

**EXPERT PANEL**  
Review of Environmental  
Assessment Processes

**COMITÉ D'EXPERTS**  
Examen des processus  
d'évaluation environnementale



# **BUILDING COMMON GROUND**

## **A New Vision for Impact Assessment in Canada**

The Final Report of the Expert Panel for the  
Review of Environmental Assessment Processes



Également disponible en français sous le titre :

***Bâtir un terrain d'entente : une nouvelle vision pour l'évaluation des impacts au Canada***

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# TABLE OF CONTENTS

<b>Message from the Panel .....</b>	<b>1</b>
<b>Executive Summary .....</b>	<b>2</b>
<b>Introduction.....</b>	<b>9</b>
<b>Section 1 – Outlining the Vision .....</b>	<b>11</b>
1.1 Meeting the Challenge .....	12
1.2 From Environmental Assessment to Impact Assessment .....	13
1.3 The Principles Guiding our Vision.....	13
<b>Section 2 – Developing the Vision .....</b>	<b>16</b>
2.1 The Purpose of Federal Impact Assessment.....	17
2.1.1 Federal Jurisdiction .....	17
2.1.2 Impact Assessment as a Planning Tool.....	18
2.1.3 From Significance to Sustainability.....	19
2.1.4 Tiering.....	22
2.2 Co-Operation Among Jurisdictions .....	22
2.2.1 Co-Operation .....	23
2.2.2 Substitution .....	25
2.2.3 Equivalency.....	26
2.3 Indigenous Considerations .....	26
2.3.1 Reflecting <i>UNDRIP</i> Principles in Impact Assessment.....	28
2.3.2 Assessing Impacts to Aboriginal and Treaty Rights in Impact Assessment.....	30
2.3.3 Capacity.....	31
2.3.4 Indigenous Knowledge.....	33
2.3.5 Impact Benefit Agreements .....	35
2.4 Public Participation in Impact Assessment .....	35
2.4.1 Meaningful Participation.....	36
2.4.2 Capacity for Participation.....	39
2.4.3 Informed Participation .....	40
2.5 Evidence-Based Impact Assessment .....	41
2.5.1 Incorporating Science in Impact Assessment .....	42
2.5.2 Integrating Science, Indigenous Knowledge and Community Knowledge.....	44
2.5.3 Developing Unbiased Impact Statements.....	45
2.5.4 Making Evidence-Based Decisions.....	46

<b>Section 3 – Implementing The Vision .....</b>	<b>48</b>
3.1 Governance Model.....	49
3.1.1 How Should Federal Impact Assessment be Governed?.....	49
3.1.2 Envisioning the New Federal Impact Assessment Authority .....	52
3.1.3 Mandate .....	55
3.2 Project Impact Assessment .....	55
3.2.1 What Should Require Project Impact Assessment? .....	56
3.2.2 How Should Project Impact Assessment be Conducted? .....	58
3.3 Monitoring, Compliance and Enforcement.....	66
3.3.1 Conditions .....	67
3.3.2 Monitoring and Follow-Up .....	68
3.3.3 Compliance and Enforcement.....	70
3.4 Discipline in Impact Assessment Time and Costs .....	72
3.4.1 Managing Proponents’ Time and Costs .....	72
3.4.2 Managing Government’s Time and Costs.....	74
3.5 Regional Impact Assessment .....	76
3.5.1 What Should Require Regional Impact Assessment? .....	78
3.5.2 How Should Regional Impact Assessment be Conducted?.....	80
3.6 Strategic Impact Assessment.....	81
3.6.1 What Should Require Strategic Impact Assessment?.....	82
3.6.2 How Should Strategic Impact Assessment be Conducted? .....	83
3.7 Climate Change and Impact Assessment.....	83
<b>Section 4 – The Expert Panel’s Review Process and What We Heard .....</b>	<b>86</b>
<b>Annex 1 – Expert Panel Terms of Reference .....</b>	<b>107</b>
<b>Annex 2 – Biographies of Expert Panel Members.....</b>	<b>113</b>
<b>Annex 3 – Discussion Paper: Suggested Themes for Discussion.....</b>	<b>116</b>

# MESSAGE FROM THE PANEL

We have been honoured to serve on the Expert Panel mandated by the Minister of Environment and Climate Change to review federal environmental assessment processes. Enclosed is our Report to the Minister outlining our recommendations to restore the public's trust and confidence in these processes. From the start, we have each believed that this is an important undertaking without which Canada would be stalled on its journey toward sustainable development. Economic progress, environmental protection and social improvement would all be less than ideal without an assessment process that has the trust of Canadians.

To all who participated in our review, we offer our heartfelt thanks and deep appreciation. Without your selfless effort, we would not have been able to undertake this work. Many of you came before us to share your views and experiences and to suggest solutions to improve assessment processes in Canada. Your enthusiasm and commitment fuelled our own passion and gave us the energy we needed day after day to complete our task. Others spent hours writing submissions that were thought-provoking and valued. We thank you all. You have been a source of inspiration.

We were very impressed by the younger generations of participants who came before us. Coupled with those who asked us to adopt "next generation" environmental assessment, we received a clear message to focus on development that is sustainable for present and future generations. We send them special thanks for their knowledge, passion and commitment, and know that they will lead Canada to a better place.

In developing our Report, we have strived to take all of your recommendations into account in developing our vision for the future. Separate from our Report, we have put together a detailed annotation of your recommendations and identified where in our Report they have been addressed.

We would like to acknowledge the support from Minister McKenna and thank her for the opportunity to contribute to this important initiative. We wish her, her office and her staff success in developing a new federal assessment regime, and we hope that our Report will be helpful in doing so.

To the Multi-Interest Advisory Committee, to the selected experts and to the former project review panel members who gave of their time to help us, we offer our thanks. Your assistance was invaluable.

Finally, to the Secretariat who supported us, we have nothing but praise and admiration. The many hours you all spent working tirelessly to enable us to complete this task was truly awesome. Thank you all very much. We would also like to thank the Canadian Environmental Assessment Agency for their support in establishing the Secretariat and our Panel.

This Report is for those who think there is a better way forward. Take the next steps. Make us all accountable to build a better Canada, more in line with who we are and what we value.



*Johanne Gélinas*  
Johanne Gélinas (Chair)



*Doug Horswill*  
Doug Horswill (Member)



*Rod Northey*  
Rod Northey (Member)



*Renée Pelletier*  
Renée Pelletier (Member)

# EXECUTIVE SUMMARY

In her mandate letter from the Prime Minister, the Minister of Environment and Climate Change (the Minister) was directed to immediately review environmental assessment (EA) processes with these objectives: to restore public trust in EA; to introduce new, fair processes; and to get resources to market. On August 15, 2016, the Minister announced the establishment of our four-person Expert Panel (the Panel) to conduct this review.

The Terms of Reference established for the review directed us, the Panel, to engage broadly with Canadians, Indigenous Peoples, provinces and territories, and key stakeholders to develop recommendations to the Minister on how to improve federal EA processes.

Views about federal EA across the various interests ranged from support to all-out opposition. It was clear, however, that current assessment processes under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) are incapable of resolving these disparate points of view.

In general, we did not hear strident opposition to the development of projects, although in a few cases there were those who held that certain projects should not have gone ahead. Rather, we heard that, when communities, proponents and governments work together with mutual respect and understanding in a process that is open, inclusive and trusted, assessment processes can deliver better projects, bring society more benefits than costs and contribute positively to Canada's sustainable future.

As we drew lessons from what we had heard across the country, we came to the conclusion that we need to improve the way we plan for development in our country. We believe that Canadians deserve better and that it is entirely possible to deliver better. Our Report explains how to achieve this.

In Section 1, Outlining the Vision, we lay the foundation for the recommendations that follow. We outline

that, in our view, assessment processes must move beyond the bio-physical environment to encompass all impacts likely to result from a project, both positive and negative. Therefore, what is now "environmental assessment" should become "impact assessment" (IA). Changing the name of the federal process to impact assessment underscores the shift in thinking necessary to enable practitioners and Canadians to understand the substantive changes being proposed in our Report.

We also outline that, as we listened to presenters and read the many submissions presented to us, we came to understand that any new effective assessment process must be governed by four fundamental principles. IA processes must be transparent, inclusive, informed, and meaningful.

In Section 2, Developing the Vision, we outline recommendations about the purpose of IA, the importance of co-operation among jurisdictions, integrating Indigenous considerations into IA processes, enabling meaningful participation and ensuring evidence-based decision-making. Each of these aspects is fundamental to ensuring that federal IA is robust and responds effectively to what we heard across the country.

Impact assessment aims to identify and address potential issues and concerns early in the design of projects, plans and policies. In so doing, it can contribute to the creation of positive relationships among various interest groups, including reconciliation between Indigenous Peoples and non-Indigenous peoples. IA also aims to contribute to the protection of the bio-physical environment and the long-term well-being of Canadians by gathering proper information to inform decision-making. At a project scale, IA should improve project design and ensure appropriate mitigation measures and monitoring programs are implemented. In sum, IA processes should give Canadians confidence that projects, plans and policies have been adequately assessed.

Federal IAs require clear direction on both the purpose and parameters of the process. There are many options on how best to do IA. In considering the future of IA in Canada, it is necessary to begin by answering the following fundamental questions through a consideration of jurisdiction, significance and sustainability, and IA's role as a planning tool:

- What should require federal IA?



- When should a federal IA for a project, plan, or policy begin?
- What should federal IA look at?

**Regarding the purpose of IA, the Panel recommends that:**

- federal interest be central in determining whether an IA should be required for a given project, region, plan or policy.
- federal IA should begin with a legislated Planning Phase that, for projects, occurs early in project development before design elements are finalized.
- sustainability be central to IA. The likelihood of consequential impacts on matters of federal interest should determine whether an IA would be required.
- federal IA decide whether a project should proceed based on that project's contribution to sustainability.
- IA legislation require the use of strategic and regional IAs to guide project IA.

IA creates challenges for Canada's system of government, with the requirement that a broad range of information be collected and evaluated but with no government having full authority to regulate all impacts. Federal, provincial, territorial, municipal and Indigenous governments may each have responsibility for the conduct of IA, but each level of government can only regulate matters within its jurisdiction.

The principle of "one project, one assessment" is central to implementing IA around the five pillars of sustainability. Grounding federal IA in legal jurisdiction, starting early in planning and focusing on assessing contributions to sustainability make co-operation among jurisdictions essential to ensure Canadians realize the benefits from IA.

**Regarding co-operation among jurisdictions, the Panel recommends that:**

- co-operation be the primary mechanism for co-ordination where multiple IA processes apply.
- substitution be available on the condition that the highest standard of IA would apply.

Finding ways to enhance Indigenous participation and consultation was identified as a key goal in the Panel's

Terms of Reference, as was reflecting the principles of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, "especially with respect to the manner in which environmental assessment processes can be used to address potential impacts to potential or established Aboriginal or treaty rights."

The Panel recognizes that there are broader discussions that need to occur between the Government of Canada and Indigenous Peoples with respect to nation-to-nation relationships, overlapping and unresolved claims to Aboriginal rights and title, reconciliation, treaty implementation and the broader implementation of *UNDRIP*. Many of these discussions will be necessary prerequisites to the full and effective implementation of the recommendations contained in this Report.

**Regarding Indigenous considerations, the Panel recommends that:**

- Indigenous Peoples be included in decision-making at all stages of IA, in accordance with their own laws and customs.
- IA processes require the assessment of impacts to asserted or established Aboriginal or treaty rights and interests across all components of sustainability.
- any IA authority be designated an agent of the Crown and, through a collaborative process, thus be accountable for the duty to consult and accommodate, the conduct of consultation, and the adequacy of consultation. The fulfilment of this duty must occur under a collaborative framework developed in partnership with impacted Indigenous Groups.
- any IA authority increase its capacity to meaningfully engage with and respect Indigenous Peoples, by improving knowledge of Indigenous Peoples and their rights, history and culture.
- a funding program be developed to provide long-term, ongoing IA capacity development that is responsive to the specific needs and contexts of diverse Indigenous Groups.
- IA-specific funding programs be enhanced to provide adequate support throughout the whole IA process, in a manner that is responsive to the specific needs and contexts of diverse Indigenous Groups.



- IA legislation require that Indigenous knowledge be integrated into all phases of IA, in collaboration with, and with the permission and oversight of, Indigenous Groups.
- IA legislation confirm Indigenous ownership of Indigenous knowledge and include provisions to protect Indigenous knowledge from/against its unauthorized use, disclosure or release.

Meaningful public participation is a key element to ensure the legitimacy of IA processes and central to a renewed IA that moves it towards a consensus-building exercise, at the core of which are face-to-face discussions.

IA can build trust in communities by bringing all affected parties to the table; it increases the transparency of the process by facilitating information sharing; it improves the design of initiatives by incorporating public information, expertise, perspective and concerns; and it provides for improved decision-making by ensuring all relevant information is available. It is through public engagement and participation that social license to operate – obtaining broad public support for proposed undertakings – can be built and optimal results of IA can be reached. Further, as a learning process, it builds literacy in IA processes and builds capacity. Lastly, meaningful participation does not finish with the decision and can contribute to oversight of project implementation.

**Regarding public participation, the Panel recommends that:**

- IA legislation require that IA provide early and ongoing public participation opportunities that are open to all. Results of public participation should have the potential to impact decisions.
- the participant funding program for IA be commensurate with the costs associated with meaningful participation in all phases of IA, including monitoring and follow-up.
- IA legislation require that IA information be easily accessible, and permanently and publicly available.

Science, facts and evidence are critical to a well-functioning IA process. Whether for collecting data, analyzing results or establishing monitoring and follow-up programs, the quality of science contributes to a trusted process and credible outcomes.

Evidence comes in many forms and includes Indigenous knowledge and community knowledge. The sustainability-based IA framework being proposed seeks to integrate all relevant evidence that supports outcomes within the environmental, health, social, cultural and economic pillars.

**Regarding evidence-based IA, the Panel recommends that:**

- IA legislation require that all phases of IA use and integrate the best available scientific information and methods.
- IA legislation require the development of a central, consolidated and publicly available federal government database to house all baseline and monitoring data collected for IA purposes.
- IA legislation provide any IA authority with power to compel expertise from federal scientists and to retain external scientists to provide technical expertise as required.
- any IA authority have the statutory authority to verify the scientific accuracy of studies across all pillars of sustainability.
- IA integrate the best evidence from science, Indigenous knowledge and community knowledge through a framework determined in collaboration with Indigenous Groups, knowledge holders and scientists.
- IA legislation require that any IA authority lead the development of the Impact Statement.
- IA decisions reference the key supporting evidence they rely upon, including the criteria and trade-offs used to achieve sustainability outcomes.

In Section 3, Implementing the Vision, we explain how our recommended vision can be put into practice. Our recommendations cover the assessment regime and its governance structure. They seek to ensure that the process, the resulting decisions and their implementation are inclusive, transparent and fair. We explain how assessment processes would start earlier and result in better and more-informed decisions. Our recommended approach seeks to build public confidence in the assessment process. We believe that public trust can lead





to more efficient and timely reviews. It may also support getting resources to market.

To restore public trust and confidence in assessment processes, any authority given the mandate to conduct federal assessments should be aligned with the Panel's guiding principles. In developing recommendations for how to govern federal IA, the Panel has identified four areas of focus:

1. Striving to remove any perceived notion of bias on the part of responsible authorities;
2. Maximizing the benefits of a planning-focused IA;
3. Instilling co-operation and consensus as a governance philosophy; and
4. Ensuring that IA delivers transparent, evidence-based decisions.

**In consideration of these areas, the Panel recommends that:**

- a single authority have the mandate to conduct and decide upon IAs on behalf of the federal government.
- the IA authority should be established as a quasi-judicial tribunal empowered to undertake a full range of facilitation and dispute-resolution processes.

Project IA is the cornerstone of the proposed IA regime. We believe that bringing federal assessment into alignment with the four principles guiding our review requires fundamental change. The proposed new process would:

- aim to build consensus and reduce conflict;
- facilitate co-operation with the provinces, territories and Indigenous jurisdictions;
- avoid conflicts of interest and protect against bias;
- mandate early planning and early engagement;
- integrate science, Indigenous knowledge and community knowledge;
- have time limits and cost controls that reflect the specific circumstances of each project, rather than the current "one size fits all" approach; and

- lead to decisions based on the five pillars of sustainability (environment, economy, social, cultural and health).

All told, this process would seek to restore trust by bringing parties together, benefiting communities and advancing the national interest in sustainable development.

Indigenous Peoples in Canada have a particularly important role to play in project IA. The proposed assessment process would seek to engage Indigenous Groups from early project planning through to assessment decisions and follow-up. It would more accurately and holistically assess impacts to Aboriginal and treaty rights and interests and identify appropriate accommodation measures. This IA process should contribute to a meaningful nation-to-nation relationship.

**Therefore, regarding project IA, the Panel recommends that:**

- IA legislation define a "project" to be a physical activity or undertaking that impacts one or more matters of federal interest.
- IA legislation require project IAs when a project is on a new Project List, a project not on the new List is likely to have a consequential impact, or the IA authority accepts a request.
- all phases of project IA be conducted through a multi-party, in-person engagement process.
- the outcome of the Planning Phase would be a conduct of assessment agreement.
  - Based on a prepared project design, the conduct of assessment agreement would finalize the factors for assessment, set out the sustainability framework, identify studies that need to be conducted, address the constitutional duty to consult, outline how the process will integrate procedural and legislative requirements of other jurisdictions, and provide details on IA timing and cost.
- the studies outlined in the conduct of assessment agreement be completed in the Study Phase. The IA authority would lead an assessment team accountable for preparing the Impact Statement, informed by these studies.



- a Decision Phase be established wherein the IA authority would seek Indigenous consent and issue a public decision statement on whether the project contributes positively to the sustainability of Canada's development.

The Decision Phase completes the “assessment” part of the IA process, while monitoring and follow-up related to conditions, as well as compliance and enforcement, make up the post-IA phase. These post-IA elements are equally important to restore trust in assessment processes and ensure robust oversight, as they ensure the implementation of conditions issued with the decision and verify the accuracy of the assessment predictions and the effectiveness of identified mitigation measures.

Establishing an effective and transparent post-IA phase ensures that project implementation meets the outcomes established through the IA process. A consistent methodology for all monitoring of projects, applied to things such as data collection, would allow for results to be compared for similar project types or activities in a similar region.

**Therefore, the Panel recommends that:**

- decision statements use outcome-based conditions that set clear and specific standards of performance.
- IA legislation contain a formal process to amend conditions.
- IA legislation ensure sustainability outcomes are met through mandatory monitoring and follow-up programs with minimum standard requirements common to all project IAs.
- Indigenous Groups and local communities be involved in the independent oversight of monitoring and follow-up programs established by the IA authority.
- all monitoring and follow-up data, including raw data, results and any actions taken to address ineffective mitigation, be posted on a public registry.
- IA legislation provide a broad range of tools to enforce IA conditions and suspend or revoke approvals.
- the results of inspections be promptly available to the public. An annual report of compliance with conditions for all projects should be published in a public registry.

- IA legislation authorize the IA authority to carry out compliance and enforcement activities with other jurisdictions, so long as the results of such activities are no less available to the public than the results of activities by the IA authority.

A final consideration of project IA is the need for a well-designed and successful IA process to provide clarity to all parties through predictable requirements and timelines. A one-size-fits-all approach to project IA timelines through legislated timeframes has not met the objective of delivering cost and time certainty to proponents. Nevertheless, these attributes are essential to ensure that projects providing a net benefit to the country are approved and built.

Any new IA regime must recognize the importance of trying to discipline the process to provide timely and cost-effective IA for Canadians.

**Therefore, the Panel recommends that:**

- the IA authority be required to develop an estimate of the cost and timeline for each phase of the assessment and report regularly on the success in meeting these estimates.

While project-specific assessments have an important role to play to ensure new activities contribute to sustainability, many sustainability questions cannot be properly assessed at the scale of project IA. Enhanced interactions between projects, regions, plans and policies, and the pillars of sustainability are an important purpose of IA. A federal IA regime equipped with this suite of options can apply the best type of assessment to any given activity or decision. Therefore, a tiered approach should be implemented whereby strategic and regional IAs produce the policy and planning foundations for improved and efficient project IAs.

Regional IA will provide clarity on thresholds and objectives on matters of federal interest in a region and will inform and streamline project IA. In addition to being well-equipped to address the sustainability of development in various regions, particularly in relation to cumulative impacts, regional IA can also streamline project IA to the benefit of proponents and communities alike.



### Regarding regional IA, the Panel recommends that:

- IA legislation require regional IAs 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.
- IA legislation require the IA authority to develop and maintain a schedule of regions that would require a regional IA and to conduct those regional IAs.
- a regional IA establish thresholds and objectives to be used in project IA and federal decisions.

A new strategic IA model should be put in place to provide guidance on how to implement existing federal policies, plans and programs in a project or regional IA. This approach involves no amendment to the existing *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* and its process for assessing new federal initiatives. Instead, the new model of strategic IA would apply exclusively to the implementation of existing federal plans, programs and policies where these initiatives have consequential implications for project or regional IA.

### Regarding strategic IA, the Panel recommends that:

- IA legislation require that the IA authority conduct a strategic IA when a new or existing federal policy, plan or program would have consequential implications for federal project or regional IA.
- strategic IA define how to implement a policy, plan or program in project and regional IA.

IA should play a critical role in supporting Canada's efforts to address climate change. Current processes and interim principles take into account some aspects of climate change, but there is an urgent national need for clarity and consistency on how to consider climate change in project and regional IA.

Criteria, modelling and methodology must be established to:

- assess a project's contribution to climate change;
- consider how climate change may impact the future environmental setting of a project; and

- consider a project's or region's long-term sustainability and resiliency in a changing environmental setting.

The Panel's recommended model for strategic IA would prove beneficial in determining a consistent approach for evaluating a project's contributions to climate change.

### Therefore, regarding climate change and IA, the Panel recommends that:

- Canada lead a federal strategic IA or similar co-operative and collaborative mechanism on the *Pan-Canadian Framework on Clean Growth and Climate Change* to provide direction on how to implement this *Framework* and related initiatives in future federal project and regional IAs.

In Section 4, The Expert Panel's Review Process and What We Heard, we summarize our cross-country review process and what we heard from coast to coast to coast. The input we received had a depth and quality that clearly demonstrated how important this issue is to Canadians, and was instrumental to the development of our Report.

These recommendations, taken together, present the Panel's vision for an impact assessment regime that will protect the physical and biological environment, promote social harmony and facilitate economic development.

Advancing Canada's economy is about generating job-supporting economic growth across all sectors. Infrastructure projects and the resource industries are among those most affected by the assessment processes. We believe that the process we propose, which is guided by principles designed to restore public trust and confidence, will facilitate the investment in these sectors that is necessary to grow Canada's economy in ways that will contribute positively to a sustainable future.

Leadership from the federal government toward improving the project assessment process across Canada would benefit every Canadian. We believe that this review provides the opportunity to raise the bar on assessment processes so that effective and trusted decisions can be made, co-operation can replace dissension, and parties can be assured that assessment processes are fair.

The Panel has diligently pursued its mandate and trusts that this Report will be accepted as a satisfactory reflection of its work.





## OUR MANDATE

In her mandate letter from the Prime Minister, the Minister of Environment and Climate Change (the Minister) was directed to immediately review environmental assessment (EA) processes with these objectives: to restore public trust in EA; to introduce new, fair processes; and to get resources to market. On August 15, 2016, the Minister announced the establishment of our four-person Expert Panel (the Panel) to conduct this review.

The Terms of Reference established for the review directed us, the Panel, to engage broadly with Canadians, Indigenous Peoples, provinces and territories, and key stakeholders to develop recommendations to the Minister on how to improve federal EA processes.<sup>1</sup>

## OUR JOURNEY

To fulfil our mandate, we have spent the past seven months travelling, listening, reading, thinking and writing.

We have heard from Indigenous Peoples, individual Canadians, environmental groups, EA practitioners, consultants, academics, industry, provincial EA offices and federal departments. Through all these interactions, we each grew individually as we came to understand many different points of view surrounding EA in Canada.<sup>2</sup>

Our travels took us from coast to coast to coast. Throughout our journey, we encountered a fairly consistent pattern of concerns and issues.

- Proponents were divided: some were, by and large, happy with the system as it exists today while others expressed concerns that timelines are not met, assessment processes are not co-ordinated and processes across the three responsible authorities are not consistent.
- Environmental organizations and individuals expressed dissatisfaction and frustration with many elements of the process: they were challenged by a lack of adequate resources, troubled by tight timelines when faced with huge amounts of difficult technical data, unable to access pertinent information, exasperated by the lack

# INTRODUCTION

of acknowledgement of their concerns, and dissatisfied with the lack of explanation provided for decisions.

- Indigenous Peoples shared many of these dissatisfactions but added more deep-seated concerns derived from what they considered a lack of respect for their rights and title.
- Provincial agencies told us that they wanted to see more effective co-operation with the federal environmental review process but were challenged by the inflexibility of the federal process timelines. They also reported a significant decline in federal scientific support for EA that was inhibiting timely and effective processes at both levels of government.
- Federal departments underlined their commitment to supporting EA, but they, too, felt stymied by inadequate resources.

Each region of the country added particular concerns and issues.

- In Atlantic Canada, offshore oil development, fisheries and electrical power development were dominant concerns.
- In Quebec, we heard about pipeline reviews, ports and power concerns, as well as the importance of federal/provincial co-ordination and understanding Indigenous concerns in the Far North.
- In Ontario, we heard from industry associations on how assessment could be improved. Matters about nuclear waste disposal, mining developments and Indigenous rights were common themes.
- In Manitoba and Saskatchewan, the issues ranged from pipelines to uranium mining, with messages about federal EA ranging from “Leave it alone because it is working” to “Throw it out and start over.”
- Alberta found us fully engaged in matters around oil and gas development and, in particular, issues related

<sup>1</sup> The Terms of Reference for the Expert Panel's review are included at Annex 1. Biographies of Panel members are included at Annex 2.

<sup>2</sup> Details on conduct of the Expert Panel's review are included in Section 4 – The Expert Panel's Review Process and What We Heard.

to developments in Fort McMurray. Indigenous Peoples in both Calgary and Fort McMurray stressed the problems brought on by the fast pace of development and cumulative impacts from many unassessed activities, such as *in-situ* oil extraction facilities. They found themselves asked to review thousands of pages of reports and data with few resources and even less time. In short, they were overwhelmed by what they faced. Some of the companies that presented before us understood the dilemma faced by Indigenous Groups and attempted to address it within their own processes. Overall, the pace and extent of development confounded the federal environmental assessment process as it pertains to development in the Athabasca region.

- Finally, in British Columbia, we found a hot-bed of concern around oil and gas pipelines, as well as mining projects, hydro-electrical projects and ports.

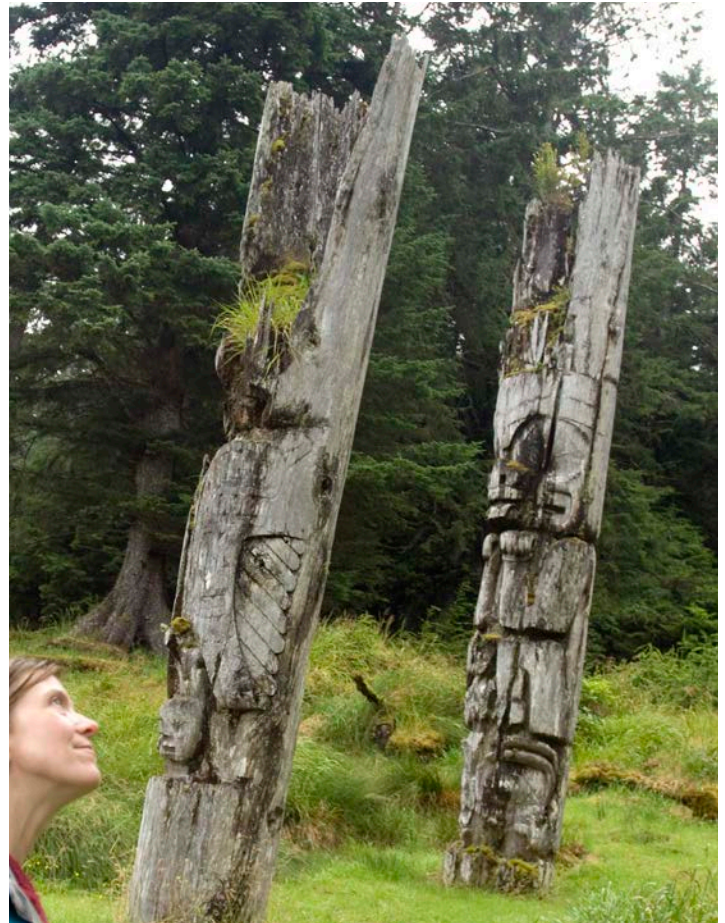
Across the country, in every place we visited, the presentations from Indigenous Peoples moved us. We heard how multiple developments in the northeast of British Columbia had impacted more than 80 per cent of Treaty 8 land without any effective assessment of impacts. We heard from the Innu Nation and the Nunatsiavut Government how the Lower Churchill Hydroelectric Project had created impacts that had the potential to wreak havoc on the wildlife upon which they depend. While these impacts had been foreseen to some extent in the assessment process, the project had been approved anyway. We heard many more cases where Indigenous Peoples felt that their rights and interests had been neglected or ignored.

Views about federal EA across the various interests ranged from support to all-out opposition. It was clear, however, that current assessment processes under the *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* are incapable of resolving these disparate points of view.

In general, we did not hear strident opposition to the development of projects, although in a few cases there were those who held that certain projects should not have gone ahead. Rather we heard that, when communities, proponents and governments work together with mutual respect and understanding in a process that is open, inclusive and trusted, assessment processes can deliver

better projects, bring society more benefits than costs and contribute positively to Canada's sustainable future.

A comment made by a community leader in Prince Rupert summed up the essence of what EA should help achieve: when you come into this world, you receive a full basket, and it is your obligation to pass a full basket on to the next generation.<sup>3</sup> We believe that our task is to help ensure this lofty goal can be met.



<sup>3</sup> Shannon MacPhail. See [http://eareview-examenee.ca/wp-content/uploads/uploaded\\_files/ceaa-2016-12-08-prince-rupert.pdf](http://eareview-examenee.ca/wp-content/uploads/uploaded_files/ceaa-2016-12-08-prince-rupert.pdf)





# **SECTION 1**

## **OUTLINING THE VISION**

## 1.1 MEETING THE CHALLENGE

Participants told us that they want an assessment process that protects the physical and biological environment, promotes social harmony and facilitates economic opportunities. They are looking to enhance long-term well-being for themselves, their fellow citizens and society as a whole through a rigorous assessment process that will achieve decisions that are considered fair by all parties.

Our review of EA is happening in the “heat of the moment.” Some of the most controversial projects in a generation have been, or continue to be, under review. Added to this is the controversy surrounding *CEAA 2012* itself which, in many ways, is a far cry from what came before. While *CEAA 2012* improved EA processes 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. In essence, *CEAA 2012* fuelled some of the dissension around project assessment today.

While the *CEAA 2012* process defines the starting point for our work, we have looked back in time through the development of EA in Canada. What we see is a pendulum of policy that we believe has swung too far. The process we envision occupies a middle ground between the assessment practices from the 1990s and those in practice today. It also builds upon the structures and laws that are in place. We are not proposing the creation of something entirely new.

There is a tendency for people to judge the effectiveness of an assessment process on how it might apply to the largest and most controversial projects. While this is important, it must be remembered that assessment applies to far more than projects that can fill the nightly news. Our vision was to design a process that could deal effectively with the large controversial projects and very successfully with the many less controversial projects.

The need to respect one another and to listen to, hear and understand each other’s perspectives were central themes that emerged across the country. These have

become the building blocks around which we built our vision for an effective assessment process. We concluded that the commitment to be empathetic, to search for common ground and to build toward consensus were the keys to success.

The term “social license” came to our attention in numerous ways. We took social license to mean the broad-based acceptance of a project or activity by the Indigenous and non-Indigenous communities that would be affected by the project. Acquiring social license will most certainly help a proponent gain approval for a project. We concluded that an effective assessment process should achieve two essential outcomes: pave the way for regulatory approval of accepted projects, and facilitate a proponent’s acquisition of social license.

Co-operation among all orders of government – federal, provincial and Indigenous – is essential to successful implementation of assessment in Canada. The Constitution splits jurisdiction for many of the matters that underlie the determination of whether, and under what conditions, a project would be good for Canada. Thus, effective assessment will normally require governments to work together.

A new assessment process must address the inequity felt by Indigenous Peoples. Reconciliation between Indigenous and non-Indigenous people demands it. Our mandate asks us to reflect the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in new assessment processes. During our meetings in Inuvik, we heard how the EA process in the Inuvialuit Settlement Region integrates Aboriginal rights and title. We saw the effectiveness that resulted from processes that are open, inclusive and trusted by affected communities. Assessments are conducted in open and collaborative ways to ensure that Indigenous Peoples’ interests are accounted for. Indigenous Groups are fully involved in making decisions about projects in their territory. The processes in northern Canada beyond the Inuvialuit Settlement Region were all commended to us for their effectiveness in reflecting the principles of *UNDRIP* in EA.

We understand, of course, that the political, demographic and community circumstances in northern Canada are not those further south, so the lessons from the North may not be directly transferable. However, the northern experience does offer guidance for resolving some of the concerns of Indigenous Peoples by providing for their





involvement throughout the assessment process and in decision-making about projects that have the potential to affect their rights.

Advancing Canada's economy is about generating job-supporting economic growth across all sectors. Infrastructure projects and the resource industries are among those most affected by the assessment processes. We believe that the process we propose, which is guided by principles designed to restore public trust and confidence, will facilitate the investment in these sections that is necessary to grow Canada's economy in ways that will contribute positively to a sustainable future.

Leadership from the federal government toward improving the project assessment process across Canada would benefit every Canadian. We believe that this review provides the opportunity to raise the bar on assessment processes so that effective and trusted decisions can be made, co-operation can be built and participants can be assured that assessment processes are fair.

We believe that the assessment process envisioned in our model will meet the test. It will protect the physical and biological environment, promote social harmony and facilitate economic development.

## 1.2 FROM ENVIRONMENTAL ASSESSMENT TO IMPACT ASSESSMENT

A matter that was heard resoundingly from Canadians was the need for an EA process to move beyond the bio-physical environment to encompass all impacts, both positive and negative, likely to result from a project. The many presenters who raised this suggested that social issues, economic opportunities, health impacts and cultural concerns should be considered.

As a consequence, we believe that what is now "environmental assessment" should become "impact assessment." This new approach would not be limited in its breadth but would instead be all-encompassing. Progress towards this modern assessment regime will be facilitated by moving from EA to impact assessment (IA).

Changing the name of the federal process to impact assessment underscores the shift in thinking that is needed to enable practitioners and Canadians to understand the substantive changes being proposed in our Report.

## 1.3 THE PRINCIPLES GUIDING OUR VISION

As we listened to presenters and read the many submissions presented to us, we came to understand that any new, effective assessment process must be governed by four fundamental principles.

### TRANSPARENT

Presenters repeatedly expressed concerns that discussion between regulators and proponents occurred behind "closed doors," that decisions came out of a "black box" without explanation or accompanying rationale, and that they did not know whether their comments had been considered. This perception contributes to a sense of suspicion and distrust among many participants in the assessment process and a belief among many that the processes are "rigged" in favour of proponents.

To restore trust and confidence in assessment processes, people must be able to see and understand how the process is being applied, how assessments are being undertaken and how decisions are being made. Without this transparency, no process will be trusted. Therefore, we concluded that, in order to restore the public's trust, the new assessment process for Canada must be **transparent**.

### INCLUSIVE

The assessment process can contribute positively to a project's social license if, and only if, that process takes into account the concerns of all parties who consider themselves or their interests to be affected by that project. The exclusion of individuals or groups from the assessment process erodes any sense of justice and fairness.

Likewise, excluding issues from assessment when there are individuals who have an interest in having those issues considered also erodes the sense of justice



and fairness. Concerns were frequently expressed that important, valued components were left out while tangential matters were included. Matters such as impact on Aboriginal rights and title were not properly included in the scope of the assessment. Socio-economic effects were often underplayed.

Considering all of these perspectives, we conclude that, to be considered just and fair, the new assessment process must be **inclusive**.

## INFORMED

Submissions received over the course of our hearings repeatedly stressed that the assessment process must be based on unbiased, adequate, accessible and complete information about impacts, issues, concerns and processes. People called for information to be presented in a way that that they could understand, for technical scientific information to be translated into plain language, for information and data to be easily accessible, and for Indigenous knowledge and community knowledge to be integrated with western science as the foundation for decision-making. Moreover, there was a strong expression of the need for the information to be independent of the proponent and special interests.

In order to ensure confidence in the new assessment process, we conclude that it must be entirely based on evidence that is, and is seen to be, unbiased, accurate, accessible and complete. The new assessment process must be **informed**.

## MEANINGFUL

Many presenters expressed the view that the current assessment process was just window-dressing, that the decision in favour of a project was always a foregone conclusion, and that there was no place in the process for a finding of “no-go.” Receiving a report of many thousands of pages and being required to prepare a response in 30 days did not allow meaningful input. Responses were often not provided to interventions by the public, leaving people to feel that their perspectives were not taken into account or that they were being ignored. In short, some groups felt that participation in the EA process was a waste of time and effort. Many presenters also felt that conditions attached to the approval of a project were ineffective and that follow-up was often minimal

to non-existent. This led some to conclude that the assessment process itself did not result in meaningful undertakings.

In order to rebuild confidence and trust in IA, we conclude that the process must be perceived by interveners to give them a real opportunity to be heard and to feel that they have had a chance to influence the ultimate decisions. The new assessment process must be **meaningful**.

## MOVING FORWARD

As we drew lessons from what we had heard across the country, we came to the conclusion that we need to improve the way we plan for development in our country. We believe that Canadians deserve better and that it is entirely possible to deliver better. Our Report explains how to achieve this.

The process we envision would encourage co-operation and reduce conflict. It would be clear and easy to understand. It would be predictable, consistent, comprehensive and open. It would be independent of either real or apprehended conflicts of interest and bias. It would be disciplined in duration and cost. It would facilitate the opportunity to make meaningful contributions by anyone who wanted to participate. It would foster a culture of learning so that assessments became more effective and efficient over time. It would facilitate co-operation with the provinces and First Nations to ensure the goal of “one project, one review” is achieved. And it would involve monitoring and follow-up to ensure that expectations at the time of decisions were being realized. If successfully implemented, references to the courts should be the exception rather than the rule.

Participants from the interested public and civil society organizations will find the opportunity to be engaged from the outset to the completion of a review. They will be able to access the information they need to formulate and present informed viewpoints. And they will know how their comments were addressed.

Indigenous Peoples will see many elements of *UNDRIP* reflected in the vision. Rather than finding themselves left on the sidelines of discussion around projects that affect them, Indigenous Peoples will be part of the decision-making process.



Proponents will secure their social license as they proceed through the project assessment that lies at the heart of the new model of assessment. The collaborative mechanisms we envisage will move the process from conflict toward consensus and should facilitate the building of positive relationships among proponents and intervening parties.

Provinces will see a process that rests on co-operation among all orders of government. Both the mechanisms and the incentive for enhanced co-operation in assessment are fundamental to this new model.

Scientists will benefit from a renewed emphasis on open data so that new scientific endeavours can benefit from knowing what has gone before. The emphasis in the new vision that decisions be fully informed by evidence – whether western science, Indigenous knowledge or community knowledge – will benefit all parties.

The Panel has diligently pursued its mandate and trusts that this Report will be accepted as a satisfactory reflection of its work.





# **SECTION 2**

## **DEVELOPING THE VISION**

*In this section, we outline recommendations about the purpose of impact assessment (IA), the importance of co-operation among jurisdictions, integrating Indigenous considerations into IA processes, enabling meaningful participation and ensuring evidence-based decision-making. Each of these aspects is fundamental to ensuring that federal IA is robust and responds effectively to what we heard across the country.*

## 2.1 THE PURPOSE OF FEDERAL IMPACT ASSESSMENT CONTEXT

Impact assessment (IA) aims to identify and address potential issues and concerns early in the design of projects, plans and policies. In so doing, it can contribute to the creation of positive relationships among various interest groups, including reconciliation between Indigenous Peoples and non-Indigenous peoples. IA also aims to contribute to the protection of the bio-physical environment and the long-term well-being of Canadians by gathering proper information to inform decision-making. At a project scale, IA should improve project design and ensure appropriate mitigation measures and monitoring programs are implemented. In sum, IA processes should give Canadians confidence that projects, plans and policies have been adequately assessed.

IA, as defined by the International Association for Impact Assessment, is “the process of identifying the future consequences of a current or proposed action.”<sup>4</sup> Whereas most environmental laws and policies set standards to regulate aspects of development such as air emissions, water withdrawals, waste management and land use, IA goes beyond a review of individual aspects of a proposal to look at the big picture – what is proposed and what may be impacted? In other words, IA processes implement the proverb, “Look before you leap.”

To achieve this outcome, the type of assessment undertaken must be appropriate for the circumstance. There are three scales of IA most commonly referenced,

which are Strategic IA, Regional IA and Project IA.<sup>5</sup> While the overarching purposes of each scale of assessment are consistent, it is important to apply the right tool to the job at hand in order to be most effective.

In Canada, the purpose of what has been called environmental assessment (EA) has evolved over time, from the federal Environmental Assessment and Review Process for major policy initiatives in 1974, through the first iteration of the *Canadian Environmental Assessment Act* in 1992 (*CEAA 1992*), to the more recent process implemented through the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*). The types of activities undergoing review, the effects considered and the decisions made over time have shaped public perceptions of federal IA and its ability to meet the needs of Canadians.

Federal IAs require clear direction on both the purpose and parameters of the process. There are many options on how best to do IA. In considering the future of IA in Canada, it is necessary to begin by answering the following fundamental questions through a consideration of jurisdiction, significance and sustainability, and IA’s role as a planning tool:

- What should require federal IA?
- When should a federal IA for a project, plan or policy begin?
- What should federal IA look at?

### 2.1.1 FEDERAL JURISDICTION WHAT WE HEARD

Participants considered federal jurisdiction as it relates to IA in a variety of ways. Some saw it as permitting, or even requiring, a wider consideration of issues in federal IA. Others saw a very narrow and specific role for federal IA within the confines of federal jurisdiction. However, while there was divergence in this regard, one common thread expressed across a broad range of perspectives was that it should be clear when a federal IA will be required.

<sup>4</sup> See [www.iaia.org/index.php](http://www.iaia.org/index.php)

<sup>5</sup> For more information on the Panel’s recommendations for each of these scales of IA, See Sections 3.2 – Project Impact Assessment; Section 3.5 – Regional Impact Assessment; and Section 3.6 – Strategic Impact Assessment.

## FINDINGS AND RECOMMENDATIONS

The Panel places great importance on the fact that federal IA must respect Canada's Constitution. It thus cannot apply to every project or every decision that may affect the environment.<sup>6</sup> Federal IAs should only be conducted on a project, plan or policy that has clear links to matters of federal interest. These federal interests include, at a minimum, federal lands, federal funding and federal government as proponent, as well as:

- species at risk;
- fish;
- marine plants;
- migratory birds;
- Indigenous Peoples and lands;
- greenhouse gas emissions of national significance;
- watershed or airshed effects crossing provincial or national boundaries;
- navigation and shipping;
- aeronautics;
- activities crossing provincial or national boundaries and works related to those activities; or
- activities related to nuclear energy.

The careful consideration and incorporation of federal jurisdiction is the starting point from which to answer the question of when federal IA should apply.

**The Panel recommends that federal interest be central in determining whether an IA should be required for a given project, region, plan or policy.**

## 2.1.2 IMPACT ASSESSMENT AS A PLANNING TOOL WHAT WE HEARD

Planning emerged as a valued purpose of IA and was seen as an opportunity to proactively address potential project problems from the outset. Public and Indigenous participants expressed a resounding desire and need for early engagement in project design and planning. Many saw early involvement as an opportunity to reduce conflict later in the IA process and as a way that adversarial relationships with project proponents might be avoided at the outset, prior to large investments of time and money into publicly contested options.

**"By critically examining development actions while they are still being conceptualized, IA contributes to fostering a balanced and sustainable future."**

*International Association for Impact Assessment*

## FINDINGS AND RECOMMENDATIONS

It is essential to maximize the role of planning and the value that can be derived from it within the federal IA process. Over time, environmental regulatory requirements have increased, and IA has emerged as one of the most important tools to integrate these requirements and look at the big picture. To do that effectively, project IAs must begin early in project design, and continue through the undertaking of studies and through to an informed decision.

While project IA typically occurs prior to the majority of regulatory requirements being determined and sets the foundation for environmental considerations to be incorporated throughout decision-making, assessments do not currently start early enough. Without input from potentially impacted communities and Indigenous Groups, as well as potential experts and regulators, a proponent's studies will not be as fully informed as possible, making it likely that the project itself will be suboptimal. This is the process we have today where, by the time project proponents submit a detailed project description to initiate the current assessment process,

<sup>6</sup> For a more detailed discussion on how environment is a shared responsibility, see Section 2.2 – Co-operation among Jurisdictions.



many of the most important decisions about how the project is to be undertaken have already been made.

Early engagement is critical to fully inclusive and informed IA processes. Establishing relationships among proponents, interested publics, Indigenous Groups and potential regulators early in the design of activities can allow for concerns to be discussed and addressed in advance of critical decisions and investments. Early engagement of all interested parties will also facilitate transparent information sharing and decision-making. Starting consensus building and co-operation early in project planning can also reduce the adversarial nature of project reviews. Beginning in the planning phase, face-to-face engagement should be prioritized to maximize relationship building, constructive dialogue and opportunities for consensus.

Additional benefits include offering a forum to build trusting relationships among proponents, governments and local communities, identify potential impacts to Aboriginal and treaty rights<sup>7</sup> across the five pillars of sustainability, and integrate Indigenous knowledge, laws and customs into the process.

“The earlier you can get in and you go in less prescriptive – it’s like if I have my home and there’s a fellow – I want to build a pipeline. I go up to him and I said, you know, we want to build a pipeline. And we’re going to build it right through your backyard. And we would like you to sign-off on it and we’re really good people so everything is great ... But if you go to them early and say, you know, we’re building a pipeline from this place to that place ... it’d probably be an easier conversation ... And I think it’s just really showing that respect for their thoughts and ideas and you’re not just coming in after the fact.”

*Dale Friesen, ATCO*

This proposed Planning Phase should lead to a more effective and efficient process. In the development of projects today, some proponents may already undertake a conceptual Planning Phase, prior to the initiation of the

current assessment process.<sup>8</sup> Bringing this conceptual Planning Phase into the formal IA process would aid both proponents and communities by helping facilitate relationship-building and trust. It would also provide clarity to the proponent early in the process with regard to the main issues of concern. For communities and Indigenous Groups, the Planning Phase would allow them to identify important information that can be inputted into the IA.

Overall, early engagement enhances IA as a planning tool by opening the process up to include collaborative planning of the project or region in question, as well as the planning and undertaking of the studies required to assess its impacts.

**The Panel recommends that federal IA should begin with a legislated Planning Phase that, for projects, occurs early in project development before design elements are finalized.**

## 2.1.3 FROM SIGNIFICANCE TO SUSTAINABILITY

### WHAT WE HEARD

While there were some exceptions, it was undoubtedly the case that there was broad interest from presenters across Canada in adopting a sustainability focus for federal IA. Participants shared their diverse notions of sustainability, many of which were holistic and called for the consideration of future generations. Many expressed support for the concept of next-generation EA, the objective of which “is to protect and enhance the resilience of desirable bio-physical, socio-ecological and human systems and to foster and facilitate creative innovation and just transitions to more sustainable practices.”<sup>9</sup>

Many participants identified the need for clarity and direction regarding the meaning and application of sustainability in an IA context. Sustainability criteria could

<sup>7</sup> For clarity, the duty to consult would be integrated into the overall IA process from the very beginning of the Planning Phase.

<sup>8</sup> For example, the Panel heard from Imperial Oil about an early engagement process on the WCC LNG project. See [http://eareview-examenee.ca/wp-content/uploads/uploaded\\_files/ceaa-2016-11-21-calgary.pdf](http://eareview-examenee.ca/wp-content/uploads/uploaded_files/ceaa-2016-11-21-calgary.pdf), p. 36.

<sup>9</sup> Gibson, Robert B., Meinhard Doelle, and A. John Sinclair. “Fulfilling the promise: basic components of next generation environmental assessment.” (2015).

be developed for each project but should be guided by transparent standards. There was a desire for a more holistic decision, based on a broad suite of evidence, with clearly articulated rationales. In cases where a project is found to not have a positive contribution to sustainability or to have unacceptable negative effects on a given area of sustainability, most participants wanted this decision to be a clear and firm “no.”

**“The two core purposes of federal EA law and associated processes are: to strengthen progress towards sustainability, including through positive contributions to lasting socio-economic and biophysical wellbeing, while avoiding and mitigating adverse environmental effects; and to enhance the capability, credibility and learning outcomes of EA-related deliberations and decision making.”**

*Multi-Interest Advisory Committee*

Many of these same participants also identified challenges with the current focus on avoiding or minimizing significant adverse environmental effects, as well as the associated cabinet decisions of when significant adverse environmental effects were justified.

## FINDINGS AND RECOMMENDATIONS

Sustainability should be central to federal IA. To meet the needs of current and future generations, federal IA should provide assurance that approved projects, plans and policies contribute a net benefit to environmental, social, economic, health and cultural well-being.

In evaluating what federal IA should consider, there is historic context for the current focus on the significance of adverse environmental effects. This focus came to prominence in Canada’s 1984 Environmental Assessment and Review Process Guidelines Order and was reinforced in *CEAA 1992*. The significance approach remains in place under the current assessment legislation, *CEAA 2012*.

However, this approach may no longer be appropriate. First, it focuses only on negative effects, and second, because significance is a “yes/no” decision, it results in adversarial relations at the outset. Instead, assessment should in the future include a review of net benefits and a review of trade-offs between benefits and negative effects.

**“Sustainability means the conditions under which ecosystem function, socio-cultural and economic well-being are maintained and risk to ecological integrity is low, thus providing the ecological foundation for the long-term socio-cultural and economic well-being.”**

*Tara Marsden, Gitanyow Hereditary Chiefs*

IA also needs to better address a review of alternatives. There is a need for an open and informed discussion about the nature of developments, and including the review of pros and cons of more than one option is essential.

The concept of sustainability provides all the key ingredients to adequately address these needs. A sustainability approach seeks to ensure that projects are planned to avoid or minimize harm and deliver benefits for current and future generations. It requires honest consideration of both positive and negative impacts and provides space for an analysis of alternatives. It is consistent with international environmental practices and trends and provides sufficient scope to meaningfully reflect *UNDRIP*. Its ultimate goal is to advance initiatives that contribute to lasting improvement in society’s well-being.

To put these ideas into action, a clear understanding of sustainability is required.

**“Environmental assessment should include a review of the impacts of all living beings, including but not limited to economic, social, cultural and health-related factors.”**

*Assembly of Manitoba Chiefs*

Sustainability is a term that has different meanings to different people in different contexts. As such, on its own it may pose challenges to implementation. Therefore, at the outset of each assessment, a sustainability framework should be defined to address specific aspects of a project and the potential for interactions and impacts on five pillars of sustainability:

- environmental;
- social;





- economic;
- health;
- cultural.

Expanding upon the three pillars typically referenced – environmental, social and economic – brings necessary emphasis to potential important impacts in IA. These five pillars are interrelated, and all five must be examined to assess impacts to Aboriginal and treaty rights and interests. Additionally, the assessment of alternatives can be undertaken, with consideration of the impacts and benefits of each alternative on the relevant components of sustainability.

A clear and transparent framework for evaluating impacts to these components needs to be established. The sustainability questions developed by the Joint Panel for the Kemess North Gold-Copper Mine provide a useful starting point. With some paraphrasing, these questions ask:

- Is adequate protection provided through all phases of the project or plan?
- Are net benefits provided locally, regionally and nationally?
- Is there a net contribution to the well-being of potentially affected people and to their interests and aspirations?
- Are the benefits and costs fairly distributed?
- Are benefits provided now, without compromising the ability of future generations to benefit?

These questions should be asked throughout an IA, but at the beginning of an IA, these questions can help guide the review of alternatives and development of specific issues to be assessed. These questions should allow the local context – such as ecologically sensitive areas, specific social dynamics, or resources required for preferred cultural practices – to be reflected in the IA.

This sustainability framework includes each of the pillars and the interactions among them. While the objective should be to minimize the times when achieving benefits in one pillar comes at the cost of losses to other pillars, trade-offs may be necessary. In this model, the ultimate IA decision on a project will apply the sustainability

framework in the form of a sustainability test. This test should be project-specific and answer questions similar to the five questions set out above using clear, objective criteria.

An IA process based on sustainability must focus on activities with potential impacts on matters of federal interest that are consequential to present and future generations. The term “consequential” is of utmost importance in triggering meaningful federal IA. Impacts that are consequential to present and future generations are, for example, impacts that:

- affect multiple matters of federal interest;
- are of a duration that will be multi-generational; and/or
- extend beyond a project site in geographic extent.

Other factors, such as if the impact is in an ecologically or culturally sensitive area, or if the impact has the potential to contribute to cumulative impacts, may also be deemed consequential impacts to present and future generations.

**The Panel recommends that sustainability be central to IA. The likelihood of consequential impacts on matters of federal interest should determine whether an IA would be required.**

The Panel believes that this sustainability approach will remedy concerns with current decisions of justification of significant adverse effects. In order to contribute effectively to Canada’s future, IA itself must judge more than the adverse environmental impacts of a development project. IA should be able to analyse, discuss and weigh negative and positive project impacts openly. Projects which provide a net benefit to the country should be approved. Those that do not should not.

An IA process should result in a clear decision, informed by the sustainability test. If a project fails to pass the test, IA decision-makers should have the authority to say “no” to the project as proposed and such a decision should restrict the issuance of subsequent federal regulatory approvals. If a project is found to contribute to sustainability at the IA stage, subsequent federal regulatory approvals would be informed by the outcomes of the IA.



The Panel recommends that federal IA decide whether a project should proceed based on that project's contribution to sustainability.

## 2.1.4 TIERING

Project-specific assessments have an important role to play to ensure new activities contribute to sustainability. Many sustainability questions, however, cannot be properly assessed at the scale of project IA. It is therefore necessary to examine whether strategic IA or regional IA can identify how policies and plans can better inform IAs.

Strategic IA will provide clarity on how federal policies can be effectively considered in regional and project IA. Regional IA will provide clarity on thresholds and objectives on matters of federal interest in a region and will inform and streamline project IA.

Therefore, a tiered approach should be implemented whereby strategic and regional IAs provide the policy and planning foundations for improved and efficient project IAs. The information gathered and knowledge gained at one tier of IA should inform IAs conducted at the lower tiers. For example, baseline data and plans from regional IAs should inform project IAs, allowing for a more thorough and efficient assessment of the project-specific issues at hand.

Enhanced interactions between projects, regions, plans and policies, and the pillars of sustainability are an important purpose of IA. A federal IA regime equipped with this suite of options can apply the best type of assessment to any given activity or decision.

The Panel recommends that IA legislation require the use of strategic and regional IAs to guide project IA.

## 2.2 CO-OPERATION AMONG JURISDICTIONS

### CONTEXT

IA creates challenges for Canada's system of government, with the requirement that a broad range of information be collected and evaluated but with no government having full authority to regulate all impacts. Federal, provincial, territorial, municipal and Indigenous governments may each have responsibility for the conduct of IA, but each level of government can only regulate matters within its jurisdiction.

For example, in the current environmental assessment context, federal decisions must be tied to matters within federal authority such as fish and fish habitat, provincial decisions must be tied to matters within provincial authority such as provincial land and certain kinds of resource development, and municipal decisions must be consistent with authority delegated to municipalities by provinces. Similarly, each jurisdiction may also lead responsibility to make decisions on the pillars of sustainable development – environmental, economic, social, cultural or health.

Indigenous jurisdiction over IA has a more complex legal basis. In some instances, IA is defined through self-governments agreements, modern treaties or agreements established under federal statutes such as the *First Nation Land Management Act*. In many instances, Indigenous Groups have inherent jurisdiction over their traditional territories, in alignment with Canada's Constitution and the principles of *UNDRIP*.

The federal environmental assessment process under *CEAA 2012* includes provisions to enable co-ordination among jurisdictions, including delegation, co-operation, substitution and equivalency. Among federal and provincial governments, the general principle guiding co-operation is "one project, one assessment." To implement this principle, many projects since the 1990s have been subject to joint federal-provincial panels. *CEAA 2012* changed certain aspects of federal EA – such as timelines, authority to carry out EA and scope of EA – so that it became more difficult to carry out joint EAs. However, *CEAA 2012* also encouraged substitution and equivalency, with British Columbia being the only province to reach a substitution agreement. The result of



## KEY TERMS

**DELEGATION:** When a part of one jurisdiction's (A) process is carried out by another person, body or jurisdiction. The process of jurisdiction A is applied by the delegated body.

**CO-OPERATION:** Co-ordinate EA processes with the objective of "one project, one assessment." All jurisdictions conduct their respective EAs, while aligning their processes to the extent possible.

**SUBSTITUTION:** When an EA law or process of one jurisdiction (A) is substituted for an EA law or process of another jurisdiction (B). The process of jurisdiction A is applied to meet the obligations of jurisdiction B. Jurisdiction B makes its decisions based on the results of A's process.

**EQUIVALENCY:** When it is determined that Jurisdiction A's process is equal to Jurisdiction B's process and they are therefore essentially the same. An assessment under B's process is therefore not required and only A makes a decision at the end of the EA.

*Arlene Kwasniak*

these changes is that current co-operative assessment practices have not achieved the goal on "one-project, one-assessment." There are fewer joint panels and assessments now increasingly occur in parallel instead.

For sustainability to be advanced, all jurisdictions need to find a way to work together. As outlined previously, federal IA should be grounded in legal jurisdiction, start early in planning and focus on assessing contributions to sustainability. These foundations make co-operation among jurisdictions essential to ensure Canadians realize the benefits from IA.

### 2.2.1 CO-OPERATION WHAT WE HEARD

The Panel heard overwhelmingly that one project should be subject to only one assessment process. Participants emphasised that co-ordinating IA processes is key to ensuring that all impacts likely to result from a project

are effectively considered. Co-ordinating multiple processes allows for the combining of strengths from each jurisdiction. It also provides process certainty for proponents and more meaningful engagement of the public and Indigenous Groups.

Many participants said there is a need for federal involvement in all IA processes because federal experts bring particular expertise on matters of federal interest and represent a national and potentially more neutral perspective on resource development. Participants also said they are less concerned about who leads the assessment process than about the process being fair, robust and transparent.

In a full day meeting with provincial and territorial environmental assessment practitioners,<sup>10</sup> the Panel heard that a common objective is a rigorous environmental assessment process that enables effective public and Indigenous engagement. Participants emphasized the need for a flexible federal assessment process to facilitate effective co-operation, reduce duplication and respect jurisdictional lines. They also

**"Application of CEAA to a project should continue to provide for co-ordination (harmonization/substitution) of federal EA requirements with provincial/territorial EA requirements and processes to ensure "one project, one review."**

*Oliver Laser, Judy Bennett, Eric Hartman, and Bruce Vincent*

reiterated the importance of federal expert engagement in all IAs, even in circumstances where only the provincial or territorial process applies.

In a full day meeting with federal departments,<sup>11</sup> the Panel heard that there is a need to bring together federal, provincial and Indigenous knowledge to understand the effects of an activity. Departments noted that better federal and provincial co-ordination mechanisms are needed and that co-ordination should occur early. Departments suggested that good co-ordination has occurred in past joint review panels.

<sup>10</sup> Expert Panel Meeting with Provinces and Territories (November 2, 2016). See <http://eareview-examenee.ca/what-weve-heard/panel-meeting-provinces/>

<sup>11</sup> Expert Panel Meeting with Provinces and Territories (November 2, 2016). See <http://eareview-examenee.ca/what-weve-heard/panel-meeting-provinces/>

## FINDINGS AND RECOMMENDATIONS

The principle of “one project, one assessment” is central to implementing IA around the five pillars of sustainability. Other options will result in fragmented, inefficient and inconsistent IAs and project decisions.

In Canada, many jurisdictions have the expertise, knowledge, best practices and capacity to contribute to IA. For example, the federal and provincial governments may focus on closely related issues, such as impacts to water quality versus impacts to a fishery. Yet Indigenous Groups also have relevant knowledge on these topics related to the practise of their Aboriginal and treaty rights, their traditional and ongoing land use, and their laws, customs and institutions. Similarly, municipalities are the custodians of land use and the full range of local impacts that affect residents and their communities. Co-operation brings all of this expertise to the table to make informed decisions about how a project may best contribute to Canada’s sustainable future.

For most projects, potential impacts on the five pillars of sustainability will include areas beyond federal authority. Therefore, to further the values achieved by “one project, one assessment,” there must be co-operative decision-making about a project’s contribution to the long-term well-being of Canadians. This will likely require provincial involvement, as well as the involvement of any other government with a decision-making authority over the project subject to IA.

The principal benefits of co-operative IA are:

- integration of all interests and issues into one process;
- sharing and streamlining of costs due to the removal of duplication;
- conduct of joint public and Indigenous engagement activities;
- involvement of the best experts from all jurisdictions;
- collective review, weighing and evaluating of impacts, including trade-offs, across the five pillars of sustainability; and
- agreement on appropriate conditions to inform decision-making and approvals.

To date, the best examples of co-operation among jurisdictions have been joint review panels, backed up by general co-operation agreements between Canada and many provinces. As such, expanding the co-operation model to include all relevant jurisdictions is the preferred method to carry out jurisdictional co-ordination.

**The Panel recommends that co-operation be the primary mechanism for co-ordination where multiple IA processes apply.**

## MECHANISMS TO SUPPORT CO-OPERATION

Co-operation in IA may take a variety of forms. Most broadly, co-operation arrangements with provincial or Indigenous governments can outline how all future IAs in that jurisdiction will be undertaken. Co-operation arrangements can also be sector-specific to identify when, for example, a joint review panel would be appropriate, or project-specific to set out the membership of a specific review panel and scope of the review. Each type of arrangement has value in improving consistency and certainty for all parties engaged in the IA process.

Project-specific co-operation arrangements should be negotiated early in the project Planning Phase and form part of any agreement on the conduct of a project IA, from planning through to study, decision-making and follow up.

**“An important feature of the federal EA regime is that, even where it falls short, it provides us access to the federal crown and federal departments.”**

*Athabasca Chipewyan First Nation*

### CO-OPERATION AGREEMENTS

The federal government should demonstrate leadership and initiate discussions to build a co-operative framework early in the development of a modernized IA regime. In addition to project-specific co-operation arrangements, overarching IA co-operation agreements are also a mechanism to support the implementation of a co-operative approach to IA in a region or jurisdiction.



Where co-operation agreements now exist between the federal and provincial government, or between the federal government and Indigenous Groups, they should be revisited to ensure that they reflect a sustainability-based IA model and meet the principle of harmonization upward, meaning co-operation to meet the highest standard of IA. Co-operation agreements should also demonstrate how the principles of *UNDRIP* would be reflected in co-operative assessment processes. The co-operation framework established by the Canadian Council of Ministers of the Environment in 1999 should be revisited and modernized to implement the principle of harmonization upward.

#### **CO-OPERATION WITH INDIGENOUS GROUPS**

Co-operation arrangements under a new IA regime should address the duty to consult and how the principles of *UNDRIP* are to be reflected in the IA process.

Where Indigenous governments have assessment responsibilities, tri-partite arrangements should be negotiated for the conduct of regional or project assessment within their traditional territory, treaty settlement lands and/or Aboriginal title lands. Should Indigenous Groups without modern treaties wish to undertake their own IA processes, they should be able to do so, and co-operation arrangements with these Groups should be negotiated. Federal IA governance structures and processes should support Indigenous jurisdiction.

## **2.2.2 SUBSTITUTION WHAT WE HEARD**

There was both positive and negative feedback on the substitution process. There are process efficiencies that result from substitution, but there was also a view that the provincial process may not meet federal process standards or substantive federal IA requirements. Some participants felt that their inability to raise concerns directly with federal officials was a gap left by substitution.

The Panel also heard that government collaboration should meet the highest environmental assessment standards, or “harmonizing upward,” to ensure that the process is robust and builds trust. Indigenous Groups stated that their lack of trust in the process and its inaccessibility to them resulted in their desire to create parallel or independent EA processes.

“Collaboration or harmonization upwards to the highest appropriate standard is the best option for fair and robust processes and maximum buy-in to decisions, while optimizing efficiency.”

*Multi-Interest Advisory Committee*

## **FINDINGS AND RECOMMENDATIONS**

In addition to co-operative assessments, substitution should remain an option in an enhanced federal IA process. However, substitution requirements should be strengthened to ensure the principle of “harmonization upward” is implemented and the highest standards of IA are met.

### **SUBSTITUTION CRITERIA SHOULD INCLUDE:**

1. Sustainability-based scope of issues based on criteria identified in the Planning Phase.
2. Transparent and accessible information.
3. Comparable opportunities for public engagement.
4. Active engagement of federal experts and federal regulators.
5. Delegation of procedural aspects of the duty to consult.
6. The principles of *UNDRIP*, specifically consent, reflected into decision-making.
7. Integration of independent science throughout the impact assessment.
8. Meeting existing commitments set out in co-management or consultation agreements

The standards and criteria to approve substitution should be strengthened to ensure the key federal requirements are maintained. The question of substituting another jurisdiction’s process, including an Indigenous process, for the federal one should be considered early in the federal IA process and a decision on substitution made once the scope of issues and interests are understood. Indigenous Groups should be actively involved in any substitution decision.

The authority responsible for conducting federal IAs should have discretion to approve substitution. To ensure that a substituted IA meets the needs of all relevant jurisdictions, there must be federal expert engagement throughout the process. There must also be an opportunity for the federal authority to request additional information from the other jurisdiction if a gap is identified upon completion of the substituted process. In order to request substitution, another jurisdiction should have a substitution or co-operation agreement in place with the authority conducting federal IAs. The agreement should clearly demonstrate how the jurisdiction will meet the substitution criteria. Substitution decisions should only be made on a project-by-project basis.

**The Panel recommends that substitution be available on the condition that the highest standard of IA would apply.**

The Panel understands that it is recommending a higher bar for the approval of substitution. This may inhibit jurisdictions from taking on a substituted assessment and would also require the renegotiation of the substitution arrangement between the Canadian Environmental Assessment Agency and the British Columbia Environmental Assessment Office. An immediate emphasis on joint or co-operative assessment processes should minimize any transitional challenges to a new substitution regime. Where the goal of a rigorous and transparent assessment process remains the objective of all jurisdictions, the new criteria should not impede future substitution opportunities.

The principles of co-ordination, co-operation and collaboration also apply to the conduct of regional IAs. Regional IAs done jointly among all implicated jurisdictions would enable decision-making on regional thresholds and objectives across the five pillars of sustainability, would enhance certainty for future developers in the region, and would enhance public and Indigenous contributions to decisions made on the regional objectives and thresholds. Co-operation would further enable the implementation of regional IA, as cost would be shared and the experts from all jurisdictions would collaborate on the setting of regional objectives.

The implementation of co-operation tools, including the substitution provisions, should be regularly reviewed and audited to confirm the objective of “one project, one assessment,” as well as the objectives of building trust and ensuring the highest standards of IA are met. A regular and consistent review of the implementation successes and challenges would contribute to the continuous improvement of future co-operative processes.

### 2.2.3 EQUIVALENCY

Equivalency is another co-operative mechanism enabled under *CEAA 2012*. In a substituted process, the IA decision remains with the federal authority responsible for IA. The equivalency approach, however, exempts a project from the federal process altogether.

The new approach for federal IA is focused on impact to matters of federal interest, which are best addressed by federal experts. The proposed model also seeks co-operation with other jurisdictions, as this is fundamental to ensuring that all impacts across the five pillars of sustainability are appropriately addressed. As equivalency does not advance these objectives, the Panel does not view equivalency as a viable option.

## 2.3 INDIGENOUS CONSIDERATIONS CONTEXT

Over the course of its journey from coast to coast, the Panel heard from Indigenous Peoples about their fundamental connection to the land. This connection includes the relationship between humans and the landscape in a holistic, interconnected framework. The Panel heard about how the land and waters, and all the resources that flow from them, are not only the source of all life and Aboriginal rights and title, but also the source and keeper of their history, their future and their laws.

Indigenous Peoples bear a disproportionate burden of developmental impacts. There is widespread belief that current processes fail to adequately account for Indigenous constitutional rights. Indigenous Groups across the country express a lack of trust in current EA processes, and there is a lack of confidence in past



environmental assessment decisions. EA processes are viewed as being based on flawed planning, misinformation, mischaracterization of Indigenous knowledge and Aboriginal and treaty rights, and opaque decision-making. Many Indigenous Groups decide to not participate in EA processes, while others create their own parallel or independent assessment processes. Instead of advancing reconciliation, EA processes have increased the potential for conflict, increased the capacity burden on under-resourced Indigenous Groups and minimized Indigenous concerns and jurisdiction.

Finding ways to enhance Indigenous participation and consultation was identified as a key goal in the Panel's Terms of Reference, as was reflecting the principles of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, "especially with respect to the manner in which environmental assessment processes can be used to address potential impacts to potential or established Aboriginal or treaty rights."

This section provides some background on, and the Panel's recommendations related to, five topics:

1. *UNDRIP* Principles
2. Assessing Impacts to Aboriginal and Treaty Rights in IA
3. Capacity
4. Indigenous Knowledge
5. Impact Benefit Agreements

Indigenous Peoples also have concerns and interests related broadly to federal IA processes, and other sections of this Report outline how the Panel's recommendations in this section can and should be implemented within IA processes and legislation. The Panel also recognizes that there are broader discussions that need to occur between the Government of Canada and Indigenous Peoples with respect to nation-to-nation relationships, overlapping and unresolved claims to Aboriginal rights and title, reconciliation, treaty implementation and the broader implementation of *UNDRIP*. Many of these discussions will be necessary prerequisites to the full and effective implementation of the recommendations contained in this Report.

## *UNDRIP PRINCIPLES*

*UNDRIP* is an international document setting out the minimum rights of Indigenous Peoples on a global scale. It is not an agreement that is signed or ratified by nation-states such as Canada, but it may be used within Canada to interpret constitutional obligations under Canadian law and international human rights treaties.<sup>12</sup> At its core, *UNDRIP* is a human rights safeguard: its underlying goal is to level the playing field between Indigenous Peoples and non-Indigenous people by setting standards and bringing effect to Indigenous Peoples' rights.

Currently, there is no process or guidance to reflect the principles of *UNDRIP* within existing assessment processes. However, the Government of Canada provided its full support, without qualification, for *UNDRIP* in May 2016 in alignment with the Calls to Action in the Truth and

**"Indigenous People of Canada have a deep and extensive connection to their territory. The connection is embedded and celebrated in our language, oral histories, culture and laws. Often the way that the lands, laws and cultures are represented are beautifully intertwined like a spider's web where one aspect will reverberate to another."**

*Sunny Lebourdais*

Reconciliation Report.

The Findings and Recommendations section below focuses on two key themes of *UNDRIP*: participation in decision-making in accordance with Indigenous Peoples' own institutions, laws and customs; and the principle of free, prior and informed consent. This Report also integrates other themes of *UNDRIP* throughout, as referenced.

## *ASSESSING IMPACTS TO ABORIGINAL AND TREATY RIGHTS IN IMPACT ASSESSMENT*

Indigenous Groups in Canada have constitutionally protected Aboriginal and treaty rights. Aboriginal rights are inherent collective rights which flow from Indigenous Groups' prior occupation of the land. Treaty rights may refer to historic or modern treaties between Indigenous Groups and the Crown which each define a unique set of rights.

<sup>12</sup> *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook*. Indigenous Bar Association. 2011, p. 7. See [http://www.indigenousbar.ca/pdf/undrip\\_handbook.pdf](http://www.indigenousbar.ca/pdf/undrip_handbook.pdf)

The Government of Canada's constitutional duty to consult and accommodate Indigenous Peoples is triggered when their asserted, claimed or established Aboriginal or treaty rights and interests may be adversely impacted by contemplated Crown conduct. This duty stems from the honour of the Crown, which is owed by Canada and every provincial government. The goal of consultation and accommodation is reconciliation. Currently, many governments have attempted to integrate the duty to consult and accommodate into their EA processes. Generally, however, the federal and provincial governments have not required that EA decisions address impacts to rights.

#### **CAPACITY**

Indigenous Groups across the country face a multitude of capacity constraints, some of which are common and others shaped by distinct historical contexts. These constraints include inadequate funding, staffing or technical/process knowledge of environmental assessment. Capacity challenges also arise from the volume and complexity of project referrals received by Indigenous Groups year by year. The net result is limited participation in current assessment processes.

#### **INDIGENOUS KNOWLEDGE**

Indigenous knowledge arises from and is inextricably linked to the land. It is widely recognized for its value. It has direct relevance to EA processes. Yet current EA legislation does not require the integration of this knowledge. While best practices have evolved in recent years to include some consideration of Indigenous knowledge in EA, there continues to be almost exclusive reliance on western science in decision-making.

#### **IMPACT BENEFIT AGREEMENTS**

Resource development proponents often negotiate agreements known as Impact Benefit Agreements (IBAs). These are private, bilateral arrangements between Indigenous Groups and industry proponents. They often contain environmental provisions, and provide contracting and employment opportunities and other forms of financial benefits in exchange for Indigenous Groups' support for, or lack of opposition to, a project. IBAs do not involve federal or provincial governments directly. They are thus distinct from resource revenue-sharing arrangements between federal or provincial governments and Indigenous Groups, which may provide communities with a share of public revenues, such as royalties and taxes from resource development.

## **2.3.1 REFLECTING UNDRIP PRINCIPLES IN IMPACT ASSESSMENT**

### **WHAT WE HEARD**

Many participants expressed support for reflecting the principles of *UNDRIP* within federal IA processes and had many ideas relating to the intersection of *UNDRIP*, the assessment of impacts to Aboriginal or treaty rights and interests, IBAs, capacity and Indigenous knowledge. Reflecting the principles of *UNDRIP* has key implications for IA. Participants expressed the view that free, prior and informed consent (FPIC) is not necessarily a veto but a process of mutual respect, trust and collaborative decision-making grounded in the recognition of Indigenous Peoples as equal partners. Reflecting the principles of *UNDRIP* will advance the goal of reconciliation.

One of the clearest messages conveyed by participants with respect to FPIC is that the Government of Canada needs to engage in a dialogue with Indigenous Peoples across the country to find out what FPIC means to them and to come to a mutual understanding going forward.

**“Collaborative consent’ is an integral concept for future environmental assessment legislation in the context of nation-to-nation agreements set out by mutually agreed-upon frameworks. Collaborative consent within nation-to-nation agreements can provide the flexibility and local and regional accommodations required for practical dialogue, informed decision-making processes, good information-sharing and projects that enhance sustainability objectives.”**

*Manitoba Métis Federation*

## **FINDINGS AND RECOMMENDATIONS**

There are many opportunities to reflect the principles of *UNDRIP* within IA legislation, processes and procedures. These principles are a natural fit with the goal of increasing Indigenous participation and consultation, especially with respect to addressing impacts to Aboriginal and treaty rights and interests. Reflecting these





principles within IA would also contribute toward the broader goal of reconciliation with Indigenous Groups.

Although *UNDRIP* is meant to be read as a whole, several articles of *UNDRIP* relate directly to the field of IA. These include:

- Right to self-determination (Articles 3, 4, and 5)
- Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)
- Right to set own priorities and strategies (Article 23)
- Right to make decisions over traditional territory (Articles 26 and 29)
- Right to free, prior and informed consent (Article 32)
- Right to culture (Articles 8, 11, and 25)
- Right to maintain and protect Indigenous knowledge (Article 31)
- Right to financial assistance (Article 39)

Explicitly acknowledging the ability of Indigenous Peoples to be directly involved in decision-making also allows for the recognition of their right to self-determination and their inherent jurisdiction, and enables them to protect and uphold a suite of other rights – basic human rights as expressed through *UNDRIP*, as well as their Section 35 Aboriginal and treaty rights.

*UNDRIP* is clear that all decision-making processes that impact the rights of Indigenous Peoples must be in accordance with the distinctive governance institutions, laws and customs of the relevant Indigenous Peoples. Accordingly, Indigenous Peoples must have the ability to select their own representatives to participate on their behalf within IA processes, and maintain and develop internal decision-making institutions and distinctive customs.

Recognition of and support for Indigenous laws and inherent jurisdiction should be built into IA governance and processes. IA should not be a process designed and imposed from afar; Indigenous Peoples should have the ability to adapt the process to reflect their own traditions, customs, law and aspirations. Ideally, for many parts of the country, there will be co-management of IA processes and natural resources between Indigenous Groups and

the federal government. It is in Canada's national interest that IA facilitates reconciliation.

When it comes to a consideration of FPIC, the main elements are clearly stated in the words themselves – free, prior and informed. FPIC is not in conflict with the duty to consult and accommodate; to the contrary, it should strengthen and supplement consultation and

**“The simple answer is the tapestry requires the golden thread of Indigenous law and legal orders. You want to consider the tapestry, what has the tapestry excluded. It's excluded Indigenous laws. The laws embodied in like all of my body modification. And the thing is those laws can be incorporated. That's the recent research being done out of UVic, U of T, U of O on Indigenous law and legal orders. The University of Saskatchewan is doing a bunch of stuff on this. There are mechanisms to incorporate Indigenous laws that intrinsically embed and transcend the kind of anthropocentric colonial mentality. And that's where I think we're going to find the richest source of solutions.**

*Caleb Behn, Keepers of the Water Society*

accommodation. To reflect FPIC, all Indigenous Peoples who are impacted by a project have the right to provide or withhold consent. While Indigenous Peoples have the right to say no, the Panel believes this right must be exercised reasonably.

Collaboration with all parties, especially Indigenous Groups, is key to the success of IA processes in general. Consent should therefore be provided under a collaborative framework which would include dispute resolution processes at decision points. Parties would have various options available to them to review the reasonableness of all decisions, including the reasonableness of Indigenous Groups withholding their consent. This is consistent with the responsibilities and limitations associated with any jurisdiction (i.e., federal or provincial governments) and does not hinder or otherwise compromise the right to FPIC.

The process of getting to FPIC within a well-designed IA process should build clarity and certainty for all. If Indigenous Peoples say “no” to a project, all parties should have a good understanding of the reasons behind that decision. When there are overlapping claims and



uncertainties with respect to who is impacted by a project, these uncertainties should be resolved by Indigenous Groups themselves in accordance with their own laws and traditions.

A new IA regime should be fundamentally based on collaborative consent, with Indigenous Peoples on par with other levels of government. The Panel wishes to make it clear that the provision of consent during an IA does not mean that the duty to consult and accommodate has been discharged for government decisions that occur after the IA is concluded.

**The Panel recommends that Indigenous Peoples be included in decision-making at all stages of IA, in accordance with their own laws and customs.**

## 2.3.2 ASSESSING IMPACTS TO ABORIGINAL AND TREATY RIGHTS IN IMPACT ASSESSMENT

### WHAT WE HEARD

Participants said that it is critical to recognize that activities on the landscape interact with Aboriginal and treaty rights and interests in a number of ways, often adversely. These impacts occur both directly and indirectly through changes to the bio-physical environment. The full suite of impacts must be considered in IA. Currently, impacts of projects to Aboriginal and treaty rights and interests are poorly assessed (when assessed at all), and no clear, transparent method is applied. For example, an impact to wildlife may take into account the resulting impact on hunting and trapping practices but may fail to account for other impacts, such as access to existing hunting or trapping sites. Furthermore, current EA processes are insufficient for fulfilling the duty to consult and accommodate. Participants expressed the view that nation-to-nation dialogue and relationships are required to remedy this failing and move towards reconciliation.

## FINDINGS AND RECOMMENDATIONS

There are two paramount and interrelated components to considering Aboriginal and treaty rights and interests in an IA context: the assessment of impacts to rights, and the associated requirements for consultation and accommodation. Improvements are needed on both fronts. Current assessment processes are unclear, inconsistent and insufficient in their assessment of Aboriginal and treaty rights and interests. *CEAA 2012* inappropriately narrows the scope of impacts on Indigenous Peoples. This approach inhibits understandings of impacts to Indigenous Peoples and productive dialogue about appropriate mitigation and accommodation and therefore satisfies neither the needs of Indigenous Peoples nor those of the project proponents or the government.

**“The fact of unresolved and outstanding Métis Aboriginal rights and title claims in relation to Métis traditional territories, lands and resources, is an important context for Canada’s environmental assessment legislation.”**

*Métis National Council*

Meeting the minimum requirements of the duty to consult and accommodate should not be the Crown’s objective in undertaking consultation. The Panel hopes that improved IA processes will facilitate not only the fulfilment of the duty but also the protection of Aboriginal and treaty rights and interests. Improved IA processes will address concerns that the duty to consult and accommodate is not addressed in current EA processes and that current EA processes are ill-suited to meet the duty.

Assessments of impacts to rights must from the outset be meaningful, thorough and effective. Indigenous Peoples need to be involved in the development of these assessments, and the IA process must be flexible enough to respond to project context and Indigenous Groups’ respective knowledge and customs. Assessments of impacts to rights in the IA process should be undertaken as distinct studies. These studies must be planned and completed by Indigenous Groups themselves.



**The Panel recommends that IA processes require the assessment of impacts to asserted or established Aboriginal or treaty rights and interests across all components of sustainability.**

An IA authority must be responsible for substantive Crown consultation and accommodation. The power of the IA authority to conduct the duty to consult and accommodate and to assess the existence and adequacy of the discharge of the duty must be explicit and be stipulated in legislation. Currently, matters of inadequate consultation and accommodation are often resolved through the courts, which requires extensive time and financial resources from all parties involved. Providing this clarity-of-consultation responsibility will reduce uncertainty, conflict and associated delays.

Assessment of impacts to rights across all pillars of sustainability (environmental, social, economic, health and cultural) will ensure an integrated understanding of impacts, as well as mitigation and accommodation. Mitigation and accommodation are not synonymous, and mitigation should not be seen as the only means by which to provide accommodation. Future IA processes must aim to comprehensively identify accommodation and hold the Crown accountable to its obligations. Adequate fulfilment of the duty to consult and accommodate should be required for project approval, and a clear determination on these matters should be issued by decision makers.

**The Panel recommends that any IA authority be designated an agent of the Crown and, through a collaborative process, thus be accountable for the duty to consult and accommodate, the conduct of consultation, and the adequacy of consultation. The fulfilment of this duty must occur under a collaborative framework developed in partnership with impacted Indigenous Groups.**

## 2.3.3 CAPACITY WHAT WE HEARD

Capacity challenges across Canada are multifaceted and pose very real barriers to participation of Indigenous Groups in current assessment processes, as well as to the assessment and mitigation of potential impacts to Indigenous Peoples. Some participants focused on the perceived lack of capacity within federal government departments undertaking or participating in current EA, as evidenced by a limited knowledge of Indigenous Peoples, rights, knowledge, history and culture. Other participants explained that funding to Indigenous Groups is insufficient to support their meaningful engagement in current assessment processes that are complex and plagued with information that is often not easily understood.

It was argued that foundational knowledge and skills must be developed outside of individual IA processes and that ongoing financial support is required to support capacity development. Furthermore, IA-specific funding should support engagement throughout all phases of IA and should be managed so as to support a level playing field. In other words, Indigenous Groups should be able to identify where and how their respective capacity development is carried out.

## FINDINGS AND RECOMMENDATIONS

Improvements to the IA process proposed throughout this Report seek to provide Indigenous Peoples with increased involvement in IA and to reflect their jurisdiction. Involvement in this process, however, will require capacity. Capacity within IA is complex, multifaceted and symptomatic of broader issues across Indigenous communities. It pertains to financial resourcing and funding, personnel availability, knowledge and expertise. The capacity challenges that exist for IA do not exist in isolation; communities are faced with capacity constraints across the board, directly tied to the complex history of Indigenous-Crown relationships within Canada.

It is evident that capacity deficits in government IA practitioners hinder Indigenous engagement in assessment. A priority should be placed on ensuring that federal bodies and departments involved in IA better understand Indigenous Peoples, culture, history and IA-related issues. A fully informed foundation is required



### Capacity Constraints across the Country

“First Nations’ consultation organizations need to maintain the capacity to engage in identification, analysis and resolution of technical and scientific and environmental issues related to resource development. ... The annual cost of implementing the optimum organization structure for each of the organizations is estimated at between \$4,752,896 and \$5,412,583 for an average of 21.5 core staff (vs. current core budgets of approximately \$1,672,352 for an average of 9.5 core staff).”

*Athabasca Chipewyan First Nation and Mikisew Cree First Nation, Alberta*

“You know, we need to be properly funded. Like I say, when the mining companies come in and they plop 20 binders on my desk and said, “Review that,” and, you know, it’s a shock. You open the first few binders, you have no clue what they’re talking about. Arsenic levels to water, this and that. You don’t know. So then you have to go out. You need to be able to be properly resourced to be able to get somebody in to be able to review the documents for you and be able to educate you so you can educate your people so you can make a proper decision. And ... that hasn’t been happening.

*Mark Bell, Aroland First Nation, Ontario*

“It pushes SXFN to consider whether we allocate more funds towards the environmental issues that we have with the project or we put more time into the traditional knowledge, traditional use studies, that kind of thing. So having to choose between the two is something that puts us in a difficult position ... Some of those decisions that we had to make were difficult when we had to choose whether, where we allocate our own funds after our budget is reduced or cut by half or cut by 70 per cent, 75 per cent the majority of the time.”

- Example: \$147,000 required vs. \$83,000 received
- Example: \$125,000 required vs. \$47,000 received

*Patrick Harry, Stswecem’c Xgat’tem First Nation, British Columbia*

“The NEB initially told participants that the review proceedings for the project would involve two phases, with a maximum funding amount of \$80,000 for both phases. Relying on this information, we mapped out our approach to participate in the NEB hearing process, and applied for funding for the first phase of the review. The \$80,000 maximum funding amount already posed challenges for us, given the scale of the project, the kind of technical evidence that would be required, and the limited financial resources that we have. Despite this, the NEB unilaterally decided to cut participant funding in half.”

*Amanda McIntosh, Woodstock First Nation, New Brunswick*

so that Indigenous Groups’ time and efforts within a given IA process can then be applied to the specific issues at hand rather than building background knowledge for government. This foundational learning should be based on real-life interactions with Indigenous Groups. The role of Indigenous Groups as the experts on matters which affect their rights and communities must be clearly acknowledged and respected.

**The Panel recommends that any IA authority increase its capacity to meaningfully engage with and respect Indigenous Peoples, by improving knowledge of Indigenous Peoples and their rights, history and culture.**

Indigenous Groups, as participants, require a foundational understanding of IA in advance of engaging in a project process; this understanding is critical to efficient use of time and resources during project IAs. Becoming familiar and confident with IA processes is challenging and requires a sufficient number and continuity of knowledgeable, dedicated personnel.

Upfront capacity building is necessary to create the conditions of FPIC. Additionally, Indigenous Groups should be able to define for themselves their respective capacity needs and appropriate strategies to address these.

**The Panel recommends that a funding program be developed to provide long-term, ongoing IA capacity development that is responsive to the specific needs and contexts of diverse Indigenous Groups.**

There are many costs to engaging in IA, and current participant funding falls far short of what is required for Indigenous Groups to meaningfully engage in IA processes and decision-making. Indigenous communities should have the capacity to play an active role in information gathering and analysis. Large volumes of complex information are common to IA. All parties involved in an IA should co-operatively assess the resources that will be required throughout the



process and develop a plan for meeting these needs so participation is adequately supported in a predictable and transparent manner and all involved can expend their capacity in a way that best meets their own needs and contributes to the IA overall.

**The Panel recommends that IA-specific funding programs be enhanced to provide adequate support throughout the whole IA process, in a manner that is responsive to the specific needs and contexts of diverse Indigenous Groups.**

## 2.3.4 INDIGENOUS KNOWLEDGE

### WHAT WE HEARD

Indigenous knowledge is misunderstood and marginalized in current assessment processes. In particular, it is often confused with traditional land use. Many participants said that Indigenous knowledge must be a requirement in future IA legislation and that there is a lack of clarity in current EA practice as to appropriate methods to collect and integrate Indigenous knowledge. Accessibility issues, including time, resources, language and communication methods, limit knowledge-sharing with proponents, regulators and EA practitioners. Trust and lack of confidentiality were also identified as barriers to sharing Indigenous knowledge. It was explained that Indigenous knowledge must be collected following culturally respectful protocols, which include earning trust and building relationships with knowledge-holders and enabling them to maintain ownership of their knowledge.

**“When you have been given the responsibility to look after the land, you do it with honour, you do it with pride. The land has been referred to as Mother Earth. And you would treat your mother the same way. You would look after her. This is the thinking of our people and how we look after the land, with great respect, with much love.”**

*Daryl Redsky, Shoal Lake No. 40 First Nation*

## FINDINGS AND RECOMMENDATIONS

The definition of Indigenous knowledge differs for each knowledge-holder or system, but there are commonalities between systems which are foundational to understanding how Indigenous knowledge should be integrated in IA. The Panel uses the term Indigenous knowledge because it is much more than traditional land use – sites on a map or physical activities. Indigenous knowledge is a value system that should be considered in parallel to western knowledge or science. It is a living entity that is inseparable from the people who hold it. Knowledge-holders may include elders, women or other community members, and not necessarily those in leadership positions in the community. Indigenous knowledge is current, forward-looking and constantly evolving – the use of the term traditional knowledge must not be confused to mean that it is antiquated or static. .

**“The terms Indigenous law, Indigenous legal orders and Indigenous legal traditions are each used by scholars to refer to ways that Indigenous peoples have governed themselves from before settlers arrived.”**

*Assembly of First Nations*

Traditional ecological knowledge, a subset of Indigenous knowledge which pertains specifically to the environment, must be integral to IA. More broadly, Indigenous knowledge systems also include Indigenous laws and governance. These components of Indigenous knowledge systems become relevant to IA when the principles of *UNDRIP* are reflected in the process, particularly when Indigenous Groups are involved in decision-making. Further, Indigenous laws and governance as they relate to Indigenous knowledge should be recognized and upheld to support a new IA sustainability model which considers impacts holistically.

*CEAA 2012* provides that an EA may take into account community knowledge and Aboriginal traditional knowledge. The lack of a requirement for consideration of Indigenous knowledge has resulted in EAs omitting this information from all stages of current assessment (such as baseline studies, analyses, decision-making and monitoring). It is also common practice to relegate Indigenous knowledge to a separate appendix, considered

in isolation, which prevents this valuable knowledge from influencing project and EA outcomes, including project and mitigation design, analysis and decision-making.

**The Panel recommends that IA legislation require that Indigenous knowledge be integrated into all phases of IA, in collaboration with, and with the permission and oversight of, Indigenous Groups.**

“The words that I say are not just rhetoric. The words that I carry, the role that I carry as a Chief and as one of the Chiefs surrounding Lake of the Woods, I carry the past and I carry the present and I carry the future for the next seven generations. And that’s a tremendous responsibility. And I also carry, of equal importance, our responsibility to the land, to the water and to the air so that we can sustain our way of life, to sustain our way of life and to ensure our children have clean water, have clean land, and that the animals are also clean so that we continue to utilize some of our animals so that we have food to eat, so that the animals are clean, so that they are able to maintain the ecosystem, the ecological system.”

*Chief Kishiqueb, Onigaming First Nation*

There is a need for guidance on how to collect and integrate Indigenous knowledge in IA processes. Current practice generally involves a proponent funding a study for a specific project which is limited in scope, time and funding. Proponents often do not allocate the time needed for culturally appropriate relationship building required to support knowledge sharing. This results in studies that are incomplete and submitted late in the process. In worst cases, Indigenous knowledge is collected and discussed in isolation of communities based on third-party information. Of particular concern are cases where Indigenous Groups have had the opportunity to share information that is then discredited or misused by EA practitioners when it is being interpreted and integrated. Indigenous knowledge studies must be initiated early on, and they must be led by communities themselves. Because Indigenous knowledge is inseparable from the knowledge-holder, integrating knowledge into IA without input from the knowledge-holders themselves

is inappropriate. There are numerous existing guidelines and protocols for collecting Indigenous knowledge in collaboration with communities, including the Akwé: Kon Guidelines for the Convention on Biological Diversity, as well as many community-developed protocols that can be followed. Ultimately, Indigenous Groups must determine for themselves how studies should be conducted and agreements should be reached on how studies should be integrated into IA.

The current EA system includes hearings for review panels. There are challenges and limitations to Indigenous knowledge-holder participation in these proceedings, including logistics, format and respect. The Berger Inquiry conducted in the 1970s for the Mackenzie Valley Pipeline is still recognized as a leading example because it included opportunities and funding for Indigenous participation, including holding hearing sessions in communities themselves. It is necessary for culturally appropriate engagement methods to be utilized to enable participation by Indigenous knowledge-holders. Of utmost importance is the respect for evidence presented by knowledge-holders.

Trust is a significant barrier to collecting Indigenous knowledge. Central to this issue is ownership and confidentiality of the data. There are cases of bio- or traditional knowledge-piracy, and others where Indigenous knowledge is used against communities in pending strength-of-claim assessments and land claims negotiations to demonstrate a lack of rights in an area. Current access-to-information and privacy legislation, namely the *Access to Information Act*, requires the release of Indigenous knowledge documentation upon request. While Aboriginal governments are exempt from disclosure, the definition in legislation is limited to those governments that are party to self-government and/or land claim agreements, and does not include most Indigenous Groups (e.g., First Nations bands). Furthermore, if an Indigenous Group is involved in litigation, it may be required to disclose any Indigenous knowledge data or reports in its possession.

**The Panel recommends that IA legislation confirm Indigenous ownership of Indigenous knowledge and include provisions to protect Indigenous knowledge from/against its unauthorized use, disclosure or release.**



## 2.3.5 IMPACT BENEFIT AGREEMENTS

### WHAT WE HEARD

There was broad agreement that Impact Benefit Agreements (IBAs) may have a role in accommodating impacts to Aboriginal and treaty rights and interests, mitigating environmental effects and including Indigenous communities in follow-up and monitoring. As IBAs are private agreements between proponents and Indigenous communities, the role for government should be limited to ensuring that Indigenous communities, through environmental assessment processes, are aware of the full impacts of a project before negotiating an IBA.

## FINDINGS AND RECOMMENDATIONS

Consistent with the principles of *UNDRIP*, Indigenous Peoples have a right to share in the economic benefits from resource development on their traditional territories in accordance with their own needs, laws, cultures and interests. The sharing of benefits also makes business and economic sense. Indigenous support often provides proponents with increased certainty. The Panel strongly encourages proponents to collaborate with Indigenous communities to determine their interest in IBA negotiation and to seek Indigenous support for project development. If negotiated in good faith, IBAs can help set the stage for free, prior and informed Indigenous consent.

Under existing processes, IBA negotiations are often finalized before the environmental assessment has been completed. This raises concerns related to FPIC. In addition, IBA negotiations are currently premised on the fact that the project will be approved, and the focus is often on economic compensation rather than the deliberative process for reaching consent: “The logic is therefore less one of deliberation about the pros and cons of a project than one of bargaining and trade-offs.”<sup>13</sup>

There is an ongoing role for government to accommodate impacts to Aboriginal and treaty rights and interests. Even when IBAs are negotiated, federal and provincial governments still need to consider how Indigenous Peoples may be impacted by a project and how they may be accommodated. The Crown must not rely on

the proponent in this regard, as the duty to consult and accommodate rests with the Crown.

In the absence of Indigenous involvement in current assessment decision-making, including the drafting of conditions ensuring mitigation and monitoring, IBAs have become the mechanism for Indigenous communities to negotiate environmental protections that are absent in the regulatory process. Going forward, IBAs will continue to provide Indigenous communities direct engagement with the proponent and an opportunity to shape the development of their traditional lands and to maximize potential benefits. However, IA processes that incorporate the recommendations made throughout this Report may mean that Indigenous Groups will no longer need

**“The core of the consultation during environmental assessment, particularly at the early and latter stages, must be between the Crown and Indigenous Nations. This does not take away from the practical reality that IBAs or similar agreements can be used to meet the requirement of explicit consent of the Indigenous Nations.”**

*Wabun Tribal Council*

to rely solely on proponents to provide environmental protections, mitigations and opportunities for follow-up and monitoring.

In consideration of the above, the Panel has chosen not to make a recommendation regarding Impact Benefit Agreements.

## 2.4 PUBLIC PARTICIPATION IN IMPACT ASSESSMENT CONTEXT

The International Association for Public Participation (IAP2) defines public participation as:

*“To involve those who are affected by a decision in the decision-making process. It promotes sustainable decisions by providing participants with the information they need to*

<sup>13</sup> Papillon, Martin and Rodon, Thierry. “Report to the Expert Panel Reviewing Federal Environmental Assessment Processes.” December 2016, p.21. See <http://eareview-examenee.ca/view-submission/?id=1490634598.8387>

*be involved in a meaningful way, and it communicates to participants how their input affects the decision."*

Meaningful public participation is a key element to ensure the legitimacy of IA processes. It is also central to a renewed IA that moves IA towards a consensus-building exercise, grounded in face-to-face discussions.

Meaningful participation can build trust in communities by bringing all affected parties to the table; it increases the transparency of the process by facilitating information sharing; it improves the design of initiatives by incorporating public information, expertise, perspective and concerns; and it provides for improved decision-making by ensuring all relevant information is available. It is through public engagement and participation that social license to operate – obtaining broad public support for proposed undertakings – can be built and optimal results of IA can be reached. Further, as a learning process, it builds literacy in IA processes and builds capacity. Lastly, meaningful participation does not finish with the decision and can contribute to oversight of project implementation.

However, members of the public often feel that their input to current assessment processes is undervalued, they have limited opportunities to influence the fate of proposals, and public participation takes place after important project decisions have already been made.

## 2.4.1 MEANINGFUL PARTICIPATION

### WHAT WE HEARD

In large measure, the Panel heard that public participation opportunities in current assessment processes are unsatisfactory. The greatest disillusionment and frustration was not being able to have an impact on the outcome. Neither proponents nor governments were viewed as actively considering and applying the information gleaned through public participation; this in turn led many participants to see decisions as foregone conclusions and participation in these processes as futile.

Presenters spoke to the need for a real voice to be given to individuals, communities, groups and Nations impacted by projects, and that federal IA should reflect more inclusive processes that do away with questions of standing or interest while still allowing those most

**"It is entirely appropriate that the public, whether at the local/regional level or even broader, at the national level, be called upon to express their views on economic development projects. [...] We believe that all of the whole society must participate in these processes." [translation]**

*Jean Piette, Quebec Business Council on the Environment*

affected to have a great deal of say. Presenters spoke of the need for feedback mechanisms to identify how input was applied and for engagement opportunities to be focused on two-way dialogue and learning. Enhanced public participation opportunities should include more in-person engagement, held in potentially affected communities, and must be supported by adequate funding, time and information.

Presenters also identified the contributions of meaningful public participation, such as the emergence of new and pertinent information through the sharing of local and Indigenous knowledge, the establishment of community support, the co-operative planning of benefits for all parties and the effective mitigation of impacts to potentially impacted communities.

There were many definitions of meaningful public participation, ranging from an incorporation of "all the essential components of participation, from the opportunity to provide input to active and critical exchange of ideas among proponents, regulators and participants" (MIAC report) to an involvement that provides a real possibility to affect the outcome of a given process.

**"In too many cases, people have participated in assessment processes, at considerable personal and collective sacrifice, only to have their concerns dismissed and their interests betrayed."**

*MiningWatch*

## FINDINGS AND RECOMMENDATIONS

An overarching criterion of public participation opportunities in IA processes is that these opportunities must be "meaningful." A meaningful participation process needs to have the inherent potential to influence decisions made throughout the assessment, provide inclusive





and accessible opportunities for early and on-going engagement from the public and Indigenous Groups, and provide the capacity required for active participation in the engagement.

It is important to define a purpose for public participation from the outset which clearly outlines the role of the public and how the public can influence the process and the decisions. For any assessment, a participation plan collaboratively designed with input from the public should clearly establish the objectives of public participation and specify roles for the public, including how input will be recorded, responded to and incorporated in decision-making. If the role of the public is established and agreed upon early in the process, future misunderstandings and frustrations could be avoided.

The Public Participation Spectrum developed by the IAP2 is becoming an international standard. The Spectrum provides a good way to present the role and influence of public participation in processes.

Current practices in Canada situate public participation in federal EA in the “Inform” and “Consult” categories. Current engagement practices, while varied, lean toward information dissemination rather than mutual learning and inclusive dialogue, and information gathering rather than clear integration of this information into project design or approval requirements.

This is not consistent with meaningful participation, as “meaningful” relates to the possibility to influence the outcomes of the process, such as the design of proposals, the considerations studied in the assessment, and/or the decision-making itself. A much more appropriate public participation process would be either in the “Involve” or “Collaborate” spectrum categories.

Across these categories, in all cases where

input is provided, feedback mechanisms should ensure participants understand how their input was incorporated. This both encourages participation and increases transparency. For example, the Mackenzie Valley Environmental Impact Review Board (MVEIRB) has adopted a systematic and transparent process with its online review system, where participants can provide input into assessments directly and in real time and can see specific answers to their comments from the proponent and reviewers. A similar system should be adopted to provide feedback in federal IA processes.

Also, when considering public participation opportunities, it is essential that IA processes not sacrifice inclusiveness in the pursuit of efficiency. While the former *Canadian Environmental Assessment Act* defined interested parties as “Any party having an interest in the EA outcome,” *CEAA 2012* put forward a narrower definition of interested party: a person “directly affected by the carrying out of the designated project” or a “person [who] has relevant information or expertise.”

**“Decision makers should weight the evidence as they see fit, but should not prevent the public from providing it.”**  
*Western and Northern Canada Affiliate of the International Association for Impact Assessment*

## IAP2’S PUBLIC PARTICIPATION SPECTRUM



The IAP2 Federation has developed the Spectrum to help groups define the public’s role in any public participation process. The IAP2 Spectrum is quickly becoming an international standard.

		INCREASING IMPACT ON THE DECISION				
		INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PROMISE TO THE PUBLIC	PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will look to you for advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.	



No matter the intention behind this change, this decision has been perceived as having been designed to limit public participation in the assessment process. The Panel believes the adoption of the “standing test” by the National Energy Board (NEB) has greatly hindered trust in the assessments the NEB conducts. The degree to which this test has limited participation is evident through NEB participation data (see box). The outcome of this is not an efficient assessment process or timely incorporation of public input into a decision-making process. In the case of the Trans Mountain Expansion Project review, a Ministerial Panel was convened after the NEB assessment process was completed, at least in part to hear from those who felt shut out of the initial process.

In short, limiting public participation reduces the trust and confidence in assessment processes without bringing any obvious process efficiency.

It is also important to address when public participation should occur. While a stated purpose of *CEAA 2012* is to ensure that opportunities are provided for meaningful public participation during an environmental assessment, there is no reference to the importance of the timing of public participation. By comparison, the former *Act* specifically stated that “there be opportunities for *timely* and meaningful public participation *throughout* the environmental assessment process” (emphasis added).

#### **Participation in NEB-led assessments:**

The Trans Mountain Expansion Project review initially received 2,118 applications to participate. Out of these, 400 were granted intervenor status (which includes the right to file written evidence, cross-examine evidence and present written and oral arguments), 798 were granted commenter status (which gives the right to file a single letter of comment), 452 asked to be intervenors but were granted commenter status, and 468 applications were denied. The first Energy East and Eastern Mainline project review received 2,652 applications to participate, out of which 1,450 were form letters. Out of these, 337 were granted intervenor status (which includes the right to file written evidence, cross-examine evidence and present written and oral arguments), 190 were granted commenter status (which gives the right to file a letter of comments and file comments on draft conditions of approval), 81 asked to be intervenors but were granted commenter status, and the others applications were denied participation in the formal process.

Early and ongoing participation within assessment processes is required to allow for concerns and ideas to be raised and addressed prior to large time and financial investments being made, and for decisions to be made with more complete information. In all cases, participation should begin early in project planning,

“Clearly, those who are deemed to be directly affected by an EA decision should be allowed to participate; however, limiting participation to those directly affected is an enormous oversight. Participation should be open to anyone who wants to become involved, through flexible and appropriate processes. In our increasingly connected and globalized world, simple geography does not determine impact or interest, and anyone who is interested should be able to participate, learn more, and voice their support or opposition to a proposed project or initiative. Any focus limited to those directly affected risks excluding certain voices from the decision-making process that could be critical to ensuring sustainable outcomes.”

*Multi-Interest Advisory Committee*

before any benchmark decision is made, and should continue throughout the process into the monitoring and enforcement phases. Early and ongoing engagement further enhances transparency by allowing participants to fully understand how decisions are made at each step of an IA and to witness the carrying out of the conditions agreed upon through the process.

**The Panel recommends that IA legislation require that IA provide early and ongoing public participation opportunities that are open to all. Results of public participation should have the potential to impact decisions.**

It is also necessary to recognize that the appropriate degree of involvement in a given project may vary from individual to individual, or from group to group. Further, the principles of *UNDRIP* – including requirements for free, prior and informed consent of Indigenous Peoples, the requirements of the duty to consult, and the objective of reconciliation – require appropriate participation processes for Indigenous Peoples. Therefore, the suite of



engagement opportunities provided should be flexible and responsive to the context, communities and Indigenous Groups involved.

The manner in which publics are engaged influences their willingness and ability to express their concerns or provide their expertise. Current quasi-judicial assessment processes are, in most circumstances, more formal, adversarial and intimidating than is needed. Going forward, engagement opportunities and events should be appropriate for the circumstance. Quasi-judicial as well as informal options, preferably dialogue-focused such as workshops, should be available, and there should be participation opportunities within affected communities and in participants' languages of choice.

## 2.4.2 CAPACITY FOR PARTICIPATION

### WHAT WE HEARD

Participants expressed the need and desire for increased capacity to take part in assessments and that doing so in complex assessment processes requires time and money, both of which are often lacking for many interested participants. They explained that their involvement in current assessment processes is often at great personal expense and their belief that funding programs should support participation throughout the entire process. Capacity challenges were seen to be exacerbated by the inaccessibility of information, lack of access to expertise, and short timelines. Another identified opportunity for increasing capacity was improved public education about IA and IA processes so that participants may enter the process better prepared and informed in order to contribute.

## FINDINGS AND RECOMMENDATIONS

A truly open and inclusive assessment process requires that those wishing to participate have the capacity to do so. Some capacity constraints may be resolved through process improvements, such as allowing sufficient time to review information, providing accessible information and having processes that are easily understood.

These improvements will not, however, negate a simple fact: meaningful participation costs money. Related

### Capacity Case Study 1 – Community Organizations and the Ajax Mine, Kamloops

- Multiple community-based organizations, including Kamloops Moms for Clean Air, Kamloops Area Preservation Association and the Kamloops Physicians for a Healthy Environment Society, participated in the EA process for the Ajax Mine Project over the course of more than six years.
- The federal Participant Funding Program awarded a total \$50,000 to collaborating community groups. This was used to hire scientists to assist with the technical review of an 18,000-page project application.
- An additional total of \$86,000 was raised by community organizations to support their review and participation.
- Volunteer hours contributed over the six years are innumerable. One volunteer alone contributed an estimated 312 days to the project.
- Financial and in-kind costs of participation included review of the EA documents, hiring of experts, travel, meeting rooms, hospitality, planning and attending meetings, and preparing submissions and correspondence.

*Kamloops Area Preservation Association and Kamloops Moms for Clean Air*

expenses include hiring subject-matter experts and legal counsel, organizing community meetings and traveling to present at hearings. These costs and activities can occur throughout all phases of a project. The current Participant Funding Program provides an insufficient amount of funding, and it does so too late in the process.

### Capacity Case Study 2 – Site C Clean Energy Project

- A maximum of \$19,000 available per group to participate.
- EA process extended over 3 years.
- Some experts calculated the time they spent providing expertise was worth \$360,000.
- “The subject matter experts and legal team supplied their expertise at considerably reduced rates and my organization collected cans and bottles from the ditches, held bake sales, garage sales, paddles, art auctions, dances and more to ensure they could participate in this process.”

*Andrea Morison, Peace Valley Environment Association*

Meaningful public participation is in the best interest of all those involved in an assessment, as is the enhanced and supported capacity of participants. Adequate funding is required to address assessment needs throughout all IA phases and ongoing capacity development.

**The Panel recommends that the participant funding program for IA be commensurate with the costs associated with meaningful participation in all phases of IA, including monitoring and follow-up.**

Knowledge – developing, gaining and accessing it – is a critical component of capacity, particularly in contexts where large volumes of complex data inform decisions. Participants have an interest in learning, increasing their literacy of assessment processes and understanding substantive issues across all components of sustainability. Supporting this learning will contribute to more efficient, effective and transparent processes and decisions. Ongoing capacity development is tightly tied to learning. In this sense, capacity development through participation in assessments and through learning opportunities outside of project-specific contexts can develop a positive feedback cycle, wherein capacity development is iterative.

In addition to dedicated funding directed at capacity-building, the authority responsible for IA may want to consider holding more frequent learning events related to IA. Information sessions at the beginning of assessments and resources to explain the process and the proposed project, plan or policy also contribute to building the capacity required to participate meaningfully.

## 2.4.3 INFORMED PARTICIPATION

### WHAT WE HEARD

Participants identified a clear need for all relevant information to be available to those interested in taking part in an assessment. Two main information-related challenges in current assessment processes were presented: it is sometimes difficult to access complete and thorough information to review; and it is often difficult to understand the information that is provided,

especially for lay persons looking to review long technical documents without in-house expertise.

Participants explained that becoming informed takes time. The opportunities to participate in current assessment processes often do not afford sufficient time to review all the information presented; participants provided examples of being presented with thousands of pages of technical information to review in extremely tight time frames, such as only 30 days. There were also examples of public organizations and Indigenous communities being made aware of comment periods a few days before they closed or having to review lengthy and extremely technical documents provided in only one language. Participants explained that these constraints are compounded when they are trying to be informed about multiple concurrent projects, a situation most frequent for Indigenous Groups.

## FINDINGS AND RECOMMENDATIONS

In order to be meaningful, participation needs to be informed. The information regarding the proposed activities and the assessment processes must be easily accessible and understandable for members of the public, stakeholders and Indigenous Peoples.

The means used to inform the public of current assessment processes and participation opportunities should be more far-reaching and effective. For example, the Alberta Utilities Commission requires that a notice providing information on participation opportunities, key dates and contact information related to a proposed undertaking be sent by mail to residents in the project area and suggests advertisement in local newspapers. In recent years, the City of Montreal public consultation office (Office de consultation publique de Montréal) has experimented with the use of social media to reach wider audiences and increase participation in its processes.

A meaningful public participation process requires time. Although it is important to try to avoid lengthy and drawn-out assessment processes, it is also necessary to consider the efficiencies gained by reducing tensions and conflict that can accompany insufficient participation opportunities and unresolved concerns. Therefore, providing sufficient notice in advance of participation opportunities, increasing the time available for public



review of assessment information and simplifying that information are necessary improvements.

Beyond being transparent and timely, assessment information also needs to be accessible. Documentation generated during an IA is complex and technical. The volume and level of detail of this information, and the fact that it is often not presented in user-friendly formats, can create barriers to meaningful participation for those with limited time, resources and experience with the IA process. The use of accessible, non-technical summaries to communicate IA information can facilitate increased public understanding of project issues and help create opportunities for meaningful participation.

In line with recommendations from the International Association for Impact Assessment (IAIA, 2015), summaries should be concise and incorporate plain language and graphics as much as possible to facilitate understanding of complex issues. The format of the information used in participation processes could be prescribed through regulations, similar to what is currently done for the Project Descriptions under *CEAA 2012*. The new IA legislation should incorporate a requirement that a summary of relevant information be translated in the local languages.

Many jurisdictions have also explored various options to bring relevant information to the public in a user-friendly way. For example, in Iceland, a proponent has worked with the National Planning Agency to develop an interactive, web-based non-technical environmental statement.<sup>14</sup> Hong Kong's Environmental Protection Department has developed a user-friendly website that provides the public with access to a wide variety of information related to each proposed project in non-technical language and also provides mechanisms for public feedback, including a system specifically designed to post and receive feedback on monitoring and audit reports in the follow-up phase.<sup>15</sup>

Lack of easy access to information relevant to IA erodes confidence in the assessment process. For example, the Canadian Environmental Assessment Registry contains only partial information related to an assessment and is difficult to search. The National Energy Board tends to publish more complete documentation, but individual

documents are difficult to find as the information is not indexed in an intuitive fashion. Public registries should contain all information related to a given assessment process in an easily accessible interface. While the registries would house documents in electronic format, which may in many cases increase access to the documents, multiple options for accessing relevant documentation in accessible formats should be accommodated.

**The Panel recommends that IA legislation require that IA information be easily accessible, and permanently and publicly available.**

## 2.5 EVIDENCE-BASED IMPACT ASSESSMENT CONTEXT

Science, facts and evidence are critical to a well-functioning IA process. Whether for collecting data, analyzing results or establishing monitoring and follow-up programs, the quality of science contributes to a trusted process and credible outcomes.

Evidence comes in many forms and includes Indigenous knowledge and community knowledge.<sup>16</sup> Many characterize these types of knowledge as science, but for the purposes of this Report, the term "science" is used to describe western scientific processes, and "evidence" is used to describe all relevant data, information or facts, whether provided through scientific studies or by Indigenous and community knowledge-holders. The sustainability-based IA framework being proposed seeks to integrate all relevant evidence that supports outcomes within the environmental, health, social, cultural and economic pillars.

<sup>14</sup> See <http://burfellwindfarm.landsvirkjun.com/>

<sup>15</sup> See <http://www.epd.gov.hk/eia/>

<sup>16</sup> Community knowledge is diverse, with examples including environmental knowledge from fishers and hunters, and data from initiatives such as seasonal bird counts.

## 2.5.1 INCORPORATING SCIENCE IN IMPACT ASSESSMENT

### WHAT WE HEARD

Canadian scientists and knowledge holders from diverse perspectives – citizen scientists, academics, non-governmental organizations, consultants, provincial and federal government experts, and Indigenous scientists and knowledge-holders – presented their research and experiences in IA and shared their professional opinions on the state of science in current assessment processes. Most importantly, they explained how to integrate science, Indigenous knowledge and community knowledge in future IA processes.

Current legislation does not include requirements for how science is incorporated into IAs, nor does it provide for timelines that would allow for credible scientific methods to be implemented. Accordingly, stronger guidelines and standards are needed to ensure that IA processes include rigorous scientific methods. Participants identified that adaptive management is being used by proponents inappropriately as an alternative to mitigation, instead of applying the precautionary principle and identifying mitigation even in cases where there is uncertainty in predictions.

**“Of course, social impacts include a great deal of subjectivity, but this does not imply that we should undertake a non-rigorous analysis of it - on the contrary. Moreover, according to the Interorganizational Committee on Principles and Guidelines for Social Impact Assessment, it is qualified specialists in the social sciences who should conduct the analysis of social impacts. The results should be reproducible in similar contexts and scientific peers should review the whole, according to recognized quality criteria in science.” [translation]**

*Marie-Ève Maillé, Notre Boîte Renforcement Des Collectivités*

Participants identified that IA science should be based on the best available data and research that have been determined to be credible through peer review. The working group model used in British Columbia, which involves the province seeking advice from representatives from federal and provincial government agencies, First Nations and local governments, was identified as a positive approach.<sup>17</sup> Participants also identified that Responsible Authorities and government departments must have the independent scientific capacity to ensure IA studies and decisions are based on robust science. Federal departments noted that some departments do not have the capacity to provide information voluntarily.<sup>18</sup>

Budgets must recognize the critical need for capacity, expertise and data collection to support the incorporation of rigorous scientific evidence in IA processes. Participants highlighted gaps in guidance and standards in specific areas, including cumulative effects, social sciences broadly, gender-based analysis, health and the design of monitoring programs.

## FINDINGS AND RECOMMENDATIONS

New legislative requirements are needed to ensure that IA is evidence-based and contains the best science. For example, the *Species at Risk Act* contains explicit requirements to consider science, community knowledge and Indigenous knowledge. This includes information requirements for written reports as well as guidelines on involving experts in its regulatory processes, how information must be considered in decision-making and reporting requirements for species monitoring.<sup>19</sup> These requirements provide a strong foundation for the integration of the best available information and reduce the risk that science will be omitted from decision-making processes.

Sustainability-based IA will require the best science to predict outcomes across the five pillars of sustainability. These predictions must be tested to confirm results and resolve uncertainty. To ensure IA processes are scientifically rigorous, IA must contain well-designed monitoring programs that include requirements to confirm

<sup>17</sup> British Columbia Environmental Assessment Office. “The Environmental Assessment Process”. See [http://www.eao.gov.bc.ca/ea\\_process.html](http://www.eao.gov.bc.ca/ea_process.html).

<sup>18</sup> Expert Panel Meeting with Federal Departments (November 8, 2016). See <http://eareview-examenee.ca/what-weve-heard/panel-meeting-federal/>

<sup>19</sup> Ray, Justina. “The Effective Use of Science in Environmental Assessment.” Submission to the Expert Panel for the Review of Environmental Assessment Processes. December 2016. 20pp. See [http://eareview-examenee.ca/wp-content/uploads/uploaded\\_files/ea-expert-panel-submission\\_ray\\_wscanada\\_23dec2016.pdf](http://eareview-examenee.ca/wp-content/uploads/uploaded_files/ea-expert-panel-submission_ray_wscanada_23dec2016.pdf)



“Rigour is needed at all stages of the science: first, in system characterization and model building; second, in preparing predictions and uncertainty analysis; third, in monitoring to address key uncertainties; fourth, in the comparison of predictions with the monitoring data to uncover divergences; and fifth, in rebuilding of the models based on the new knowledge. And that, I argue, is the essence of adaptive management. So therefore, a strong implementation of adaptive management is, in my view, the best approach to managing scientific uncertainty, and EA decisions need to make it happen.”

*Peter Duinker, Dalhousie University*

predicted IA results and revisit IA conclusions in light of the evidence that emerges from this monitoring. Adaptive management should be used to modify mitigation and project design wherever monitoring results vary from predicted results, with the ultimate goal of ensuring that sustainability outcomes are monitored, tested and met.

The new approach to federal IA should continue to rely on the precautionary principle and approach to address issues of scientific uncertainty.

**The Panel recommends that IA legislation require that all phases of IA use and integrate the best available scientific information and methods.**

The Panel supports requests that new federal IA legislation provide access to existing data from ongoing and past projects. Such access could reduce uncertainty in mitigation measures, models and methods used in future IAs and project designs. Similarly, access to IA data would increase trust and transparency and would also support the characterization of baseline conditions for future IAs or other initiatives.

Baseline and monitoring data should be standardized and made publicly available. This should include standard methods for data collection or metadata so that data are comparable and studies are replicable. Accessibility to this information should strengthen future IA practices by building a shared body of knowledge across environmental, economic, health, cultural and social conditions, including cumulative effects. Improved access to existing IA information will also reduce uncertainty on the efficacy of mitigation and new technologies used

by a project. More broadly, the general availability of IA monitoring data will enable scientists to review methods such as modeling that are used to predict impacts, and thereby also refine these methods to improve accuracy and reduce uncertainty.

**The Panel recommends that IA legislation require the development of a central, consolidated and publicly available federal government database to house all baseline and monitoring data collected for IA purposes.**

To restore trust in IA processes, it is imperative that expert review be transparent and collaborative. The Panel's proposed approach to IA includes broad review of IA science by qualified experts from all governments, including federal, provincial and Indigenous governments. Where Indigenous governments may not have their own technical capacity, federal IA should provide resources to enable Indigenous governments to retain experts to participate in reviews on their behalf. The results of all expert panel reviews must be publicly available to ensure transparency and consideration of information by any relevant experts outside the process.

It has been largely recognized that the federal government has in recent years greatly reduced its scientific capacity to support IA, which has clear implications for any effort to reform federal IA. There is a need for a comprehensive review of federal expert research initiatives, standards and guidance to support IA. Any gaps should be addressed by the relevant expert, department or regulatory federal body. This initiative must include regular updates on initial findings and future needs to establish new guidance in areas not covered by current assessment processes.

Timely access to expertise is necessary to implement a successful and scientifically robust IA process, especially for a new process that considers a wider breadth of issues within a sustainability framework. The former federal IA legislation used regulations to require timely access to federal expertise. To support future access to the best federal experts during IA processes, the new IA legislation should restore the federal notification process that required experts to contribute their science, expertise and knowledge to the IA authority within a set timeline. Additionally, the IA authority must have the authority



to retain the appropriate expertise and guidance from outside the federal government if they do not exist within the federal government.

**The Panel recommends that IA legislation provide any IA authority with power to compel expertise from federal scientists, and to retain external scientists to provide technical expertise as required.**

The IA authority must be impartial so that it may conduct a thorough and unbiased review of studies. To ensure that IA studies use robust scientific methods, the IA authority must have a statutory mandate to verify the adequacy of IA studies, including the Impact Statement. This review would come near the end of the IA Study Phase and would include all five sustainability pillars. This new legislative requirement is needed to ensure that the scientific evidence produced in IA processes is based on robust methods and can therefore be relied upon and trusted by participants in the IA process.

**The Panel recommends that any IA authority have the statutory authority to verify the adequacy of IA studies across all pillars of sustainability.**

## 2.5.2 INTEGRATING SCIENCE, INDIGENOUS KNOWLEDGE AND COMMUNITY KNOWLEDGE

### WHAT WE HEARD

Many participants believe that the current assessment process, including decision-making, relies solely on science and not all forms of reliable knowledge. They identified a lack of capacity for proponents, practitioners and government staff to understand Indigenous knowledge and recommended that the government build internal capacity by retaining qualified staff to support the effective integration of Indigenous knowledge. They expressed a hope for a future IA process that braids together western and Indigenous knowledge systems by respecting, integrating and valuing both sources equally.

*“In light of the world view that I bring forward as an Anishinaabe man from this part of the world, the ceremonies that I’ve participated in have taken me to a place where I recognize that relying on empirical data, relying on western science is like trying to tie your shoe with only one hand.”*

*Grand Chief Nepinak, Assembly of Manitoba Chiefs*





Participants called for community knowledge, including citizen science, to be trusted as evidence within IA and said that the omission of this information from decision-making contributes to a lack of trust. They recommended that a framework be defined that clearly identifies how all knowledge sources are incorporated in decision-making.

## FINDINGS AND RECOMMENDATIONS

Federal IA would benefit from considering all relevant evidence, whether provided by Indigenous and community knowledge-holders or by scientific studies, as there is importance to each of these sources of knowledge. Integrating Indigenous knowledge and community knowledge into IA provides an opportunity to improve the quality of IA studies and participants' trust in the IA process. Indigenous knowledge must be integrated in IA, and the Panel disagrees with the current practice of asking Indigenous knowledge-holders to validate their evidence using scientific data. Similarly, community knowledge should also be considered in the analysis of potential impacts.

**"If we did things the right way; i.e., had elders guide the assessment process, had the communities involved right upfront in project planning, built environmental assessment baselines based on the knowledge that the communities shared, then the question of whether indigenous knowledge = science becomes irrelevant. Because then knowledge would be knowledge and baselines would be integrated baselines. I find the dialogue on (traditional knowledge) equal or not equal to western science distracting and divisive. So I was advocating for an integrated approach all along."**

*Winnipeg public workshop participant*

There should be a shift in thinking from weighing individual knowledge sources against each other to an integrated approach that weaves all knowledge sources together. The Planning Phase provides an opportunity to develop a framework that integrates Indigenous knowledge and community knowledge from the outset of an IA. Indigenous knowledge and community knowledge should be used to scope baseline studies and analysis. Furthermore, Indigenous and community knowledge-holders should be able to collect baseline data with scientists. The best way to integrate different sources of

knowledge should be determined on a project-by-project basis in discussion with Indigenous and community knowledge-holders and scientists.

**The Panel recommends that IA integrate the best evidence from science, Indigenous knowledge and community knowledge through a framework determined in collaboration with Indigenous Groups, knowledge-holders and scientists.**

Currently, federal advice on IA does not understand Indigenous knowledge or community knowledge well. Integrating both sources of knowledge in IA will require that any future federal IA authority understand Indigenous knowledge and community knowledge and review whether that information was integrated into the IA. Retaining staff who understand Indigenous knowledge will be essential to addressing this requirement. This finding does not replace the role of Indigenous or community knowledge-holders, but it should provide an improved reception for such knowledge in future IAs.

## 2.5.3 DEVELOPING UNBIASED IMPACT STATEMENTS

### WHAT WE HEARD

The collection of data by consultants hired by project proponents has led to perceived inconsistencies in the quality of data, analyses and conclusions and the perception of bias in the analysis of impacts. Many presenters said that, in order to build trust and improve the quality of Environmental Impact Statements, the proponent should not be responsible for the collection and analysis of data. Instead, studies should be funded by proponents but conducted by an independent agency, independent scientists or government experts. Other participants emphasized that good-quality science can be produced by proponents; however, it must also be generated and reviewed by Indigenous Groups, government, universities, citizens and non-governmental organizations to obtain public confidence in IA outcomes.

## FINDINGS AND RECOMMENDATIONS

IA must rely on unbiased evidence; this is essential to restoring trust. Current practice is to delegate many IA responsibilities to proponents: they collect the data, conduct studies, analyze results and document findings in an Environmental Impact Statement. This practice has led to a clear perception of bias in the results, regardless of whether this is warranted. Canada should look to alternative models for data collection and analysis that exist in other jurisdictions globally. In the United States, for example, Environmental Impact Statements are prepared by the government, supported by consultants who are also retained by the government and funded by the proponent. In Denmark, data are collected by the proponent and provided to the government for analysis and the preparation of an Environmental Impact Statement.

The proposed model for Canada would make the IA authority responsible for leading the key IA document – the Impact Statement – which would be similar to the Environmental Impact Statement now produced by the proponent but which in future would be prepared by the IA authority using a team of consultants and experts retained by the IA authority. This document would be prepared using studies conducted by the proponent, Indigenous Groups and others.

Building on an earlier recommendation to require a collaborative approach to IA planning at the commencement of the IA process, there should be a consensus-based approach to scoping the IA in advance of the study phase of IA. This would enable early dialogue and expert involvement in the scoping of studies and improve the efficiency of the IA process by identifying methodological concerns prior to studies being conducted. This consensus-based approach to scoping would also enable all interested parties, including Indigenous Groups and scientific experts, to provide input on the professionals selected to prepare the Impact Statement. Although it would be essential that the IA authority lead the Impact Statement, the studies that would feed into the Impact Statement could be conducted by various parties. For example, Indigenous Groups may be best placed to lead health-impact studies on community members, whereas proponents may be best placed to gather many kinds of baseline bio-physical data.

At all times, Indigenous Groups must maintain control over Indigenous knowledge.

Additional oversight and buy-in from all parties would remove the perception of partiality in the results of studies. It would also facilitate the integration of science, Indigenous knowledge and community knowledge. It is also likely to increase public and participant trust in the process which, over time, should improve efficiency and reduce the cost of IA processes by minimizing the need for third-party review. The proposed transparent and collaborative approach to IA is expected to eliminate the need for a lengthy information request process that frequently stops the regulatory clock and draws out assessment timelines.

**The Panel recommends that IA legislation require that any IA authority lead the development of the Impact Statement.**

## 2.5.4 MAKING EVIDENCE-BASED DECISIONS WHAT WE HEARD

One of the most critical issues identified by participants is a lack of transparency in current assessment processes, especially in decision-making. Participants advocated for the legislation of sustainability criteria and trade-off rules to ensure that decisions take into account the best-available knowledge. Current decisions do not reflect the best information collected during the IA process.

**“Right now, decisions are being made in a black box or we talk about being drawn out of a magic hat. What we want to do here is to be able to draw that curtain back and to see how decisions are made.”**

*Aerin Jacobs, on behalf of nearly 2,000 other young researchers in Canada*



## FINDINGS AND RECOMMENDATIONS

The proposed sustainability framework requires that decisions be based on evidence. Further, this evidence must relate to the five pillars making up the sustainability framework or support the trade-offs of impacts and benefits. Uncertainty about the evidence must take into account issues of risk and the precautionary principle.

Transparency in decision-making is vital to the legitimacy of IA for the public, scientists and Indigenous knowledge-holders. People must be able to see how decisions reflect the facts and evidence collected throughout the IA process. It is also vital that decision-making criteria be explicitly described and any trade-offs explained and justified.

**The Panel recommends that IA decisions reference the key supporting evidence they rely upon, including the criteria and trade-offs used to achieve sustainability outcomes.**





# **SECTION 3**

## **IMPLEMENTING THE VISION**

*In this section, we explain how our recommended vision can be put into practice. Our recommendations cover the assessment regime and its governance structure. They seek to ensure that the process, the resulting decisions and their implementation are inclusive, transparent and fair. We explain how assessment processes would start earlier and result in better and more-informed decisions. Our recommended approach seeks to build public confidence in the assessment process. We believe that public trust can lead to more efficient and timely reviews. It should also support getting resources to market.*

## 3.1 GOVERNANCE MODEL CONTEXT

To restore public trust and confidence in assessment processes, the conduct of IAs must respect the principles of being transparent, inclusive, informed and meaningful. Any authority given the mandate to conduct federal assessments should be aligned with these principles and: be open in process and decision-making; encourage participation from all corners; strive to ensure that participants feel engaged and their concerns have been considered; ensure decisions take into account science, facts and evidence; and ensure that the outcomes of the process are protective of future generations.

In Canada, there have been two main approaches to governing IA: a self-assessment model and a centralized model. Under the self-assessment model established in the former *Canadian Environmental Assessment Act*, assessments were the responsibility of all federal decision-makers. Today, under *CEAA 2012*, the responsibility for conducting assessments is centralized in three Responsible Authorities: the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC) and the Canadian Environmental Assessment Agency (“the Agency”). The NEB and CNSC act as Responsible Authorities for projects requiring an assessment which they regulate; all other assessments fall under the responsibility of the Agency.

While all three Responsible Authorities have IA responsibilities established under the same Act, each Authority has applied the provisions of *CEAA 2012* differently and, as a result, has a different assessment process. In part, these variations result from how the two regulators, the NEB and the CNSC, integrate

environmental assessment requirements into their formal regulatory processes.

### 3.1.1 HOW SHOULD FEDERAL IMPACT ASSESSMENT BE GOVERNED? WHAT WE HEARD

There were various views on who should be responsible for conducting IAs. Generally, participants felt that the reduction in the number of responsible authorities under *CEAA 2012* was a positive step as it improved co-ordination and reduced the number of regulatory entities with which proponents had to engage. Participants noted the lack of consistency between the EA processes under *CEAA 2012* and questioned the need to have more than one responsible authority, recognizing that the Responsible Authority could bring in other federal departments with relevant expertise where needed.

Some proponents and practitioners submitted that, because of the technical expertise required to assess the merits of nuclear plants and pipelines, the NEB and CNSC should be responsible for those assessments. Moreover, these participants said that the results of an assessment are more easily transferred into a licensing process if both are overseen by the same body, and that this lifecycle approach is a good way to build relationships.

Other participants were concerned about having the NEB and CNSC conduct assessments. A frequently cited concern was the perceived lack of independence and neutrality because of the close relationship the NEB and CNSC have with the industries they regulate. There were concerns that these Responsible Authorities promote the projects they are tasked with regulating. The apprehension of bias or conflict of interest, whether real or not, was the single most often cited concern by participants with regard to the NEB and CNSC as Responsible Authorities. The term “regulatory capture” was often used when participants described their perceptions of these two entities. The apprehension of bias on the part of these two Responsible Authorities eroded confidence in the assessment process.

Additionally, some participants argued that these industry-specific regulatory agencies are more focused



on technical issues than they are on the planning process that is fundamental to a thorough IA. Participants felt that issues were not properly being assessed and were being put off to the post-decision regulatory phase. The Agency, by contrast, was described favourably, largely for not being subject to the same pressures faced by the NEB and CNSC as regulators.

Some participants proposed that all IAs be conducted by a single, independent and impartial body to help increase public trust in IA outcomes and provide more process consistency and predictability. Participants identified that the Agency should be strengthened and provided additional capacity and expertise to fulfil this role.

Many participants also expressed concerns about a perceived lack of independence in assessment decisions and believed that an independent body should be empowered as decision-maker. Others believed that the regulators and elected officials are best placed to make these decisions. What most participants agreed on was the need to ensure IA decisions are transparent and reasons are provided.

Participants highlighted the progressive disappearance of the federal government from the regions and the challenges that local communities face when working with federal contacts in distant offices. They expressed regret that they don't have local federal representatives, either to provide scientific input and enforcement services or to liaise with provincial governments. For example, participants identified that the closure of the Agency's office in Winnipeg has affected co-operation in Manitoba. To address these concerns, it was suggested that regional federal government presence should be increased and assessment processes should be decentralized from headquarters to the regions.

## FINDINGS AND RECOMMENDATIONS

The aim of IA is to develop better undertakings which are in the long-term public interest. In developing recommendations for how to govern federal IA, the Panel has identified four areas of focus:

- Striving to remove any perceived notion of bias on the part of Responsible Authorities;
- Maximizing the benefits of a planning-focused IA;

- Instilling co-operation and consensus as a governance philosophy; and

- Ensuring that IA delivers transparent, evidence-based decisions.

First and foremost to the goal of restoring trust and confidence in the process is a belief that the authority conducting the assessment must be free from bias and conflicts of interest.

Public trust and confidence is crucial to all parties. Without it, an assessment approval will lack the social acceptance necessary to facilitate project development. While some would likely favour the NEB and CNSC for the assessment of projects in their particular industries, the erosion of public trust in the current assessment process has created a belief among many interests that the outcomes are illegitimate. This, in turn, has led some to believe that outcomes are pre-ordained and that there is no use in participating in the review process because views will not be taken into account. The consequence of this is a higher likelihood of protests and court challenges, longer timeframes to get to decisions and less certainty that the decision will actually be realized – in short, the absence of social license.

On the other hand, if there is trust in the authority conducting the IA, the outcome is more likely to be considered fair and thus be accepted by all parties, even if their particular positions do not win the day. As such, an authority that does not have concurrent regulatory functions can better be 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 licensing 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 which 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 sometimes prevents them from fully assessing projects in specific situations. For example, projects that would have a pipeline component as well as a facility component could require assessments to be conducted by two Responsible Authorities on the distinct elements of that project.

The mandate of an authority that is focused solely on implementing an effective, timely and disciplined IA process is unlikely to give rise to concerns about bias or favouritism. Participants should be confident that such an authority will conduct a rigorous assessment of the impacts arising from any project or undertaking. Additionally, the more frequent and broader the conduct of assessment is, the higher the skill level that will emerge.

Third, any federal IA authority must be instilled with a governing philosophy that encourages a culture of consensus and co-operation and must be able to understand and account for diverse views across a wide spectrum of interests.<sup>20</sup> These traits are essential to move federal IA away from conflict toward consensus.

The governing philosophy of any federal IA authority must also equip it to play a leadership role in co-ordinating the various orders of government involved in IA, which is a fundamental component for the full implementation of the Panel's recommended sustainability-based focus for federal IA.

An emphasis on a philosophy of consensus and co-operation will be needed to ensure any federal IA authority can realize the full and effective inclusion of Indigenous interests into its governance and its assessment processes, in keeping with the Government's stated goal of reflecting the principles of *UNDRIP*.

Realizing consensus and co-operation will require a strong regional presence for any federal IA authority. The strong, sustained relationships an IA authority must build with stakeholders and Indigenous Groups require facilitated discussion and face-to-face engagement.

Fourth, a new governance model must provide for transparent, evidence-based decisions. IA decisions must reflect the facts and evidence collected throughout the IA process, and decision-making criteria must be

explicitly described and the trade-offs explained and justified. Decisions that meet these criteria have the greatest potential to be accepted by the broadest range of stakeholders and Indigenous Groups.<sup>21</sup>

There must also be transparency on all IA decisions. The current decision-making process does not provide reasons or information on the justification for major projects likely to cause significant effects. This is an important source of frustration with current assessment processes and a key reason why people do not trust its outcomes.

For all of these reasons, the Panel believes that the best way to achieve efficient, consistent and accountable governance is to incorporate the IA function into a single authority, with strong regional presence across the country and with the mandate to make IA decisions. A structure such as a quasi-judicial tribunal would empower the single authority to fulfil this mandate. The capacity to act quasi-judicially is not intended to transform the nature of IAs or panel reviews; rather, it is intended to provide the IA authority with appropriate independence and powers to address the full range of disputes that require resolution in IA – from facilitation and mediation to informal and formal hearings.

The power to make IA decisions is aligned with the independence of the authority. Canada has longstanding experience of independent, quasi-judicial tribunals making final decisions, with perhaps the best-known example being the Canadian Radio-television and Telecommunications Commission (CRTC). With regard to projects, the federal system prior to 2012 had decades of experience with delegating final decision-making to the Canadian Nuclear Safety Commission (and the former Atomic Energy Control Board) and the National Energy Board.

In line with the principle of transparency, the IA authority should provide reasons for decisions, all of which should be based on a net contribution to the improvement of the long-term well-being of Canadians, as measured by the impact on environmental, economic, social, health and cultural factors.

<sup>20</sup> The corporate culture within the Canadian Environmental Assessment Agency, with its focus on listening to and respecting diverse and conflicting views, seems to be consistent with the consensus-building approach the Panel is trying to achieve.

<sup>21</sup> For a more detailed discussion on evidence-based Impact Assessment, see Section 2.5 – Evidence-based Impact Assessment.



As IA decisions may have broad implications for the well-being of Canadians, elected officials must have the ability to provide a final say, when and as needed. The authority's IA decisions should therefore be subject to an appeal to the Governor in Council, whereby a party involved in an IA could request a review of an IA decision. The appeal process could be used by any participant. It should be focused on errors in the sustainability decision, and also limited in time and by some measure of standing in respect to a particular assessment. The Governor in Council should be required to provide the full reasons for decisions based on the purposes of the legislation, including explanation and justification of trade-offs, as well as the project-specific sustainability criteria.

**The Panel recommends that a single authority have the mandate to conduct and decide upon IAs on behalf of the federal government.**

**The Panel recommends that the IA authority should be established as a quasi-judicial tribunal empowered to undertake a full range of facilitation and dispute resolution processes.**

### 3.1.2 ENVISIONING THE NEW FEDERAL IMPACT ASSESSMENT AUTHORITY

The new federal IA authority – the Impact Assessment Commission (“the Commission”) – would be empowered to decide whether a project would make a positive contribution to Canada’s future well-being and, on that basis, approve or deny a project’s application.

The Commission would undertake robust, consistent and predictable reviews and oversee strategic, regional and project IAs. It would be guided by the core principles underpinning this Report and would facilitate involvement by the public and Indigenous Groups, ensuring that the views received are considered and accounted for. The Commission would base its work on relevant and objective information sourced from western science, Indigenous knowledge and community knowledge,

and would make its decisions transparently, based on evidence presented to it.

In keeping with the Panel’s mandate to reflect the principles of *UNDRIP* in the new IA process, members of Indigenous Groups would play a central role in the Commission. In circumstances where Indigenous Groups had their own assessment process, the Commission and interested Indigenous Groups would create an appropriate co-operative approach to integrate processes to best satisfy the “one project, one assessment” objective. The goal of both the IA process and the Commission itself would be to recognize the importance of Aboriginal rights and title and the role IA has to play in reconciliation.

Appropriate mechanisms and structures for the Commission would accomplish four key objectives:

1. Ensure democratic oversight and accountability.
2. Provide leadership, direction, and quality assurance and control.
3. Delineate required functions and capacities.
4. Assure regional representation and responsiveness.

### DEMOCRATIC OVERSIGHT AND ACCOUNTABILITY

In the Commission, democratic accountability would be assured in a number of important ways. First, the government’s key role in passing laws and developing policies related to IA would remain intact. Second, the government may want to consider giving itself the power to direct the Commission on policy matters. Third, leadership positions within the Commission, including the head and other members as described below, would be Governor in Council appointments. Fourth, decisions made by the Commission could be overruled on appeal to the Governor in Council.

### LEADERSHIP, DIRECTION, AND QUALITY ASSURANCE AND CONTROL

The Commission would be headed by a Chairperson who with the other members (“Commissioners”) would be the federal decision-makers in IAs. Commissioners would be independent with respect to their decision-making, an arrangement that is essential to building





trust in IA processes. Their duties would cover the full range of dispute-resolution mechanisms, from facilitation to adjudication. Some full-time members would be appointed for a fixed term and others would be appointed on an as-required basis from regional rosters maintained for appointments. Both full-time members and rosters must meaningfully include Indigenous appointees who would be recommended to the Governor in Council through mechanisms identified by Indigenous Groups.

The Commission would require strong quality assurance programs, as well as audit functions covering both cost control and process. The role of the quality assurance program would be to assess the quality of IAs conducted by the Commission and ensure that continuous learning and improvement takes place within the organization. Cross-cutting issues would be studied, such as the accuracy of predictions of certain impacts, the effectiveness of mitigation measures and the implementation and effectiveness of follow-up programs. Program analyses would be publicly available.

The Commission's internal audit function would ensure that it has rigorous financial controls in place and that it is disciplined with respect to managing the money entrusted to it for conducting IAs. The internal audit function would also ensure that the assessments conducted by the Commission are of high quality and that its responsibilities are being effectively fulfilled. Audits would be public and therefore ensure that the Canadian public is informed of the way the Commission is performing its duties.

The Commission would require an ombudsperson-type function that would serve as a mechanism for complainants who are dissatisfied with the way the Commission has acted - although care must be taken to avoid overlap between this ombudsperson process and dispute-resolution procedures internal to the IA process and appeals. Reporting directly to the Chairperson and independent of the Commission's staff and management, the ombudsperson-type function would be responsible for receiving and investigating complaints, issuing recommendations to the units concerned and reporting publicly on how recommendations have been taken into account.

## REQUIRED FUNCTIONS AND CAPACITIES

For effective and efficient management of the IA process, the Commission requires the expertise and capacity to deliver on the following functions: Planning and Assessment; Science and Knowledge; Indigenous Relations; Public Participation; Proponent Liaison; Information Management; and Monitoring and Enforcement.

### *PLANNING AND ASSESSMENT*

The Commission would be process experts and would be responsible for each step of the assessment process: developing policies and procedures for the conduct of IA; managing consultants who would prepare the Impact Statement; and preparing the documentation related to IAs.

### *SCIENCE AND KNOWLEDGE*

The Commission would be in charge of vetting all analyses for adequacy related to the five pillars of sustainability, through the conduct, co-ordination or oversight of studies conducted throughout the assessment. It would be equipped with expertise in western science as well as in Indigenous knowledge and community knowledge.

It would validate monitoring and follow-up data and create and maintain a public database of baseline and monitoring data, as well as other data sets, for potential use in future assessments.

Because all IA decisions must be evidence-based, the Commission must have a Chief Science Officer to head the Science and Knowledge function. By legislation, this Officer would have the authority and duty to verify the adequacy of studies used in the assessment, as well as the Impact Statement. As set out in legislation, the Chief Science Officer would be responsible for issuing a certificate of independent validation for each IA. The purpose of these measures is to safeguard the use of the best science in assessment processes.

### *INDIGENOUS RELATIONS*

Indigenous Relations would play an integral role in each IA as well as in setting the Commission's strategic vision with regard to Indigenous rights and interests in IA. The Commission would fulfil consultation and accommodation requirements, build capacity and establish long-term relationships. Value should be



placed on retaining Indigenous Peoples to support Indigenous relations, to benefit from their knowledge and expertise, and to encourage capacity building within the Commission.

**PUBLIC PARTICIPATION**

The Commission would create and maintain policies, practices and procedures on public participation. It would research and apply best practices for meaningful participation, administer a participant funding program, and facilitate and execute the participation processes.

The Commission should also include a public advocate function mandated to assist participants as appropriate in each assessment.

**PROPONENT LIAISON**

The Commission would recognize the importance of providing seamless and efficient guidance to proponents throughout the IA process through a single point of contact.

**INFORMATION MANAGEMENT**

The Commission would provide guidance on the accessibility requirements for information to be used in public participation processes and maintain the IA registry, which would contain all of the information related to every stage of all assessments.

**MONITORING AND ENFORCEMENT**

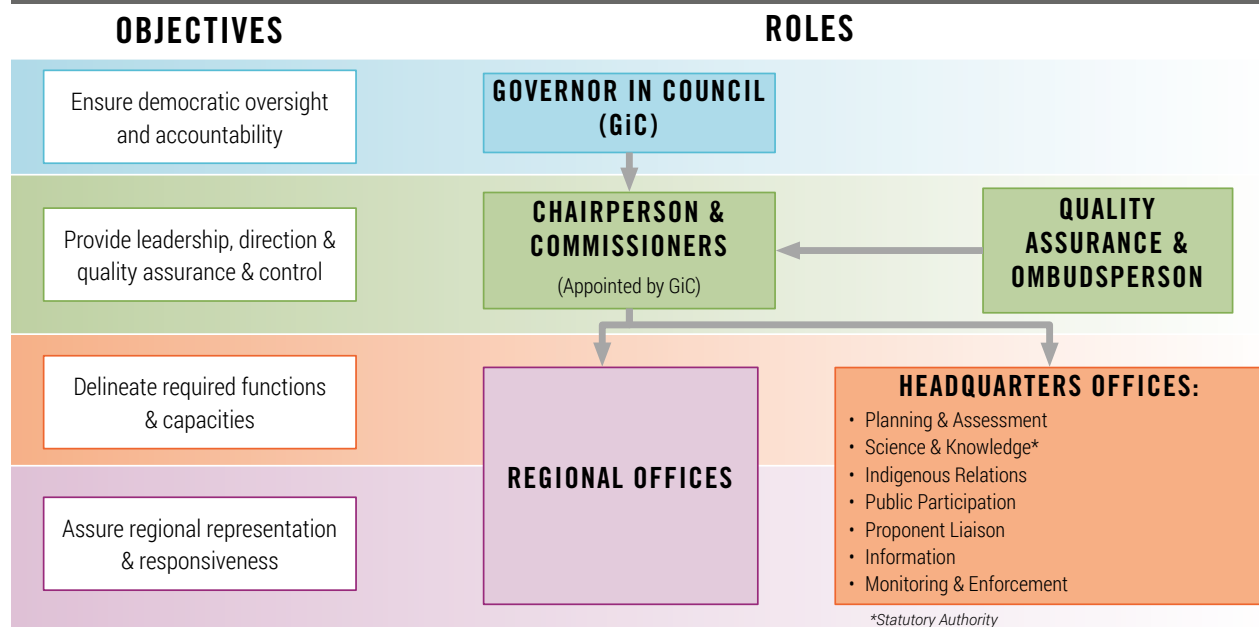
Compliance and Enforcement officers within the Commission would ensure that conditions associated with IA decisions are properly implemented and would report publicly on all activities related to enforcement. They would also ensure that monitoring and follow-up programs are properly implemented, provide support to local and community monitoring groups, identify situations where conditions need to be amended and follow up on adaptive management measures.

**REGIONAL REPRESENTATION AND RESPONSIVENESS**

To fulfil its mandate, the Commission must have a strong regional presence. IAs should be undertaken within the region or regions affected by a project.

The Commission should conduct its operations largely from regional offices, with common services based in headquarters. It would establish a regional structure with offices across Canada, for example, in Atlantic Canada, Quebec, Ontario, Eastern Prairies, Alberta and British Columbia. An array of regional offices is necessary to facilitate development of long-term relationships with provincial governments, Indigenous Groups and local communities and stakeholders. Each office would be

**FIGURE 1 – ORGANIZATIONAL ARRANGEMENT FOR THE IA COMMISSION**



responsible for the conduct of regional and project IA in its particular region and would be staffed to conduct the IA, Indigenous relations and public participation processes, as well as perform monitoring and enforcement duties.

The diagram in Figure 1 outlines a proposed organizational arrangement for the IA Commission.

### 3.1.3 MANDATE

The mandate of the Impact Assessment Commission would be to:

- Implement government IA policy and provide guidance for IA at the federal level covering Strategic IA, Regional IA and Project IA;
- Conduct or manage IAs in an effective, timely and predictable manner that results in clear, evidence-based decisions;
- Provide incentives and flexibility in the IA process to enable effective co-ordination with other jurisdictions;
- Ensure the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* are reflected in IA;
- Ensure impacts on Aboriginal and treaty rights are considered and assessed in the IA process and ensure the duty to consult and accommodate is appropriately fulfilled by the Commission;
- Ensure decisions are based on reliable independent science, Indigenous knowledge and community knowledge;
- Ensure that the process is transparent and that public reporting of information occurs at all phases of the IA, including the rationale for decisions made and the consideration of comments received;
- Maintain both a public registry of IA information for public participation and a searchable database for all scientific data created for IA purposes;
- Ensure the public is engaged meaningfully at each step of the assessment process, from the planning stage through to the post-IA stage of monitoring and follow-up;
- Ensure the process is, and is perceived to be, fair;
- Ensure that throughout IA, Commissioners support consensus-building but also provide timely dispute

resolution and decision-making to advance IA objectives;

- Ensure fiscal discipline for all IAs;
- Ensure compliance and adequate monitoring and follow-up; and
- Monitor the quality of IAs and create a culture of continuous improvement.

## 3.2 PROJECT IMPACT ASSESSMENT CONTEXT

Project IA is the cornerstone of the proposed IA regime. These assessments should protect the physical and biological environment, promote social harmony and generate economic opportunities. A rigorous assessment process should achieve decisions that are considered fair to all parties. A new process should reflect the principles of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* and advance reconciliation with Indigenous Peoples. Properly structured, a new project assessment process would meet these goals and contribute to a sustainable future for Canadians.

Bringing federal assessment into alignment with the four principles guiding the Panel's review requires fundamental change. The proposed new process would:

- aim to build consensus and reduce conflict;
- facilitate co-operation with the provinces, territories and Indigenous jurisdictions;
- avoid conflicts of interest and protect against bias;
- mandate early planning and early engagement;
- integrate science, Indigenous knowledge and community knowledge;
- have time limits and cost controls that reflect the specific circumstances of each project, rather than the current "one size fits all" approach; and
- lead to decisions based on the five pillars of sustainability (environment, economy, social, cultural and health).

All told, this process would seek to restore trust by bringing parties together, benefiting communities and advancing the national interest in sustainable development.

Indigenous Peoples in Canada have a particularly important role to play in project IA. The proposed assessment process would seek to engage Indigenous Groups from early project planning through to assessment decisions and follow-up. It would more accurately and holistically assess impacts to Aboriginal and treaty rights and identify appropriate accommodation measures. This IA process should contribute to a meaningful nation-to-nation relationship.

## 3.2.1 WHAT SHOULD REQUIRE PROJECT IMPACT ASSESSMENT? WHAT WE HEARD

Many participants favoured the continued use of a Project List approach to trigger federal assessments because it is predictable and clear, and places the focus on major resource projects. Requiring an assessment for projects with minor impacts was described as too burdensome and time consuming for proponents and lacking proportionality. Participants also said, however, that the current Project List is too focused on certain industries such as mining and should be revisited to ensure that the List more accurately reflect projects with the highest potential for adverse effects, with some participants indicating that *in-situ* oilsands projects and hydraulic fracturing activities should be included.

Participants noted that *CEAA 2012* significantly reduced the number of assessments conducted by the federal government. Some advocated for a return to the former triggers approach<sup>22</sup> to capture activities that are clearly under federal jurisdiction, potentially in combination with a List of excluded activities. Some also suggested that a hybrid approach could be applied using a Project List

supplemented by federal triggers to require assessments for certain projects not on the List.

## FINDINGS AND RECOMMENDATIONS

The starting point for requiring a federal IA is to define “project” as a proposed physical activity or undertaking that affects one or more matters of federal interest.<sup>23</sup> Effects on federal interests should be the foremost factor when determining whether a federal IA is required. This differs from the current approach which includes projects that may not affect matters of federal interest.

*“CEAA 2012 uses Regulations Designating Physical Activities to specify what activities are subject to the Act, without any underpinning rationale for what should be designated and no purpose identified for the application of the Act to guide that decision. This is a fundamental challenge for assessing the effectiveness of CEAA 2012. The lack of objective clarity in the stated purposes of the Act, which outline how environmental assessments under CEAA 2012 are to be carried out, but not when or why they are to be carried out, renders the application of CEAA 2012 to the mining sector – and its lack of application to numerous other activities of equal or even greater impact – arbitrary.”*

*Mining Association of Canada*

There should be an appropriate threshold for effects on federal interests so that a trivial impact does not trigger IA. This threshold, defined as a consequential impact, should be tied to the sustainability framework. Australia takes a similar approach to triggering environmental assessments by requiring an assessment when a proposed action is “likely to have a significant impact on a matter of national environmental significance.”<sup>24</sup>

A new Project List should be created that would include only projects that are likely to adversely impact matters of federal interest in a way that is consequential for present and future generations. Projects on the new Project List

<sup>22</sup> Under the former *Canadian Environmental Assessment Act*, an EA of a project was required before a federal authority exercised a power or performed any duty or function in respect of a project - specifically, when the federal authority was a proponent of a project, provided funding for a project, provided land for a project, or issued a permit, licence, grant or approval for a project.

<sup>23</sup> As outlined earlier in this Report, matters of federal interest should be greater than what is currently studied under section 5 of *CEAA 2012*. For a more detailed discussion on matters of federal interest, see Section 2.1 – The purpose of federal impact assessment.

<sup>24</sup> See “Environment Protection and Biodiversity Conservation Act 1999 environment assessment process – referral” available at: <https://www.environment.gov.au/system/files/resources/38fc57cd-c744-4727-8fa0-51ecbd6e879b/files/flow-chart.pdf>



would automatically require a federal project IA. For projects not on the new Project List, two other triggering mechanisms should be provided:

1. Statutory criteria should be established to require an IA of projects that have the potential to impact present and future generations in a way that is consequential (e.g., the project occurs in a sensitive area).<sup>25</sup> These criteria should be clear so that discretion is not required.
2. Provisions should be made for proponents or any person or group to request that a project require a federal project IA.

The Panel has considered the role of s.67 of *CEAA 2012* in the IA process and concluded that it is not consistent with the Panel's vision for IA as it lacks transparency and meaningfulness. Section 67 indicates that any federal authority (including airport authorities) cannot carry out any project on federal land unless they first determine that the project is not likely to cause significant adverse environmental effects or, where significant effects are likely, Cabinet determines that they are justified. 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. As concerns s.68 of *CEAA 2012*, which is about project outside of Canada,<sup>26</sup> the Panel did not hear much, if anything, from participants. The Panel therefore decided not to address this topic in its Report.

In order to determine whether a project may require a federal IA, the proponent would file a notice with the authority that would include a concise conceptual description of the project, not the detailed project description demanded by the current *Prescribed Information for the Description of a Designated Project Regulations*.

Unlike the current process, the future process should not normally require a decision by the IA authority on whether to require an IA: no decision should be required for a listed project or a project that meets the criteria of

**“The preparation of a project description for the federal screening assessment is in and of itself quite onerous, and requires the proponent to carry out the majority of the work involved in a full environmental assessment. In addition to making the process more efficient for proponents, reducing the complexity of the formal Project Description required at the screening stage would also facilitate earlier consultation and allow for greater flexibility in response to community input.”**

*Canadian Association of Petroleum Producers*

consequential impact; however, where there is a request for an IA or there is otherwise a need for a decision, the IA authority should publicly release this decision and provide its rationale using the applicable statutory criteria for a required IA or a requested IA. Given the earlier starting point for requiring notice, there should also be an opportunity to reconsider the IA trigger based on new information. The triggering approach should also be reviewed regularly to ensure that IA is applicable to the appropriate projects.

Compared to the current approach, the proposed new approach will require more project IAs.<sup>27</sup>

**The Panel recommends that IA legislation define a “project” to be a physical activity or undertaking that impacts one or more matters of federal interest.**

**The Panel recommends that IA legislation require project IAs when a project is on a new Project List, a project not on the new List is likely to have a consequential impact, or the IA authority accepts a request.**

<sup>25</sup> For guidance on how to define consequential impacts, see Section 2.1.3 – From Significance to Sustainability.

<sup>26</sup> The Panel observes that s.68 uses a similar approach to s.67 in how it addresses projects outside Canada. For more information on this topic, see <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/projects-federal-lands-outside-canada.html>

<sup>27</sup> The current approach under *CEAA 2012* applies to dozens of projects annually compared to the former legislation that applied to thousands of projects annually. The Panel expects that the new approach will apply to hundreds of projects annually.

## 3.2.2 HOW SHOULD PROJECT IMPACT ASSESSMENT BE CONDUCTED?

Federal IA would involve three phases: a Planning Phase, a Study Phase and a Decision Phase. The Planning Phase represents a major change from current practice and is intended to bring parties to face-to-face meetings and open up discussion on proposed activities early, before critical elements are decided. The Study Phase would resemble the assessment process of today, but the Impact Statement would be directed by the IA authority. In the Decision Phase, the decision on the overall contribution of the project to sustainability would rest with the IA authority, with provision for an appeal to the Governor in Council.

### 3.2.2.1 PLANNING PHASE WHAT WE HEARD

A common concern of participants across Canada was that the current assessment process starts too late and the project description requested from proponents to trigger a federal assessment requires too much information. For many Canadians, by the time they are asked to participate, projects are already fully planned with little room for change. As such, the starting point is perceived to be too late for communities, stakeholders and Indigenous Groups to provide input into project design or alternative means by which a project could be realized.

Participants believe the assessment process should mandate early engagement, which would allow for effective information-sharing, including the early integration of Indigenous knowledge, and reduce conflict in the assessment process. Early engagement can also provide clarity for industry by sharing community knowledge about an area, including what may be worth avoiding.

Federal experts, industry, the public and Indigenous Groups seek a more collaborative, active and ongoing role in assessments. Participants promoted the establishment of a working group that would provide for more co-ordination upfront among the proponent, the consultant conducting studies, the communities and the regulators so that the process is properly scoped and the

right information is gathered. Early co-ordination should eliminate the lengthy information request process and improve efficiency.

## FINDINGS AND RECOMMENDATIONS

Project IA should commence with an official Planning Phase that would provide a face-to-face opportunity for all interested parties to identify their issues of concern to the proponent, provide input into the project design and establish terms for the assessment.

**“There needs to be upfront consultations with local and Indigenous communities with regards to the industrial siting of proposed projects. A key example of how the consultation process under CEAA 2012 has brought significant challenge from recipient communities occurred during the assessment of Pacific NorthWest LNG. Local and Indigenous communities were informed of the proposed project only after several years, hundreds of thousands of dollars spent, and a siting decision having been made by the proponent.”**

*SkeenaWild Conservation Trust*

The Planning Phase would provide a forum to build trusting relationships among proponents, all levels of government, and local residential and Indigenous communities. It would also enable the early use of scientific knowledge, Indigenous knowledge and community knowledge, and data to identify valued features and areas and Indigenous rights.

### *WHO WOULD PARTICIPATE*

This Phase and all subsequent phases would be led by the Impact Assessment Commission (“the Commission”), which would provide a Commissioner to lead the process and provide dispute resolution. The Planning Phase would begin with a public notice announcing the commencement of the IA and requesting interested parties to self-identify should they wish to be involved in the IA process.

To ensure that interested parties and subject matter experts are provided effective forums through which to collaboratively discuss proposed activities, the Commission would establish two committees to support



the engagement of the public, Indigenous Groups, stakeholders and experts in the IA review.

The first committee (the “project committee”) would include interested parties such as representatives of various orders of government, Indigenous Groups, community organizations, non-governmental organizations, the proponent and members of the public. This committee should be inclusive of all persons seeking to be involved in the IA process.

The second committee (the “government expert committee”) would include government experts on subject matters related to the project and its impacts. Membership could include technical experts from the Commission, federal and provincial government experts, and Indigenous experts identified by the Indigenous Groups themselves. The government expert committee would access the extensive expertise in government that is needed to inform project IAs, as having relevant government expertise involved throughout the IA process will improve the quality and consistency of projects IAs.

All jurisdictions, including Indigenous, provincial, municipal and territorial governments, would be encouraged to participate in the Planning Phase to establish a co-ordinated process that integrates process and legislative requirements from all jurisdictions. If another jurisdiction such as a provincial government or an Indigenous Group has its own assessment process, agreements could be reached on how these should be co-ordinated with the federal IA.<sup>28</sup>

### **PROCESS**

The Planning Phase would commence when the Commission determines that a federal IA is required. The notice from the proponent used to determine if an IA is required would be used at the start of the Planning Phase to facilitate public and Indigenous engagement. Legislation should ensure that the proponent has the onus and legal duty to provide the notice early in project development.

The Commission would convene an initial meeting of interested participants and set up a schedule of future meetings and topics, as well as the estimated time required for the Planning Phase. The goal of the Planning Phase meetings is to identify the valued components,

the alternatives that require study, and the sustainability framework for the project, including the questions that guide future studies for each of the five pillars of sustainability.<sup>29</sup>

For linear projects such as pipelines that have the potential to impact multiple communities or Indigenous Groups, it may be necessary to have meetings in different locations to ensure all interested participants are able to be engaged.

Substantial benefits would accrue from actively engaging

**“Public engagement in EA makes it more credible as everything is done in a transparent and accountable manner (Sinclair & Diduck, 2005). Public engagement at early stages of the project can overcome the possibility of later conflicts between people and proponents and ensures that the project is sustainable and supports community needs (Doelle & Sinclair, 2006). This can reduce the delaying of projects, monetary losses, social costs and other such problems arising out of lack of clarity and consensus between proponents and the public (Rutherford & Campbell, 2004).”**

*Gurmeet Singh, University of Manitoba*

various actors at this early stage of the IA. Early engagement would:

- help ensure that key information is integrated in a timely manner;
- increase the comprehensiveness and effectiveness of an IA;
- reduce the need for additional requests for information at later stages of the IA;
- ensure proper consideration and accommodation of impacts to Aboriginal and treaty rights; and
- increase the confidence of Indigenous Groups and other parties that their voices are heard and they have informed the assessment.

<sup>28</sup> For a more detailed discussion on mechanisms for co-operation, see Section 2.2.1 – Co-operation.

<sup>29</sup> For guidance on the sustainability framework, see Section 2.1.3 – From Significance to Sustainability.

Engagement would be conducted in part through the active involvement of the project committee and the government expert committee, and through additional public participation and Indigenous consultation opportunities led by the Commission.

Early Indigenous involvement will be a key opportunity to incorporate their jurisdiction and decision-making authority and for Indigenous Groups to shape IA in a way that reflects their customs, laws and traditions. For Indigenous Groups, these opportunities would begin with the collaborative design of plans to guide Indigenous-Crown consultation that would be drafted with their direct involvement. Engaging in a collaborative design of the consultation is critical to ensuring that proposed activities will respond to Indigenous needs such as preferred locations, times or formats of events, as well as the substance of discussions. In alignment with principles outlined earlier in this Report,<sup>30</sup> public participation plans would be developed with input from the public. Plans would also reflect preferred locations, times and formats of events for public engagement.

### **OUTCOMES**

The Planning Phase would produce clarity on the scope of the IA through the establishment of a project-specific conduct of assessment agreement.

Coincident with this phase, the proponent would gain information on matters of concern that it could consider as it prepared the project design that would underpin the IA. The conduct of assessment agreement would be based on this design and finalize the factors for assessment. All IA processes should include some common factors such as positive and negative impacts on the five pillars of sustainability. Other factors, such as alternatives, would be raised and potentially resolved in the Planning Phase or identified for assessment during the Study Phase. The relevant factors should also be consistent with the data and results of any regional IA that has been conducted in the area.

The conduct of assessment agreement would set out the sustainability framework. To implement the five pillar approach to sustainability, the framework would identify the valued components and criteria for each pillar – using, for example, a format of key questions.<sup>31</sup> Impacts to

asserted or established Aboriginal or treaty rights and interests would be considered across the five pillars, as appropriate and as communicated by the relevant Indigenous Groups.

Based on the factors of assessment and the sustainability framework, the conduct of assessment agreement would identify the studies that need to be conducted. The agreement would also identify who is responsible to conduct the studies, which could be the proponent, Indigenous Groups or others. The government expert committee would have a key role in deciding upon study methods and the presentation of results.

The conduct of assessment agreement would address the constitutional duty to consult. In particular, the agreement should include an order listing the Indigenous Groups who have the potential to be impacted by the proposed project, the categories of potential impacts and the federal government agencies and departments who owe the duty to consult with the impacted Indigenous Groups. This list would be subject to change as the IA progresses, details of the project are decided and impacts become known.

The conduct of assessment agreement would outline how the process will integrate procedural and legislative requirements of other jurisdictions, including how joint review panels should be conducted. The IA authority should have broad authority to ensure that joint or co-operative reviews occur wherever possible. The process would also integrate Indigenous customs, laws and traditions.

The conduct of assessment agreement must contain details on IA timing and cost, and the Commission must be accountable for timely and cost-effective IA processes. Following discussion with the committees, the Commission would set out project-specific cost and time estimates for the Study Phase. The Commission would then be accountable to meet these estimates or explain why they were not met. Timelines must be project-specific to accommodate, among other things, variation in provincial assessment processes, the unique laws, governance structures and capacity of Indigenous Groups, the complexity of project circumstances, and

<sup>30</sup> See Section 2.4 – Public participation in impact assessment.

<sup>31</sup> An example of project-based sustainability questions is set out in Section 2.1.3 – From Significance to Sustainability.





the need to integrate science, Indigenous knowledge and community knowledge.

Before finalizing the conduct of assessment agreement, there would be an opportunity for public participation as well as Indigenous consultation.<sup>32</sup>

Some proponents may involve communities and Indigenous Groups in project planning in advance of any required notice and obtain consensus on some issues. In this circumstance, the Commissioner may use this work, in whole or in part, to support the development of the conduct of assessment agreement.

In some circumstances, the Planning Phase may produce a second outcome: termination of the IA, as proponents may adjust their project design in such a way that the project will no longer impact any matters of federal interest or will no longer consequentially affect matters of federal interests for present and future generations. In either circumstance, the proposed project would no longer be subject to a federal IA.

The Commissioner should also have authority to finalize the conduct of assessment agreement and initiate the Study Phase if no more progress is being achieved.

Where there is consensus on the terms of the conduct of assessment agreement, the Planning Phase is concluded. There may also be topics where there is not consensus. All topics lacking consensus shall be decided upon by the Commissioner, through a formal order that includes reasons for the decision.

**The Panel recommends that all phases of project IA be conducted through a multi-party, in person engagement process.**

**The Panel recommends that, for project IA, the outcome of the Planning Phase would be a conduct of assessment agreement.**

### 3.2.2.2 STUDY PHASE WHAT WE HEARD

Differing views were expressed about the conduct of studies and the development of the Environmental Impact Statement, with some participants saying that proponents should continue to conduct this work while others proposed the work be done by an independent body. Some participants felt additional parties should be involved in conducting studies. All participants, however, recognized that trust in the accuracy and impartiality of this information is critical to its acceptability. Participants also expressed the need for peer review of studies and suggestions were made that this could be achieved through the use of advisory committees or working groups.

There is a lack of clarity about when an assessment is referred to a review panel versus when it is led by the Canadian Environmental Assessment Agency. Participants provided examples of projects, such as the Ajax Mine Project, where significant concerns among some members of the community led to numerous requests for a review panel but the resulting assessment was nonetheless led by the responsible authority.

**"I suggest that, in order to ensure a thorough and unbiased process, it is necessary that EIAs be conducted by scientists who are truly independent and free of economic and political pressure and influence. The public would be more likely to trust the EIA process if they could be sure of its integrity."**

*Denise Melanson, Kent County Council of Canadians*

## FINDINGS AND RECOMMENDATIONS

The Study Phase is a new name for what currently constitutes the federal environmental assessment process.

### WHO WOULD PARTICIPATE

The Study Phase should include all interested participants from the Planning Phase. As with the Planning Phase, it would be led by the Commission. It would also include the project committee and the government expert committee established in the Planning Phase.

<sup>32</sup> See Section 2.3 – Indigenous considerations and Section 2.4 – Public participation in impact assessment.

The Study Phase is where all of the studies identified in the conduct of assessment agreement would be carried out by the various parties, with input from the project committee and government expert committee. These studies would then be used to prepare the Impact Statement (known in the previous EA regime as an Environmental Impact Statement), which would identify and assess the impacts of the project across the five pillars of sustainability, based on the project-specific sustainability framework.

The development of the Impact Statement would be led by the Commission using a team of consultants and experts (the “assessment team”) retained by the Commission that is free of any conflict of interest and chosen through a collaborative process involving the project committee and government expert committee. The assessment team would be project-specific and constituted to take into account the studies conducted and prepare an Impact Statement that assesses the project’s impacts on the five pillars of sustainability. It would include consultants and other independent experts (including Indigenous knowledge-holders) with expertise related to the factors of the study, the sustainability framework and any other special expertise relevant to preparing the Impact Statement.

The Study Phase would also include other experts in accordance with the conduct of assessment agreement. Although the Impact Statement must be prepared by the assessment team, the assessment agreement may provide that the proponent, Indigenous Groups or other participants take the lead on providing relevant studies and other evidence.

### **PROCESS**

The assessment team must carry out a comprehensive review of all topics identified in the conduct of assessment agreement with consideration for all evidence, including scientific data, Indigenous knowledge and community knowledge, Aboriginal and treaty rights, and input from the proponent on project design. Based on this information, the assessment team would produce a draft Impact Statement that sets out mitigation measures to reduce or avoid impacts, as well as the findings and the rationales.

The Commission would release a draft of the Impact Statement for review by the project committee and the government expert committee. There would also be

**“Consent is a process, rather than an outcome. It is a way to walk together, as proponents, governments, and Indigenous nations, towards a mutually beneficial outcome, where First Nations’ rights, interrelationships with the land, and legal traditions are respected, recognized, and supported.”**

*Assembly of First Nations*

Indigenous consultation and a public comment period on the draft document, consistent with the process outlined in the consultation plans.

The Study Phase must also address the topic of accommodation for impacts on Aboriginal and treaty rights and interests, which must involve consultations with Indigenous Groups led by the Commission. These consultations would also involve government departments identified in the Planning Phase. Accommodation options should include mitigation measures but not be limited to mitigation. The purpose of accommodation is to fully address impacts to Aboriginal and treaty rights and interests and to advance the goal of reconciliation. A focused and substantive effort to develop and implement appropriate accommodation measures will create certainty for the process and support the provision of free, prior and informed consent.

After reviewing submitted comments and advice, the assessment team would finalize the Impact Statement.

**“Federal EA should move towards a proponent-funded but agency-led model. The responsible authority (preferably an independent EA agency...) with the proper expertise should conduct the investigation and EA, or it (rather than the proponent) should hire the most qualified independent consultants to provide technical reports.”**

*BC Nature*

### **OUTCOMES**

Once the Impact Statement has been finalized, the Commission would convene a meeting of the project committee and government expert committee. One of the purposes of this meeting would be for the proponent to confirm the final proposed project design and components and for committee members to identify topics of consensus and non-consensus.



Following receipt of comments from the committees, the Commission would prepare a summary report laying out the issues of consensus that would be formalized by order of the Commissioner. Where there are important issues of non-consensus, including adequacy of consultation and consent, these issues should be referred to a review panel for the Decision Phase.

The Study Phase would then be concluded and the IA would advance to the Decision Phase.

**The Panel recommends that the studies outlined in the conduct of assessment agreement be completed in the Study Phase. The IA authority would lead an assessment team accountable for preparing the Impact Statement, informed by these studies.**

### 3.2.2.3 DECISION PHASE WHAT WE HEARD

Participants expressed concern about the lack of transparency in all current environmental assessment decision-making processes – for example, when determining if projects are in the public interest, if environmental effects are significant or whether significant effects are justified in the circumstances. Some participants expressed distrust in the process, believing that outcomes are often decided prior to the assessment process being concluded. Participants were concerned that current assessment focuses on mitigation in vague terms that is not effective or comprehensive and then inevitably leads to project approval.

A wide range of participants indicated that decisions should consider diverse matters beyond the bio-physical environment, including economic, social, health and cultural impacts. Decisions should turn on the balance between social and economic benefits and environmental impacts after mitigation. They should seek to minimize impacts and provide compensation where it is required. Overall, decisions should assess whether projects can achieve long-lasting social and economic benefits while avoiding adverse environmental effects.

## FINDINGS AND RECOMMENDATIONS

There should be a new Decision Phase for federal IA. Consistent with the independent, transparent and evidence-based approach of the proposed IA process, the IA decision should be made by the new Impact Assessment Commission.<sup>33</sup>

For circumstances where there is consensus on all important issues, the Commissioner would formalize this in an order setting out the terms of consensus. This order would constitute the IA decision. Where there are important issues of non-consensus, a review panel would be appointed to make the IA decision.

At the commencement of the Decision Phase, the Commissioner or the review panel, if one has been established, would provide an estimate of the time required for this phase.

The review panel would include Indigenous and regional representation, as required, and would have the ability to retain its own experts within a fixed budget. It would have two responsibilities: to hold a hearing on all issues of non-consensus and make a conclusion on each issue, and to make a decision on the overall net benefit of the project for present and future generations, taking into account all information on each pillar of sustainability.

#### TEST FOR APPROVAL

The evidence-based IA decision would apply a project-specific sustainability test to assess the impacts to valued components identified across the pillars of sustainability against established criteria, taking into account mitigation and accommodation measures. The decision would include an explanation and justification for any trade-offs between pillars and determine whether the proposed project would create an overall net benefit to Canada for present and future generations.<sup>34</sup>

<sup>33</sup> Details about the rationale for IA authority decision-making, as well as a discussion of provisions to ensure the democratic accountability of the IA authority, can be found in Section 3.1 - Governance Model.

<sup>34</sup> For more details about evidence-based decision-making, see Section 2.5 – Evidence-based impact assessment.

The diagram in Figure 2 outlines the application of the sustainability framework and the sustainability test for the Panel's proposed project IA process.

The decision must also address the adequacy of Indigenous consultation. After applying the sustainability test to the project, the Commission would officially request that Indigenous Groups provide their decision on consent. If an Indigenous Group provides its consent, the process would continue. If an Indigenous Group withholds consent, any party involved could request that the Commission refer this matter to a panel to review whether the withholding of consent is reasonable. For clarity, the absence of appropriate accommodation measures should be deemed an acceptable reason for the withholding of consent.

**“The Mackenzie Valley Environmental Impact Review Board is responsible for conducting environmental assessments on proposed developments and for striking panels to conduct environmental impact reviews on them if necessary, throughout the Mackenzie Valley.**

**Based on the findings of its assessment, this co-management board makes recommendations to the federal and responsible ministers on whether a proposed development can proceed for regulatory approval or not, and if so under what conditions.**

**When the Minister of Indian and Northern Affairs receives the Report of Environmental Assessment from the Review Board, the Minister will pass it on to other ministers that are also responsible for regulating that project. All of them then consider the report and decide the outcome. The four possible decisions they can make are to:**

- **adopt the Review Board's recommendation;**
- **refer it back to the Review Board for further consideration;**
- **consult the Review Board and then adopt the recommendation with modification; or**
- **consult the Review Board and then reject the reasons for decision and order an environmental impact review.”**

*Mackenzie Valley Environmental Impact Review Board*

### **JURISDICTIONAL CO-OPERATION**

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

**“A thorough understanding of the full jurisdiction of each level of government to carry out EA is critical for EA to realize its potential as a tool for good decision-making to facilitate and accelerate the transition to sustainability, including through jurisdictional cooperation.”**

*Jason MacLean, Meinhard Doelle, and Chris Tollefson*

Where other jurisdictions are not involved in the IA process, it is useful to look at current practices in northern environmental assessment systems. For example, the Mackenzie Valley Environmental Impact Review Board provides all regulatory decision-makers with the IA conditions for matters that fall within their responsibility.<sup>35</sup> A similar approach could ensure that all conditions, not just those of federal jurisdiction, are implemented. Jurisdictions would be asked to examine the conditions within a certain timeframe, during which they could comment on or modify the conditions prior to ultimately committing or declining to enforce them.

Another option could be for the Commission to enter into a compliance agreement with the proponent on conditions not regulated by existing federal regimes. Should there be conditions outside of federal jurisdiction that the province does not want to enforce, the compliance agreement may be required for the project to proceed. If the proponent declines to enter into such an agreement, the Commissioner or review panel may conclude that the project cannot be implemented in a way that contributes to sustainability and decline to issue an approval.

<sup>35</sup> See [http://www.reviewboard.ca/process\\_information/step\\_by\\_step\\_information.php](http://www.reviewboard.ca/process_information/step_by_step_information.php)



# FIGURE 2 — APPLYING THE SUSTAINABILITY FRAMEWORK TO PROJECT IA

The sustainability framework is defined on a project by project basis for each Project IA.

**STEP 1:** Identify the Project and Components. Identify potential alternative locations or design options for project & components

**STEP 2:** For each identified alternative location & design option, identify potential issues such as:

- Potential impacts to Indigenous fishery
- Increase in town population
- Increase in job opportunities

**STEP 3:** For each identified issue, identify potentially affected Valued Components (VCs) across all pillars such as:

- **Economic** – local economy, provincial economy, national economy
- **Social** – housing; community safety
- **Health** – local food diets; ambient air quality
- **Environment** – fish; water quality
- **Culture** – sacred sites

**STEP 4:** Identify criteria to measure sustainability for each VC such as:

- **Economic** – for local economy: local procurement, job creation
- **Social** – for housing: maintain availability of housing
- **Health** – for ambient air quality: maintain air quality below acceptable health standards
- **Environment** – for water quality: maintain water quality below Canadian Council of Ministers of the Environment guidelines for aquatic health
- **Culture** – for sacred sites: conserve and maintain access to sacred sites

**STEP 5:** Identify required studies

- Studies on project alternative locations and designs (to best balance positive and negative impacts to VCs)
- Studies to determine benefits to VCs
- Studies to determine impacts on VCs
- (Each study should cover direct, indirect, and cumulative benefits/ impacts from project)

In the Study Phase, these valued components are studied to measure impacts to the pillars of sustainability, based on the issues identified in the framework.

In the Decision Phase, the sustainability test is conducted. The test measures impacts to valued components against criteria established in the framework.

## DESCRIBE PROJECT & COMPONENTS:

1. Identify alternative locations
2. Identify alternative designs

## IDENTIFY POTENTIAL ISSUES

For each identified alternative location and design

## IDENTIFY VALUED COMPONENTS (VCs)

Key VCs affected by project across all pillars (environment, cultural, health, economic, social)

## ESTABLISH SUSTAINABILITY CRITERIA

to measure sustainability for each VC

## IDENTIFY REQUIRED STUDIES

Baseline studies and studies to understand positive or negative impacts of the project on each VC. Ensure alternative locations/ designs are considered

## ANALYSIS of valued components conducted in the Study Phase

## SUSTAINABILITY TEST:

Measures positive and negative impacts to valued components against sustainability criteria

### DECISION STATEMENT

The Decision Phase would conclude with the issuance of a decision statement. When there is consensus, the Commissioner would issue the decision statement using the consensus report and taking into account the results of the sustainability test. When there are important issues of non-consensus, the review panel would issue the decision statement.

Public engagement and Indigenous collaboration should be undertaken on proposed conditions for all projects prior to their finalization.<sup>36</sup> Following these discussions, the Commissioner or review panel would work to resolve outstanding issues, if any, and prepare a final decision statement.

Where it is determined that a project would contribute positively to sustainability, the decision statement would outline all conditions that can be enforced by the Commission. The decision statement, along with the commitments in a compliance agreement, and an agreement for enforcement of conditions by other jurisdictions or regulators, would form the IA decision.

Where it is determined that a project would not contribute positively to sustainability, this must result in a decision that the project not proceed, that no federal authority may make or take a decision that would allow the project to proceed in whole or in part, or both.

To ensure that the circumstances informing the approval do not change prior to project initiation, the decision statement should have an expiration date.

Decisions by the Impact Assessment Commission should be subject to a time-limited right of appeal to the federal Cabinet.<sup>37</sup> For such appeals, resulting decisions should be evidence-based, supported by reasons related to the five pillars of sustainability, prompt and publicly available.

**The Panel recommends that a Decision Phase be established wherein the IA authority would seek Indigenous consent and issue a public decision statement on whether the project provides an overall net benefit to Canada across the five pillars of sustainability for present and future generations.**

The diagram in Figure 3 outlines the Panel's proposed project IA process.

## 3.3 MONITORING, COMPLIANCE AND ENFORCEMENT CONTEXT

As the Decision Phase completes the "assessment" part of the IA process, there is need for a post-IA phase to address monitoring and follow-up related to conditions, as well as compliance and enforcement. These post-IA elements are equally important to restore trust in assessment processes and ensure robust oversight. These elements ensure the implementation of conditions issued with the IA decision and verify the accuracy of the assessment predictions and the effectiveness of identified mitigation measures.

Establishing an effective and transparent post-IA phase ensures that project implementation meets the outcomes established through the IA process.

The post-IA phase also helps ensure that the IA process is an iterative learning process. Without an understanding of the effectiveness of mitigation measures or the accuracy of impact predictions, it is impossible to learn from past successes and mistakes in order to improve future project design and decision-making.

<sup>36</sup> For more details on conditions, see Section 3.3 – Monitoring, compliance and enforcement.

<sup>37</sup> For more details on the appeal process, see Section 3.1.1 – How should federal impact assessment be governed?



**FIGURE 3 – PROJECT IA PROCESS OVERVIEW**



### 3.3.1 CONDITIONS WHAT WE HEARD

Participants believe that, under current assessment processes, project IA conditions can be difficult to interpret and enforce. There was broad support for the need to ensure that conditions imposed in project IA decisions can, in fact, be enforced by Responsible Authorities. Such conditions should be outcome-based, have better performance measurements and facilitate adaptive management by including a mechanism to amend conditions over time. Participants also saw the need for public and Indigenous involvement in the development of conditions, including the plans, procedures and processes developed by the proponent to implement conditions.

### FINDINGS AND RECOMMENDATIONS

IA is a planning tool, so information about the project design may evolve after the IA is complete. Therefore, outcome-based conditions are required to ensure that project implementation will minimize impacts and achieve outcomes established under the five pillars of sustainability.

Outcome-based conditions are currently used in decisions under *CEAA 2012*, as well as by other jurisdictions such as British Columbia. These conditions, which can be broadly stated objectives, rules and concepts, focus on regulatory performance and provide flexibility in how they are implemented. This leaves space for innovation, including the adoption of best available technologies as they become available, and adaptive management. To be effective and meaningful, these types of conditions

must have clear performance standards to ensure that the project meets the sustainability objectives set in the project IA.

Issues captured in conditions established in current assessment processes do not always add value as they require proponents to comply with other existing regulatory requirements. For conditions to be meaningful and bring added value, they must focus on a project's contribution to Canada's sustainable development, and complement other regulatory processes or respond to a regulatory gap not covered by any other process.

**The Panel recommends that decision statements use outcome-based conditions that set clear and specific standards of performance.**

While outcome-based conditions provide some flexibility, they may not effectively take into account the adoption of new standards, such as enhanced air quality standards. There may also be circumstances where permits, authorizations or licences provided by other regulators duplicate, contradict or conflict with IA conditions.

Outcome-based conditions may not take into account changes in baseline environmental conditions or the results of monitoring and follow-up programs. In such situations, adaptive management should be applied. Adaptive management is a systematic method to ensure conditions are effective and to adjust those conditions, as necessary, in order to meet sustainability outcomes. Therefore, it is necessary to make conditions subject to future review and possible amendment to take into account improved standards and enable adaptive management.

**"As projects go into service and experience is gained with their operation and the body of the knowledge accumulated through monitoring, there should be an explicit power with the agency to amend Decision Statements in order to ensure that the activities that need to be carried out with respect to the project are maintained on a current basis, in a timely manner."**

*Manitoba Hydro*

Providing the Impact Assessment Commission with the power to amend conditions would support the effective implementation of monitoring and follow-up and allow for new mitigation measures where monitoring and follow-up shows that predictions in the IA were not accurate. Amending conditions also enables continued co-operation and collaboration with other regulatory processes, where appropriate. This amendment exercise should be conducted in a manner that supports and enhances the sustainability of the project. The process for amending conditions should be inclusive and provide for collaboration with Indigenous Groups and opportunities for the public and other stakeholders to provide comments.

**The Panel recommends that IA legislation contain a formal process to amend conditions.**

### 3.3.2 MONITORING AND FOLLOW-UP WHAT WE HEARD

Participants were concerned about the federal government's lack of attention to monitoring and follow-up after a decision has been made and emphasized the importance of verifying the conclusions of EA predictions. There were also a number of concerns about proponent self-monitoring, with some participants suggesting that third parties should be contracted to conduct monitoring activities. Some participants felt that insufficient effort is being put into monitoring and would like to see increased oversight by the federal government to ensure monitoring is taking place. Local communities and Indigenous Groups want a role in monitoring but are currently limited in how they can be involved.

Participants said that the lack of trust related to monitoring and follow-up is related to a lack of transparency in the monitoring and follow-up phase. They want all monitoring data to be posted publicly in real time in order to show clearly that monitoring is taking place and that the local environment is not being put at risk.





**“Merely ensuring that all follow-up reports and monitoring data are available and searchable on a public registry – and the potential for public and academic scrutiny that comes with that – would likely have a significant positive effect on compliance, improving the quality of follow-up reporting and monitoring at a minimal cost to the government.”**

*Martin Olszynski, University of Calgary*

## FINDINGS AND RECOMMENDATIONS

The federal government has a responsibility to ensure that its decisions are based on the best available evidence and information. Given the iterative nature of the IA process, part of this responsibility is to verify whether impact and mitigation predictions made in the study phase actually occur when projects are implemented. The outcomes of project implementation should be monitored to determine the effectiveness of mitigation measures in order to ensure continuous improvement for future decisions with similar predicted impacts. Additional resources and capacity are required to ensure that the federal government can play an active role in ensuring that proponents conduct monitoring and follow-up correctly through verification of data and conclusions produced by proponents.

There is a lack of clarity in current legislation and associated guidance on how to design a monitoring and follow-up program that is robust and effective. Currently, specifics about monitoring and follow-up programs are established on a project basis through conditions set out in decision statements. There are no legislated minimum requirements for monitoring and reporting on the monitoring results, and the federal government lacks a clear mandate for oversight of monitoring and follow-up effectiveness.

Legislated requirements are needed for monitoring and reporting by the proponent and for quality control by the IA authority. These legislated requirements should set the standard for follow-up and monitoring and ensure they are implemented consistently across the country. Standardized follow-up programs would lead to better results and enable continuous improvement. A consistent methodology for all monitoring of projects, applied to things such as data collection, would allow for results to be compared for similar project types or activities in

a similar region. Increasing the standard for monitoring requirements would contribute to better data on which to base conclusions about the accuracy of impact predictions. This information could inform the outcomes of other assessments, support the management of cumulative effects at the project or regional level, and inform amendments to conditions in order to better reflect the intended outcomes of the assessment.

**The Panel recommends that IA legislation ensure sustainability outcomes are met through mandatory monitoring and follow-up programs with minimum standard requirements common to all project IAs.**

While the government has a role to play in the oversight of monitoring and follow-up, parties outside of government must still be responsible for the gathering of monitoring data used in follow-up programs. In the current regime, this responsibility falls on the proponent. There is an advantage to having proponents continue to be responsible for carrying out the monitoring activities, given their ability to merge monitoring into their operations and hire the staff to ensure monitoring is adequately carried out. Proponents should bear the costs of these monitoring and follow-up activities, with proponent-led monitoring considered a cost of doing business.

The Panel also recognizes both the value and the role that Indigenous Groups can and should play in monitoring and follow-up. In particular, Indigenous Groups should have the right to be involved in monitoring and follow-up when a project has been determined to have an impact on their potential or established Aboriginal or treaty rights and interests. In these cases, affected Indigenous Groups

**“As stewards of the land and having the aforementioned inherent connection, the Métis should be involved in EA monitoring during and after a project is approved. The Métis people are on the land currently and tend to have intimate knowledge of the areas traditionally accessed. As such, any inclusion of the Métis in environmental monitoring for projects is the utilization of existing systems.”**

*Métis Nation of Alberta*

should be involved in providing additional independent oversight.

The Panel notes the federal government's recent efforts to establish a joint environmental monitoring committee with the government of British Columbia and with First Nations through an environmental monitoring agreement for the Pacific Northwest LNG Project.

Independence in reviewing monitoring and follow-up results is key to ensuring public confidence in the post-decision phase of IA. Independent monitoring bodies should be set up with a clear mandate to verify environmental impacts and allow all parties to be represented in the process fairly and equally. A number of similar independent oversight bodies have been established, notably the Ekati Mine Independent Environmental Monitoring Agency and the Prince William Sound Regional Citizens' Advisory Council. These bodies have specific features, including their independence from the proponent, that should be integrated into monitoring and follow-up programs of projects in the post-decision phase of IA as often as possible.

Independent oversight bodies are often successful due to significant local community involvement. Monitoring and follow-up programs must provide opportunities for affected Indigenous Groups and local communities to be involved and to influence results and decisions on the need for adaptive management.

With improved government oversight, an enhanced oversight role for communities and Indigenous Groups, and publicly available monitoring data and reporting, proponents should maintain responsibility for gathering monitoring data and conducting initial follow-up based on the results.

**The Panel recommends that Indigenous Groups and local communities be involved in the independent oversight of monitoring and follow-up programs established by the IA authority.**

In general, information about the effects of projects on the Canadian environment should be publicly available. Thus, monitoring and follow-up information should be made available promptly to the public, except in rare

cases where the IA authority reasonably believes that release of such information must be delayed. One clear benefit to posting monitoring data publicly is the potential for that data to be taken into account in subsequent IAs, for example in the evaluation of cumulative effects. Over time, this would lead to a significant increase in the availability of IA-related data that could be drawn upon in other studies, eliminate some of the burden of data collection and increase the accuracy of impact prediction.

**The Panel recommends that all monitoring and follow-up data, including raw data, results and any actions taken to address ineffective mitigation, be posted on a public registry.**

### 3.3.3 COMPLIANCE AND ENFORCEMENT WHAT WE HEARD

There are concerns that proponents are not being held accountable for all conditions set out in environmental assessment approvals and that conditions will not be respected unless there is adequate oversight. Participants noted a lack of capacity for compliance and enforcement and the importance of imposing more serious consequences commensurate with the extent of non-compliance. Participants indicated that inadequate enforcement contributes to the lack of trust in the EA process and discussed the need for greater transparency in enforcement actions and response. They proposed that a public database be created to track all environmental assessment conditions, compliance and enforcement activities, and the proponent's compliance with these conditions.

### FINDINGS AND RECOMMENDATIONS

Effective compliance and enforcement is needed to ensure IA objectives are met.

Effective compliance promotion activities build public trust and also proponent awareness and understanding of existing non-compliance, encourage voluntary compliance



and help prevent adverse effects from occurring in the first place. Effective enforcement acts as a deterrent, as it demonstrates a willingness to take action to prevent or correct non-compliance. Both compliance and enforcement activities are required to achieve the best possible outcome for IA. In addition, to be fully effective, the results of these activities should be transparent and easily accessible to the public.

Current practice in IA includes making information on a proponent's performance publicly available, an approach sometimes referred to as "sunshine compliance." However, governments are best able to secure compliance when a wide range of enforcement measures are available to them. With many enforcement measures available, government can choose the most appropriate action to respond to the circumstance and can escalate the response where proponents resist compliance. Access to this range of options is also a deterrent to non-compliance.

Where non-compliance persists, fines must be increased and administrative monetary penalties should be implemented to remove any economic incentives for non-compliance. Administrative monetary penalties are widely used across all governments for different types of offences, ranging from minor to serious non-compliance. In situations where non-compliance falls short of criminal behaviour but may still warrant financial penalty, administrative monetary penalties are an effective option. Such penalties should be reviewed to ensure they more effectively reflect the capacity of the proponent to pay and the economic impact that may result from non-compliance. Incapacitating sanctions, such as the suspension or revocation of an approval, should also be a tool that is available in extreme cases of non-compliance where all other enforcement measures fail or significant impacts are occurring. This last measure is not novel and is being used by the other regulators, such as the British Columbia Ministry of the Environment.<sup>38</sup>

**The Panel recommends that IA legislation provide a broad range of tools to enforce IA conditions and suspend or revoke approvals.**

To ensure compliance with IA conditions and to increase the public's confidence that conditions are implemented, compliance should be verified regularly and results of these verifications disclosed.

Transparency of information related to compliance can assist Indigenous Groups, the public and other stakeholders to be more informed about what is expected of proponents. All information should be publicly available, including information on the intent and objectives of conditions, as this would help proponents, other stakeholders and Indigenous Groups understand expectations and the current state of compliance. Transparency would also increase the effectiveness and consistency in the implementation of compliance and enforcement activities.

To ensure conditions are adhered to, authorities need the resources to conduct regular compliance verification inspections. In order to restore trust, it is necessary to verify compliance with IA conditions on a regular basis and publish an annual report on general compliance. Regular compliance verification actions are part of increased oversight, but there should also be surprise inspections in cases of alleged non-compliance.

**The Panel recommends that the results of inspections be promptly available to the public. An annual report of compliance with conditions for all projects should be published in a public registry.**

Working collaboratively with other parties would make the conduct of compliance and enforcement activities more inclusive and increase capacity. The authority to designate any person for enforcement could be used to foster collaboration with regulators from all jurisdictions, especially given the close linkages IAs have to other regulatory processes. There is a benefit in designating Indigenous Groups who have the interest and capacity to conduct enforcement activities within their territories. This would also reflect the principles of the United Nations Declaration on the Rights of Indigenous Peoples. Increased co-operation with all parties would reduce duplication in efforts, make the process more efficient and

<sup>38</sup> See <http://www.eao.gov.bc.ca/compliance.html>



improve the effectiveness and results of compliance and enforcement activities.

Mechanisms to involve the general public can also complement the work of enforcement officers. Such mechanisms would include processes to report alleged violations, protection for whistleblowers, and independent oversight, such as monitoring groups.

**The Panel recommends that IA legislation authorize the IA authority to carry out compliance and enforcement activities with other jurisdictions, so long as the results of such activities are no less available to the public than the results of activities by the IA authority.**

## 3.4 DISCIPLINE IN IMPACT ASSESSMENT TIME AND COSTS

### CONTEXT

A well-designed and successful IA process must provide clarity to all parties through predictable requirements and timelines. These attributes are essential to ensure that projects providing a net benefit to the country are approved and built.

Measures have already been taken to try to discipline perceived lengthy assessment processes, in particular, through amendment to the former *Canadian Environmental Assessment Act* in 2010 that introduced legislative timelines in federal assessments. Under *CEAA 2012*, all assessments of designated projects are subject to legislated timelines except those conducted by the Canadian Nuclear Safety Commission. These timelines were intended to provide more certainty and predictability to proponents and all parties involved in assessment processes.

Any new IA regime must recognize the importance of trying to discipline the process to provide timely and cost-effective IA for Canadians.

## WHAT WE HEARD

Participants spoke about the importance of predictable timelines and how unexpected delays may result in major costs for proponents and compromise project viability. In other words, thinking about cost discipline means thinking about predictability. It is vitally important for proponents to have guidance on how long assessment processes will take.

“Legislated timelines have not resulted in predictability and consistency as expected. This is primarily because the 2012 amendments introduced multiple opportunities for time extensions and time outs ... In our experience, overall timelines, from the date the application is filed to the date of GIC approval, have actually increased since 2012.”

*Enbridge*

Legislative timelines under *CEAA 2012* are not meeting their objective of streamlining the EA process and have instead resulted in uncertainty and inefficiency. One key reason identified is the number of ways to stop and extend timelines within the process itself. Timelines have also made the process more difficult to align and harmonize with provincial processes.

Time constraints often prevent meaningful public engagement and Indigenous consultation in EAs as there is little time (30 days in many cases) to review substantial documentation and to provide comments to responsible authorities.

Participants said that timelines should be more flexible to meet the “one project, one assessment” principle, to enable co-ordination with Indigenous IA processes, laws and customs, and to allow for meaningful public engagement and Indigenous consultation.

### 3.4.1 MANAGING PROPONENTS’ TIME AND COSTS

A one-size-fits-all approach to project IA timelines through legislated timeframes has not met the objective of delivering cost and time certainty to proponents. For



example, one of the major inefficiencies of the current approach is the time not accounted for when government information requests are made to proponents. Issuing these requests has the effect of “stopping the clock” for purposes of the prescribed timeline. Although the development of such requests is “on the clock,” the requests can be numerous and the time required for a proponent to prepare responses can be significant and is “off the clock.” Each stoppage of the timeline clock lengthens the assessment process well beyond the prescribed timeline.

Another challenge with the current timelines is the inability to effectively align with provincial processes which, among other factors, have lengthened the assessment process. In addition, legislated timelines are not in keeping with a project IA process that recognizes the role of Indigenous Groups in shaping each individual assessment by incorporating their own customs, laws and traditions.

Project proponents will expect discipline and accountability on costs and timeframes in how the IA process is implemented. A process that has a predictable timeframe is also likely to have a predictable cost. These issues will be a preoccupation of proponents and a determinant of the trust and confidence that proponents and investors will have in the federal assessment process.

Project IA timelines should be established on a project-by-project basis that takes into account each project’s specific context and issues. Project-specific timelines would accommodate, among other things: variation in provincial assessment processes; the unique laws, governance structures and capacity of Indigenous Groups; the complexity of the circumstance; and the need to integrate science, Indigenous knowledge and community knowledge.

The use of project-specific timelines would require the establishment of specific mechanisms to provide prompt guidance to all parties about expected IA duration. In the proposed project IA process,<sup>39</sup> the IA authority would set out project-specific cost and time estimates for each of the three phases of the IA process. The authority would then be accountable to meet these estimates or explain why they were not met.

<sup>39</sup> See Section 3.2 – Project Impact Assessment.

<sup>40</sup> For more information on the conduct of assessment agreement, see Section 3.2.2.1 – Planning Phase.

At the beginning of the Planning Phase, the new Impact Assessment Commission would provide an estimate of the time required for this phase. All participants – proponents; provincial, municipal and Indigenous representatives; the public – would also have the opportunity to provide input into the determination of timelines for the Study Phase. The timeline and costs estimates for this Phase would then be finalized by the Commission and included in the conduct of assessment agreement.<sup>40</sup> The timeline estimate for the Decision Phase would be determined by either the Commissioner or the review panel, should one be established, at the beginning of that Phase.

**“We perceive a trend towards reduced alignment between federal and provincial processes, and towards reduced integration between environmental assessment and post-assessment federal approval processes that, taken together, are resulting in additional delays. The result is a perception that Canada’s attractiveness for new mining investment is decreasing.”**

*Mining Association of Canada*

Timelines for the Planning Phase could be streamlined where proponents undertake community engagement early and on their own initiative. Proponents who have engaged affected communities and Indigenous Groups could on behalf of those it engaged submit a consensus report to the Commissioner at the initiation of the Planning Phase, and the Commissioner would be obliged to take the report into account in estimating timelines.

The Planning Phase would need to be disciplined, which will be the job of the Commissioner assigned to lead the assessment. Future legislation should provide the Commissioner with broad authority to ensure that the Planning Phase is always progressing towards finalizing the conduct of assessment agreement, which marks the end of this phase. The Panel expects that, in most cases, the participants will share this objective. However, for circumstances where one or more participants do not seem to be interested in this objective, the Commissioner would have the authority to take the initiative or respond to a proponent or other participant request and make the appropriate conduct of assessment order in a timely way.



While the addition of the Planning Phase means the proposed assessment process would begin earlier in the project lifecycle than under the current assessment process, this would not lengthen project development. This phase would allow for the early identification of important impacts of a project that will require study, which the Panel envisages would be a collaborative process to identify those elements and to develop the conduct of assessment agreement.<sup>41</sup> This could shorten the time currently taken up by information requests and in hearings. Moreover, by identifying early the important factors which require study, the Planning Phase should contribute to reducing the cost of IA by ensuring that studies are focused on matters that will inform the final decision.

The proposed Study Phase should also be efficient and effective as it focuses on location and project-specific studies identified collaboratively. Participants in the Planning Phase would have contributed to setting the terms for those studies and would participate in the oversight of the conduct of the studies. This should enhance trust in the outcome and shorten the time required for review of the studies and any hearing required to address important issues of non-consensus.

The diagram in Figure 4 illustrates efficiencies resulting from the Panel's proposed project IA process.

Under the current assessment process, decisions are made by either the Minister or Cabinet, which requires time to ensure they have the information required to make an informed decision. The model proposed by the Panel would streamline the Decision Phase as the decision would be made by those who are hearing the evidence, i.e., the Commissioner, or by a review panel following a hearing if one is required. To ensure accountability of the IA process and the Impact Assessment Commission, the decision by the Commissioner should be appealable to the Governor in Council. While such an appeal is an additional step compared to the current process, this appeal need not be longer than the current Ministerial or Cabinet process that follows every panel decision, and legislation can create certainty by setting timelines on this appeal process.

## 3.4.2 MANAGING GOVERNMENT'S TIME AND COSTS

The proposed IA process, including the single authority managing it and the specialists and scientists required to support it, will cost more than is spent today on environmental assessment. The bulk of the additional cost will come from doing more assessments every year. *CEAA 2012* reduced the number of federal assessments from several thousand per year to a few dozen per year. The Panel does not foresee a return to thousands of assessments per year but does expect to see assessments increase to a few hundred under the new regime. It would also be necessary to increase the federal capacity to provide scientific and technical advice needed to support effective IA. Additional funding would also be required to provide capacity for Indigenous and public participation in IA.

The government should view this increased cost as the re-investment needed to restore capacity and deliver a trusted federal IA process. This increased cost should also be weighed against the cost to Canada of doing nothing. The results from today's regime speak for themselves: projects are unable to advance due to conflict, protests and lengthy court battles.

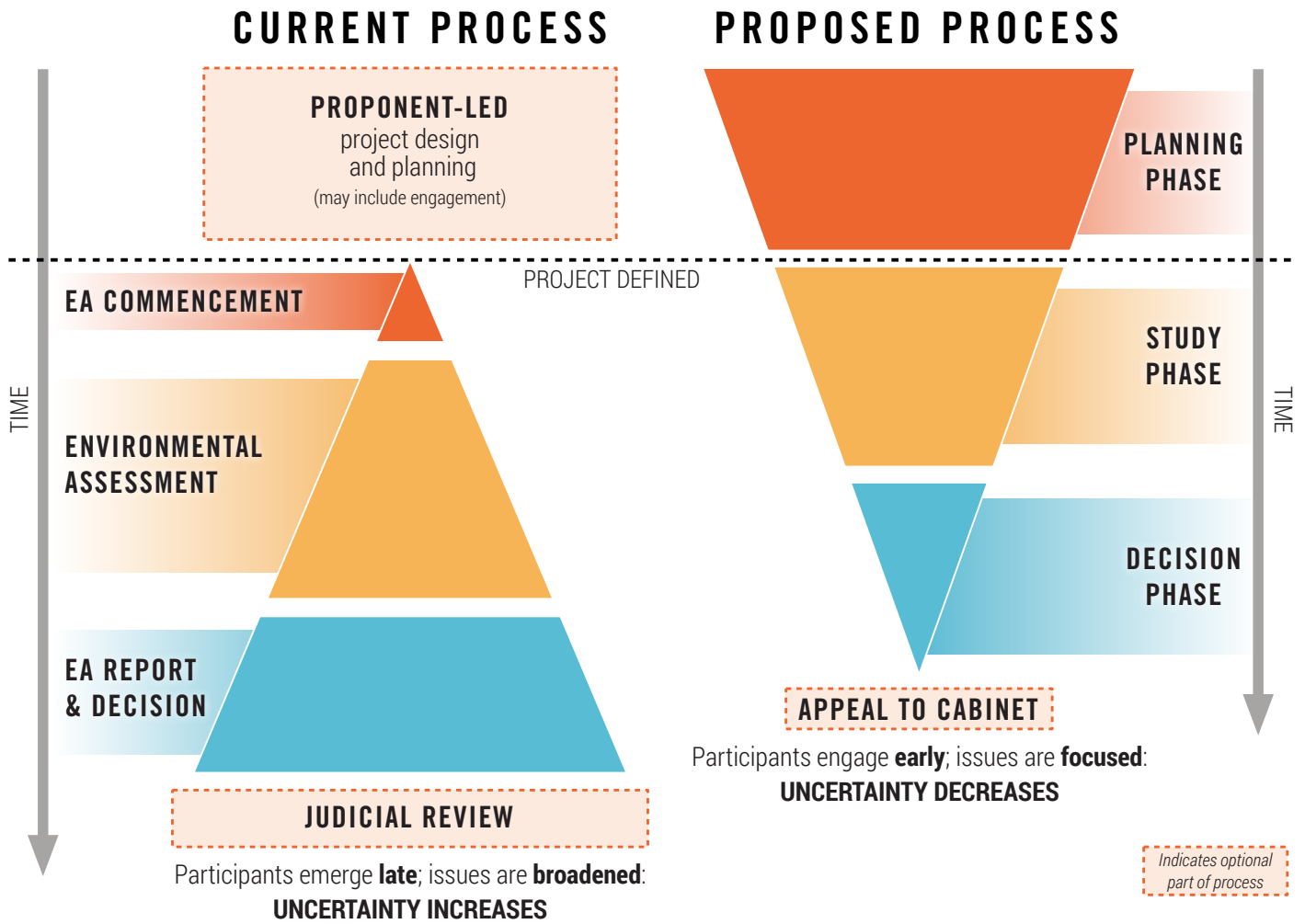
The proposed IA regime should be able to rely on the re-assignment of some existing funds, in particular from the re-assignment of assessment responsibilities from the NEB, the CNSC and other federal entities doing reviews of projects on federal lands. Another reassignment of funds may come from creating a proponent facilitation office in the Commission to replace the Major Projects Management Office.

The consolidation of overhead costs associated with IA into one office should result in time and cost savings. The Impact Assessment Commission would apply one clear and consistent process, at which it would become more proficient over time. Quality assurance and quality control would be more effectively realized. The accountability of the Commission would be for assessment alone and would not be mixed up with regulatory accountability. The resulting transparency would make it easier for the federal government, proponents and participants to hold

<sup>41</sup> For more information on the conduct of assessment agreement, see Section 3.2.2 – How should project impact assessment be conducted?



**FIGURE 4 – EFFICIENCIES IN PROJECT IA:  
CURRENT VERSUS PROPOSED PROCESS**



that single authority to account for financial and time discipline. Internal and external auditing should be made part of the governance of the Commission as a means of reinforcing accountability.

The cost and time estimate would be made public, and the Commissioner assigned to an assessment should be required to report regularly on the success in meeting the estimates with an explanation of any significant variances.

The recommended process, which is true to the Panel's four guiding principles, will have a much higher likelihood of getting to a decision that would be widely accepted by those who have had the interest to participate. Having gone through this process, the proponent will be much more likely to have acquired its social licence and the probability of a decision being taken to court for review will be less likely. If a decision were taken to court, the extent of due process in the proposed model should result in most, in not all, decisions being upheld. Thus, the time

from project concept to final decision could and should be shorter than what is experienced today.

The Panel believes that the model proposed will meet the test of financial prudence and will effectively balance the different perspectives regarding the time required for IA.

**The Panel recommends that the IA authority be required to develop an estimate of the cost and timeline for each phase of the assessment and report regularly on the success in meeting these estimates.**

## 3.5 REGIONAL IMPACT ASSESSMENT

### CONTEXT

Regional IA is used to assess baseline conditions and the cumulative impacts of all projects and activities within a defined region. In addition to being well-equipped to address the sustainability of development in various regions, particularly in relation to cumulative impacts,<sup>42</sup> regional IA can also streamline project IA to the benefit of proponents and communities alike.

Current federal environmental assessment (EA) legislation provides for the conduct of regional studies on the effects of existing or future physical activities, but no studies have been conducted under it. However, regional EAs such as the Fraser-Thompson Corridor Review and the Beaufort Sea Hydrocarbon Production and Transportation Proposal have been completed under previous federal EA regimes. As well, other jurisdictions have initiated regional assessments, such as the Lower Athabasca Regional Plan,<sup>43</sup> the Beaufort Regional Environmental Assessment<sup>44</sup> and the Great Sand Hills Regional Environmental Study.<sup>45</sup>

Regional IA can play a major role in managing cumulative impacts on matters of federal interest in an airshed, watershed or other regionally defined area. It may therefore play an important role in addressing cumulative impacts on Indigenous communities and their ability to exercise their constitutionally-protected Aboriginal and treaty rights.

## WHAT WE HEARD

With near unanimity, participants said that regional IA is needed. They indicated that good regional assessments could resolve broader-scale issues such as habitat fragmentation, would help start conversations earlier, and would provide context and background information for matters of interest to the community, such as the assessment of cumulative effects in a region.

It was noted that in many instances there can be issues that are not related to just one project but, under the current assessment regime, must be dealt with by proponents at the project level. These issues cover the full range of environmental effects and also often relate to historic and cumulative impacts on Aboriginal rights and title. The nature and extent of the impacts is not well understood, and information has not been collected or studied consistently regarding how the landscape and the relationship of Indigenous Groups with it has changed over the years due to previous activities. Participants believed that regional assessment would be best placed to assess cumulative effects.

It was argued that there would be merit in a tiered approach that would include the implementation of a regional assessment that would inform project assessments in that region and streamline project assessment by reducing timelines and efforts. It could also make the project assessment process more predictable for proponents by setting regional development objectives and thresholds, collecting ecological baseline data and identifying potential valued components. There may be a need for legislated requirements outlining that projects must conform to established regional plans. Participants believed that,

<sup>42</sup> Using an adaptation of a definition laid out by the Canadian Council of Ministers of the Environment that uses sustainability in place of change to environment, this Report defines cumulative impacts as the change to the five pillars of sustainability caused by multiple interactions among human activities and natural processes that accumulate across space and time. See [http://www.ccmec.ca/files/Resources/enviro\\_assessment/CE%20Definitions%20and%20Principles%201.0%20EN.pdf](http://www.ccmec.ca/files/Resources/enviro_assessment/CE%20Definitions%20and%20Principles%201.0%20EN.pdf)

<sup>43</sup> See <https://www.landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/Pages/default.aspx>

<sup>44</sup> See <http://www.beaufortrea.ca/>

<sup>45</sup> See <http://www.environment.gov.sk.ca/Default.aspx?DN=bc247d49-29a2-4685-98bc-ed6cc4a3c7e0>





if regional assessments go beyond federal lands, they should be developed with provinces so that they inform the outcomes in a region. Participants also expressed the need for Indigenous Groups to be involved, and linked the need for regional IA to the United National Declaration on the Rights of Indigenous Peoples (*UNDRIP*), the protection of Aboriginal and treaty rights, and the advancement of reconciliation.

## FINDINGS AND RECOMMENDATIONS

Regional IA is an important tool to be implemented in a future federal IA regime. The guidance on Regional Strategic EA<sup>46</sup> published by the Canadian Council of Ministers of the Environment (CCME) sets out an approach to conducting regional IA that is in line with the views of participants. The Panel believes that this guidance should be built upon to realize the vision of a sustainability-based model for regional IA.

Regional IA may address five key objectives:

- To streamline, inform and improve project IA;
- To gather information about and improve management of cumulative impacts affecting the sustainability of matters of federal interest;
- To inform federal decisions on future projects in the region;
- To build trust and relationships with Indigenous Groups; and
- To set a preferred direction and strategy for achieving sustainability in a region through the assessment of alternative development scenarios.

Although some of these objectives may be achieved through a federal-only regional IA, the greatest benefits from regional IAs will occur through the co-operation of all orders of government. Such co-operation is in the best interest of all Canadians.

### *STREAMLINED, INFORMED AND IMPROVED PROJECT IA*

Regional IA is a tool to significantly improve the efficiency and effectiveness of project IA. Regional IA will reduce the

burdens of time and cost for project IAs. Instead of being required, as they are today, to create a cumulative effects framework, project IAs would be able to focus on project-specific impacts, their contribution to cumulative impacts in the region and how they align with the objectives of the regional IA. This improvement to project IAs may occur through the Panel's proposed model for regional IA, where a regional IA will gather baseline information (including traditional land-use studies), establish valued components and associated criteria, understand local context and areas of importance, and assess cumulative impacts. This should result in fewer and less onerous studies for project IAs in the region, as current data relevant to each of the pillars of sustainability should be more readily available, including information regarding the cumulative impacts. Regional IA would also assist project IA with management or mitigation options that may be taken into account early in the project IA.

Regional IA would bring increased efficiency and accuracy to the assessment of impacts to Aboriginal and treaty rights. Current case law directs that project IAs must be based on understanding the nature and extent of historic and cumulative impacts to Aboriginal rights and taking a broad, forward-looking approach to cumulative IA in relation to Aboriginal rights.<sup>47</sup>

### *INFORMATION GATHERING*

Gathering baseline information at a regional level is one of the most obvious benefits of conducting regional IA. This information would provide understanding of the current state of the environment, regional stressors and trends that may already exist. The proposed model for regional IA would seek baseline information on all federal interests across the five pillars of sustainability.

### *PROJECTS REQUIRING FEDERAL DECISIONS*

Regional IA provides environmental management benefits beyond improving project IAs. Even with more federal project IAs triggered,<sup>48</sup> there are likely to be many anticipated activities in a region that do not trigger federal IA. Regional IA may assist with providing information and management direction for those cumulative impacts that result from a combination of small activities that do not require federal project IA.

<sup>46</sup> See [http://www.ccme.ca/files/Resources/enviro\\_assessment/rsea\\_principles\\_guidance\\_e.pdf](http://www.ccme.ca/files/Resources/enviro_assessment/rsea_principles_guidance_e.pdf)

<sup>47</sup> See <https://www.canlii.org/en/bc/bcca/doc/2011/2011bcca247/2011bcca247.html>

<sup>48</sup> For more details on triggers, see Section 3.2.1 – What should require project impact assessment?

The results and requirements of the regional IA should be incorporated into subsequent federal permits or approvals for projects. Managing cumulative impacts should not be the responsibility only of those proposing projects that require federal IA but a shared responsibility among all those proposing activities that may contribute to cumulative impacts.

#### ***BUILDING TRUST AND RELATIONSHIPS***

The proposed model for IA has many components to build trust in IA from the ground up, community by community, based on face-to-face meetings and facilitated discussions. These attributes should also apply to regional IAs.

A central federal interest is addressing impacts to Indigenous Peoples and their lands. This interest is broader than, but clearly includes, accurate identification of potential impacts to Aboriginal and treaty rights and interests across the five pillars of sustainability. Regional IA may complement project IA in providing for the early integration of Indigenous knowledge and community knowledge into the IA process and expressly addressing the severity of impacts on rights and the provision or withholding of consent. Regional IA may also play a key role in implementing federal IA so that it reflects the principles of *UNDRIP*. Important principles to guide this implementation include the rights of Indigenous Peoples to make decisions over traditional territories, set their own priorities and strategies, and provide their free, prior and informed consent to impactful decisions.

#### ***ALTERNATIVES ASSESSMENT AT THE REGIONAL LEVEL***

In order to achieve the goal of sustainability for current and future generations, regional IA must be forward-looking and proactive, where possible. If a regional IA is solely on federal lands, or when all orders of government agree to a co-operative approach, a regional IA should consider a range of possibilities for future development within a region. The assessment of alternative scenarios, as discussed in the CCME approach, is the key way for parties to discuss how they would like the region to look in the future.

An example of this kind of assessment would include identifying marine shipping route scenarios where multiple federal ports or projects that require shipping are proposed. Another example, in a co-operative approach with other jurisdictions, would include considering development pressures in an area surrounding a national

park that may affect ecosystem integrity in the park. When everyone can see and compare various future scenarios, it becomes possible to identify which scenario best meets that vision and establish guidance that aligns with the chosen scenario.

The review of alternatives is the key step to make regional IA not just an information-gathering tool about past and present but also a management tool to address the future. It is designed to provide clear direction for a region to prevent and manage cumulative impacts and to identify what level of change is acceptable in the region, in collaboration with local communities, Indigenous Groups and all orders of government.

### **3.5.1 WHAT SHOULD REQUIRE REGIONAL IMPACT ASSESSMENT?**

A discretionary approach to carrying out regional studies under *CEAA 2012* has not been used. Regional IA is too important to long-term federal interests to be triggered on an *ad hoc* basis, but it must fit within Canada's federal structure and constitutional system. Because many areas of Canada would benefit from regional IA, the Panel has sought to identify when a regional IA must be commenced, while also encouraging a co-operative approach to regional IA among multiple jurisdictions.

**“In a ‘contribution to sustainability’ model, alternative development scenarios in a region should be considered as a component of the assessment so that project or regional development proposals can be compared with a range of potential outcomes that include long-term, fairly distributed benefits and minimization of ‘trades offs’ (economics v. environment).”**

*Eabametoong First Nation*



Regional IA should be required in two cases:

1. On federal lands or marine areas with the potential for cumulative impacts.
2. Outside of federal lands and marine areas where there is a potential for, or existing, cumulative impacts on many federal interests.

The first case identifies regional IAs that would apply where there is broad federal authority over an area. These IAs would focus on federal lands or marine areas and would be required where multiple activities are likely to cause cumulative impacts that are consequential on current and future generations.<sup>49</sup> In recognition of the value of co-operative regional IA, there should be provision for these regional IAs to extend beyond federal lands and marine areas if there is co-operation with other jurisdictions. These regional IAs should be centred on the five pillars of sustainability and focus on assessing cumulative impacts in a region in order to inform a robust, forward-looking alternative development scenario approach.

The second case applies where there are many federal interests affected by activities in an area, but there is not exclusive federal authority over the area. These regional IAs would be required where existing or foreseeable activities are likely to cause cumulative impacts on matters of federal interest that are consequential for current and future generations. Although these regional IAs would be similar to those identified in the first case, they would be subject to two important limits: they would not include any consideration of alternative development scenarios, and they would focus exclusively on cumulative impacts to valued components related to matters of federal interest. As a consequence of these limits, the scope of these regional IAs would not use a comprehensive sustainability framework but would be focused on the sustainability of matters of federal interest.

Similarly, there should be provision for a regional IA that is initially focused on federal matters to have a broader scope, including consideration of all impacts affecting the five pillars of sustainability, and to consider alternative development scenarios if there is co-operation with other jurisdictions. An example where this type of regional IA would be appropriate is where there are multiple federal

interests (e.g., a national park, important fisheries, and Indigenous lands and rights) meriting a cumulative impacts assessment. In this case, a regional IA would be required. The co-operation of other jurisdictions would be sought, in which case the regional IA could have broader scope.

The Panel strongly advocates for co-operation among all jurisdictions, including Indigenous Groups, in any area targeted for a regional IA. Where the requirements for a regional IA are met, the IA authority should notify other jurisdictions to determine if there is an interest in taking part in the regional IA.

The co-operative approach is the best way to create a forum for all jurisdictions to have input and to assess alternative development scenarios for the region. Additionally, the co-operative approach best supports a broad implementation of regional IA decisions. It also likely contributes the most to future project IAs within the region.

As regions vary enormously in the extent to which they are currently affected by human activity, the best scenario to achieve sustainability for current and future generations is for regional IA to happen prior to many developments in a region. This would allow the regional IA process to be proactive rather than reactive, although regional IA can also be beneficial in regions that are already experiencing cumulative impacts to matters of federal interest and where the sustainability of the region is under increasing pressures from new development. In these cases, a better understanding of the current state of the environment prior to allowing further development will help inform future sustainability decisions at the

**“Regional Environmental Assessment would be more appropriate for coordinating federal, provincial and local governments and other stakeholders in collectively addressing challenges such as climate change and cumulative effects and providing guidance for regional land-use planning with due consideration of regional and national interests. These processes could help to set the context for and guide specific development projects and their environmental assessments.”**

*Railway Association of Canada*

<sup>49</sup> The Panel provides guidance on how to define consequential impacts earlier in the Report. See Section 2.1.3 – From Significance to Sustainability.



project level. It could also help inform decisions on timing of development and restoration of previously developed areas.

**The Panel recommends that IA legislation require regional IAs 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 best way to implement a Canada-wide requirement for regional IAs is to impose this requirement gradually through a transition process. A schedule should be created to prioritize which regions should require a regional IA, taking into account:

- existing or future projects that would require a federal project IA that have potential for consequential cumulative impacts;
- existing or future projects that are not captured by federal project IA but that have potential for consequential cumulative impacts;
- federal lands or marine areas that would benefit from a regional IA;
- multiple activities that are federally regulated; and
- public or Indigenous concerns.

The schedule should be developed collaboratively with other relevant jurisdictions and through public input so that common priorities can be identified. Ultimately, however, the schedule should focus on federal priorities and timeframes.

**The Panel recommends that IA legislation require the IA authority to develop and maintain a schedule of regions that would require a regional IA and to conduct those regional IAs.**

## 3.5.2 HOW SHOULD REGIONAL IMPACT ASSESSMENT BE CONDUCTED?

Regional IA should have the same three phases as project IA. Within each phase, many of the steps of the IA process described in Section 3.2 (“Project Impact Assessment”) are similar to the steps that should be followed in the regional IA process. This is particularly so for the Planning Phase in any future regional IA process and the involvement of Indigenous Groups, but applies also to establishing a collaborative and co-operative approach among parties in a region.

### PLANNING PHASE

Planning is of utmost importance for the success of regional IA. The goal of the Planning Phase in regional IA would be to develop consensus about what the IA should consider and how it should be conducted. Specifically, it would determine the scope of the assessment, including the sustainability framework where applicable, spatial and temporal boundaries, and valued components in the region. This would focus the assessment on the most important issues in the region and facilitate a timely and effective process.

In order to facilitate collaboration with all parties and jurisdictions, including Indigenous Groups, planning should be done through the establishment of a project committee and a government expert committee as described in Section 3.2. The Planning Phase should also conclude with a binding conduct of assessment agreement for the regional IA. This agreement would set out agreed-upon timelines, methods and study criteria. For clarity, the conduct of assessment agreement for regional IA would also include a plan for how Indigenous laws, customs and jurisdiction would be built into the process.

### STUDY PHASE

The Study Phase of regional IA would be the information gathering and analysis phase, with four distinct steps:

1. Identification and mapping of valued components and criteria consistent with the pillars of sustainability.



2. Data gathering to establish the baseline quality of each valued component.
3. Identification and mapping of existing and foreseeable sources of impacts to each valued component.
4. Identification of alternative development scenarios (on federal lands and marine areas only or when provincial co-operation exists).

Baseline data, as well as existing and future stressors and trends such as climate change, must be defined in the regional IA and used to identify sustainable thresholds for the valued components in the region agreed upon in the Planning Phase.

Where a regional IA is conducted in a region not made up solely of federal lands or marine areas and where there is no provincial co-operation, the Study Phase would conclude with the application of the sustainability framework to the identified valued components of federal interest.

For regional IAs conducted on federal lands or marine areas, or where there is provincial co-operation, the Study Phase would assess alternative development scenarios for the region by carrying out a cumulative impacts assessment under each alternative development scenario to identify the most sustainable alternative. Areas requiring protection should also be established when selecting the most sustainable development scenario.

## DECISION PHASE

The Decision Phase would involve the implementation of conditions that reflect the consensus achieved on each valued component considered in the regional IA. These conditions may include thresholds, management objectives and mitigation strategies.

Following the regional IA, project IAs in the region would have to demonstrate that they are consistent with all relevant outcomes of the applicable regional IA, including any applicable conditions. Similarly, any federal decisions on projects that do not require federal project IA should be consistent with the applicable regional IA.

Where the regional IA considered alternative development scenarios, the regional plan would implement the preferred development scenario that achieves the most sustainable outcome across all five pillars for the region.

The IA authority should have the mandate to review regional IA decisions periodically to assess implementation and whether those decisions require amendment or updating.

**The Panel recommends that a regional IA establish thresholds and objectives to be used in project IA and federal decisions.**

## 3.6 STRATEGIC IMPACT ASSESSMENT CONTEXT

The federal government has established plans, programs and policies (together, “initiatives”) to achieve goals in matters of national interest. Many of these matters have implications for projects and affect project IAs. Currently, however, very few of these national initiatives provide clear direction for project IAs, which has had two adverse outcomes. First, it has added to the time and cost of project IA, as every new project must engage in a federal review of not just the project but how applicable federal initiatives apply to the project. Second, for several high-profile federal initiatives, project IAs have become a battleground over how these initiatives should be implemented, adding even more time and costs and, in some cases, derailing the project.

Under the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (“Cabinet Directive”), Canada now implements strategic environmental assessment to incorporate environmental considerations early in the development of a plan, policy or program, along with economic and social considerations.

## WHAT WE HEARD

Participants believed that strategic IAs are a better forum than project IAs to evaluate government policies and strategies. It is sometimes impossible to deal with broad objectives in a project IA without a strategic IA providing direction on how to meet those objectives. Strategic IA can set criteria and thresholds to inform choices to be made. Participants raised the idea of a tiered assessment



approach, with assessments starting at the strategic and regional levels and informing project IAs.

### 3.6.1 WHAT SHOULD REQUIRE STRATEGIC IMPACT ASSESSMENT?

A new strategic IA model should be put in place to provide guidance on how to implement existing federal policies, plans and programs in a project or regional IA. This approach involves no amendment to the existing Cabinet Directive and its process for assessing new federal initiatives. Instead, the new model of strategic IA would apply exclusively to the implementation of existing federal plans, programs and policies where these initiatives have consequential implications for federal project or regional IA.<sup>50</sup>

The guidance and direction provided by this new strategic IA model would have several benefits. It would enhance how these federal initiatives can realize their goals within federal IA. It would provide greater clarity to proponents about the information that will be required and the objectives or standards that should be met in their project development. And it would provide consistent guidance for all those involved in project IA, including governments, Indigenous Groups and the public. As a result, this strategic IA model would be an important contribution to an efficient IA process, both in time and resources.

The strategic IA model would apply to a federal initiative that:

1. is likely to affect many projects subject to federal IA; and
2. lacks clear guidance on how it should be applied in project or regional IA.

Existing initiatives of interest for IA cover a range of topics directly related to project IA, including wetlands, species at risk, climate change, fisheries, migratory birds, ocean protection, and sustainable development.

Currently, these initiatives do not consistently address their relationship to IA. For example, *Canada's Oceans Protection Plan*, launched in November 2016 by Transport Canada, Fisheries and Oceans Canada, and Environment

and Climate Change Canada, is a new plan with broad application. However, the plan does not make clear if or how it will apply to future federal IAs. A strategic IA

**“An important advantage of an assessment regime that incorporates both strategic and project level applications is the opportunity for clarity and efficiency in a linked hierarchy of tiered assessments. Deliberations at the project level can uncover needs for strategic-level initiatives to address the broader issues. Similarly, strategic-level assessments can provide guidance for project assessments, in part by resolving these broader issues.”**

*Robert B. Gibson, University of Waterloo*

should be conducted to generate guidance and direction for these types of initiatives to help implement their goals and objectives in project and regional IA.

On the other hand, *The Federal Policy on Wetland Conservation*, established in the early 1990s and focusing on wetland conservation through the full range of federal decisions and responsibilities, does provide detailed guidance to support its application in project IA. This is an example where a strategic IA may not be required, as there would be no additional benefit.

As certain federal initiatives may help to build an understanding of what sustainability means in federal IA, there is also value in conducting a strategic IA on an initiative that has sustainability as a core objective. This may develop general guidance on how the five pillars of sustainability could be taken into account in all regional and project IAs.

**The Panel recommends that IA legislation require that the IA authority conduct a strategic IA when a new or existing federal policy, plan or program would have consequential implications for federal project or regional IA.**

<sup>50</sup> The Panel provides guidance on how to define consequential impacts earlier in the Report. See Section 2.1.3 – From Significance to Sustainability.



## 3.6.2 HOW SHOULD STRATEGIC IMPACT ASSESSMENT BE CONDUCTED?

Strategic IA should be a participatory process that provides meaningful opportunities for interested jurisdictions and parties with relevant expertise or experience to be engaged. Indigenous Groups should be involved in a manner that reflects their inherent jurisdiction, consistent with the findings and recommendations throughout this Report.

When scoping the strategic IA, the elements of the initiative that would be considered in future project or regional IAs should be highlighted, as well as how they might intersect with the five pillars of sustainability.

Some initiatives may intersect with more than one of the five pillars as they may have social, economic, cultural and health-related implications. Many of these initiatives also have direct implications for Indigenous Groups and Aboriginal and treaty rights. The proposed model of strategic IA would seek to provide direction and guidance on how to implement the relevant initiatives across all the relevant pillars of sustainability.

This model of strategic IA would produce three outcomes:

1. Guidance and direction on all pillars of sustainability that are relevant to implementing the federal initiative for project and/or regional IA;
2. Within each applicable pillar, guidance and direction on the information or studies that are needed to address the federal initiative in project and/or regional IA; and
3. Guidance and direction on the objectives, criteria, thresholds, methods or protocols that must be addressed in project and/or regional IA.

There should be Indigenous consultation and an opportunity for public participation.

The Panel recommends that strategic IA define how to implement a policy, plan or program in project and regional IA.

## 3.7 CLIMATE CHANGE AND IMPACT ASSESSMENT CONTEXT

Climate change is one of the biggest challenges of our time, and Canada has committed to take action to reduce its greenhouse gas (GHG) emissions by 30 per cent below 2005 levels before 2030. To achieve this objective, Canada's First Ministers developed a comprehensive plan, the *Pan-Canadian Framework on Clean Growth and Climate Change* (the "Pan-Canadian Framework"), which includes several initiatives to reduce emissions, build resilience to adapt to a changing climate, and accelerate innovation and adoption of clean technologies.<sup>51</sup>

Currently, project environmental assessment (EA) is one of the key forums available to assess climate change impacts. This assessment is done by measuring a project's direct GHG emissions and by assessing the impacts of the environment, including impacts of climate change, on the project. In early 2016, an interim approach was introduced that required the assessment of upstream GHG emissions related to certain projects.<sup>52</sup> Some project EAs have also considered the future effects of climate change in combination with a project's environmental effects as part of their cumulative effects assessments.

The impacts of climate change are global. Climate change causes measurable environmental impacts which are disproportionately felt by people who live off the land, including Indigenous Groups. Without clear direction on how to address the contributions of projects to climate change, it will be difficult for Canada to meet its reduction targets.

## WHAT WE HEARD

A recurring theme was that there is a need to consider climate change impacts in IA in an appropriate and

<sup>51</sup> See <https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html>

<sup>52</sup> See <http://news.gc.ca/web/article-en.do?nid=1029999>

meaningful way. Participants noted difficulties with considering the cumulative impacts of climate change in project EA as they cannot easily be attributed to any single project. Participants spoke extensively about issues associated with the increased use of project EA to debate broader policy issues such as climate change. They noted that this lack of clarity in broad policy objectives leads to an increase in uncertainty, delay in the conduct of project EA and its outcomes, and a more adversarial process. Participants suggested that strategic as well as regional IA be conducted to better understand impacts of climate change in a region and to support the implementation of policies in project EA.

## FINDINGS AND RECOMMENDATIONS

IA should play a critical role in supporting Canada's efforts to address climate change. The current assessment process and interim principles take into account some aspects of climate change, but there is an urgent national need for clarity and consistency on how to consider climate change in project and regional IA.

Many actions to address climate change fall under provincial jurisdiction. Canada has committed, through the Pan-Canadian Framework, to provide provinces and territories with the flexibility to design their own policies to meet emission-reduction targets. Because this Framework is not just federal, and because the subsequent policies, plans and programs resulting from the Framework will be varied across Canada and across industry sectors, governmental co-operation will be critical to effectively assess and manage a project's contribution to climate change.

Within IA, there is a need for national consistency in how to assess climate change. Consistent criteria, modelling and methodology must be established to:

- assess a project's contribution to climate change;
- consider how climate change may impact the future environmental setting of a project; and
- consider a project or region's long-term sustainability and resiliency in a changing environmental setting.

The absence of national methods and criteria on climate issues means that individual project assessments remain the leading forum to debate broader climate policy issues not yet addressed by governments. However, the Panel believes that project IA is not the correct venue to debate broad policy issues.

The new model of strategic IA proposed earlier in this Report<sup>53</sup> would prove beneficial in determining a consistent approach for evaluating a project's contributions to climate change with regard to:

- the methods to determine a project's GHG emissions;
- the means of ensuring that Indigenous knowledge is appropriately taken into account;
- the ways to assess impacts to Aboriginal and treaty rights caused by a project's interaction with climate change;
- the means of evaluating impacts on carbon sinks;
- the ways to take into account the five sustainability pillars;
- the ways to manage uncertainties;

**"The Supreme Court of Canada has long recognized that protection of our environment is a fundamental value of Canadian society and one of the major challenges of our time. There is no greater threat to our environment than that of climate change. Environmental assessments can and should serve as climate gatekeepers, where robust consideration of Canada's climate commitments are considered before, during, and after each project assessment."**

*Ecojustice*

- the ways to identify acceptable mitigation, including compensation measures such as offsets; and
- the criteria for the determination of a project's contribution to sustainability with respect to climate change impacts.

A strategic IA could establish thresholds and targets for GHG emissions for a particular sector, industry or region

<sup>53</sup> See Section 3.6 – Strategic impact assessment.





and would ensure that any new development aligns with Canada's commitments. These thresholds and targets could then be made binding in project IA.

A strategic IA could also determine a consistent approach for considering the impacts of climate change on a project or region and assessing a project's or region's resiliency to changes to the environment as a result of climate change.

In order to effectively assess and mitigate a project's overall impacts, it is also important to understand how those impacts may be worsened in a changing environment. For example, climate change impacts could affect the migration pattern of a caribou herd that an Indigenous Group hunts. If a project's effects include clearing land and fragmenting caribou habitat, it may

or plans resulting from the Framework are still being developed. These challenges suggest that a unique Pan-Canadian IA mechanism is required to meet the urgent national need for clarity and consistency on how to consider climate change in project and regional IA to support Canada's policy and sustainability goals.

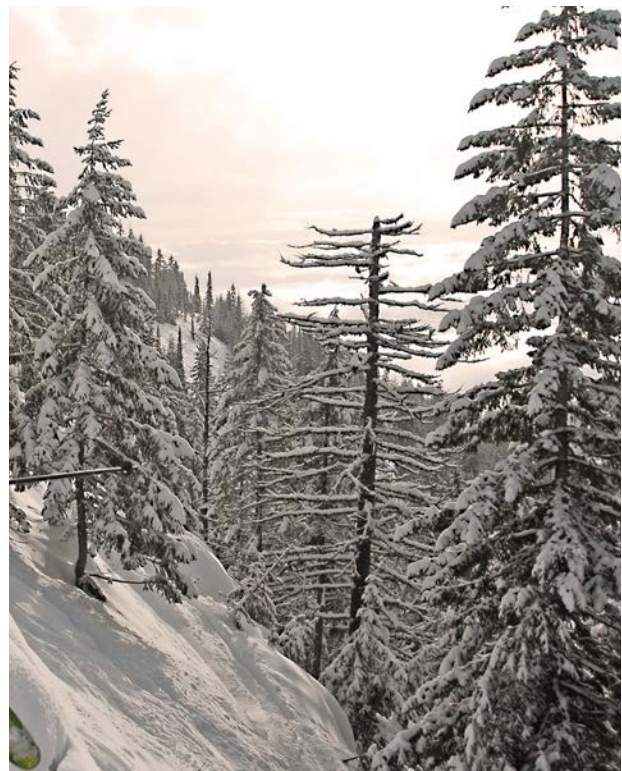
**The Panel recommends that Canada lead a federal strategic IA or similar co-operative and collaborative mechanism on the Pan-Canadian Framework on Clean Growth and Climate Change to provide direction on how to implement this *Framework* and related initiatives in future federal project and regional IAs.**

**"The best way to address needs for climate change mitigation in EAs of individual undertakings is a major unresolved issue in Canada and a serious problem in EA application. In the absence of credibly developed, specific strategic guidance, conflicts arising at least in part from dissatisfaction with the handling of climate change concerns in individual project assessments have been an evident feature of several recent EAs and surrounding activities including court cases."**

*Multi-Interest Advisory Committee*

not necessarily affect the sustainability of the caribou herd or the ability of the Indigenous Group to hunt that herd at the beginning of the project, but over time it could add significant cumulative risk when considered in combination with climate change impacts to the caribou. A strategic IA could prove useful in providing a consistent approach to assessing future climate change impacts to Aboriginal and treaty rights, valued components and the five pillars of sustainability. The guidance gained by this kind of IA should, for example, provide the necessary baseline information to effectively assess the cumulative impacts of a project in combination with the impacts of climate change.

Although the proposed model of strategic IA is suitable to address federal implementation of the Pan-Canadian Framework, the Pan-Canadian nature of climate issues creates challenges for a solely federal strategic IA, and the Panel recognizes that more-detailed policies, programs





# SECTION 4

## THE EXPERT PANEL'S REVIEW PROCESS AND WHAT WE HEARD



*In this section, we summarize our cross-country review process and what we heard from coast to coast to coast. The input we received had a depth and quality that clearly demonstrated how important this issue is to Canadians and was instrumental to developing our recommendations.*

## THE REVIEW PROCESS

The Panel offered Canadians three ways to participate in the review: in person in one of 21 cities across Canada, online through a “Choicebook,” and in writing with a submission. The aim was to provide members of the public, Indigenous Groups, non-governmental organizations, community groups and industry with a variety of options for participation. Both online and in-person engagement activities were open to everyone.

This review also provided the opportunity to raise awareness of federal environmental assessment (EA) among Canadians. To ensure the broadest possible engagement, the Panel used digital communications including social media,<sup>54</sup> and extensive traditional outreach to identify opportunities to participate. The Panel also sought to facilitate feedback by developing a list of guiding questions to enable respondents to focus on key issues.<sup>55</sup>

All presentations, transcripts, correspondence and submissions received by the Panel, as well as summaries of all Panel engagement sessions, are available online.<sup>56</sup>

## ENGAGEMENT

The Panel heard from more than a thousand participants during the in-person sessions. Participants took part in public workshops and Indigenous open-dialogue sessions held in each location and delivered almost 400 in-person presentations. Of these presentations, almost one-third were made by Indigenous Groups or organizations.

In addition, the Panel received more than 520 written submissions from Indigenous Groups, individuals, academics, NGOs, provinces, territories, municipalities, Port Authorities, land claim organizations, industry associations and companies.

The Panel also received 2,673 responses to the online Choicebook, a survey-like tool that provides users with background information, differing perspectives and scenarios to gather informed feedback on current assessment processes. Of the respondents, 1,673 self-selected to complete the survey, and a further 1,000 were selected to form a representative sample of the Canadian

DATE	PARTICIPANTS	SUMMARY
September 9, 2016	Federal departments, agencies and boards that play a key role in federal EA	Provided baseline information on current EA processes. The session was webcast on the Panel's website.
November 2, 2016	Provincial and territorial EA practitioners from across Canada	Discussed opportunities for reducing duplication while maintaining robust EA processes
November 8, 2016	Federal expert departments and agencies, Canadian Environmental Assessment Agency, National Energy Board and Canadian Nuclear Safety Commission	Focused on the integration of science in federal EA, capacity considerations for expert departments, best practices and lessons learned
January 9 and 16, 2017	Indigenous Groups, organizations and communities. Open to other organizations, the general public and media.	Two technical workshop sessions hosted by the Assembly of First Nations to discuss issues of concern related to current EA processes
January 17, 2017	Past Review Panel Members	Discussed key matters related to EA, mainly regarding the conduct of review panels and joint review panels

<sup>54</sup> See: [https://twitter.com/ea\\_review](https://twitter.com/ea_review)

<sup>55</sup> See: Annex 3 – Discussion Paper: “Suggested Themes for Discussion”

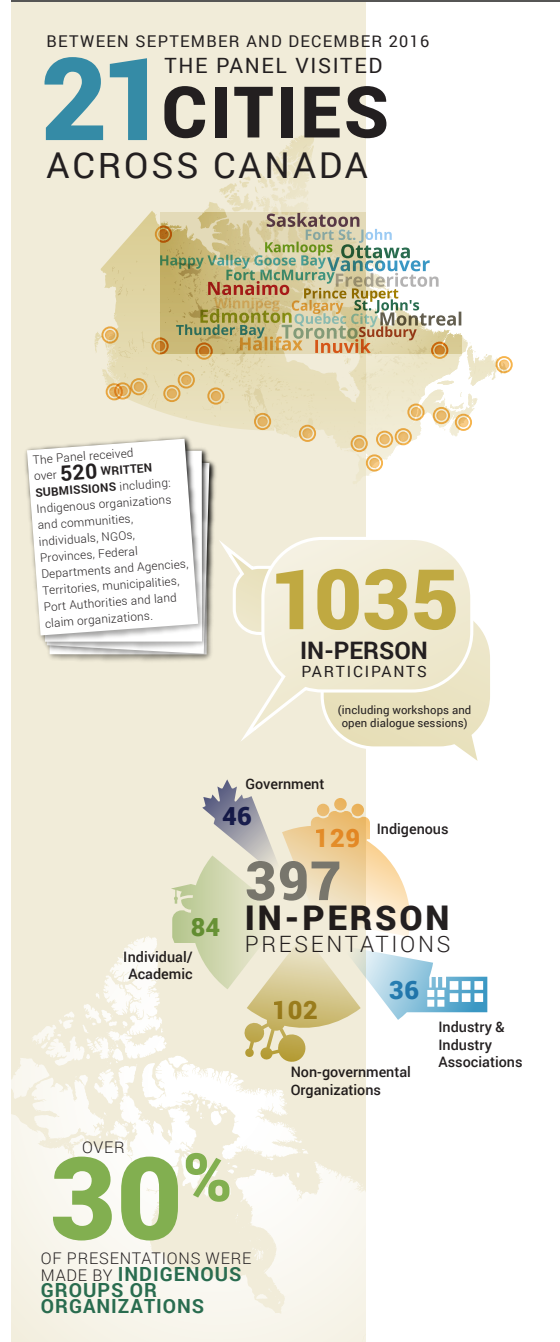
<sup>56</sup> See: <http://eareview-examenee.ca/what-weve-heard/>



population, weighted based on the 2011 census according to age, gender and region.

The diagram in Figure 5 provides an overview of participation in the Panel's engagement process.

## FIGURE 5 – OVERVIEW OF PARTICIPATION IN PANEL'S ENGAGEMENT PROCESS



## BRIEFING SESSIONS

The Panel participated in six technical briefing sessions to explore specific issues.

## MULTI-INTEREST ADVISORY COMMITTEE

A Multi-Interest Advisory Committee (MIAC) was established by the Minister to provide advice to the Panel. MIAC includes representatives of Indigenous organizations, industry associations and environmental groups. The Panel sought advice from MIAC on a select number of issues, including:

- Lessons learned from previous EA;
- Assessing Aboriginal Rights and Title in EA;
- Addressing overarching policy issues, such as climate change;
- International EA best practices; and
- The effective integration of science-based advice into EA decision-making.

## EXPERT RESEARCH AND REVIEW

In addition to advice provided by MIAC, the Panel requested expert research from academics and EA specialists on the following topics:

- Monitoring, Follow-Up, Adaptive Management and Quality Assurance;
- Enforcement;
- Gathering and Incorporating Indigenous Knowledge;
- Impact Benefit Agreements;
- Indigenous EA Models;
- Approaches to Triggering EAs;
- Incorporating Indigenous Consent into Federal EA Processes; and
- Harmonization, Substitution, Equivalency and Delegation.



Further, an Advisory Panel of eight noted academics and EA specialists reviewed draft sections of the Panel's Report and provided expert advice to the Panel. Three past panel members were also consulted on draft sections of the Report.

## WHAT WE HEARD

This section is a synthesis of the thousands of pages of written comments and Choicebook results received and the oral evidence heard over the last few months. It follows the structure of Sections 2 and 3 of this Report, identifying what we heard on each topic. Some of the content in this section has been summarized in earlier sections in order to provide context for the Panel's recommendations.

These contributions were instrumental to the Panel's review of EA processes and informed its recommendations and conclusions. They are not the views of the Panel but of the participants themselves.

## THE PURPOSE OF FEDERAL IMPACT ASSESSMENT FEDERAL JURISDICTION

Some participants identified a role for federal EA to ensure a consistent level of environmental considerations across the country. Where participants saw gaps in provincial processes, they expressed an expectation that federal EA would offer some protection or oversight. In contrast, other participants saw provincial processes as more than adequate and federal EA as duplicative. This relates to the varied ways participants considered federal jurisdiction as it related to EA and the scope of federal processes.

Some participants saw federal jurisdiction as permitting, or even requiring, a wider reach of federal EA, while others saw a very narrow and specific role for federal EA within the confines of federal jurisdiction. On one hand, issues such as climate change, seen as within the purview of federal responsibility, were identified as critical to consider within federal EA, as were the federal governments' specific responsibilities towards Indigenous Peoples that required more thorough and comprehensive federal EA than is currently conducted. On the other hand, some participants saw current EA regimes as appropriate in their breadth.

## IMPACT ASSESSMENT AS A PLANNING TOOL

Public and Indigenous participants expressed a resounding desire and need for early engagement in project conceptualisation, design and planning. Many saw this as an opportunity to reduce conflicts later in the assessment process and to identify adverse effects and associated mitigation measures in an integrated and iterative fashion, prior to large investments of time and money into publicly unpalatable options. Institutionalising a planning component to EA was seen as an opportunity to gather and analyse all necessary information in a publicly available and informed way earlier than current processes require. Early engagement was also seen as integral to a complete life-cycle approach to project review. Participants from all walks generally expressed support for EA as a planning tool. However, divergent views were expressed regarding the extent to which current assessment processes are effective as a planning tool. In some cases, participants purported to undertake project planning in a transparent and participatory manner, while in other cases participants expressed concern that projects only entered into the public sphere after it was too late for input to project design to be incorporated.

**“Environmental assessment should do five things for people in Canada:**

- 1. Allow everyone, including Indigenous Peoples, to say “no” to environmentally damaging projects in their communities.**
- 2. Ensure that the environmental safety net, which includes other laws and regulations, is intact and working to keep air, water and soil healthy.**
- 3. Guarantee public participation and the free, prior and informed consent of Indigenous Peoples.**
- 4. Consider the “big picture” and include cumulative effects from multiple projects on interconnected ecosystems in ways a case-by-case approach cannot.**
- 5. Include scientific and traditional Indigenous ecological expertise on all environmental assessment panels.”**

*Excerpt from form letter, supporters of the David Suzuki Foundation*

## FROM SIGNIFICANCE TO SUSTAINABILITY

Many participants expressed views on what EA should achieve. The Panel received more than 11,000 letters from supporters of the David Suzuki Foundation and more than 500 letters from supporters of the West Coast Environmental Law Association that spoke to the purpose of EA in Canada. The signatories of these letters supported the idea of a next-generation assessment process which would address specific issues, including sustainability, climate change, Aboriginal rights, alternatives and cumulative effects.

There were many discussions around the link between sustainability and the EA process. Some participants identified that EA should move towards a net sustainable benefits model that considers a broad range of environmental, social, economic, cultural, and health effects. Graph 1 shows that survey respondents identified the need for environment to remain a focus of EA but felt that social and economic considerations should also play a role in decision-making.

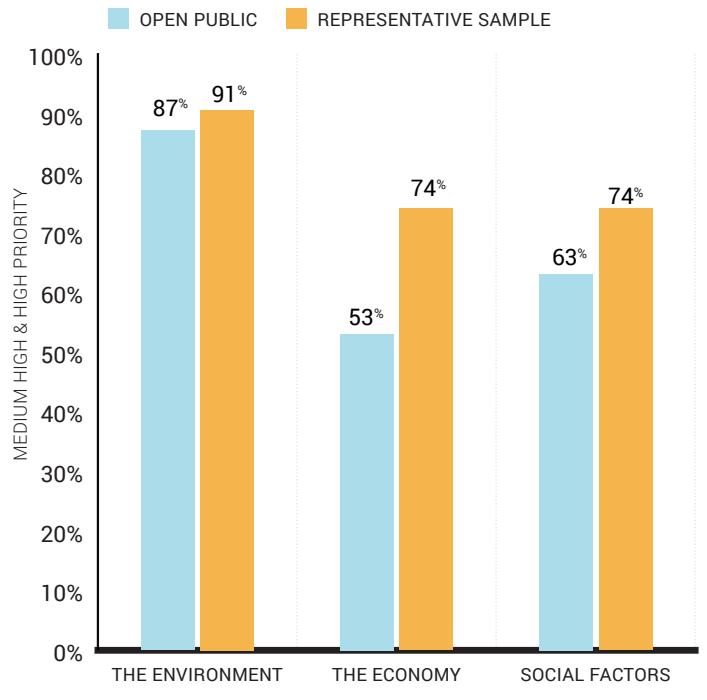
Some participants also explained that EA should move beyond significance assessment to consider risk-benefit analysis, sustainability and/or the public interest. Some advocated for the introduction of a next-generation process that would assess the long-term sustainability of a project, while others thought that sustainability is difficult to define for the purpose of EA. More generally, participants felt that *CEAA 2012* does not always result in the most environmentally sound project being approved.

Some participants said that the outcomes of the EA process should be to determine whether a project should go ahead and to select the best technologies and mitigation, rather than the lowest-cost options. Others said that EA processes should not hinder economic development or Canada's economic sovereignty.

Some participants identified that EA processes should be used to promote broad public policy commitments, such as the protection of Aboriginal and treaty rights, and act on commitments to reconciliation and nation-to-nation relationships. Some participants also said that EA processes should be used to support Canada in fulfilling its commitments made under international agreements such as the Convention on Biodiversity, the Paris Agreement on greenhouse gas (GHG) emissions

### ONLINE QUESTIONNAIRE (CHOICEBOOK) RESULTS GENERAL SCOPE

GRAPH 1 – How much do you think federal EA processes should consider...



**"I agree that a next-generation environmental law should be based on an integrated set of reforms, including:**

- Sustainability as a core objective, to ensure the long-term health of the environment and communities
- Meaningful public participation for anyone who wishes to participate
- Accessible information for the public, Indigenous Groups and stakeholders
- A climate test to ensure Canada stays on track to meet its climate goals
- A framework for addressing the cumulative effects of industrial and other activities in a region
- Collaborative decision-making with Indigenous nations, based on nation-to-nation relationships and the obligation to secure free, prior and informed consent
- Rules and criteria to encourage transparency, accountability and credibility, and to avoid politicized decision"

*Excerpt from form letter, supporters of West Coast Environmental Law*

and the United Nations Declaration on the Rights of Indigenous Peoples. These participants thought the federal EA processes could be part of the toolkit available to the federal government to address its international commitments and obligations. However, many participants believed these broader public issues are difficult or even impossible to resolve in project reviews and result in significant delays. Many participants felt that national policies and commitments should be determined outside of a project-specific EA context.

## CO-OPERATION AMONG JURISDICTIONS

Participants said that having multiple assessment processes with different participation opportunities is confusing and leads to consultation fatigue for the public and Indigenous Groups. Processes need to be simplified to provide more certainty to investors and participants.

**“Achieve actual harmonization with provinces and territories or designate one main EA process so as to avoid the controversy and political pressure of having to be ‘aligned.’”**

*Choicebook respondent*

The Panel heard that co-ordination of federal and provincial processes is a way to regain trust. Many participants expressed support for harmonization and the “one project, one assessment” approach. Multiple or misaligned processes result in proponents having to respond to information requests twice, confusion for participants and time delays.

Opinions differed on the means to achieve this objective. While some were in favour of substitution, others were concerned with that approach. Some did not perceive the provincial processes to be as comprehensive as the federal processes. Others wanted to be sure that the federal government was present when matters of federal jurisdiction were being considered. Sharing of information and aligning timelines were proposed as options to ensure alignment. Some participants were of the view that substitution is an inappropriate abdication of federal responsibility. Co-operation, although not perfect, was seen by many to be the preferred option for getting to the goal of “one project, one assessment.”

Key messages heard at the Panel’s technical session with provincial and territorial EA administrators were that the assessment process should be flexible enough to align with the various provincial laws and enable effective co-operation. Participants were of the view that EA should be led by the best-placed jurisdiction, defined as the one with the greatest stake in the project approval and life-cycle management. It was also identified that federal experts should always participate in a provincial EA.

Participants explained that federal EA processes should not apply in regions with settled lands claims that include EA provisions managed by co-management bodies such as in the areas covered by the Inuvialuit Final Agreement and the James Bay and Northern Quebec Agreement. EA legislation should acknowledge the constitutional obligations outlined in modern treaties and enable participation in, and harmonization of, processes.

Some participants emphasized the need for regional co-operation on joint assessments areas of international jurisdiction, such as international waters. There should be an established process for engaging on transboundary concerns at a government-to-government level.

## INDIGENOUS CONSIDERATIONS *UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)*

Participants explained that Canada’s commitment to reconciliation and *UNDRIP* indicates that the relationship between the Government of Canada and Indigenous Peoples is evolving, and that this should be reflected in EA processes. Relationships with Indigenous Groups need to be long-term and ongoing, and include meaningful dialogue. Many participants were supportive of the implementation of *UNDRIP*, which is broadly seen as a framework for reconciliation in Canada, although some participants expressed caution about the outright adoption of *UNDRIP* because its creation in the international forums of the United Nations did not necessarily reflect the Canadian reality. Participants agreed that early engagement provides an opportunity within EA for industry to improve relationships with



Indigenous Peoples. Engagement, they felt, should occur often and throughout the course of the project.

Participants identified many opportunities and possibilities for how to reflect the principles of *UNDRIP* in EA. They expressed cautious hope for change but reminded the Panel about the difficult history between Indigenous Peoples and the Crown. Many participants felt that the implementation of *UNDRIP* would start to repair some of that damage, contribute to greater understanding between Indigenous Peoples, the Crown, and the public, lead to nation-to-nation relationships and ultimately provide a foundation for reconciliation. Some participants were clear that, as part of the implementation of *UNDRIP*, Indigenous laws need to be recognized as well as recognizing three levels of government and jurisdiction: Indigenous, provincial and federal. Reconciliation in the view of many would involve shared jurisdiction over lands and resources, including collective decision-making by all three levels of government in EA processes. Participants explained that the EA process should respect Indigenous Peoples' decision-making authority where there may be impacts on their established or asserted rights.

Participants explained that the free, prior and informed consent (FPIC) of Indigenous Peoples must be given before projects that may impact them are allowed to proceed. Nation-to-nation relationships can only be achieved if the federal government respects Indigenous rights to FPIC and decision-making. Participants said that the federal government must undertake a process to find out what FPIC – consent in particular – means to Indigenous Peoples across Canada and come to a mutual understanding. Participants further said that FPIC, and the implementation of other aspects of *UNDRIP*, is broader than EA. Some participants thought that this means that FPIC should not be implemented within EA legislation but dealt with at a higher policy level. Regardless of the level at which participants thought FPIC should be reflected in government processes and/or policy, they agreed that consistency and co-ordination is essential, particularly as FPIC relates to the duty to consult and accommodate.

Some participants were clear that FPIC means that saying “no” to a project should always be an option, while others were concerned that this may privilege the interests of Indigenous Peoples over other Canadians. Other participants expressed concern about the view that FPIC is merely about a veto and believe that FPIC is about

a process based on mutual respect and framed by a nation-to-nation relationship. Participants suggested that impacted Indigenous and non-Indigenous communities should be involved in decision-making and that innovative participatory models for decision-making should be explored, whether it is through an advisory committee, representation to decision-making bodies or a mechanism to appeal EA decisions. Other participants focused their consideration of FPIC around the need for clarity and certainty of process, no matter what is finally decided about the role of FPIC in EA.

## ABORIGINAL AND TREATY RIGHTS IN EA

Across the country, Indigenous Groups highlighted the importance of understanding Aboriginal and treaty rights. Participants spoke about the importance of their treaties, the need for the Crown to respect the treaties in the spirit in which they were signed, and the need for the Crown to educate itself about Indigenous Peoples. A limited understanding of Aboriginal and treaty rights was identified as a barrier to meaningfully consulting on potential impacts to these rights. Overall, they said that impacts on Aboriginal rights and title should be properly included in scope of the EA.

Some participants thought that legislative provisions regarding the duty to consult should be added to improve Crown consultations. Others thought that duty to consult requirements should be discharged outside of federal EA processes. The Panel heard that the Responsible Authorities conducting EAs need to have mechanisms and processes to properly address complex Indigenous issues while ensuring timely and predictable decisions. Further, participants explained that in regulatory processes they often must fight to have their rights recognized by proponents and the government, noting that these parties should be more knowledgeable about Indigenous Peoples and their culture, history and rights.

**“I’m trying to make the point that the current process fails to recognize and accommodate Section 35 Aboriginal and treaty rights. It fails to account for the traditional laws of the nations and the inherent connectedness to lands and resources and the sharing of the land that was contemplated in the treaties.”**

*Michael Jerch, Southern Chiefs Organization*





Participants highlighted the importance of appropriately conducted Traditional Land Use Studies to enable better understandings of the exercise of rights, in the past, present and future. Assessments undertaken by Indigenous communities carried more weight in the eyes of potentially impacted peoples than studies led by proponents. Participants expressed a desire for the continued development of nation-to-nation relationships and saw assessments of impacts to rights in EA as an important component. An informed and meaningful assessment of impacts to rights was identified as a necessary prerequisite to FPIC, as Indigenous Groups must be equipped with a full understanding of that to which they are consenting.

Others expressed concerns about overlapping and competing claims of Aboriginal rights and title and how the inclusion of FPIC within EA could further compound difficulties with resolving overlaps. Participants were concerned with increased delays in project assessments and approvals, and associated costs to proponents. It was suggested that unresolved issues related to Aboriginal rights and title should be addressed outside the EA process. This concern was related to the lack of clarity around roles and responsibilities for all parties, including government, Indigenous Groups and proponents.

Participants expressed concern that current federal assessment processes exacerbate conflict between and within Indigenous communities, as well as conflict and misunderstanding between Indigenous and non-Indigenous communities. Participants identified the need to address conflict at its source before EA processes commence, or at a minimum at the earliest possible stage of EA, according to the traditions and governance systems of the relevant Indigenous Groups.

## CAPACITY

Participants identified gaps in capacity and a scarcity of resources as primary barriers to meaningful participation in EAs and to meaningful consultation. Many Indigenous communities face consultation fatigue, resulting from sometimes thousands of project applications or consultation requests per year. In addition to the high volume of notifications received, EA processes often demand quick turnaround times that do not allow for meaningful community engagement and have deadlines that are not feasible for understaffed offices to meet. Participants expressed the desire to have the capacity

to play an active role in undertaking and analyzing EA studies and in decision-making. Expertise could be developed within individual Indigenous Groups or broader organizations, or access to outside expertise could be



improved. Participants also identified access to complete information as a necessary component of increasing capacity to engage in EA. Funding was highlighted as critical to capacity – both long-term and ongoing capacity development from a reliable funding source, and funding to participate in specific initiatives such as project EA, regional assessments or other consultation.

It was noted that federal and provincial governments have a poor understanding of Indigenous Peoples' culture, traditional knowledge and rights. Improved training and education would better position government to engage and consult with Indigenous Peoples more effectively and efficiently, thereby alleviating some capacity pressures.

## INDIGENOUS KNOWLEDGE

Throughout the Review, participants described a disconnect between western science and Indigenous knowledge. Many identified that the current reliance on

western worldviews in decision-making is problematic and recommended that Indigenous knowledge be given equal weight in decision-making. Several participants specifically identified that the language in *CEAA 2012*, which states that an EA may take into account Indigenous knowledge, is inadequate as it considered its incorporation to be optional. As a result, incorporation of Indigenous knowledge is shallow or absent in the majority of assessments.

Participants identified concerns with the methods used to collect Indigenous knowledge. Many felt that studies were approached as a check-box engagement activity by proponents, rather than as a meaningful scientific exercise. They identified accessibility issues, including language, for knowledge-holders to understand project information, and for proponents, regulators and EA practitioners to understand Indigenous knowledge. Given that Indigenous knowledge is primarily shared through oral traditions, it was recommended that EA processes be flexible to incorporate methods outside hearing processes and written submissions. It was also recommended that decision-makers spend time on the land with knowledge-holders, as this is the best way to begin to understand the knowledge they share.

## IMPACT BENEFIT AGREEMENTS (IBAS)

Indigenous Groups noted that Impact Benefit Agreements (IBAs) are often signed before an assessment is completed and the full knowledge of all impacts, including cumulative impacts, is available. Some Indigenous Groups do not want to discuss IBAs until they are fully informed of a particular project's impacts, but they feel pressure, often in the absence of adequate government consultation, to agree to IBAs before a project is approved. Other Indigenous Groups said that their direct engagement with proponents gave them the opportunity to influence the development of a project and address matters related to accommodating their rights. It was also noted that, in the absence of adequate government consultation and accommodation, IBAs are utilized to secure additional mitigation and monitoring of impacts.

Some participants believed that governments should not have a role in IBAs since these are private agreements between proponents and Indigenous communities and that, outside the modern treaty context, IBAs should not be legislated. Some Indigenous Groups favoured

the confidential nature of IBAs because they feared a reduction to their federal funding as a result of making the content of IBAs public. Both industry representatives and Indigenous Groups agreed that the Crown continues to hold the duty to consult and accommodate, regardless of IBA negotiation.

Others acknowledged that government should to be involved and should ensure that IBAs are not confidential so that Indigenous communities can learn from each other. In addition to building best practices, a transparent process would be conducive to ensuring agreements are negotiated to provide optimal benefits to Indigenous communities. Some participants suggested that the confidential nature of IBAs is not conducive to community and is often a leadership-driven process that proceeds without the consent of community members.

## PUBLIC PARTICIPATION IN IMPACT ASSESSMENT

There was a strong sense of disillusionment and discontent among participants about the perceived extent to which expertise shared by the public influences EA outcomes. Public engagement was described as a check-the-box exercise rather than providing for open dialogue and discussion. Neither proponents nor governments were seen as actively considering and applying information gleaned through public participation. This led many participants to see assessment decisions as foregone conclusions and participation in these processes as futile.

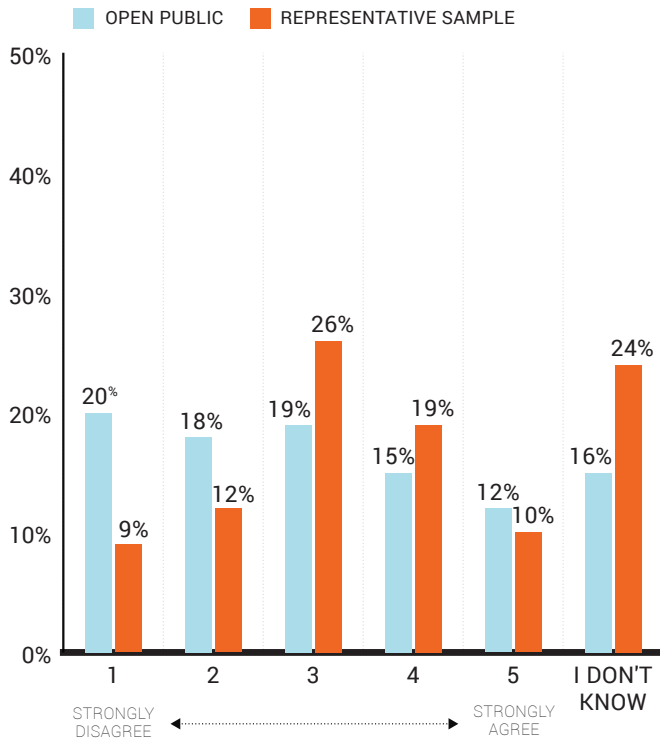
Choicebook respondents expressed an overall negative opinion about their ability to engage in the current federal assessment process. Graph 2 shows that only one-quarter of respondents consistently agreed that information was accessible and timelines were adequate, while roughly four in 10 broadly disagreed.

Participants suggested that feedback mechanisms be required and built into EA processes so that decision-makers and proponents must respond to the comments provided. Participants identified that, when done properly, public participation results in better planning, a better project and a more accepted outcome.





GRAPH 2 – The information I need to participate is accessible.



## WHO SHOULD PARTICIPATE?

Participants identified that involvement of directly impacted people should be increased. Standing tests, such as being directly affected, were largely described as inappropriate and a means of silencing voices of those who have an interest in the project outcomes and who could truly contribute to the EA. It was noted that those who are most likely to be impacted should be given the most influence. Many participants emphasized that EA processes need to be more inclusive when considering who should participate and that not only those who are affected be allowed to give their insights but also all of those who are interested. Some participants expressed the need to include local governments in the process because they are generally the ones who will have to manage the local impacts of a project. Others were concerned with the potential influence of advocacy organizations.

## EDUCATION/CAPACITY

Participants spoke to capacity constraints faced on a number of fronts, with a focus on knowledge of EA, access to information and expertise, timelines and funding. There is a lack of understanding of current assessment processes among the general public, and offering public capacity-building opportunities for all potential participants in those processes is important. There are barriers for the public to understand the science supporting EA processes. Many participants recommended the information should be available for all parties in plain language written in the language spoken locally. These capacity constraints may necessitate the assistance of costly consultants and legal counsel to understand information.

Many participants noted that individuals participating in assessments are doing so on top of personal and professional responsibilities. Organizations are participating with minimal paid staff and reliance of volunteers. The short timelines associated with current assessment processes are a significant challenge for participants. In order for participation to be meaningful and effective, funding should be increased through additional support from proponents and government.

**“To achieve community engagement/participation that is more than symbolic, efforts are needed to ensure a process managed by communities themselves. More commitment to multiple forms of knowledge generation is needed to address community concerns, including: citizen juries and citizen science projects; decolonizing methodologies of data collection; analysis with and for Indigenous communities at the local level; and benchmarked comparator indicators with high resolution across provinces and Canada on socioeconomic conditions of communities.”**

*People’s Health Movement-Canada*

## EARLY PLANNING/PARTICIPATION

Participants expressed an interest in being supported to be actively involved throughout EA processes, noting this would allow for mutual learning and could enhance transparency and trust. Participants indicated that proponents are not required to provide information to a community in advance of commencing the current assessment process. Throughout the review, participants

raised the idea of early engagement, beginning with the need for the project and, if applicable, evaluating alternatives and scoping EA study requirements. Some participants noted that public engagement should start at the conception stage, while others indicated it should start with the project description.

It was suggested that a working group be put in place at the beginning of the process when a project is proposed, with input from concerned citizens. Participants indicated that the working group should determine which scientists should be brought in to study the proponent's Environmental Impact Statement (EIS) with consideration for western science, Indigenous knowledge and community knowledge. Participants indicated that Indigenous Groups should have an active role in the planning process, and that better planning results in a better project. Being involved at the application stage is also important, as this is when cultural sites are often impacted. Participants said that engagement should start when a proponent or government realizes that a project has the potential to affect Indigenous Peoples' rights. Early engagement is necessary to allow input from the general public and Indigenous Groups to actually have an effect on outcomes. Participants also explained that, in the development of projects today, proponents may already undertake early engagement through their own internal mechanisms, prior to the initiation of the current assessment process.

## EVIDENCE-BASED IMPACT ASSESSMENT INCORPORATING SCIENCE IN IMPACT ASSESSMENT

Participants indicated that science is a necessary foundation for EA materials produced before, during and after an EA. Some participants described the use of science, facts and evidence as a positive element of current assessment processes conducted under CEAA 2012. Others expressed concern about the lack of scientific rigour of current assessment processes,

**"Decisions must be based on evidence, science, facts, and serve the public interest. This is in your mandate."**

*Choicebook respondent*

including methodologies and methods used to select valued ecosystem components, collect baseline data, predict social and health impacts, estimate GHG emissions or determine the significance of environmental effects.

Participants indicated that those engaged in EA within the federal government must have the scientific capacity to ensure EA outcomes are based on strong scientific input. They suggested that federal government budgets must recognize the critical need for scientific capacity and expertise, as well as data collection and maintenance, to support the incorporation of rigorous scientific evidence in EA processes. It was also mentioned that effective follow-up and monitoring programs require a strong government science framework which should include substantial and direct contributions from several federal departments. Participants said that best-available methods, standards and protocols used in EA processes should be consistent with international best practices. They believed this could be achieved by ensuring that those preparing and reviewing environmental impacts statements have adequate qualifications, that sound technical guidance is available and that clear information requirements are communicated prior to the studies being conducted.

**"I feel that many decisions are politically motivated rather than based on evidence."**

*Choicebook respondent*

While some participants identified adaptive management as a tool that can be used to manage scientific uncertainty of EA predictions, others warned that it is sometimes used as an excuse to not meet the requirements of the current assessment process. Other tools to manage or reduce uncertainty were identified, including enforceable conditions, further studies such as sensitivity analyses, collective learning from past and current projects, and data and knowledge sharing through public databases. Participants noted that the current challenge is that there are no provisions for conditions to be amended over time. As project lifespans can be quite long, participants were of the view that a mechanism to amend conditions was important to re-evaluate the risk of a project and to consider emerging scientific or other knowledge. Some participants also suggested there be



a mechanism to review follow-up every five years and amend conditions as appropriate as a result of that review. Participants said that science is always evolving and there can be conflicting data and conclusions. Standardization and transparency of data should bring clarity and consistency.

For the review of the Environmental Impact Statement, participants proposed that an EA review committee include all relevant federal expertise, including Indigenous Groups' and citizens' representatives, as this inclusive approach would help build public trust in the process. Provincial representatives should also participate to provide expertise in their areas of responsibility. In addition, the public, Indigenous Groups and other stakeholders want the opportunity to review documents and submit comments. There was a suggestion that government hire a third party to review the EIS rather than rely only on voluntary participation in the process. Participants expressed the need to involve affected

Indigenous communities in deciding the criteria to be used in the assessment of the significance of effects.

## INTEGRATING SCIENCE, INDIGENOUS KNOWLEDGE AND COMMUNITY KNOWLEDGE

Many identified that current federal assessment processes rely solely on western knowledge. While some participants believed EA decisions should be based solely on science, others warned that not considering Indigenous knowledge and community knowledge contributes to the lack of trust in assessments.

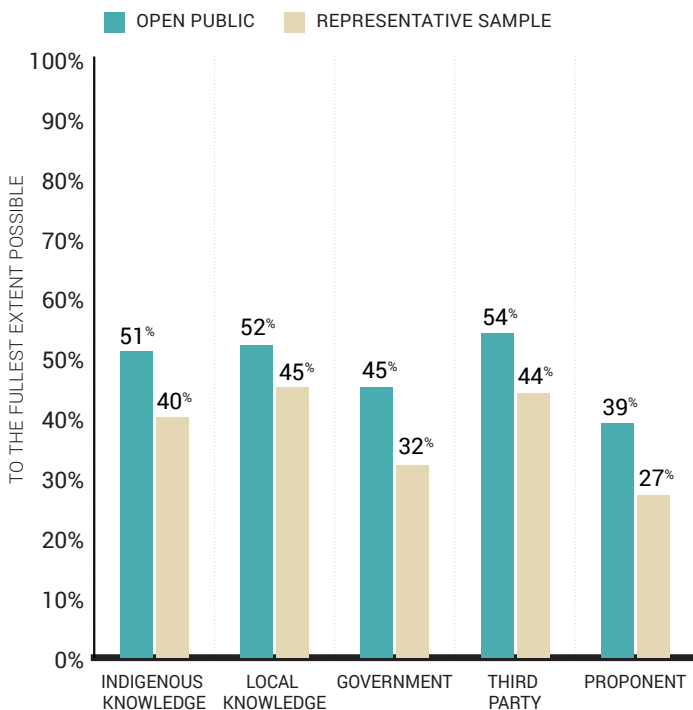
Graph 3 shows that independent third parties were the preferred source for information in federal assessment processes, followed by local community knowledge and Indigenous knowledge. During the review process, participants indicated that it is advantageous to learn what communities know about an area and what to avoid, before the EA is done.

ONLINE QUESTIONNAIRE  
(CHOICEBOOK) RESULTS



### SCOPE CONSIDERATIONS

GRAPH 3 – To what extent should the following sources of information be considered in federal EA processes?



**“Scientific knowledge and verified factual evidence should inform EA’s. Anyone who can provide this kind of knowledge or information should be encouraged to participate to the fullest extent possible.”**

*Choicebook respondent*

Participants shared their experiences witnessing elders and knowledge-holders being asked to prove their knowledge in western scientific terms. They explained that Indigenous knowledge is a form of science that must be weighed equally to western science. Participants shared their hope for a process that bridges western and Indigenous knowledge systems, and respects, integrates and values both sources equally. They spoke about the immense potential to sustainably manage resources from integrating the holistic viewpoint presented in Indigenous knowledge systems into data collection, analysis, decision-making and monitoring.

It was recommended that a framework be defined that clearly identifies how Indigenous knowledge, community knowledge and science are incorporated in decision-making. Participants suggested that these sources of knowledge be given equal weight to western scientific

knowledge in assessing a project's impacts and in decision-making. Others said that the question of whether Indigenous knowledge is equal to western science is divisive. They advocated that EA decisions be based on an integration of all knowledge, which can be accomplished if communities are involved from the beginning in project planning and if EA baseline information and impact predictions are based not only on scientific information but also on community knowledge.

## DEVELOPING UNBIASED IMPACT STUDIES

Participants argued that the collection of data by consultants hired by project proponents has led to inconsistencies in the quality of data, analyses and conclusions, and the perception of partiality in the analysis of impacts. Some participants suggested that EA studies should not be conducted by the proponent or by contractors they hire. Others emphasized that, while science can be produced by proponents, it must also be generated from other actors such as government agencies, universities and NGOs for EA outcomes to obtain a more comprehensive portrait of the impacts. Some participants said that "community-based science" could offer valuable insights into impacts but that it was generally ignored. Participants pointed out that community organizations, conservation groups and Indigenous Groups currently do not have the capacity and opportunity to present competing science within current assessment processes, which can be explained by the lack of time, resources or rigorous data. Participants indicated that those engaged in EA within the federal EA processes must be funded to build their own independent scientific capacity.

To help build trust and to improve the quality and usefulness of EIS, participants suggested that environmental studies be conducted by an independent agency, by scientists or by government experts. This view is reflected in the results from the online survey, as demonstrated in Graph 4, where Canadians generally

**"An independent agency would prepare the EIS without any biases and favours. Thus it can bring out the true consequences of the projects. "**

*Choicebook respondent*

believed the Responsible Agency, not the project proponent, should conduct the EIS. Some participants said that proponents should be the only ones responsible of conducting an EIS, that they should be held accountable for the results of their studies, that concerns regarding bias are unfounded and that proponents need to work with consultants directly to inform project planning. While some participants felt that professional consultants working for proponents maintain their independence

**"This Principle of "Walking on Two Legs" (Western & Indigenous) is necessary to support Canada's goal of reconciliation. When processes are designed to respect both ways of knowing and understanding the world, we can create a value system that will support equity in decision-making processes."**

*St'k'emlúpsenc Te Secwepemc Nation*

and objectivity and ensure the conclusions are those of the consultants and are defensible, others shared experiences of a disconnect between what is included in the proponent's EIS and what independent experts find. Some participants thought that experts conducting the EIS should have better certifications and accreditations. Moreover, participants said that, in certain cases such as with social impact studies, the federal government does not have the proper expertise and training to challenge the proponent's studies.

## MAKING EVIDENCE-BASED DECISIONS

Some participants said that current assessment decisions are not based on science but are a national policy decision based on political and economic considerations. There is also a perception that current assessment decisions are not always based on the best information or evidence available. Most participants believed that decisions should be evidenced-based, including best available knowledge from all sources, such as western science, Indigenous knowledge and community knowledge.

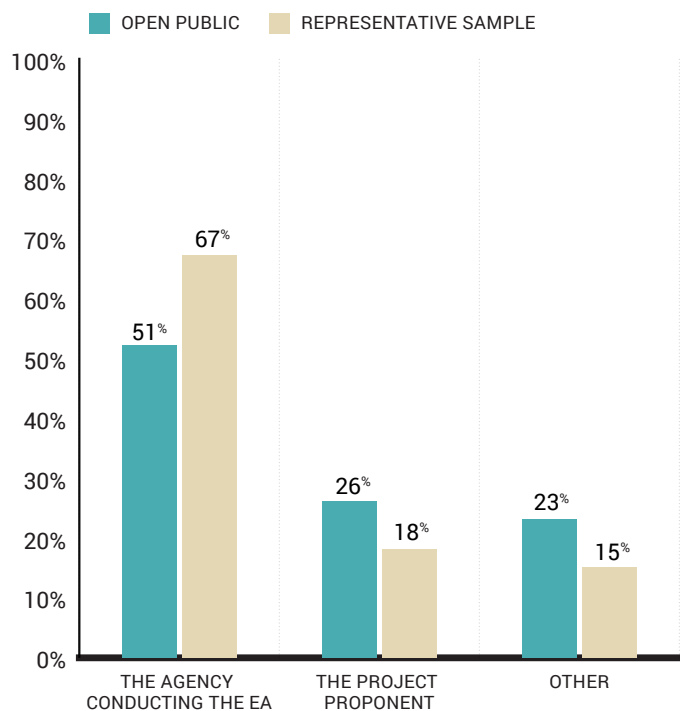
## GOVERNANCE MODEL

Participants identified that reducing the number of Responsible Agencies (RAs) to three under *CEAA 2012*





GRAPH 4 – Who do you think should prepare the Environmental Impact Statement?



was a good evolution from the multiplicity of RAs that conducted assessments under *CEAA 1992*. Nonetheless, some participants noted the lack of consistency between current assessment processes under *CEAA 2012* and questioned the need to have more than one RA. In their view, one RA would be adequate, and federal departments with relevant expertise can participate where needed.

“There should be one independent agency that conducts and oversees federal EA, and that agency should not be a regulator. *CEAA 2012* did improve federal EA by getting rid of self-assessment of many RAs.”

*Choicebook respondent*

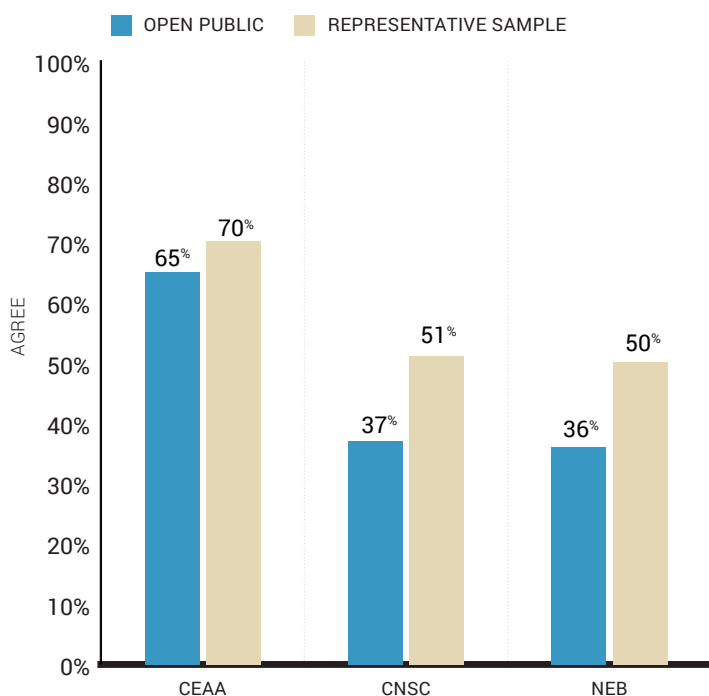
To obtain more credibility and regain public trust, participants proposed that EAs be conducted free from political and proponent influence by an independent and impartial body. They noted that conducting EA through

an independent body would provide more consistency and predictability and would prevent government from making changes. As shown in Graph 5, the majority of respondents to the online survey, both from the public and the sample, want the Canadian Environmental Assessment Agency (CEAA) to be responsible to conduct federal EA processes, while fewer feel the same about the Canadian Nuclear Safety Commission (CNSC) and the National Energy Board (NEB).

Some participants consider the CNSC and the NEB to be the most appropriate federal entities to undertake EA for projects in their respective industries since they provide comprehensive regulatory oversight of the industry they regulate. These RAs have a strong regulatory framework and, given that they are the most familiar with their regulated facilities, are best placed to assess risks.



GRAPH 5 – The following federal agencies should be responsible for conducting federal EAs:



Moreover, some participants identified that the results of an EA are more easily transferable into the licensing process, and this lifecycle approach was viewed as a

good way to build relationships and create efficiencies in project approval processes. However, other participants shared several concerns about having the CNSC and the NEB conduct EAs. While they agreed that these RAs may be the best-placed regulators in terms of technical expertise and knowledge, there is a perception of a lack of independence and neutrality because of their close relationship with the industries they regulate. For example, participants noted the cross mobility of personnel between these regulators and their regulated industries and voiced concerns that these RAs promote the projects they are tasked with regulating.

## DECISION-MAKING

Most participants emphasized that the decision-making process should be transparent and objective, and the Panel heard that politicians should not be involved in the decision-making process. Participants emphasized

that the decision-making process is considered a “black box” that does not elicit trust. There are no criteria, guidance or constraints on Cabinet’s determination of whether significant adverse effects are justified in the circumstances. Some thought that EA decisions should stay with Cabinet but decisions should be more transparent, with more justification provided. Non-transparent political decisions to approve projects despite assessment findings can undermine public trust in decisions.

Trust in EA would be greatly improved if the decision-maker were required to provide full reasons, in a language understandable by all stakeholders. A solution proposed to the Panel was to lift Cabinet confidentiality for EA decisions and make all documents, reasons and trade-offs considered publicly available.

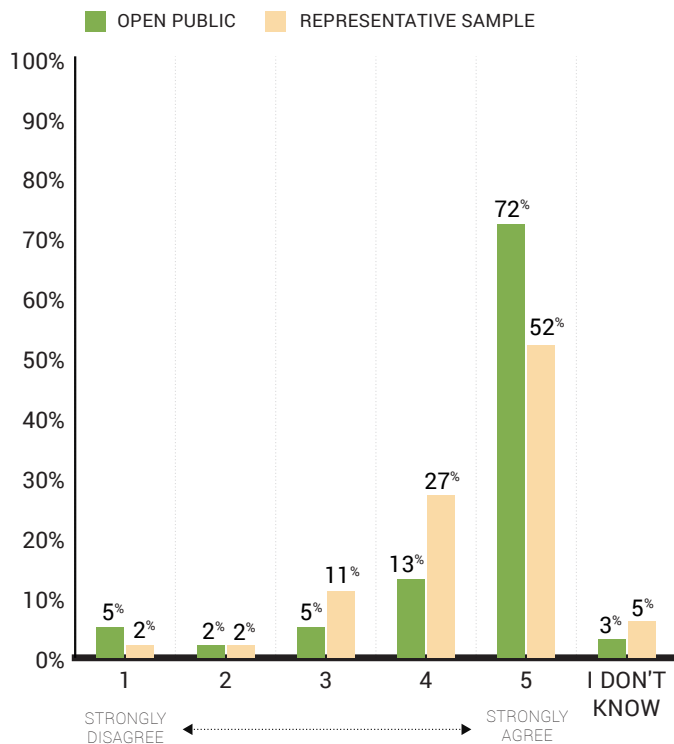
The Panel also heard that it should be possible to call for a judicial review of EA reports that are considered flawed before a decision is made.

ONLINE QUESTIONNAIRE  
(CHOICEBOOK) RESULTS



## DECISION-MAKING

GRAPH 6 – Cabinet should be required to present a comprehensive Reason for Decision in support of its decision to approve or reject a project.

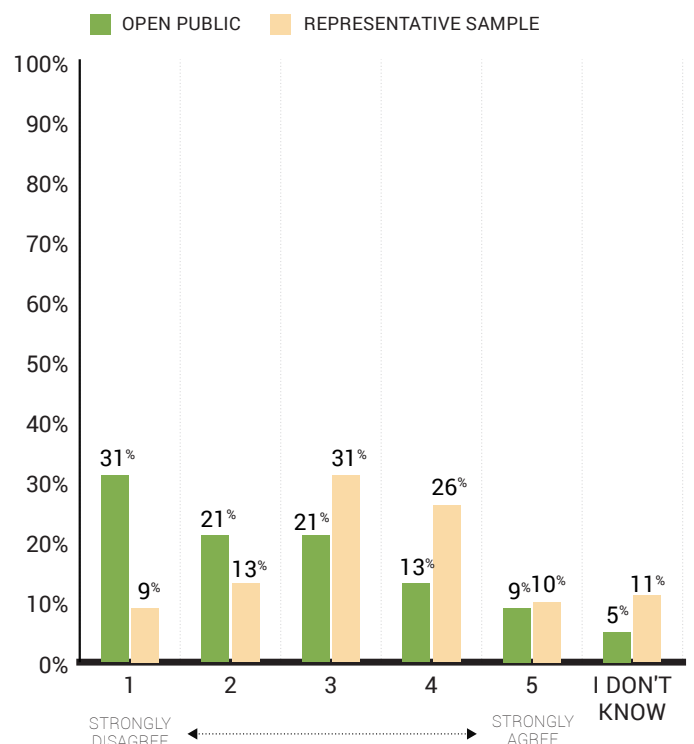


ONLINE QUESTIONNAIRE  
(CHOICEBOOK) RESULTS



## DECISION-MAKING

GRAPH 7 – The current decision-making process is appropriate.





The Panel heard concerns related to the independence of decision-making all along current federal assessment processes. Some thought that Cabinet should decide on the policy objective and leave the EA decision to responsible authorities. As seen in Graph 6, respondents to the online survey expressed a clear interest in receiving more information on decisions and how they are made. Eighty-five per cent of the public and 79 per cent of the sample agreed that Cabinet should be required to present a comprehensive Reason for Decision in support of its decision to approve or reject a project. Meanwhile, Graph 7 shows that only 22 per cent of the public and 36 per cent of the sample agreed that the current decision-making process is appropriate.

## PROJECT IMPACT ASSESSMENT WHEN SHOULD EA APPLY?

Many participants liked the introduction of the “designated project” list to trigger federal EA under *CEAA 2012* as this approach was predictable and clear. Some participants acknowledged that the project list should be reviewed to include more projects that could have significant adverse effects. Participants identified that all projects on the list should require an EA rather than having a screening process, but if a screening process is kept, there should be more clarity and consistency around the process. There were also concerns raised about the lack of clarity around decisions made by the Minister concerning the designation of projects not on the list. Many participants said that the federal government should ensure that all projects that may have adverse effects on the environment be assessed.

Other participants advocated for a return to the former “triggers approach,” as it was a more comprehensive approach that was able to capture the activities that are clearly under federal jurisdiction. Unlike the project list approach, triggers allow for all projects to be included in the process unless excluded and are a better way to bring projects into the system. Some participants said this approach could be improved and would be more useful if there were a better “exclusion list” that clearly defined the types of projects that would always be excluded from project EA.

Some participants advocated for a hybrid approach, where certain projects could be on a list that would always require a federal EA, but there could also be federal triggers that would require an EA for certain projects not on the list. Participants suggested that some new types of triggers could be useful, such as climate change or a potential impact to Aboriginal and treaty rights and interests, in order to properly capture the types of projects that should be subject to federal EA.

## REVIEW PANELS

Participants discussed the composition of panel members for projects undergoing EA by review panels or projects requiring hearings. Some participants suggested that panel members be selected by government and industry while others supported the need to have an arm’s-length review panel with adequate expertise to cover all key components of a review. While some were of the view that review panels should only contain science experts and no business representatives or lawyers, others believed it should include persons who can make value judgments about the project and whether it should proceed. Participants also suggested that review panels include Indigenous representation as a step toward reflecting the principles of *UNDRIP*. Participants also discussed the role of review panels relative to decision-making, with some comfortable with the current state of recommendations and others suggesting that panel recommendations be mandatory conditions of a project’s approval.

## MONITORING, COMPLIANCE AND ENFORCEMENT

It was clear throughout the Panel’s engagement activities that Canadians view monitoring and follow-up as an essential part of the EA process. Serious concerns were raised by participants that the federal government is not playing a big enough role to ensure that monitoring and follow-up activities are being carried out and impact predictions are verified. Participants emphasized that there is currently a lack of capacity in the federal government to oversee monitoring and to respond when monitoring shows discrepancies between assessment predictions and actual outcomes. The Panel heard that there is a lack of evidence that the federal government is focusing adequately on the post-assessment phase.



A consistent concern across the country was the degree of independence of those carrying out monitoring activities. The Panel often heard that there is a conflict of interest when proponents are tasked with carrying out monitoring activities, as they benefit from results that show their projects' effects on the environment are not significant. A potential solution raised would be the hiring of third-party, independent monitors who would not be employees of project proponents. Another proposed solution would be for monitoring to be conducted by a government agency. It was mentioned that effective follow-up and monitoring programs require a strong government science framework which should include substantial and direct contributions from all relevant departments. Some participants suggested community-based monitoring programs are also important and effective means of delivering high-quality monitoring and should be supported with capacity funding and training. However, it was also argued that proponents are best-placed to carry out day-to-day monitoring of projects for which they are responsible, as they are most familiar with their projects and are capable of making project modifications in order to mitigate unforeseen effects.

The lack of publicly available monitoring data has led to a lack of trust that any monitoring activities are happening and that the federal government is overseeing monitoring and follow-up. One of the most consistently heard messages was that all monitoring data should be made public. Participants proposed that a public database be created to permit the tracking of all EA

**“Information provided should be available to everyone and data stored for future referral on other similar projects. This includes pre-development and post-development monitoring data.”**

*Choicebook respondent*

commitments, compliance and enforcement activities and the proponent's compliance with these commitments. Some participants suggested that an interpretive table for conditions be made available to ensure the intent of the conditions is met. The Panel heard that information needs to be shared up front and from a landscape perspective.

Participants expressed their support for the proponent's obligations to follow the recommendations that arise

from EAs through enforceable conditions. In their view, enforceable conditions are much more effective than recommendations to ensure that EA commitments are met. However, some expressed concerns about the lack of evidence that conditions being developed under *CEAA 2012* result in environmental protection. The Panel heard that conditions have problematic wording which leads to issues with interpretation and enforcement. In addition, participants felt that the practice of referring to other regulations does not bring any added value. Participants recommended that conditions have better performance measurements, serve a purpose and bring added value.



Some participants preferred outcome-based conditions with clear standards to be met, as this would give proponents the flexibility to meet those objectives and standards.

The Panel heard of the need to have conditions that facilitate adaptive management. Participants noted that the current challenge is that there are no provisions for conditions to be amended over time. Because project lifespans can be quite long, participants were of the view that a mechanism to amend conditions was important to re-evaluate the risk of a project and to consider emerging scientific or other knowledge. Some participants also suggested there be a mechanism to review risk assessment every five years and amend conditions as appropriate as a result of that review.

The Panel heard that that compliance and enforcement are needed for EA processes to be effective. Participants expressed concerns that proponents are not being held accountable and that environmental commitments will not be respected unless there is adequate oversight. They said that the current mechanism for compliance



and enforcement lacks teeth. Participants suggested that inspections be regular and consistent and include random surprise visits. They also noted the importance of having higher-level consequences to match the non-compliance and to be more effective at compelling compliance. Proposed measures included higher fines and administrative monetary penalties, and the ability to amend or revoke decisions, or shut down a project and prevent non-compliance.

There were various views on who should be responsible for conducting compliance and enforcement activities. Some participants noted that it should be a shared responsibility between provinces and the federal government. Under this perspective, some believed the federal government should maintain its role for areas within its responsibility, while others suggested the possibility of delegating enforcement of all conditions to the provinces. Other participants showed a preference of having compliance and enforcement conducted by an independent agency and that local Indigenous and non-Indigenous communities be involved in monitoring activities and be given powers to enforce conditions. Participants indicated that they want a mechanism for public complaints to be logged that result in concrete and timely action by the government.

## DISCIPLINE IN IMPACT ASSESSMENT TIME AND COSTS

There were a variety of views on timelines, though generally it was agreed that EA should be timely and predictable. Some participants expressed support for the legislated timelines under *CEAA 2012* and said these timelines should be maintained. It was said that long timelines to complete EAs reduce investor certainty, increase project costs and compromise project viability. Others thought that, while timelines were supposed to streamline the processes, they are now longer and more uncertain, partly due to the stop-clock options available.

Other participants said that timelines were too short and inflexible to allow for meaningful participation and rigorous assessments. Participants identified a discrepancy between the time available to the proponent and the resources at the disposal of other stakeholders. They noted challenges including time available to work

with colleagues, experts and community members, review and comment on volumes of technical information, and ensure the process is well informed by science. Participants also indicated that there should be ways to increase the amount of time for the public and Indigenous Groups to provide input to the process.

Participants identified that, while adding timelines was a good approach, they may have actually made the process more rigid and difficult to align and harmonize with provincial processes.

## REGIONAL IMPACT ASSESSMENT

Many participants told the Panel that federal EA processes should be integrated and tiered, starting at the strategic and regional levels which would then inform project level EA. Across the country, participants identified that regional EA should be legislated, anticipatory and commonplace. Some participants showed interest in regional EA but identified reservations that it could introduce a new layer of decision-making. Participants said there is a need for a guidance framework from the federal government to build a strong methodology for regional EA based on sound science. Some participants stressed the need for a good definition of cumulative effects.

**“The combined effects of many projects could push the surrounding environment past a tipping point. Beyond the tipping point, irreversible damage is done and the land may be rendered incapable of supporting the ecosystem and lifestyle that once existed upon it.”**

*University of Victoria Environmental Law Centre, on behalf of the Northwest Institute for Biological Research*

Many participants emphasized the need to assess cumulative effects at the regional level to resolve larger-scale issues that cannot be assessed at the project level. Participants said that regional EA could help find alternatives to contentious projects. Participants were also of the view that, to ensure transparency, governments must gather, store and make publically accessible data around upstream and downstream environmental impacts and cumulative effects.



Some participants linked requirements from regional cumulative effects studies to compliance monitoring and enforcement. They also identified a need for legislated requirements for projects to conform to land use plans before initiating an EA. Cumulative effects assessment informs land use plans in an iterative process. Land use planning can set triggers and limits in a region and also identify areas of high potential sensitivity.

Participants emphasized that regional EA would help start conversations earlier, provide context and background information and help streamline project level assessments by defining regional baselines and thresholds. A tiered, risk-based approach would help reduce duplication and repetition for low-risk projects since not every smaller project needs to be assessed. Participants identified that regional studies could help meet timelines and that there is a need for public engagement at the regional level. Experts stated that other jurisdictions, such as the provinces or territories, must also be involved in regional studies. Ultimately, regional EA was seen as very beneficial by providing a framework for early public and Indigenous engagement.

## STRATEGIC IMPACT ASSESSMENT

Participants noted that Canada has made international commitments but does not have policies in place to support them, citing climate change as an example. Participants were concerned about the lack of strategic EAs, suggesting that strategic EA can address broad policy issues such as *UNDRIP* and climate change, and support equity, fairness, trust and legitimacy of assessment processes. They also noted the need for public debate and an understanding of the Canadian position on these strategic questions.

Participants noted that it is impossible to deal with broader issues in project EA without some strategic EA

**“(Strategic environmental assessments) should serve as the foundation for discussion about higher-level plans and policies that can provide strategic guidance to the type and levels of development that will positively contribute to a region.”**

*World Wildlife Fund Canada*

or policy providing directions on objectives. Strategic EA can set the criteria and thresholds so that better choices can be made at a project level. One idea was to have a major emphasis on strategic EA, occasionally do regional EA and then rarely do project EA. Another suggestion was that projects be reviewed at a strategic level before beginning the EA process, and if projects do not comply with national and provincial plans and policies they would not be evaluated further.

Participants said that a new mechanism needs to be developed to ensure strategic EAs are conducted and that this mechanism must have a legislated base and be done for regional and sectoral plans, policies and programs. Participants suggested that the provinces should have a role in the development of strategic EAs.

## CLIMATE CHANGE AND IMPACT ASSESSMENT

Many participants emphasized the need to evaluate climate change in EA and said it should be a key factor in EA decisions. As shown in Graph 8, almost half of the respondents to the Choicebook felt that assessment processes should “completely” address Canada’s climate change commitments. Some participants said that the way to do this would be by implementing a climate test or a climate change trigger because, while a single project may not emit a large amount of greenhouse gases (GHG), cumulatively it could impact climate change. Participants identified that the federal government should recognize the sensitivity of certain regions in Canada that are already being impacted by climate change.

Many participants underlined there should be greater use of strategic and regional EA to address climate change as a policy issue. Further research and guidance related to considering climate change in EA is needed to ensure these considerations use science and evidence for decision-making in a consistent, clear and predictable manner. This would allow decision-makers to consider regional changes and take a longer-term approach to cumulative regional impacts. EA processes need to ask how projects impact ecosystem integrity in the face of climate change. Participants also identified that there is less uncertainty in regional climate models.

EA processes should also address the impacts of climate change on the project. In this regard, participants



identified that climate change adaptation should be part of the EA processes. Some said that all assessment panels should have to view project impacts over a long timeframe, both in terms of mitigation and adaptation. There is a need to understand the impacts of climate change on local populations, including Indigenous Groups.

suggested California as a model for assessing upstream and downstream emissions.

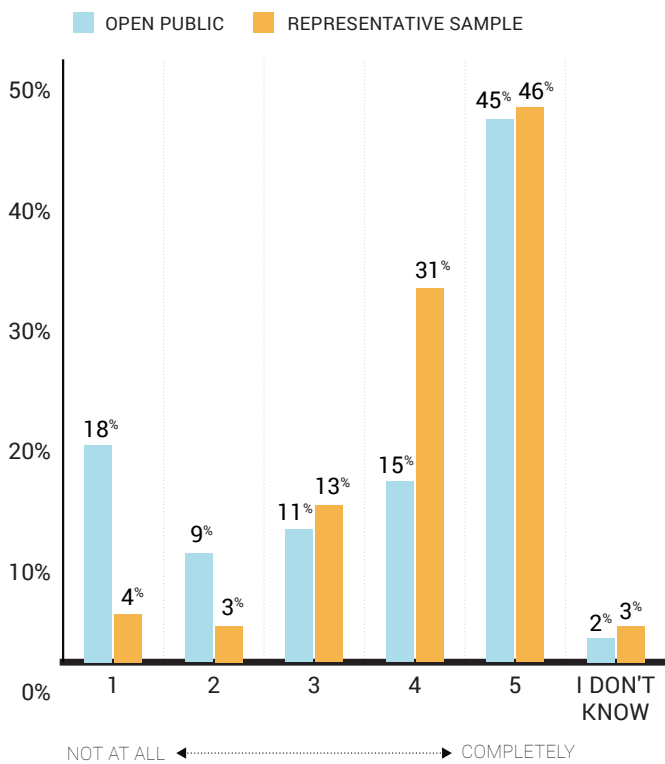
The federal government must develop a credible plan for managing GHG emissions, including decision-making. Participants identified that EA processes must operate within a national carbon budget, with the assessment of individual project emissions based on relative contribution to the national limit. In this regard, EA processes must consider if a project is the best use of the allotted megatonnes of carbon dioxide (CO<sub>2</sub>).

ONLINE QUESTIONNAIRE  
(CHOICEBOOK) RESULTS



## GENERAL SCOPE

GRAPH 8 – Climate change is an example of a policy commitment that is frequently raised in the context of EA processes. To what extent should federal EA processes address Canada’s climate change commitments?



There is a need to account and measure the effect of climate change in the short and long term. Some participants emphasized the need to develop methodologies that include quantitative assessment of potential project emissions. Others said the federal EA processes must take into consideration cumulative carbon emissions across projects, with some participants identifying that a good EA process should look at all GHG emissions: upstream, direct and downstream. Others

## CONDUCT OF THE EXPERT PANEL'S REVIEW

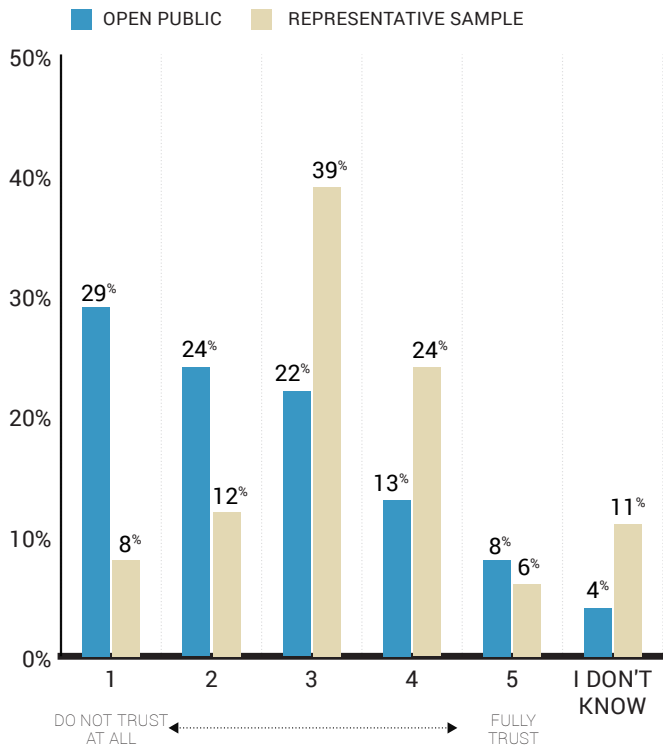
Many participants commended the federal government for undertaking a review of current assessment processes and expressed hope for new and improved processes that recognize the rights of Indigenous Peoples in decision-making, include more meaningful opportunities for public participation and ensure a more sustainable future for the next generation of Canadians.

The panel recognized the importance of continuous improvement through its engagement activities and provided participants with an opportunity for feedback after each workshop event. Results of these evaluations showed that participants valued the approach taken by the Panel and that the sessions were informative, helped





GRAPH 9 – To what extent do you trust current federal EA processes?



Several participants criticized the omnibus bills that amended Canadian environmental laws in 2012, describing these changes as unilaterally imposed by the previous federal government without consulting Canadians, as can be seen in Graph 9. This concern most clearly emerged in responses to the online survey and was directly tied to lack of trust in the current assessment process. Participants cautioned against repeating this process of legislative change.

All participants understood that the federal government would consider the Panel's Report as it decided the direction it would take in changing the federal assessment process.

Overall, participants strongly supported the need to renew federal EA and expected that they would have the opportunity to provide further input along the way.

## CONDUCT OF THE GOVERNMENT'S REVIEW OF ENVIRONMENTAL AND REGULATORY PROCESSES

The Panel heard about the need for continued engagement and consultation with Indigenous Peoples related to the recommendations in this Report and, specifically, any future design, review or legislative or policy changes related to EA. Indigenous Groups also recommended that, in order to restore confidence in Canada's environmental and regulatory processes, related reviews should proceed as nation-to-nation engagement based on the recognition of rights, respect, co-operation and partnership.





# **ANNEX 1**

## **EXPERT PANEL TERMS OF REFERENCE**

## CONTEXT

Currently, federal environmental assessment informs government decision-making and supports sustainable development by identifying opportunities to avoid, eliminate or reduce potential adverse impacts on the environment and by ensuring that mitigation measures are applied.

The Government of Canada fully supports the principles of the United Nations Declaration on the Rights of Indigenous Peoples, with the goal of renewing its relationship with Indigenous people in Canada and moving toward reconciliation.

The mandate letter of the Minister of Environment and Climate Change (the Minister) directs her, as a top priority, to “immediately review Canada’s environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes that will:

- restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with provinces and territories to avoid duplication;
- ensure decisions are based on science, facts and evidence and serve the public’s interest;
- provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and
- require project advocates to choose the best technologies available to reduce environmental impacts.”

In carrying out this review, the Minister is to be supported by the Minister of Fisheries, Oceans and the Canadian Coast Guard, the Minister of Natural Resources, the Minister of Indigenous and Northern Affairs and the Minister of Science.

The Minister is establishing an Expert Panel (the Panel) to conduct a review of environmental assessment processes. The Panel will engage and consult with Canadians, Indigenous people, provinces and territories and key stakeholders to develop recommendations on ways to strengthen and improve federal environmental assessment processes.

## MANDATE

The Panel’s review shall consider the goals and purpose of modern-day environmental assessment and be conducted in a manner that is consistent with these Terms of Reference.

The Panel shall prepare a report that sets out:

- the conclusions, recommendations and rationale for the conclusions and recommendations of the Panel; and
- a summary of the input received and how it was considered, including that from the Multi-Interest Advisory Committee or other experts.

## COMPLEMENTARY MANDATES

Environmental assessment is one part of a broader regulatory framework. In addition to the Minister’s mandate to review federal environmental assessment processes, other ministers have also been mandated to carry out reviews and propose reforms to matters that intersect with environmental assessment. These include:

- Minister of Fisheries and Oceans and the Canadian Coast Guard— review changes to the Fisheries Act, restore lost protections and incorporate modern safeguards;
- Minister of Natural Resources – modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development and Indigenous traditional knowledge; and
- Minister of Transport – review changes to the Navigable Waters Protection Act, restore lost protections and incorporate modern safeguards.

The Panel shall focus on those relevant matters that intersect with federal environmental assessment. For example, this will include the roles of federal expert departments in supporting the Canadian Environmental Assessment Agency as it conducts assessments and carries out compliance and enforcement activities. If matters are raised that are outside the scope of environmental assessment, but are related to the other mandated reviews, the Panel will receive the information





and forward it to the appropriate secretariat or department supporting the mandated review. Participants who would like to participate in the other mandated reviews are not expected to duplicate efforts; a single submission can be made to one or more reviews. The relevant information will be shared with the appropriate review bodies with the consent of participants.

Given that the territories have distinct and effective environmental assessment regimes rooted in constitutionally-protected land claim agreements with specific mechanisms for consultation and public participation, matters related to northern environmental assessment regimes will not be reviewed by the Panel. However, the approaches adopted in these regimes may be of interest and relevance to the Panel as it considers ways to improve and strengthen federal environmental assessment processes.

Proposed amendments to the Yukon Environmental and Socio-economic Assessment Act have already been introduced in Parliament. Indigenous and Northern Affairs Canada will continue to work with Aboriginal and territorial governments on this front. The Minister of Indigenous and Northern Affairs intends to launch a process soon to work with all applicable First Nations and the territorial government in Northwest Territories to identify possible solutions related to the Mackenzie Valley Resource Management Act.

## SCOPE OF REVIEW

In carrying out the review, the Panel shall consider the following matters raised in the Minister's mandate letter and the mandate letter of the Minister of Indigenous and Northern Affairs (Question 5):

1. How to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with the provinces and territories to avoid duplication?
2. How to ensure decisions are based on science, facts and evidence and serve the public's interest?
3. How to provide ways for Canadians to express their views and opportunities for experts to meaningfully participate?

4. How to require project advocates to choose the best technologies available to reduce environmental impacts?
5. How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects?

This should include, for example:

- how environmental assessment processes are conducted under the *Canadian Environmental Assessment Act, 2012*, including practices and procedures, such as Indigenous engagement and consultation, public participation, the role of science and Indigenous knowledge, cumulative effects assessment and harmonization and coordination with other orders of government;
- practices and approaches within Canada and internationally;
- relationship between environmental assessment and other elements of the regulatory framework; and
- alignment of various jurisdictional processes.

To recognize the objectives of the United Nations Declaration on the Rights of Indigenous Peoples, the Panel shall reflect the principles of the Declaration in its recommendations, as appropriate, especially with respect to the manner in which environmental assessment processes can be used to address potential impacts to potential or established Aboriginal and treaty rights.

## THE REVIEW PROCESS

### THE PANEL

The Minister will appoint individuals to the Panel that have knowledge or experience relevant to environmental assessment processes.

The Panel will consist of four members, including one Chairperson. In the event that a Panel member resigns or is unable to continue to work, the remaining members shall constitute the Panel unless the Minister determines



otherwise. In such circumstances the Minister may choose to replace the Panel member.

By way of letter from the Chairperson, the Panel may request clarification of its Terms of Reference from the Minister. The Panel shall continue with its review to the extent possible while waiting for a response in order to comply with the timelines of these Terms of Reference.

The Panel shall issue a notice to the public regarding any clarifications to its Terms of Reference and shall make those clarifications available on its website.

By way of letter from the Chairperson, the Panel may request an amendment to its Terms of Reference from the Minister. The Panel shall continue with its review to the extent possible while waiting for a response from the Minister in order to comply with the timelines of these Terms of Reference.

Upon appointment of the Panel, the Canadian Environmental Assessment Agency will provide to the Panel the comments received during the comment period on the draft Terms of Reference. The input received through the online questionnaire “Improving Canada’s Environmental and Regulatory Processes” will also be provided to the Panel.

## THE PANEL SECRETARIAT

The Panel Secretariat will provide administrative, technical and procedural support as requested by the Panel and shall be comprised of staff from the federal public service, under the direction of an Executive Director. The Secretariat will report to the Panel and will be structured to allow the Panel to conduct its review in an efficient and cost-effective manner. The Secretariat will liaise and facilitate the flow of information with the relevant bodies supporting the other related mandated reviews. Members of the Secretariat shall be guided in their work and professional conduct by the Values and Ethics Code for the Public Service.

## CONDUCT OF THE REVIEW TIMELINE

The Panel shall complete its review and provide its report with recommendations to the Minister by March 31, 2017.

## PUBLIC ACCESS TO INFORMATION

The Panel shall create and maintain a website which makes public the information it receives during the course of the review.

The Panel shall also offer opportunities for online engagement and provide procedures for the receipt of written submissions. The results of any online engagement carried out and any written submissions received shall be posted on the Panel’s website.

## PUBLIC ENGAGEMENT

The Panel shall communicate directly with a broad cross-section of interested groups, organizations and individuals during its review to gain an understanding of issues and opportunities related to federal environmental assessment processes.

The Panel shall prepare a Public Engagement Plan outlining how and when it will conduct in-person events. In preparing the Plan, the Panel shall take into account the activities associated with the other mandated reviews. This Plan shall be posted on the Panel’s website.

The Panel shall also include any procedures necessary for the timely and efficient conduct of the events. The procedures will allow for the events to be open to the public and be conducted in a manner that offers all participants an opportunity to participate. The Panel shall ensure that a record of any in-person engagement event is created and posted on the Panel’s website.

The Panel shall, where practicable, hold in-person engagement events in regions or communities where project environmental assessments have been recently conducted or where interest has been expressed in the review.

The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of in-person engagement events.



## INDIGENOUS ENGAGEMENT AND CONSULTATION

The Panel shall directly engage and consult with Indigenous organizations, groups, communities and individuals during its review in order to gain an understanding of issues and opportunities related to federal environmental assessment processes.

The Panel shall prepare an Indigenous Engagement Plan, outlining how and when it will conduct Indigenous in-person consultation activities. The Panel shall meet with the leadership of National Indigenous Organizations in the preparation of the Plan. In preparing the Plan, the Panel shall take into account the activities associated with the other mandated reviews. This Plan shall be posted on the Panel's website. The Panel shall work with regional Indigenous organizations in the planning and hosting of Indigenous in-person consultation activities.

The Panel shall also include any procedures necessary for the timely and efficient conduct of these activities. The procedures will allow for the events to be open and to be conducted in a manner that offers all participants an opportunity to participate. The Panel shall ensure that a record of any Indigenous in-person engagement event is created and posted on the Panel's website.

The Panel shall, where practicable, hold Indigenous in-person consultation activities in regions or communities where project environmental assessments have been recently conducted or where communities have expressed interest in the review.

The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of Indigenous in-person consultation activities.

## MULTI-INTEREST ADVISORY COMMITTEE

A Multi-Interest Advisory Committee with representatives of Indigenous organizations, industry associations and environmental groups will be established by the Minister to provide advice to the Panel.

The Panel will identify a select number of issues which may benefit from discussion by the Multi-Interest

Advisory Committee. The Multi-Interest Advisory Committee may also recommend to the Panel issues that would benefit from discussion. The Panel will, by way of a letter to the Canadian Environmental Assessment Agency, as convener of the Multi-Interest Advisory Committee, describe the issues for which it seeks advice and provide any relevant context to support the discussions by the Multi-Interest Advisory Committee.

The Multi-Interest Advisory Committee will meet as required in order to discuss the issues and will provide its consensus advice, to the extent possible, for the Panel's consideration and in accordance with any timeline provided by the Panel. Any advice provided to the Panel will be posted on the Panel's website. The Panel will include a summary of any advice provided in its Report.

## EXPERT ADVICE

Where expertise cannot be provided by the Multi-Interest Advisory Committee, the Panel may retain the services of other experts on certain subjects within its mandate. Any information provided to the Panel by experts will be posted on the Panel's website.

## ENVIRONMENTAL ASSESSMENT REVIEW REPORT

The report, reflecting the views of each Panel member, shall include:

- an executive summary of the report;
- the conclusions, recommendations and rationale for the conclusions and recommendations of the Panel with respect to the relevant issues within the mandate provided to the Panel; and
- a summary of the input received and how it was considered, including that from the Multi-Interest Advisory Committee or other experts.

The Panel shall submit the report to the Minister, and on request of the Minister, clarify any of the conclusions and recommendations set out in its report.

Upon receiving the report of the Panel, the Minister will make the report available to the public.





## PARTICIPANT FUNDING

The Canadian Environmental Assessment Agency will offer participant funding to Indigenous organizations, groups, communities and individuals to support their participation in the review.

## DELIVERABLES

- Public engagement plan
- Indigenous engagement plan
- Report

## OFFICIAL LANGUAGES

All deliverables and any other documents produced by the Panel for the purpose of communicating information to the public must be produced and made publicly available in both official languages. The Executive Summary and the final report will be made available March 31, 2017 in both official languages. Documents provided to the Panel will be made publicly available in the language that they were received.

## CONFIDENTIALITY

All information gathered by the Panel in the course of its work is subject to the provisions of the Access to Information Act and the Privacy Act.





# **ANNEX 2**

## **BIOGRAPHIES OF EXPERT PANEL MEMBERS**

## JOHANNE GÉLINAS PANEL CHAIR

Johanne Gélinas is a Partner in Raymond Chabot Grant Thornton's Strategy and Performance Consulting Group and in charge of its Sustainability and Greenhouse Gas Management practice. Before joining Raymond Chabot Grant Thornton, she led the Sustainable Development and Climate Change practice at Deloitte, from 2007 to 2012.



Johanne was the Canadian Commissioner of the Environment and Sustainable Development from 2000 to 2007. She also served for 10 years as Commissioner with the Government of Quebec BAPE (Bureau d'audiences publiques sur l'environnement). She recently led the think tank and public consultation on the social acceptability issue for the Ministère de l'Énergie et des Ressources naturelles du Québec.

Johanne is a certified Global Reporting Initiative (GRI) trainer. She has been teaching at the Collège des administrateurs de sociétés since 2011. She is currently Chair of the Board of Protégez-Vous magazine and a member of the Board of Directors for the Espace Libre Theatre. She was also Chair of RECYC-Québec's Board of Directors.

She received the 2009 UQAM Recognition Award for her innovative vision and commitment to sustainable development. She also was awarded the Prix Femmes d'affaires du Québec, and won the 2012 Korn/Ferry Award for Enterprise Governance Excellence. Première en affaires recognized her as one of the top eight individuals in Quebec's governance industry.

## DOUG HORSWILL PANEL MEMBER

Doug Horswill retired as Senior Vice President, Sustainability and External Affairs, Teck Resources in April 2014. Doug holds a Bachelor of Applied Science degree in Mineral Engineering and a Master of Arts degree in Economics from the University of British Columbia.

Following 20 years in the Public Service, culminating in the positions of Deputy Minister of Finance and Corporate Relations and Deputy Minister of Energy, Mines and Petroleum Resources for the Province of British Columbia, Doug joined Cominco Ltd., later Teck Resources Ltd., as Vice President, Environment and Public Affairs in September 1992. He spent the next 22 years developing and leading Teck's sustainability, community relations, environment, health, safety and external relations areas including Teck's international zinc and health program.

Doug is past Chairman of the Mining Association of Canada and the Mining Association of British Columbia. He recently served as Chairman of the Board of Resource Works and is a member of the Boards of the Sunny Hill Health Care Centre for Children, The International Fertilizer Development Center, Providence Health Care and the Canadian International Resource Development Institute. He is past Board Member of CARE Canada and the Vancouver Aquarium and Marine Research Center. He is an Executive in Residence for the Asia Pacific Foundation of Canada.

Doug was awarded the Queen Elizabeth Diamond Jubilee medal for service in international development charitable sector.



## ROD NORTHEY PANEL MEMBER

Rod Northey is an environmental lawyer and partner in the Toronto office of Gowling WLG. He is in his 27th year of private practice and certified by the Law Society of Upper Canada as a specialist in environmental law.

Rod is author of the 2016 Guide to the *Canadian Environmental Assessment Act* (LexisNexis), a 1994 annotation of federal environmental assessment law and panel reviews, and law journal articles on infrastructure planning, and federalism and environmental law.

Rod is an adjunct faculty member at Osgoode Hall Law School's Municipal Law LLM program for a graduate course on environmental protection. He is recognized by his peers in national and international listings, including



Lexpert, Canada's Best Lawyers, and Who's Who Legal: The International Who's Who of Business Lawyers.

Throughout his career, Rod has been active in environmental law reform. He has been retained by the federal government to deal with the precautionary principle, apply environmental assessment to Crown corporations, and apply environmental assessment to projects outside Canada. He has

also appeared before parliamentary committees on constitutional law and environmental assessment. In Ontario, Rod was on the 2004 task force to establish the Ontario Greenbelt, and on the 2005 advisory committee to reform environmental assessment to better address green energy, transit and waste management projects.

Outside his legal practice, Rod is chair of the Friends of the Greenbelt Foundation and the Greenbelt Fund.

## RENÉE PELLETIER PANEL MEMBER

Renée Pelletier is the managing partner at Olthuis Kleer Townshend LLP, one of Canada's leading Aboriginal rights law firms. Renée is Maliseet and grew up in Nova Scotia. Renée practices

Aboriginal rights and environmental law. She regularly advises and represents her Indigenous clients on consultation matters, regulatory and environmental matters, reserve land management and impacts and benefits agreements. Her practice also includes work on Aboriginal and treaty rights litigation and specific claims. She has litigated judicial review applications and appeared before various levels of courts

on motions, trials and appeals. Renée was cited by the Supreme Court of Canada in the high-profile case *R. v. Ipeelee*, 2012 SCC 13. Renée is especially passionate about assisting her Indigenous clients in achieving greater self-determination. She also strives to incorporate the legal traditions of her Indigenous clients into the work she does on their behalf.

Renée has worked at Aboriginal Legal Services of Toronto, volunteered for the Native Women's Resource Centre, and worked with the Innocence Project about the case of Native American Activist Leonard Peltier. Renée was also a Native Court Worker at College Park Criminal Court.

Renée is a member of the New Brunswick and Ontario Bars. She is French Acadian, her first language is French, and she is fluently bilingual in both French and English. Renée is also a member of the Indigenous Bar Association.





# **ANNEX 3**

## **DISCUSSION PAPER: SUGGESTED THEMES FOR DISCUSSION**



## ENVIRONMENTAL ASSESSMENT IN CONTEXT

Recognizing the goal that decisions made by the federal government should be sustainable and in the public interest, consideration must be given to selecting planning and regulatory tools which are fair, reliable and effective. These tools should take into account three pillars: environmental, social and economic.

Environmental assessment is one such planning tool to predict environmental effects of proposed initiatives before they are carried out. When it comes to actions in Canada, there are often competing interests and different points of view. It is important that Canadians and Indigenous Peoples trust that environmental assessment processes in Canada are fair, robust, based on valid science, facts and evidence, including Indigenous traditional knowledge and will protect the environment.

Given the Government of Canada's international and national environmental and social commitments such as addressing climate change, sustainable economic growth and supporting the United Nations Declaration on the Rights of Indigenous Peoples, now is the time to ask the questions: how does, and how *could*, environmental assessment contribute to Canadians' and Indigenous Peoples' trust that the review process has been complete, fair, and effective, and that it aligns with these important commitments.

- Q1 - To what extent do current federal environmental assessment processes enable development in Canada that considers the environment, social matters and the economy?
- Q2 - What outcomes do you want federal environmental assessment processes to achieve in the future?
- Q3 - How can federal environmental assessments support investor certainty, community and environmental wellbeing, the use of best available technology, certainty with respect to the protection of Aboriginal and treaty rights and timely decision-making?
- Q4 - How should federal environmental assessment processes address the Government of Canada's international and national environmental and social commitments, such as sustainable economic growth and addressing climate change?

## OVERARCHING INDIGENOUS CONSIDERATIONS

The Government of Canada consults with Indigenous Peoples as part of the environmental assessment process for a variety of reasons, including: statutory and contractual obligations, policy and good governance, and the constitutional duty to consult. Additionally, current legislation requires the assessment of the potential for adverse effects on Aboriginal peoples' resulting from a change in the environment on land use, health and socio-economic conditions, physical and cultural heritage; and structures, sites, and things of significance.

The Government of Canada has indicated that it is seeking to renew relationships with Indigenous People in Canada and move towards reconciliation. It has also recently indicated that it fully supports the principles of the United Nations Declaration on the Rights of Indigenous Peoples.

- Q1 - How can federal environmental assessment processes better reflect and incorporate the multiple ways in which Indigenous Peoples may interact with federal environmental assessment, including as potentially affected rights holders, proponents of development, self-governing regulators, and partners?
- Q2 - How is the need to address potential impacts to potential and established Aboriginal and treaty rights best incorporated into the federal environmental assessment process?
- Q3 - What is the best way to reflect the principles of United Nations Declaration on the Rights of Indigenous Peoples, including the principles of Free, Prior and Informed Consent and the right to participate in decision-making in matters that would affect Indigenous rights, in federal environmental assessment processes?
- Q4 - What role should Indigenous traditional knowledge play in federal environmental assessments and what are some international best practices?
- Q5 - How can the practices and procedures associated with federal environmental assessments, as well as the process itself, support the Government of Canada's



goal of renewing the nation-to-nation relationship with Indigenous Peoples and moving towards reconciliation?

## PLANNING ENVIRONMENTAL ASSESSMENT

The planning stage of environmental assessments determines whether an environmental assessment is needed, the breadth of issues to be covered, and the type of assessment required.

The emphasis of current federal environmental assessment processes is on project-specific environmental assessments. At present, major projects potentially subject to a federal environmental assessment are identified in a supporting regulation, the *Regulations Designating Physical Activities*. In addition, the Minister of the Environment and Climate Change may require that a project undergo an environmental assessment if she is of the opinion that it may cause adverse environmental effects or public concern.

Under existing federal legislation, project environmental assessments evaluate the adverse environmental effects likely to result from a project that are within federal jurisdiction. The foundation for all such assessments is effects on fish, migratory birds, impacts of a transboundary nature, and impacts on Aboriginal people resulting from a change in the environment. Additional effects can be assessed where a project requires a federal regulatory approval, such that the effects relevant to that approval are part of the assessment. These two perspectives define the scope of effects in current federal environmental assessments.

A federal project environmental assessment must also consider additional factors. Some key factors to consider under the current approach include: cumulative effects likely to result from the project in combination with other projects, the effects of accidents and malfunctions, mitigation measures, the significance of effects, and comments from the public.

In addition to project-specific environmental assessments, the *Canadian Environmental Assessment Act, 2012* also applies to federal decisions on projects outside Canada or on federal lands inside Canada. These decisions must

not be carried out unless the federal body determines that the project is not likely to cause significant adverse environmental effects or Governor in Council decides that these effects are justified.

There are also provisions that provide the Minister of the Environment and Climate Change with the authority to establish a committee to conduct a regional study to assess cumulative effects at a regional scale. Regional studies provide for a more comprehensive analysis of potential impacts in an area and help to inform future environmental assessment decisions.

Finally, under current policy and not legislation, federal government bodies conduct strategic environmental assessments on their new plans, programs or policies when the following conditions are met: the proposal is submitted to a Minister or Cabinet for approval and when the proposal may result in important positive or negative environmental effects. For example, strategic environmental assessments are conducted for international trade agreements.

- Q1 - Under what circumstances should federal environmental assessment be required?
- Q2 - For project environmental assessments, do you think the current scope and factors considered are adequate?
- Q3 - Are there other things (effects, factors, etc.) that should be scoped into an environmental assessment?
- Q4 - Under which circumstances should environmental assessment be undertaken at the regional, strategic or project-level?
- Q5 - Who should contribute to the decision of whether a federal environmental assessment is required?

## CONDUCT OF ENVIRONMENTAL ASSESSMENT

The current federal environmental assessment legislation makes three bodies responsible for conducting project environmental assessments. These bodies, referred to as responsible authorities, are the Canadian Environmental Assessment Agency, the National Energy Board and the



Canadian Nuclear Safety Commission. Each responsible authority has its own process, timelines, scoping, and transparency requirements.

A common element to all three processes is the preparation of an Environmental Impact Statement by the proponent. This document is based on scoping guidance from the responsible authority. An Environmental Impact Statement provides detailed information to assess the potential adverse effects of a proposed project and support conclusions on the significance of those effects after implementation of mitigation measures.

The public, government experts, Indigenous groups and environmental organizations provide comments on this information. The responsible authority then reviews all of the information provided, asks questions of the proponent and other participants in the process, and prepares the Environmental Assessment Report. The report includes the responsible authority's proposed mitigation measures and recommendations on the likelihood of significant adverse environmental effects.

- Q1 - Who should be responsible for conducting federal environmental assessments? Why?
- Q2 - What should be the role(s) of the proponent, Indigenous Peoples, the public, environmental organizations, experts, the government and others in the planning of, collection, analysis and review of environmental assessment-related science including community and Indigenous traditional knowledge?
- Q3 - How can environmental assessment processes be improved to ensure a timely, yet thorough process has been conducted?

## DECISION AND FOLLOW-UP

In the decision-making phase of the current environmental assessment process, mitigation measures are taken into account prior to a decision being made on whether there is likely to be significant adverse environmental effects resulting from a project. Identified mitigation measures must be technically and economically feasible and, where appropriate, the success of their implementation can be measured in a follow-up program.

A decision on the likelihood of significant adverse environmental effects of the project is required. The Minister of Environment and Climate Change makes the decision where the Canadian Environmental Assessment Agency is the responsible authority. Cabinet makes the decision where the National Energy Board is the responsible authority. The Canadian Nuclear Safety Commission makes the decision where it is the responsible authority. For all responsible authorities the decision on whether any significant adverse effects are justified in the circumstance is made by Cabinet. If the project is approved, a decision statement or licence would be issued to the proponent including enforceable conditions.

- Q1 - What types of information should inform environmental assessment decisions?
- Q2 - What would a fair, transparent and trustworthy decision-making process look like?
- Q3 - Who should participate in the implementation of follow-up and monitoring programs and how should that participation be encouraged or mandated?
- Q4 - Are enforceable conditions the right tool to ensure that the Government of Canada is meeting its environmental assessment objectives and, if so, who should have a role in compliance and enforcement?
- Q5 - Given that environmental assessment decisions are made in the planning phase of proposed actions, how should these decisions manage scientific uncertainty?

## PUBLIC INVOLVEMENT

Public participation is a part of the environmental assessment process. Ideally, it allows those with concerns or those who may be affected by a decision to be involved in the planning process and have their voices reflected in the outcome of the process. Community knowledge provided through public participation should not only help inform decisions, but may help identify potential environmental effects and may influence project design at an early stage.

Currently, the federal legislation provides several opportunities for public participation in federal project environmental assessments. The law also requires that



participant funding be made available. As well, each responsible authority or panel may provide additional opportunities for the public to provide input during the environmental assessment process such as commenting on the Environmental Impact Statements prepared by the proponent. The Canadian Environmental Assessment Agency maintains an online registry to provide access to information about specific project environmental assessments. The Canadian Nuclear Safety Commission and the National Energy Board also provide opportunities for the public to participate through their hearing process.

- Q1 - What do you think meaningful, effective and inclusive participation in the environmental assessment process looks like?
- Q2 - To what extent are current opportunities for public participation in federal environmental assessment processes adequate?
- Q3 - To what extent do you feel your views are considered in environmental assessments?
- Q4 - What information do you need during an environmental assessment to allow you to effectively participate? What capacity support should be provided and at what stage in the process would that support enable meaningful engagement?

## COORDINATION

In Canada, the environment is an area of shared jurisdiction between federal and provincial governments. Both federal and provincial governments have legislated requirements for environmental management as well as for environmental assessment. Additionally, environmental assessment is covered by several comprehensive land claim and self-government agreements with First Nations across Canada.

Under the current legislation there are five ways in which project environmental assessments can be undertaken to reduce duplication and be more efficient:

1. A responsible authority may delegate the carrying out of any part of the environmental assessment including the preparation of the environmental assessment report.

2. The federal government and other jurisdictions may coordinate their efforts, including notifying each other when they have environmental assessment responsibilities with respect to a project and sharing information throughout the environmental assessment process.
3. The legislation allows for the process of another jurisdiction to be substituted for a federal process. The federal government still requires that the same information be analysed and still makes a decision at the end of the environmental assessment.
4. The legislation also allows for a provincial process to be deemed equivalent. In the case of equivalency, the provincial process is the only environmental assessment that applies and no federal decision is required.
5. For projects subject to panel review, options to coordinate with another jurisdiction's environmental assessment process are also available and include the establishment of joint review panels.

- Q1 - To what extent can the Government of Canada coordinate with other jurisdictions (e.g. provincial and/or Indigenous governments) while maintaining process integrity in the conduct of federal environmental assessments?
- Q2 - To what extent is the current approach to substitution and equivalency effective?
- Q3 - Do you think duplication between the federal environmental assessment process and the environmental assessment process of other jurisdictions exists? If yes, what are ways in which duplication could most effectively be reduced while maintaining process integrity?
- Q4 - How can Indigenous Peoples' inherent jurisdiction best be reflected and respected in the federal environmental assessment process?





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