this brief.

RECOMMENDATION #7: For project-level assessments, the *IAA* should be amended to incorporate all proper and necessary triggers that engage, or are linked to, areas of federal interest, including (but not limited to) federal lands, federal funding, federal approvals, and federal proponency.

Similarly, several paragraphs in section 6 of the *IAA* repeatedly mention "designated projects." In CELA's opinion, this project-oriented focus suggests that the Government of Canada intends to generally restrict the application of the impact assessment process to mega-projects, rather than the full range of activities or facilities that may affect areas of federal interest. In addition, this narrow application seems to be based on the erroneous premise that only mega-projects can cause adverse effects on federal areas of concern. The misguided emphasis upon "designated projects" also gives short shrift to the compelling need for effective strategic and regional assessments, which remain discretionary under the *IAA* and are barely mentioned in section 6.

In this regard, CELA points out that section 6 of the *IAA* merely seeks to "encourage" (but not "require") the assessment of cumulative effects through strategic and regional assessments. Even if this is viewed as a laudable goal, it is clearly undermined by the continuing absence of any peremptory language or mandatory triggers in the *IAA* which ensure that these higher-level assessments will actually be undertaken (with meaningful public and Indigenous participation), or that the results of these assessments will influence, or be incorporated into, project-level assessments. This topic is explored in more detail below.

CELA further observes that certain paragraphs in section 6 speak to the need to "promote" cooperation, coordination and communication between the federal government and Indigenous governing bodies, to "ensure respect" for constitutionally protected Indigenous rights, and to "take into account" traditional Indigenous knowledge. As noted above, these paragraphs conspicuously lack any reference to the UNDRIP or the FPIC principle. Similarly, these paragraphs inexplicably fail to specify that impact assessment and decision-making under the *IAA* must occur in a manner that advances reconciliation with the Indigenous peoples of Canada. In our view, these omissions should be rectified in the *IAA* statement of purposes, particularly since the federal government frequently maintains that reconciliation is a key objective of this law reform exercise.

RECOMMENDATION #8: Section 6 of the *IAA* should be amended to include more precise language about the overall intent and desired outcomes of impact assessment and decision-making for projects, plans, policies and programs that are linked to areas of federal interest, and should be reframed to better reflect the paramountcy of sustainability in all stages of the new process.

If this recommendation is endorsed by the Standing Committee, then it will be necessary to make corresponding adjustments in the preamble of the proposed *IAA* as well as the operative provisions of the legislation.

(b) Designation of Physical Activities

It appears to CELA that the proposed *IAA* simply continues the narrow *CEAA 2012* approach of developing a regulatory list of the types of major projects that warrant an impact assessment. As discussed below, however, the mere inclusion of a particular project on the list does not necessarily mean that an impact assessment will be automatically undertaken since the Agency has discretion under section 16 of the *IAA* to determine that an impact assessment is not required after all.

[23] *CEAA 1992*, subsection 5(1).

For our clients, other stakeholders and the public at large, this discretionary "opt-out" provision significantly reduces accountability and predictability as to when – or if – the federal process will actually apply, even to major projects on the regulatory list. It should be further noted that even if a designated project remains subject to the *IAA*, the various factors[24] that are to be taken into account during the impact assessment can be "scoped" or limited by the Minister or the Agency.[25] Like the equivalent provision in *CEAA 2012*,[26] the exercise of this scoping power on a case-by-case basis will inevitably create more – not less – uncertainty or inconsistency, and will greatly diminish – not restore – public trust. CELA's further comments and associated recommendations on the section 22 factors (and potential scoping thereof) are set out below.

CELA is aware that section 9 of the *IAA* confers discretion upon the Minister to issue orders that apply the Act to non-designated activities. This provision appears to duplicate the discretionary power found in subsection 14(2) of *CEAA 2012*, which, to our knowledge, has rarely – if ever – been used to date. It further appears that such orders may be made under the *IAA* by the Minister upon request or on his/her own initiative, although the Act does not clearly specify who can file a request (e.g. individuals, groups, municipalities, provincial governments, federal agencies or departments, or Indigenous governing bodies). This oversight should be addressed by an appropriate amendment to section 9.

RECOMMENDATION #9: Section 9 of the *IAA* should be amended to specify that any person or jurisdiction may request the Minister to issue an order to designate physical activities that are not prescribed by the regulatory projects list.

We further note while the Minister's discretion under section 9 is tied to adverse effects within federal jurisdiction (or "public concerns" about such effects), there are no statutory criteria in section 109(b) of the *IAA* to guide the current creation of, or future revisions to, the regulatory list of designated projects. CELA acknowledges that some potential criteria are suggested in the Consultation Paper[27] that the federal government has recently released for public comment by June 1, 2018. However, since these criteria are not established in the *IAA* itself, it appears that Cabinet has maximum flexibility in crafting the regulatory list of designated projects. Indeed, the Consultation Paper indicates that the federal government's intention is to simply "revise" the current projects list under *CEAA 2012*, which is an unacceptable starting point for the reasons outlined in previous CELA submissions.[28]

We further understand that after considering the public input on the Consultation Paper, then the federal government will prepare a draft projects list for public review/comment, and will eventually publish the finalized list in the *Canada Gazette* at some indeterminate date in 2019.

In light of this anticipated chronology, CELA seriously questions how the public, stakeholders, Indigenous peoples, Standing Committee members or other Parliamentarians can adequately review the *IAA* (or its alleged efficacy) without having even a draft projects list in hand at the present time to better understand which physical activities will – or will not – be subject to the new law. CELA therefore submits that this gap must be addressed by the public release of the draft projects list as soon as possible, and certainly well in advance of Third Reading debate on Bill C-69.

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[24] *IAA*, subsection 22(1).
[25] *IAA*, subsection 22(2).
[26] *CEAA 2012*, subsection 19(2).
[27] See https://www.impactassessmentregulations.ca/.
[28] See http://www.cela.ca/publications/draft-ceaa-regs.

RECOMMENDATION #10: The Government of Canada should release its draft regulatory projects list for public review and comment as soon as possible, and well before the *IAA* receives Third Reading and Royal Assent.

(c) Early Planning Phase

CELA strongly supports the creation of a statutory "planning phase" for project-level assessments under the *IAA*. As correctly noted by the Expert Panel, one of the major drawbacks under *CEAA 2012* is that "many of the most important decisions about how the project is to be undertaken have already been made" in a non-participatory manner before the current assessment process is even initiated.[29] The Panel found that "early engagement is critical to fully inclusive and informed IA processes," and recommended that "federal IA should begin with a legislated Planning Phase that, for projects, occurs early in project development before design elements are finalized."[30]

Unfortunately, the proposed *IAA* does not adequately remedy the early planning shortcomings that the Expert Panel identified under the existing *CEAA 2012* regime. Incredibly, the *IAA*, as currently drafted, does not establish or mention the early planning steps or documentation that are promised in the federal government's "Technical Briefing" document that describes the new assessment process.

For example, the Technical Briefing states after the proponent provides its "initial" project description, the Agency will consult upon and issue the following documents by the end of the planning phase (which cannot exceed 180 days in length):

- Impact Assessment Cooperation Plan, consisting of an Indigenous Engagement and Partnership Plan and a Public Participation Plan;
- "tailored" Impact Statement Guidelines;
- Permitting Plan (if requested).

While this arrangement may reflect the federal government's general intentions in the new regime, it is highly incongruous that not one of these key documents is actually referenced in sections 10 to 15 of the proposed *IAA*. Similarly, these provisions fail to prescribe how the Agency will ensure meaningful participation by the public and Indigenous communities during the early planning phase.

For example, there is no clear requirement in the *IAA* that participant funding shall be made available to persons, groups or Indigenous communities that wish to become involved in the various components of the early planning process. In short, there is a dearth of details in the *IAA* that clearly articulate how the planning phase is supposed to be implemented in project-level assessments, and how meaningful public participation will be facilitated during this phase.

In addition, there are no mechanisms for resolving ongoing disputes over the proposed content of the early planning documents, or for appealing or reviewing the Agency's determinations during the early planning phase. To remedy this omission and to enhance accountability, the *IAA* should enable participants in the early planning phase to appeal the Agency's determinations to the Minister on the grounds that the determinations are inconsistent with the purposes and provisions of the Act. In the alternative, this appeal could lie to the specialized

[29] Expert Panel Report, pages 18 to 19.
[30] *Ibid*.

appellate tribunal that CELA recommends below in relation to Ministerial or Cabinet decisions on designated projects.

We are also concerned that the proposed early planning phase requires the proponent to submit an initial project description that contains the information to be prescribed by regulation.[31] This requirement appears to allow the proponent to lock in (and defend) its preferred option long before public participation has even commenced. CELA submits that this approach also renders meaningless the section 22 obligation to consider alternatives to the project, and alternative means of carrying out the project, within the assessment process.

In our view, the proponent should be required by the *IAA* to file a detailed description of a reasonable range of alternatives that may address the perceived need, issue or opportunity identified by the proponent. This filing would then kick-start the early planning phase under the Act, and would engage the public and Indigenous communities in an open and transparent planning process that systematically weighs the pros/cons of the alternatives using sustainability criteria, and helps the proponent and participants to jointly identify and plan the preferred alternative from a sustainability perspective. Once the preferred option has been selected, then sustainability criteria should continue to be used to influence the final design details, and to influence the nature and extent of commitments made by the proponent in order to ensure that the project contributes to sustainability.

In summary, CELA submits that the early planning requirements under the *IAA* need to be substantially improved and expanded in order to obtain process efficiencies, enhance public and Indigenous engagement, and derive the other benefits that the Government of Canada claims will accrue under the new assessment process. In our view, each of the required steps and documentation in the early planning phase should be clearly established in law, trigger participant funding programs, and be supplemented by additional or more prescriptive requirements in the *IAA* regulations.

RECOMMENDATION #11: Sections 10 to 15 of the *IAA* should be amended by:

> **(a) setting out prescriptive details on how the Agency will ensure that meaningful public participation occurs during the early planning phase;**
>
> **(b) specifying that adequate participant funding will be made available during the early planning phase;**
>
> **(c) providing a time-limited opportunity to appeal the Agency's planning phase determinations to the Minister, or, in the alternative, to a specialized appellate tribunal; and**
>
> **(d) requiring the early planning phase to commence with the proponent's filing of a detailed description of a reasonable range of alternatives that address the need, issue or opportunity that the proponent intends to pursue.**

Section 7 of the proposed *IAA* generally prohibits proponents from proceeding with designated projects, unless the project has been approved in a decision statement issued under section 65 of the Act, or unless the Agency has determined that no impact assessment is required. On this latter point, section 16 of the *IAA* purports to empower the Agency to wholly dispense with the need to conduct impact assessments of designated projects. This provision closely resembles section 10 of *CEAA 2012*, which also enables the Agency to make and web-post its decision on whether an assessment will be required for a designated project.

[31] *IAA*, section 10.

In CELA's view, there is no public interest justification for this *de facto* exemption power under section 16 of the *IAA*. If a designated project is environmentally significant enough to warrant inclusion on the regulatory projects list, then the requisite impact assessment must be commenced by the Agency or review panel, subject only to the Minister's authority in section 17 to order an early termination of the impact assessment. We have no objection to *IAA* provisions that may facilitate an early "no" to an unsustainable designated project, but we strongly object to *IAA* provisions that allow designated projects to proceed without conducting the impact assessment required by federal law.

CELA further notes that *CEAA 1992* did not contain any provisions that permitted the Agency to unilaterally decide that the prescribed type of assessment (e.g. screening, comprehensive study or review panel) did not have to be conducted although the EA triggers in subsection 5(1) were applicable. These statutory triggers were further refined through various regulations[32] under *CEAA 1992* (e.g. Comprehensive Study List, Law List, and Inclusion/Exclusion Lists). In our view, this is a preferable and more comprehensive approach than the simplistic designation of a relatively small number of major projects under the proposed *IAA*.

For transparency, certainty and accountability purposes, CELA submits that Agency officials should not be empowered under the *IAA* to second-guess Parliament or Cabinet on which designated projects should – or should not – undergo an impact assessment. In short, if a designated project is caught by the *IAA* or its regulations, then the impact assessment and decision-making requirements under the Act must be complied with in a timely and effective manner.

RECOMMENDATION #12: Section 16 of the *IAA* should be deleted.

(d) Impact Assessments by the Agency

Once it is decided by the Agency that an impact assessment of a designated project is required, the information-gathering stage of the proposed *IAA* process begins with the web-posting of the notice of commencement and other prescribed documents.[33] Among other things, this notice will set out the "information and studies" that the proponent must prepare and submit to the Agency within the prescribed timeframe,[34] or else the impact assessment process shall be terminated.[35]

For Agency-led assessments, sections 25 to 29 of the *IAA* outline the Agency's duties to conduct the impact assessment, prepare a draft report, and submit a final report to the Minister within 300 days of the notice of commencement.[36] CELA notes that these provisions are substantially similar to those currently found in *CEAA 2012*,[37] except that the new proposed timeline is shorter than the 365 day timeline used under the current *CEAA 2012*.[38] Moreover, CELA submits that a standard timeline may not necessarily work for all the different types, scales and locations of designated projects that are subject to Agency-led assessments and reports. CELA therefore recommends that this specific timeline should be deleted, and that the Agency should be enabled to fix reasonable timeframes on a case-by-case basis after receiving input from the proponent, members of the public, stakeholders, and Indigenous communities.

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[32] See, for example, SOR/94-636; SOR/94-637; SOR/94-638; and SOR/2007-108.
[33] *IAA*, section 18.
[34] *IAA*, section 19.
[35] *IAA*, section 20.
[36] *IAA*, subsection 28(2).
[37] *CEAA 2012*, sections 22 to 27.
[38] *CEAA 2012*, subsection 27(2).

RECOMMENDATION #13: Section 28(2) of the *IAA* should be amended by deleting the reference to "300 days", and by enabling the Agency, after receiving parties' input during the early planning phase, to establish an appropriate timeframe for completion of the assessment process and submission of the Agency's report to the Minister.

In terms of the content of the Agency's report to the Minister, the proposed *IAA* focuses primarily on adverse effects within federal jurisdiction,[39] and does not specifically require the Agency to provide the Minister with its findings, conclusions or recommendations regarding the full suite of considerations listed in section 22 of the Act. In general terms, CELA is content with the section 22 inventory of matters that must be addressed in every impact assessment, provided that these matters are not narrowly "scoped", or otherwise rendered meaningless, by the Agency.[40]

However, we recommend that section 22 (and other related provisions, including section 28 and 51) should be amended to clarify that the reports prepared by Agency and review panel must include a robust, sustainability-based comparative analysis of the pros/cons of alternatives to the project, alternative means of carrying out the project, and the null (or "no go") alternative. At the same time, CELA submits that subsection 22(1)(d) should be amended to clarify that project justification (e.g. purpose of, and need for, the project) shall be based on whether there is a demonstrable public need for the project, as opposed to the proponent's perceived need, business model, or pecuniary interest. Given that *IAA* approval is premised on the public interest, it is necessary and appropriate for the Act to ensure that a proponent's mandate or objective (e.g. to provide services, manufacture products, or otherwise generate profits) does not skew or narrowly constrain the sustainability-based consideration of purpose, need and alternatives under the Act.

RECOMMENDATION #14: The *IAA* should be amended to:

> **(a) require that the assessment reports submitted by the Agency and review panels to the Minister must include a comparative analysis of alternatives to the project, alternative means of carrying out the project, and the null alternative; and**
>
> **(b) specify that the purpose of, and need for, a designated project shall be considered on the basis of sustainability criteria and the public interest, rather than the proponent's own perspective.**

CELA notes that section 22 includes the very considerations that the Minister or Cabinet are supposed to take into account under section 63 when determining if the designated project is in the "public interest" (e.g. contribution to sustainability, impacts on Indigenous rights, mitigation measures, and climate change implications). If the Agency's report to the Minister is supposed to promote or facilitate informed decision-making under sections 60 to 63, then it is imperative that the report must specifically address the exact same matters upon which the *IAA* decision to approve/reject will be based. Otherwise, there is a major disconnect between what the Agency is reporting upon, and what the actual decision will be based upon under the Act.

RECOMMENDATION #15: Section 28 of the *IAA* should be amended to specifically require the Agency's final report to the Minister to provide its findings, conclusions or recommendations in relation to all factors listed in section 22 and all public interest considerations listed in section 63.

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[39] *IAA*, subsection 28(3).
[40] *IAA*, subsection 22(2).

CELA further notes that the *IAA* merely obliges the Agency to provide the public with an "opportunity to participate" in the impact assessment of a designated project.[41] This sparse sentence in section 27 of the Act makes no reference to ensuring "meaningful" public participation, and provides no substantive direction on how and when this obligation should be implemented by the Agency through various means, techniques, languages and fora (including in-person meetings, mediation, alternative dispute resolution, etc.). In essence, section 27 duplicates the wording of the same inadequate provision found in the current *CEAA 2012*.[42] Therefore, this provision cannot be construed as a new or ground-breaking improvement on public participation opportunities that were correctly found to be deficient by the Expert Panel.

For example, although public participation is entrenched as a statutory purpose[43] of *CEAA 2012* (just as it is in the proposed *IAA*), the Expert Panel received considerable evidence from citizens, environmental groups and other stakeholders who encountered serious obstacles when attempting to participate in federal EA processes. These obstacles include: deficient or delayed public notices; short public comment periods; lack of timely access to all relevant documentation; inadequate awards of participant funding; and lack of basic procedural rights in some recent cases.

In light of this evidence, the Expert Panel properly recommended various reforms that were intended to go beyond mere public dissemination of project information under *CEAA 2012*, and that would help ensure meaningful public involvement in project design, assessment scoping, and decision-making. In particular, the Expert Panel recommended that:

- the new legislation should require the impact assessment process to provide early and ongoing public participation opportunities that are open to all;
- the results of public participation should have the potential to influence decisions;
- the participant funding program under the new legislation should be commensurate with the costs associated with meaningful participation in all phases of impact assessment, including post-approval monitoring and follow-up; and
- the new legislation should require that impact assessment information be easily accessible, and permanently and publicly available.[44]

Unfortunately, these important indicia of meaningful public participation are not reflected in the *IAA* adequately or at all. In our view, simply repeating *CEAA 2012*'s deficient public participation provision in the *IAA* will not lead to any tangible improvements in public engagement under the new regime.

More generally, CELA notes that the need for, and the societal benefits of, public participation in assessment processes has long been recognized, and need not be reviewed in detail in this brief.[45] Suffice it to say that early and meaningful opportunities for public involvement result in fairer and more credible processes, and improve the overall quality, acceptability and soundness of assessment decisions. In short, CELA submits that meaningful public participation is the *sine qua non* for informed decision-making under the proposed *IAA*.

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[41] *IAA*, section 27.
[42] *CEAA 2012*, section 24.
[43] *CEAA 2012*, subsection 4(1)(e).
[44] Expert Panel Report, pages 39 to 43.
[45] See, for example, MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 41 to 42; Canadian Bar Association, *Environmental Assessment Process Review* (December 2016), page 7.

Accordingly, CELA concludes that the single *IAA* sentence requiring an undefined "opportunity to participate" in Agency-led assessments may be a statement of good intention, but it is not an acceptable substitute for prescriptive details or specific legislative requirements that ensure meaningful public participation. Interestingly, while the purpose statement of the *IAA* contains a commitment to "meaningful" public participation,[46] the Act itself does not define this term, nor does it provide any indicators to help identify how and when "meaningful" participation opportunities should be provided to the public, stakeholders and Indigenous communities. For these reasons, CELA submits that section 27 must be significantly strengthened and expanded through appropriate amendments that ensure that the public can do more than merely file written comments from time to time in Agency-led assessments.

RECOMMENDATION #16: The *IAA* should be amended to:

> **(a) impose an affirmative duty on the Agency to take all necessary steps to ensure meaningful public participation occurs in all stages of the impact assessment and reporting process, starting from the early planning phase and continuing to post-approval monitoring and follow-up programs; and**
>
> **(b) provide further prescriptive details on how and when the Agency shall implement its duty to ensure meaningful public participation.**

(e) Substitution of Other Assessment Processes

Section 31 of the *IAA* generally enables the Minister to approve the use of another jurisdiction's assessment process instead of the federal process if he/she opines that the other process is an "appropriate substitute." Section 33 of the Act then lists some procedural considerations that the Minister is to take into account when determining whether to approve a substitution for the *IAA* process. Significantly, this section 33 list does not require the availability of participant funding in the other jurisdiction's assessment process as a precondition for substitution.

However, where substitution does occur, the other jurisdiction's process is deemed to be an impact assessment that satisfies all requirements of the *IAA*,[47] although federal decision-makers may require additional information from the proponent or the other jurisdiction.[48]

In principle, CELA supports the "one project - one assessment" approach often espoused by governmental officials, proponents and stakeholders during this law reform initiative. However, it is our view that this approach is best implemented by harmonizing, coordinating or integrating federal, provincial or Indigenous assessment regimes into a single joint process whenever possible, rather than by allowing wholesale substitutions for, or improper delegations from, the federal process established under the *IAA*.

On this issue, CELA acknowledges that the Expert Panel concluded that substitution could "remain an option in an enhanced federal IA process," and the Panel went on to articulate eight restrictive criteria as to when substitution should – or should not – be permitted.[49] However, some of the Panel's key criteria are not reflected in the section 33 list of substitution considerations under the *IAA*.

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[46] *IAA*, subsection 6(1)(h).
[47] *IAA*, section 34.
[48] *IAA*, section 35.
[49] Expert Panel Report, page 26.

For example, the Expert Panel recommended that "the principles of UNDRIP; specifically consent" should be reflected in the substituted decision-making process.[50] In contrast, section 33 of the *IAA* merely requires Indigenous "consultation" in the substituted process, and the UNDRIP itself is not mentioned anywhere in the Act.

Similarly, the Expert Panel recommended that substitution should only be available "on the condition that the highest standard of IA would apply," which the Panel describes as "a higher bar" than the current substitution provisions under *CEAA 2012*.[51] In contrast, this "upward harmonization" requirement is not reflected anywhere in the substitution provisions of the *IAA*.

In addition, the Expert Panel recommended that the federal assessment authority should be the entity determining whether substitution should be allowed.[52] In contrast, the proposed *IAA* confers the substitution power upon the Minister.

Since several of the Expert Panel's key safeguards have not been incorporated into the *IAA*, CELA concludes that the Act's substitution provisions are inadequate, and we recommend that they should be deleted in their entirety. In making this recommendation, CELA is mindful of the dubious substitution track record under *CEAA 2012*, which provides little or no evidence that substituted processes are better or more effective than cooperative (or joint) assessments in terms of ensuring robust reviews or environmentally sustainable decisions.[53] We further note that substitution may be difficult to implement in practice since provincial assessment regimes are diverse, variable, and non-duplicative of federal requirements or constitutional interests.

In summary, CELA submits that when a designated project is subject to multi-jurisdictional assessment by various levels of government, then, to the maximum extent possible, governmental officials should work together in a coordinated and cooperative manner to implement an efficient and rigorous "one project – one assessment" approach that satisfies all applicable requirements for all stages of the federal assessment process (e.g. from early engagement/planning to post-approval monitoring and follow-up).[54] For the same reason, CELA further recommends the deletion of the overbroad[55] delegation power in section 29 of the proposed *IAA*.

RECOMMENDATION #17: The *IAA* should be amended by deleting sections 29 and 31 to 35.

(f) Impact Assessments by Review Panels

In CELA's experience, properly framed, adequately staffed and sufficiently resourced review panel hearings represent the highest and best form of public participation in the impact assessment process. Not only do review panels offer parties an important opportunity to present (or challenge) evidence on the subject matter of the hearing, but they also enhance the overall credibility, completeness and fairness of the information-gathering stage and significantly assist in facilitating informed decision-making.

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[50] Expert Panel Report, page 25.
[51] Expert Panel Report, page 26.
[52] *Ibid*.
[53] Expert Panel Report, page 25. See also West Coast Environmental Law, *Submissions to the Expert Panel* (December 23, 2016), pages 6 to 7.
[54] See also MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 49 to 52.
[55] See also Arlene Kwasniak "Multi-Jurisdictional Assessment and Bill C-69 – The Further Fading Federal Presence in Environmental Assessment" (March 26, 2018), http://ablawg.ca/wp-content/uploads/2018/03/Blog_AK_Multijuris_BillC69.pdf.

Nevertheless, CELA has a number of concerns about the structure, composition, and function of review panels under the proposed *IAA*. Accordingly, we conclude that the review panel provisions of the *IAA* require various amendments before the Act is passed.

At the outset, we note that there are two basic ways in which a designated project can land in front of a review panel: the Minister can, in his/her discretion, refer a project to a review panel (section 36); or certain projects are automatically subject to review panels (sections 40 and 43). CELA strongly supports the automatic referral of designated energy projects that are regulated under the *Nuclear Safety and Control Act* or *Canadian Energy Regulator Act*, provided that the regulatory projects list includes a broad range of activities licenced under these statutes. However, the actual trigger or timing of this mandatory referral does not appear to be specified in the *IAA*.

To remedy this lack of clarity, CELA submits that this referral must occur at the earliest possible opportunity in the impact assessment process, preferably immediately after the initial documentation has been filed by the proponent. In our view, earlier engagement of the review panel will enable panel members to assist in the identifying the issues to be addressed in the forthcoming hearing. Otherwise, if the Agency unilaterally frames or "tailors" the impact statement guidelines (or other upfront documentation), then the resulting impact statement produced by the proponent may be too scoped (or excessively narrow) to enable the review panel to fully discharge its powers, duties and responsibilities under the *IAA*, as described below.

RECOMMENDATION #18: The *IAA* should be amended to require the Minister to refer energy-related projects to review panels forthwith (or within a specific timeline) after proponents file their initial documentation with the Agency.

As noted above, CELA recommends the wholesale deletion of section 16 of the *IAA* (Agency decision to not require an impact assessment). In the alternative, if section 16 remains in the Act, then the *IAA* should be amended to specify that this provision does not apply to matters referred to a review panel pursuant to section 43 of the Act.

RECOMMENDATION #19: The *IAA* should be amended to specify that section 16 does not apply to designated projects that are referred to review panels pursuant to section 43 of the Act.

In relation to the Minister's discretionary power to refer other projects to review panels, CELA notes that section 36 makes no explicit provision for enabling the public, environmental organizations, Indigenous communities or other levels of government to request such referrals. In our view, the *IAA* should specifically enable such requests to be filed, and the Minister should be required, within a prescribed timeline, to provide reasons why he/she has decided for or against referring the project to panel review.

Under subsection 36(1) of the *IAA*, it appears that the Minister can only refer a project to a review panel within 45 days after issuance of the notice of commencement of the impact assessment process. While CELA supports timely assessment processes (and expeditious referral to review panels), we are unclear about the basis for the proposed 45 day time limit. For example, as the proponent conducts the necessary studies, consults the public, engages Indigenous communities and otherwise prepares the Impact Statement over a number of months (or longer), it is not uncommon for new or unanticipated planning, technical or scientific issues to arise between the parties, which may warrant closer scrutiny and reporting by a review panel after a public hearing. Accordingly, CELA submits that the upfront 45 day constraint should be removed from subsection 36(1), and that the Minister should be free to refer a designated project to a review panel at any time within 45 days after the Impact Statement has been placed on the Registry for public comment.

In exercising his/her discretion whether to refer a project to a review panel, subsection 36(1) requires the Minister to opine if it is in the "public interest" to do so, while subsection 36(2) sets out three considerations on whether the public interest warrants referral (e.g. whether the potential effects are adverse; public concerns; and opportunities for cooperation). CELA agrees that these considerations are relevant factors, but we submit that the public interest also requires consideration of additional matters, including: the purposes of the Act (subsection 6(1)); the government's duty to foster sustainability and apply the precautionary principle (subsection 6(2)); and whether referral to a review panel will facilitate informed decision-making about the designated project (sections 60 to 63). Where one or more of these considerations are satisfied, then the Minister should be under a positive legal obligation to refer the designated project to a review panel, unless the Minister determines, with written reasons, that the referral request is frivolous, vexatious, or made in bad faith.

RECOMMENDATION #20: Section 36 of the *IAA* should be amended to:

(a) enable any person or jurisdiction to request the Minister to refer a designated project to a review panel;

(b) allow such referral requests to be made at any time up to 45 days after the proponent's Impact Statement has been placed on the Registry;

(c) require the Minister to make a decision on such referral requests within a prescribed timeline, and to provide reasons for decision to the person or jurisdiction that requested referral to a review panel;

(d) place a mandatory duty on the Minister, on request or on his/her own initiative, to refer a designated project to a review panel when it is in the public interest to do so, taking into account the following considerations:

(i) the extent to which the project may cause, or contribute to, direct, indirect or cumulative effects that are adverse;

(ii) public or Indigenous concerns about such effects;

(iii) opportunities for cooperation with other jurisdictions in the assessment of such effects;

(iv) the purposes of the Act;

(v) the federal government's duty to foster sustainability and apply the precautionary principle;

(vi) the extent to which referral to a review panel may facilitate informed decision-making by the Minister or Cabinet under the Act;

(vii) any other relevant factor; and

(e) specify that the Minister may refuse a referral request if he/she determines, with written reasons, that it is frivolous, vexatious or made in bad faith.

For the purposes of gathering information and making decisions, the Expert Panel recommended that the new Agency should be established as an independent, quasi-judicial authority (subject to Cabinet appeal).[56] Unfortunately, the *IAA* does not implement this sound recommendation, and instead carries forward the same basic *CEAA 2012* mechanism (e.g. preparation/submission of advisory reports to political decision-makers).

In order to regain public trust, ensure robust assessments and establish transparent, evidence-based decision-making, CELA submits that the proposed continuation of the *CEAA 2012* status quo is insufficient and unacceptable, and we strongly urge the Expert Panel's above-noted recommendation upon the Standing Committee. As we have noted in our previous submissions,[57] there is nothing legally necessary or inherently preferable about having the Minister or Cabinet make decisions under the *IAA*, as there are other notable federal and provincial precedents where independent tribunals (e.g. CRTC, Ontario's Environmental Review Tribunal, etc.) make binding decisions on matters of profound public importance or environmental significance. Our further comments on decision-making criteria under the *IAA* are set out below.

RECOMMENDATION #21: The *IAA* should be amended to establish the Agency as the single quasi-judicial authority that conducts assessments and makes decisions under the Act on behalf of the federal government.

In the event that the *IAA* is not amended to give effect to this recommendation, then CELA has a number of concerns about the Act's proposed arrangements regarding review panels and their reports to decision-makers. For example, if the Minister, in his/her discretion, refers a designated project to a review panel, then the Minister appoints the review panel members from rosters of persons established under section 50 of the *IAA*. During the first day of the Standing Committee hearings on Bill C-69, the Agency President suggested that maintaining the *ad hoc* roster approach from *CEAA 2012* provides wider flexibility than having hearings held by permanent administrative bodies.[58]

With respect, CELA submits that there is no merit to this claim. To the contrary, it has been our experience over the past four decades that permanent environmental tribunals are more than capable of sifting through conflicting technical and scientific evidence, and deciding the many diverse matters that come before them for public hearings. For example, the members of Ontario's Environmental Review Tribunal (and its predecessor EA Board and related Joint Boards) have conducted public hearings and rendered binding decisions on a wide range of complex and environmentally significant undertakings (e.g. forest management, aggregate extraction, hazardous waste disposal, landfills/incinerators, electricity demand/supply plan, etc.) This is also true of superior court judges, who hear and decide a wide variety of evidentiary issues without necessarily being technical experts (or former regulators) in the relevant field (e.g. medical malpractice, motor vehicle litigation, defective consumer products, environmental pollution, etc.).

CELA submits that these administrative and judicial examples readily demonstrate that establishing a permanent hearing tribunal (equipped with necessary administrative support, resources and capacity) under the *IAA* is both feasible and, in our view, preferable to the vagaries, inefficiencies and inconsistencies associated with the *ad hoc* approach imported from *CEAA 2012*.

RECOMMENDATION #22: The *IAA* should be amended to establish an independent Review Panel Hearings Office, comprised of full- and part-time unbiased permanent members drawn from regions

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[56] Expert Panel Report, pages 49 to 55.
[57] See, for example, http://www.cela.ca/preliminary-submissions-federal-ea-act, pages 14 to 18; http://www.cela.ca/publications/1132-supplementary-submissions-environmental-and-regulatory-reviews-discussion-paper-june-20, page 2.
[58] Transcript, Standing Committee Meeting 99 (March 22, 2018).

across Canada and appointed by Cabinet on the basis of their education, training, local or traditional knowledge, and experience in environmental issues and/or Indigenous rights and interests.

If, however, the roster-based model is retained within the *IAA*, then CELA strenuously objects to the ill-conceived proposal that rosters of regulators shall be maintained and used to appoint members of review panels to hear matters that are subject to the *Nuclear Safety and Control Act* and *Canadian Energy Regulator Act*. In particular, the *IAA* requires the Minister to appoint "at least" one member of the Canadian Nuclear Safety Commission ("CNSC"), or "at least" one commissioner of the Canadian Energy Regulator, to such panels. However, there is no statutory cap on the overall number of regulators that can be appointed to review panels, and there is nothing in the Act to prevent the Minister from appointing regulators as the Chairpersons of review panels. Indeed, there is nothing in the *IAA* to prevent the Minister from wholly stocking a review panel with members of regulatory bodies.

In our view, the skewed membership of review panels assessing energy projects under the *IAA* essentially repeats the same contentious types of regulator-led assessments that occurred under *CEAA 2012*, and that resulted in a loss of public trust which prompted the above-noted commitments by the federal government to review and revise the national EA regime in the first place. In short, public confidence cannot regained by creating a system that still allows regulators to lead, control or otherwise dominate assessments of projects that the regulators also happen to licence under other statutes. CELA's view is shared by several dozen other non-governmental organizations across Canada that sent a joint letter to the Environment Minister and Natural Resources Minister in December 2017 to vigorously object to allowing federal regulators to conduct or co-lead impact assessments.[59]

In addition, leaving aside strong public concern over regulatory capture or pro-industry favouritism by these regulatory bodies, CELA notes that the Expert Panel correctly concluded that regulators should not lead or conduct assessments under the new regime:

> An authority that does not have concurrent regulatory functions can be better held to account by all interests than can entities that are focused on one industry or area and that operate under their own distinct practices.
>
> Second, regulation and assessment are two quite distinct functions that require different processes and expertise. Regulatory licencing typically focuses on determining the technical acceptability of a proposed project against the requirements set out in a governing piece of legislation, with a consequent emphasis on technical expertise and a tendency for the regulator and the regulated industry to be in regular contact and discussions. Assessment is a planning process that considers both technical and non-technical matters and engages in public review to select the best options. The scope of assessment is much broader and requires more diverse expertise, especially in consideration of the sustainability approach being proposed by the Panel. Even under the current regime, the narrow mandate of regulators prevents them from fully assessing projects in specific situations (emphasis added).[60]

CELA fully concurs with the Expert Panel's analysis, and we commend it to the Standing Committee. CELA submits that for the reasons provided by the Expert Panel, it is incumbent upon Committee members to craft appropriate *IAA* amendments that would enable regulators to provide its "specialist or expert information or knowledge" in the assessment process (like any other federal authority under section 23 of the *IAA*), but not to actually conduct or co-lead the assessment process or to prepare the review panel's report to decision-makers under the Act.

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[59] http://www.cela.ca/LetterToMinistersReNuclearEA.
[60] Expert Panel Report, pages 50 to 51.

RECOMMENDATION #23: The *IAA* should be amended by deleting subsections 42(2)(b) and (c); 44(3); 46; 47(3); 48; 50(a) and (b); 51(2) and (3); and any other provisions that propose to place regulators on review panels.

In the alternative, if the *IAA* continues to allow regulators to be appointed to review panels, then the Act must be amended to clearly restrict such appointments. CELA's primary position is that regulators should not serve as members or Chairpersons of review panels at all, but if this remains as an option under the *IAA*, then the Act must establish specific limits on the number and role of regulators on review panels.

RECOMMENDATION #24: In the alternative, sections 44 and 47 of the *IAA* should be amended to specify that no more than one member of the CNSC, or one commissioner of the Canadian Energy Regulator, may be appointed to a review panel, and that the appointed member or commissioner cannot be named as the Chairperson of a review panel.

Section 22 of the IAA sets out the mandatory factors that must be addressed in every impact assessment that is conducted under the Act. As noted above, CELA is generally content with the lengthy list of section 22 factors, but we remain concerned about the Minister's omnipresent power to "scope" (or constrain) these factors once a designated project is referred to a review panel. Presumably, this scoping power – which is being carried forward from *CEAA 2012* – will be exercised by the Minister when fixing the terms of reference for review panels, although the precise timing of assessment scoping remains unclear under the *IAA*.

For example, it is uncertain whether these factors will get scoped by the Minister prior to the issuance of impact statement guidelines to the proponent, or when the Minister determines, in his/her discretion, that an Agency-led assessment should be referred to a panel, or when an energy project is automatically subject to a review panel and the initial project description is first filed by the proponent. In this regard, CELA submits that it would be helpful to engage the review panel in any scoping determinations at the earliest possible opportunity in order to ensure meaningful evaluation of all section 22 factors by the time that the proponent's Impact Statement is received by the panel and the public hearing process is commenced under the Act.

RECOMMENDATION #25: The *IAA* should be amended to clarify how and when the Minister's power to "scope" section 22 factors may be exercised in relation to designated projects that are referred to a review panel under sections 36, 40 or 43.

Sections 41, 42, 44 and 47 of the *IAA* empower the Minister to establish the terms of reference for review panels. However, no express provision is made for public review/comment of the proposed terms of reference prior to their issuance by the Minister. To order to ensure meaningful public participation – and meaningful review panel hearings – the Minister should be obliged to post draft terms of reference on the Registry and/or internet site (see sections 104 to 105), and to solicit and consider any public comments received on the draft before finalizing and issuing the terms of reference.

RECOMMENDATION #26: Sections 41, 42, 44 and 47 of the *IAA* should be amended by requiring the Minister to post draft terms of reference for review panels on the Registry and/or internet site, and to solicit and consider any public comments received on the draft before establishing the terms of reference.

The *IAA* imposes various obligations upon review panels, including filing its report after hearing the evidence and argument on the issues in dispute at the public hearing.[61] However, the content requirements for panel reports

[61] *IAA*, section 51.

largely replicate what is currently found in *CEAA 2012*,[62] and appear to be largely focused on the question of whether there may be adverse effects within federal jurisdiction, rather than the full set of factors under section 22. Similarly, section 51 does not actually require review panel to provide its "rationale, conclusions or recommendations" on whether project is in the "public interest," as outlined by the section 63 list of considerations.

These glaring omissions strike CELA as a major oversight that must be addressed through appropriate amendments to section 51 of the *IAA*. If the overall purpose of the review panel is to test the evidence, weigh conflicting expert opinions, consider competing perspectives, and provide a report that facilitates informed decision-making under the Act, then the panel report must be specifically required to address all section 22 factors and all "public interest" considerations that the Minister or Cabinet must take into account under section 63.

In our view, clarifying the legal nexus between the information-gathering and decision-making stages under the Act will enhance accountability and achieve the stated purposes of the *IAA*. In addition, it is clear that review panels – not political decision-makers – will be directly receiving and evaluating the evidence and argument submitted by the parties. Similarly, review panels – not political decision-makers – will have the best opportunity to observe the demeanor of expert witnesses and make findings about their credibility or the reliability of their opinions. Thus, review panel members are closer to the action and are better positioned than political decision-makers to make the key findings on whether, for example, the project will – or will not – make a contribution to sustainability, as required by section 63.

RECOMMENDATION #27: Section 51 of the *IAA* should be amended to specifically require the review panel's report to provide its rationale, conclusions or recommendations in relation to all factors listed in section 22 and all public interest considerations listed in section 63.

It is beyond dispute that the institutional ability of review panels to provide substantive assistance to decision-makers under the Act will greatly depend on the practice and procedure utilized by review panels to conduct public hearings. In short, a comprehensive and participatory hearing process is the condition precedent for ensuring meritorious and technically sound decisions by the Minister or Cabinet under the *IAA*.

Nevertheless, in CELA's opinion, the proposed *IAA* contains inadequate legislative details on this critically important matter, other than merely directing panels to hold hearings that offer an "opportunity" for public participation,[63] and that emphasize "flexibility and informality."[64] In principle, CELA agrees that review panel hearings should not be transformed into highly adversarial civil trials featuring complicated interlocutory stages, unwieldy production/disclosure obligations, or unduly prescriptive evidentiary rules.

On the other hand, CELA submits that there must be sufficient rigour and minimum procedural safeguards (e.g. examination and cross-examination of expert witnesses) within the hearing process in order to: (a) achieve the purposes of the Act; (b) to test the evidence adduced by the proponent, federal authorities and other parties; and (c) enable the review panel to properly complete its statutory tasks in a fair and credible manner. After all, review panels are holding legally mandated "hearings," not inconsequential public meetings or casual town hall events. In addition, for the purposes of greater certainty and predictability, the *IAA* should require general consistency in review panel practice and procedure across Canada. At the same time, the *IAA* should recognize that in some cases, there may be a need to allow review panels to depart from general hearing rules in appropriate circumstances.

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[62] *CEAA 2012*, section 43.
[63] *IAA*, subsection 51(1)(c).
[64] *IAA*, section 54.

Accordingly, CELA strongly submits that the *IAA* should provide a uniform list of basic procedural rights conferred upon hearing parties in review panel proceedings. These and other rights can be supplemented or operationalized as rules of practice[65] issued under the regulation-making authority under the Act. These procedural safeguards could resemble those entrenched in Ontario's *Statutory Powers Procedure Act* (*SPPA*),[66] which generally applies to administrative boards (e.g. Environmental Review Tribunal) that hold public hearings in the exercise of statutory powers of decision under provincial legislation (e.g. *Environmental Assessment Act*). These safeguards include, but are not necessarily limited to:

- right to reasonable notice;
- right to representation;
- right to present evidence;
- right to call and examine witnesses; and
- right to cross-examine witnesses.

The *SPPA* also addresses a number of matters regarding the conduct of public hearings, such as: alternative dispute resolution; rules of practice; pre-hearing conferences; types of hearings; witness panels; official notice of facts or opinions; costs; administration of oaths; and record of proceedings. CELA submits that these and other key hearing-related matters should be specifically addressed in the *IAA* and in more detailed regulations promulgated by Cabinet or the Minister.

RECOMMENDATION #28: The *IAA* should be amended to:

(a) entrench basic procedural rights for parties involved in hearings held by review panels; and

(b) expand the regulation-making authority in section 109 (or, in the alternative, section 112) to enable the promulgation of rules of practice and procedure to govern hearings held by review panels.

Where a designated project has been referred to a review panel, it is possible for the Minister to enter into agreements with other jurisdictions in order to establish a joint review panel.[67] CELA supports this provision since it implements the collaborative multi-jurisdictional approach endorsed above in this brief. However, the proposed *IAA* goes on to prohibit the Minister from entering into a joint review panel agreement where the designated projects include physical activities regulated under the *Nuclear Safety and Control Act* or the *Canadian Energy Regulator Act*.[68] We are unaware of any persuasive public interest rationale for this highly questionable prohibition, and CELA therefore recommends to the Standing Committee that this prohibition should be deleted from the Act.

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[65] See, for example, the Ontario Environmental Review Tribunal's *Rules of Practice and Procedure* (September 12, 2016), which serve as an excellent illustrative example of how to define and entrench public participation rights in public hearings, including impact assessment proceedings.
[66] RSO 1990, c.S.22.
[67] *IAA*, section 39.
[68] *IAA*, subsection 39(2).

RECOMMENDATION #29: The *IAA* should be amended by deleting subsection 39(2).

CELA notes that section 37 of the *IAA* requires review panels to submit their reports to the Minister no later than 600 days after the panel is first appointed. This timeframe is considerably shorter than the current timeframe (720 days) used under *CEAA 2012*, ostensibly because of the alleged efficacy of new early planning phase under the *IAA*. However, for the reasons outlined above, CELA submits that significant improvements are required in the upfront planning phase in order for any significant time savings or process efficiencies to occur under the Act.

More generally, it appears to CELA that while the 600 day timeline may be workable for some projects, it may be inadequate for other projects, particularly those posing sizeable environmental risks, transboundary effects, or impacts upon Indigenous rights or interests. Accordingly, the 600 day limit strikes CELA as an arbitrary "one size fits all" rule that is unrealistic and inappropriate. Section 37 of the Act itself seems to implicitly recognize this fact by conferring statutory discretion upon the Minister or Cabinet to extend or suspend time limits. However, we draw no comfort from the mere existence of this discretion in the *IAA*, particularly since no criteria are established in the Act to structure the exercise of this discretion, which can also be used to actually shorten the timeline.[69]

In our view, the preferable approach is to delete the *IAA*'s specific reference to 600 days, and to enable the review panel itself, in consultation with the hearing parties, to work out a fair, timely and appropriate timetable that allows the panel to fully discharge its powers, duties and responsibilities under the Act. On this point, it appears to CELA that while imposing statutory time limits may make the *IAA* more politically palatable to proponents or other stakeholders, the legal reality is that time limits are problematic relics from *CEAA 2012* that should be discontinued under the *IAA*. Legislated time limits also raise serious questions about the credibility, function and independence of review panels, and should be avoided under the Act.

RECOMMENDATION #30: Section 37 of the *IAA* should be amended to delete the "600 day" time limit, and to enable review panels to develop an appropriate project-specific timetable for the public hearing and the delivery of the panel's report.

In taking this position, CELA hastens to assure the Standing Committee that we fully support efficient and timely review panel proceedings. In our view, however, it is not in the public interest for the *IAA* to pressure review panels to craft superficial reports that gloss over or ignore the issues in dispute just to meet a pre-determined deadline. In short, a rushed report is not necessary a better report for informed decision-making under the Act. Put another way, administrative or political expediency should not trump fairness considerations or the need for careful evidence-based deliberation by the panel on all applicable factors and sustainability considerations.

(g) Decision-Making by the Minister or Cabinet

As noted above, CELA supports the Expert Panel's recommendation that the Agency should be established as an independent quasi-judicial authority that gathers information and makes decisions under the *IAA*.

CELA notes that the need for independent – not political – review of assessments and decision-making has also been endorsed by a recent United Nations report on environmental and human rights:

> Prior assessment of the possible environmental impacts of proposed projects and policies is generally required by national laws, and the elements of effective environmental assessment are widely understood: the assessment should be undertaken as early as possible in the decision-making process for any proposal

[69] *IAA*, subsection 37(2)(b).

> that is likely to have significant effects on the environment; the assessment should provide meaningful opportunities for the public to participate, should consider alternatives to the proposal, and should address all potential environmental impacts, including transboundary effects and cumulative effects that may occur as a result of the interaction of the proposal with other activities; the assessment should result in a written report that clearly describes the impacts; and the assessment and the final decision should be subject to review by an independent body (emphasis added).[70]

In our view, the proposed *IAA* does not adequately reflect or entrench these principles, particularly since the ultimate decision under the Act is made by politicians, and is not subject to review by, or appeal to, an independent body. In addition, CELA submits that the controversial track record under *CEAA 2012* (and *CEAA 1992*) clearly demonstrates that leaving the assessment decision to politicians is not a panacea. In short, utilizing this model again in the *IAA* will not dissipate public distrust about politicized decision-making in the impact assessment context.

Nevertheless, in the event that political decision-making is continued under the *IAA*, then CELA has a number of concerns about certain provisions regarding Ministerial or Cabinet decisions under the Act.

For example, sections 60, 62 and 64 of the Act require these decision-makers to determine whether adverse effects within federal jurisdiction, as indicated in assessment reports by the Agency or review panel, are "in the public interest." This peculiar legislative drafting is somewhat puzzling to CELA, and we suspect that the intent is to require the Minister or Cabinet to determine whether designated projects are in the public interest despite their adverse effects. If so, then these sections should be re-worded.

RECOMMENDATION #31: Sections 60, 62 and 64 of the *IAA* should be amended to clarify that the Minister or Cabinet is required to determine whether designated projects (not their adverse effects) are in the public interest.

In making this "public interest" determination, the *IAA* specifies that the Minister or Cabinet "must" consider five factors:

- the extent to which the project "contributes" to sustainability;
- the extent to which the indicated effects are adverse;
- the implementation of "appropriate" mitigation measures;
- the potential impacts on constitutionally protected Indigenous rights and interests; and
- the extent to which the project's effects may "hinder or contribute" to Canada's ability to meet its environmental obligations and commitments regarding climate change.[71]

While some observers (including the Minister[72]) have described these provisions as a public interest "test," CELA submits that section 63 does not delineate a clear legal standard for granting/refusing approvals under the Act. Instead, section 63 is best characterized as a loose collection of vague terms that must simply be "considered," possibly traded off against each other, and described in reasons for decision, without any requirement to explain

[70] John Knox, *Framework Principles on Human Rights and the Environment* (March 2018), page 13.
[71] *IAA*, section 63.
[72] Transcript, Standing Committee Meeting 99 (March 22, 2018).

or justify any trade-offs or compromises made between the five factors.[73] Even for political (or "ballot box") accountability purposes, section 63 falls considerably short of the mark, and requires immediate revision to ensure that the *IAA* decision is based on these five factors, and does not merely "consider" them.

This is also true for legal accountability purposes since recent *CEAA* jurisprudence[74] suggests that the decision-maker only needs to give "some consideration" to the factors enumerated by the statute. This has been described by the courts in judicial review proceedings as a "low threshold," which means that the courts may be unwilling to intervene or overturn the *CEAA* approval decision unless it is demonstrated that the decision-maker gave no consideration whatsoever to a mandatory factor.[75] Thus, it appears to be permissible for the *CEAA* decision-maker to simply mention the factor, however briefly, in the decision, even if there is little or no evidence to support the decision-maker's discussion of the factor. In short, under the reasonableness standard of review, some court judgments have exhibited considerable deference to *CEAA* decisions, and have been reluctant to closely scrutinize or carefully probe the impugned decision to discern whether it is justifiable, transparent, or intelligible[76] in light of a purposive interpretation of the relevant legislative provisions.

To remedy these concerns about transparency and accountability, CELA submits that there are several *IAA* amendments that should be developed and implemented. First, section 63 should be transformed from a mere "consideration" approach to an actual legal standard that prescribes an appropriate standard of proof for approving/rejecting designated projects. For example, the Act should specify that no designated project shall be approved by the Minister or Cabinet unless the impact assessment record demonstrates, on a balance of probabilities, that the project is in the public interest because it:

- will provide a positive, equitable and long-lasting contribution to sustainability by providing net benefits to environmental, social, economic, health and cultural well-being;

- is consistent, or does not conflict, with Canada's targets and timetables under international climate change agreements, treaties or conventions, or under federal law or regulations; and

- does not adversely impact Indigenous rights of Indigenous peoples as affirmed by section 35 of the *Constitution Act, 1982*, and is consistent, or does not conflict, with the UNDRIP or the FPIC principle.

The foregoing list is not intended to be exhaustive in nature, and it is certainly open to the Standing Committee to consider creating other legally binding criteria to govern decision-making under the *IAA*.

Second, the central "contribution to sustainability" concept must be more fully fleshed out in the Act and the implementing regulations (in which case, the regulation-making authority in section 109 should be expanded to expressly enable the passage of clear and consistent regulatory details on interpreting and applying sustainability requirements). For example, these additional details should provide concise direction on how "contributions" are to be identified and evaluated, how the precautionary and adaptability principles are to be applied, how adverse effects should be avoided, and on how traceable trade-offs (if any) are to be made among the various pillars of sustainability. As noted above, these matters, if incorporated as decision-making criteria under section 63, should be explicitly addressed in assessment reports prepared by the Agency and review panels and submitted to the Minister and Cabinet.

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[73] *IAA*, subsection 65(2).
[74] See, for example, *Ontario Power Generation Inc. v. Greenpeace et al.*, 2015 FCA 186, paras. 124-130, 134-135, 139 and 151.
[75] *Ibid*.
[76] *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 22, 25-29, 41, 47.

Third, to enhance accountability, the Minister or Cabinet decision should be reviewable upon an appeal to a specialized independent body or tribunal established under the *IAA*. In the alternative, there should be an express right of appeal on questions of law, or mixed questions of law/fact, to the Federal Court in relation to Ministerial or Cabinet decisions under the *IAA*. The appeal deadline should be 30 days from the time that the Minister or Cabinet releases its decision statement and reasons for decision pursuant to section 65. In our view, a statutory appeal to an independent tribunal or to the Federal Court would provide appropriate (and much-needed) administrative or judicial oversight to ensure compliance with the decision-making requirements imposed by the Act, including the legal standard for approving/rejecting designated projects.

Fourth, the revised "public interest" criteria in section 63 for decisions on designated projects should also be made applicable to federal decisions made in relation to strategic and regional assessments conducted pursuant to sections 92 to 103 of the *IAA*.

Fifth, the reasons for decision under subsection 65(2) must include an evidence-based justification of any trade-offs that were made between or among the public interest considerations under section 63. This recommendation is based on two concerns: (a) there can be no transparency or accountability without expressly requiring a reasonably detailed explanation on how and why trade-offs were made; (b) the reasons for decision must not merely parrot the statutory language of section 63, but must instead provide a cogent evidence-based account of why, for example, a project was approved despite the likelihood of adverse environmental effects or impacts on Indigenous rights and interests.

Sixth, section 65 requires the decision statement to attach conditions established under section 64, including mandatory mitigation measures and follow-up programs. Conditions of approval may be amended, added, removed by the Minister in some circumstances, but not when the designated projects involve physical activities regulated under the *Nuclear Safety and Control Act*.[77] CELA is unaware of any compelling public policy reason to impose this limitation in relation to *IAA* conditions governing nuclear projects, and we therefore recommend that subsection 68(4) should be deleted.

Seventh, if a proponent does not comply with one or more of the conditions of approval, there should be a positive legal duty on the proponent to self-report non-compliance to the Minister forthwith. As a legislative precedent, it should be noted that mandatory self-reporting is required in the *Fisheries Act*,[78] *Canadian Environmental Protection Act, 1999*[79] and other environmental laws.[80] In CELA's view, the practical reality is that federal enforcement officers or analysts cannot be deployed everywhere in Canada to monitor and enforce decision statements under the *IAA*. Therefore, imposing a legally enforceable duty upon proponents to self-report non-compliance will assist in protecting the environment, safeguarding public health, and ensuring sustainability.

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[77] *IAA*, subsection 68(4).

[78] RSC 1985, c.F-14, subsection 38(4) (reporting occurrence causing serious harm to fish); and subsection 38(5) (reporting unauthorized deposit of deleterious substance into water frequented by fish).

[79] SC 1999, c.33, section 95 (reporting the release of toxic substances in contravention of an order or regulation); section 169 (reporting the release of international air pollutant in contravention of a regulation); and section 179 (reporting the release of international water pollutant in contravention of a regulation).

[80] See, for example, Ontario's *Environmental Assessment Act*, RSO 1990, c.E.18, subsection 5(5) (notifying Minister that proponent cannot comply with the EA approval as a result of a change in circumstances); and *Environmental Protection Act*, RSO 1990, c.E.19, section 15 (reporting the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect).

RECOMMENDATION #32: The *IAA* should be amended by:

(a) creating a new legal standard for decision-making under section 63 of the Act, which should specify that no designated project shall be approved by the Minister or Cabinet unless the impact assessment record demonstrates, on a balance of probabilities, that the project is in the public interest because it:

- will provide a positive, equitable and long-lasting contribution to sustainability by providing net benefits to environmental, social, economic, health and cultural well-being;

- is consistent, or does not conflict, with Canada's targets and timetables under international climate change agreements, treaties or conventions, or under federal law or regulations; and

- does not adversely impact the rights of Indigenous peoples as affirmed by section 35 of the *Constitution Act, 1982*, and is consistent, or does not conflict, with the UNDRIP or the FPIC principle;

(b) providing additional details, rules and criteria on the "contribution to sustainability" component of the new legal standard, which should be further supplemented by regulations under the Act;

(c) establishing a statutory right of appeal that lies from Ministerial or Cabinet decisions on designated projects to a specialized or independent body established under the Act, or in the alternative, to the Federal Court on questions of law and mixed questions of law/fact;

(d) specifying that the revised "public interest" criteria in section 63 for decisions on designated projects should also be made applicable to federal decisions made in relation to strategic and regional assessments conducted pursuant to sections 92 to 103 of the Act;

(e) requiring the Minister's reasons for decision under subsection 65(2) to include an evidence-based justification for any trade-offs made between the public interest factors listed in section 63;

(f) deleting subsection 68(4); and

(g) requiring the proponent to immediately self-report to the Minister any non-compliance with conditions contained in a decision statement issued under the Act.

(h) Projects on Federal Lands or Outside of Canada

Sections 81 to 91 of the proposed *IAA* impose duties upon certain federal authorities in relation to different types of physical activities to be carried out on federal lands (e.g. national parks) or outside of Canada. In essence, these provisions duplicate what currently exists in *CEAA 2012*.[81]

CELA notes that these *IAA* duties do not require these authorities to actually conduct an impact assessment in accordance with the Act. Instead, these authorities are merely directed to determine whether their proposals are likely – or are not likely – to cause significant adverse environmental effects ("SAEE").[82] This key term remains

[81] *CEAA 2012*, sections 66 to 70.
[82] *IAA*, sections 82 and 83.

undefined in the *IAA*, but the Act lists some "factors" that must be considered in making this determination.[83] More alarmingly, there is no apparent duty upon federal authorities to ensure meaningful public participation within this self-assessment process, except that the authorities must, at some point, web-post notice of its intent to make the SAEE determination, and to "invite" public comments thereon.[84]

This questionable and unaccountable approach attracted strong criticism from the Expert Panel:

> The Panel has considered the role of s.67 of *CEAA 2012* [now section 82 of the *IAA*]… and concluded that it is not consistent with the Panel's vision for IA as it lacks transparency and meaningfulness… The Panel concludes that projects currently subject to s.67 meet the new project definition of affecting one or more federal interests and should therefore trigger IA where they meet the new proposed tests for triggering IA.[85]

CELA concurs with the Expert Panel's views regarding the assessment of projects on federal lands, and we submit that they apply, with necessary modification, to projects outside of Canada which are subject to the same limited process and the same SAEE determination. Accordingly, CELA submits that sections 81 to 91 should be deleted and replaced by provisions which require the Agency to conduct an impact assessment and to report to Cabinet whenever federal authorities propose to undertake, fund, issue permits, or assign land/water interests to enable designated projects to proceed on federal lands or outside of Canada.

RECOMMENDATION #33: The *IAA* should by amended by deleting sections 81 to 91, and by designating activities or facilities on federal lands or outside of Canada as projects which trigger an obligation upon the Agency (not the federal authority) to prepare an impact statement and submit a report to Cabinet in accordance with the Act (including meaningful public participation), where such projects are linked to federal interests.

In making this recommendation, CELA acknowledges that it may be possible to design a more streamlined Agency-led assessment process for projects (or classes of projects) on federal lands or outside of Canada. This process could be established in the *IAA* itself or through regulations, provided that the resulting process is credible, participatory and transparent.

RECOMMENDATION #34: The Government of Canada should consider establishing a streamlined Agency-led assessment process, in the *IAA* or regulations, which applies to projects (or classes of projects) on federal lands or outside of Canada.

(i) Regional and Strategic Assessments

CELA agrees that strategic and regional assessments are important tools for not only evaluating cumulative effects, but also for addressing broader policy issues, comparatively evaluating alternative approaches and development scenarios, and understanding the overall environmental, socio-cultural and economic context for individual projects. In our view, appropriately framed strategic or regional assessments have considerable potential to help determine resource management priorities and appropriate land uses, particularly in areas where there has been little or no resource development, extraction activities or related infrastructure expansion.

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[83] *IAA*, section 84.
[84] *IAA*, section 86.
[85] Expert Panel Report, page 57.

The Expert Panel report acknowledged the need for strategic and regional assessments, and offered a number of detailed findings and recommendations on this topic.[86] In particular, the Expert Panel correctly recommended that:

- the new legislation should require regional impact assessments where cumulative impacts may occur or already exist on federal lands or marine areas, or where there are potential consequential cumulative impacts to matters of federal interest;

- the legislation should require the assessment authority to develop and maintain a schedule of regions that would require a regional impact assessment and to conduct those regional assessments;

- regional impact assessments should establish thresholds and objectives to be used in project-level assessments and federal decision-making;

- the legislation should require the assessment authority conduct a strategic impact assessment when a new or existing federal policy, plan or program would have consequential implication for federal project or regional impact assessment; and

- strategic impact assessment should define how to implement a policy, plan or program in project and regional IA.[87]

In this regard, we note that the Multi-Interest Advisory Committee ("MIAC") has also offered similar advice that strongly affirms the need for effective strategic- and regional-level assessments in Canada.[88]

Despite this well-founded advice, the proposed *IAA* fails to provide any operational details on how strategic and regional assessments are to be triggered, structured and implemented under the Act. In short, the *IAA* does not create a legally binding duty to conduct strategic or regional EAs of federal plans, policies and programs, and essentially leaves these matters to virtually unfettered governmental discretion.

On this point, we also note that the Commissioner of the Environment and Sustainable Development has reported[89] that leaving strategic EA to a Cabinet directive has meant that few federal ministries or agencies have fully considered the environmental implications of governmental plans, programs or policies. CELA reasonably anticipates that a similarly disappointing track record will occur under the *IAA* unless it expressly imposes a mandatory legal duty upon the federal Cabinet (and ministries, departments or agencies) to conduct strategic- or regional-level assessments.

RECOMMENDATION #35: The *IAA* should be amended by specifying the mandatory triggers, content requirements, procedural steps, implementation of outcomes, and opportunities for public and Indigenous participation in strategic and regional assessments.

Moreover, CELA submits that properly designed strategic- or regional-level sustainability assessments should not be confined to certain discrete matters within the Government of Canada's exclusive constitutional jurisdiction (e.g. fisheries, migratory birds, etc.). To the contrary, CELA envisions that the information-gathering

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[86] Expert Panel Report, pages 76 to 85.
[87] *Ibid*.
[88] MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), page 34.
[89] Commissioner of the Environment and Sustainable Development, *2016 Fall Report 3: Departmental Progress in Implementing Sustainable Development Strategies*, paragraphs 3.13 to 3.22.

phase of strategic- and regional-level assessments will inevitably involve other matters and other jurisdictions across Canada. In this regard, CELA endorses the "cooperative assessment" approach recommended by the Expert Panel.[90]

PART III – CONCLUSION

For the foregoing reasons, CELA concludes that the federal government's decision to graft *IAA* reforms directly onto the fundamentally flawed *CEAA 2012* structure is both unfortunate and unacceptable. As succinctly noted by one experienced commentator, "*CEAA 2012* was a backwards and mistaken step, and there is nothing in it worth retaining."[91]

In our view, the ill-advised *IAA/CEAA 2012* hybrid continues or compounds many of the current problems within the current federal EA regime, but it also creates new difficulties and considerable uncertainties, all of which must be addressed by carefully tailored amendments.

Accordingly, CELA calls upon the Standing Committee to develop and adopt a series of appropriate revisions to the *IAA* that will actually achieve the stated objectives of this important law reform exercise. Despite the unduly compressed nature of the Standing Committee's current hearing schedule, the paramount challenge for all Committee members is to identify and pursue the full suite of *IAA* changes that are needed to entrench a robust, participatory and evidence-based impact assessment and decision-making process at the national level in Canada.

CELA's specific recommendations and proposed statutory amendments that help salvage the proposed *IAA* are summarized below in Appendix A. We trust that these recommendations will be considered and acted upon as the *IAA* continues its way through the Parliamentary process.

April 6, 2018

[90] Expert Panel Report, pages 22 to 24.
[91] Peter Usher, *Response to the Government Discussion Paper on EA Reform, with particular Reference to Independent Panel Reviews for Major Projects* (August 24, 2017), page 1.

APPENDIX A

CELA'S RECOMMENDATIONS AND PROPOSED AMENDMENTS TO THE *IMPACT ASSESSMENT ACT* ("*IAA*")

RECOMMENDATION #1: The section 2 definition of "effects" should be amended to include cultural conditions.

RECOMMENDATION #2: The Government of Canada's proposed content of Schedule 3 of the *IAA* should be publicly disclosed as soon as possible.

RECOMMENDATION #3: The section 2 definition of "effects within federal jurisdiction" will require amendments if the *IAA* triggers for impact assessment are expanded to include all relevant areas of federal interest.

RECOMMENDATION #4: The concept and definition of "interested party" should not be reinstated in the *IAA*.

RECOMMENDATION #5: The purposes and/or text of the *IAA* should be amended to expressly refer to, and fully incorporate, the UNDRIP, including the FPIC principle.

RECOMMENDATION #6: The Government of Canada's proposed content of Schedule 2 of the *IAA* should be publically disclosed as soon as possible.

RECOMMENDATION #7: For project-level assessments, the *IAA* should be amended to incorporate all proper and necessary triggers that engage, or are linked to, areas of federal interest, including (but not limited to) federal lands, federal funding, federal approvals, and federal proponency.

RECOMMENDATION #8: Section 6 of the *IAA* should be amended to include more precise language about the overall intent and desired outcomes of impact assessment and decision-making for projects, plans, policies and programs that are linked to areas of federal interest, and should be reframed to better reflect the paramountcy of sustainability in all stages of the new process.

RECOMMENDATION #9: Section 9 of the *IAA* should be amended to specify that any person or jurisdiction may request the Minister to issue an order to designate physical activities that are not prescribed by the regulatory projects list.

RECOMMENDATION #10: The Government of Canada should release its draft regulatory projects list for public review and comment as soon as possible, and well before the *IAA* receives Third Reading and Royal Assent.

RECOMMENDATION #11: Sections 10 to 15 of the *IAA* should be amended by:

> **(a) setting out prescriptive details on how the Agency will ensure that meaningful public participation occurs during the early planning phase;**
>
> **(b) specifying that adequate participant funding will be made available during the early planning phase;**

(c) providing a time-limited opportunity to appeal the Agency's planning phase determinations to the Minister or, in the alternative, to a specialized appellate tribunal; and

(d) requiring the early planning phase to commence with the proponent's filing of a detailed description of a reasonable range of alternatives that address the need, issue or opportunity that the proponent intends to pursue.

RECOMMENDATION #12: Section 16 of the *IAA* should be deleted.

RECOMMENDATION #13: Section 28(2) of the *IAA* should be amended by deleting the reference to "300 days", and by enabling the Agency, after receiving parties' input during the early planning phase, to establish an appropriate timeframe for completion of the assessment process and submission of the Agency's report to the Minister.

CELA RECOMMENDATION #14: The *IAA* should be amended to:

(a) require that the assessment reports submitted by the Agency and review panels to the Minister must include a comparative analysis of alternatives to the project, alternative means of carrying out the project, and the null alternative; and

(b) specify that the purpose of, and need for, a designated project shall be considered on the basis of sustainability criteria and the public interest, rather than the proponent's own perspective.

RECOMMENDATION #15: Section 28 of the *IAA* should be amended to specifically require the Agency's final report to the Minister to provide its findings, conclusions or recommendations in relation to all factors listed in section 22 and all public interest considerations listed in section 63.

RECOMMENDATION #16: The *IAA* should be amended to:

(a) impose an affirmative duty on the Agency to take all necessary steps to ensure meaningful public participation occurs in all stages of the impact assessment and reporting process, starting from the early planning phase and continuing to post-approval monitoring and follow-up programs; and

(b) provide further prescriptive details on how and when the Agency shall implement its duty to ensure meaningful public participation.

RECOMMENDATION #17: The *IAA* should be amended by deleting sections 29 and 31 to 35.

RECOMMENDATION #18: The *IAA* should be amended to require the Minister to refer energy-related projects to review panels forthwith (or within a specific timeline) after proponents file their project documentation with the Agency.

RECOMMENDATION #19: The *IAA* should be amended to specify that section 16 does not apply to designated projects that are referred to review panels pursuant to section 43 of the Act.

RECOMMENDATION #20: Section 36 of the *IAA* should be amended to:

(a) enable any person or jurisdiction to request the Minister to refer a designated project to a review panel;

(b) allow such referral requests to be made at any time up to 45 days after the proponent's Impact Statement has been placed on the Registry;

(c) require the Minister to make a decision on such referral requests within a prescribed timeline, and to provide reasons for decision to the person or jurisdiction that requested referral to a review panel;

(d) place a mandatory duty on the Minister, on request or on his/her own initiative, to refer a designated project to a review panel when it is in the public interest to do so, taking into account the following considerations:

(i) the extent to which the project may cause, or contribute to, direct, indirect or cumulative effects that are adverse;

(ii) public or Indigenous concerns about such effects;

(iii) opportunities for cooperation with other jurisdictions in the assessment of such effects;

(iv) the purposes of the Act;

(v) the federal government's duty to foster sustainability and apply the precautionary principle;

(vi) the extent to which referral to a review panel may facilitate informed decision-making by the Minister or Cabinet under the Act;

(vii) any other relevant factor; and

(e) specify that the Minister may refuse a referral request if he/she determines, with written reasons, that it is frivolous, vexatious or made in bad faith.

RECOMMENDATION #21: The *IAA* should be amended to establish the Agency as the single quasi-judicial authority that conducts assessments and makes decisions under the Act on behalf of the federal government.

RECOMMENDATION #22: The *IAA* should be amended to establish an independent Review Panel Hearings Office, comprised of full- and part-time unbiased permanent members drawn from regions across Canada and appointed by Cabinet on the basis of their education, training, local or traditional knowledge, and experience in environmental issues and/or Indigenous rights and interests.

RECOMMENDATION #23: The *IAA* should be amended by deleting subsections 42(2)(b) and (c); 44(3); 46; 47(3); 48; 50(a) and (b); 51(2) and (3); and any other provisions that propose to place regulators on review panels.

RECOMMENDATION #24: In the alternative, sections 44 and 47 of the *IAA* should be amended to specify that no more than one member of the CNSC, or one commissioner of the Canadian Energy Regulator, may be appointed to a review panel, and that the appointed member or commissioner cannot be named as the Chairperson of a review panel.

RECOMMENDATION #25: The *IAA* should be amended to clarify how and when the Minister's power to "scope" section 22 factors may be exercised in relation to designated projects that are referred to a review panel under sections 36, 40 or 43.

RECOMMENDATION #26: Sections 41, 42, 44 and 47 of the *IAA* should be amended by requiring the Minister to post draft terms of reference for review panels on the Registry and/or internet site, and to solicit and consider any public comments received on the draft before establishing the terms of reference.

RECOMMENDATION #27: Section 51 of the *IAA* should be amended to specifically require the review panel's report to provide its rationale, conclusions or recommendations in relation to all factors listed in section 22 and all public interest considerations listed in section 63.

RECOMMENDATION #28: The *IAA* should be amended to:

> **(a) entrench basic procedural rights for parties involved in hearings held by review panels; and**
>
> **(b) expand the regulation-making authority in section 109 (or, in the alternative, section 112) to enable the promulgation of rules of practice and procedure to govern hearings held by review panels.**

RECOMMENDATION #29: The *IAA* should be amended by deleting subsection 39(2).

RECOMMENDATION #30: Section 37 of the *IAA* should be amended to delete the "600 day" time limit, and to enable review panels to develop an appropriate project-specific timetable for the public hearing and the delivery of the panel's report.

RECOMMENDATION #31: Sections 60, 62 and 64 of the *IAA* should be amended to clarify that the Minister or Cabinet is required to determine whether designated projects (not their adverse effects) are in the public interest.

RECOMMENDATION #32: The *IAA* should be amended by:

> **(a) creating a new legal standard for decision-making under section 63 of the Act, which should specify that no designated project shall be approved by the Minister or Cabinet unless the impact assessment record demonstrates, on a balance of probabilities, that the project is in the public interest because it:**
>
> **- will provide a positive, equitable and long-lasting contribution to sustainability by providing net benefits to environmental, social, economic, health and cultural well-being;**
>
> **- is consistent, or does not conflict, with Canada's targets and timetables under international climate change agreements, treaties or conventions, or under federal law or regulations; and**
>
> **- does not adversely impact the rights of Indigenous peoples as affirmed by section 35 of the *Constitution Act, 1982*, and is consistent, or does not conflict, with the UNDRIP or the FPIC principle;**

(b) providing additional details, rules and criteria on the "contribution to sustainability" component of the new legal standard, which should be further supplemented by regulations under the Act;

(c) establishing a statutory right of appeal that lies from Ministerial or Cabinet decisions on designated projects to a specialized or independent body established under the Act, or in the alternative, to the Federal Court on questions of law and mixed questions of law/fact;

(d) specifying that the revised "public interest" criteria in section 63 for decisions on designated projects should also be made applicable to federal decisions made in relation to strategic and regional assessments conducted pursuant to sections 92 to 103 of the Act;

(e) requiring the Minister's reasons for decision under subsection 65(2) to include an evidence-based justification for any trade-offs made between the public interest factors listed in section 63;

(f) deleting subsection 68(4); and

(g) requiring the proponent to immediately self-report to the Minister any non-compliance with conditions contained in a decision statement issued under the Act.

RECOMMENDATION #33: The *IAA* should by amended by deleting sections 81 to 91, and by designating activities or facilities on federal lands or outside of Canada as projects which trigger an obligation upon the Agency (not the federal authority) to prepare an impact statement and submit a report to Cabinet in accordance with the Act (including meaningful public participation), where such projects are linked to federal interests.

RECOMMENDATION #34: The Government of Canada should consider establishing a streamlined Agency-led assessment process, in the *IAA* or regulations, which applies to projects (or classes of projects) on federal lands or outside of Canada.

RECOMMENDATION #35: The *IAA* should be amended by specifying the mandatory triggers, content requirements, procedural steps, implementation of outcomes, and opportunities for public and Indigenous participation in strategic and regional assessments.