Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

March 29, 2019 **BY EMAIL**

Senator Rosa Galvez, Chair
Standing Senate Committee on Energy, the Environment and Natural Resources
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Galvez:

RE: BILL C-69, PART 1 – *IMPACT ASSESSMENT ACT*

On behalf of the Canadian Environmental Law Association (CELA), I am writing to provide our comments and recommendations to the Standing Senate Committee in relation to the *Impact Assessment Act* (*IAA*) in Part 1 of Bill C-69, as passed by the House of Commons on June 20, 2018.

PART I - BACKGROUND

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

For over four decades, CELA has participated in various administrative and legal proceedings[1] under the *Canadian Environmental Assessment Act 2012* (*CEAA 2012*) and its predecessors, *CEAA 1992* and the *Environmental Assessment and Review Process* ("*EARP*") *Guidelines Order*. Similarly, CELA participated in the 2016 consultations held by the federally appointed Expert Panel in relation to Canada's environmental assessment (EA) processes. In addition, CELA filed detailed comments on the federal government's 2017 *Discussion Paper* on EA reform, and appeared as a witness in the 2018 hearings on Bill C-69 held by the House of Commons Standing Committee on Environment and Sustainable Development.[2]

For the purposes of preparing this brief, CELA has reviewed the Second Reading debate in the Senate in relation to Bill C-69. We have also considered all of the witness testimony on the *IAA* offered to the Standing Senate Committee to date. In addition, we have read all of the written submissions regarding the *IAA* that have been posted on the Standing Senate Committee's website.[3]

[1] For example, CELA intervened in *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6, and has served as counsel for other environmental groups involved in federal EA cases in the Federal Court and Federal Court of Appeal.
[2] CELA's submissions on federal EA reform are available at the CELA website: http://www.cela.ca/collections/justice/canadian-environmental-assessment-act. Many of the comments in this brief reiterate and expand upon CELA's previous submissions to the Expert Panel and to the Government of Canada in relation to Bill C-69.
[3] See https://sencanada.ca/en/committees/ENEV/Briefs/42-1?oor_id=499144.

CELA's general comments on the *IAA*, and our responses to statements made by opponents and supporters of the *IAA*, are set out below in Part II of this brief. Our recommended amendments to the *IAA* are outlined below in Part III, and our overall conclusions are contained in Part IV of this brief.

PART II – CELA'S GENERAL COMMENTS ON THE *IAA*

(a) CELA's Position on the IAA

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

In principle, CELA strongly supports legislation that fully implements the federal government's stated objective of establishing national assessment processes that "regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous persons, ensure good projects go ahead, and resources get to market."[4] However, unless the *IAA* is substantially amended, CELA concludes that the legislation falls short of meeting these laudable objectives.

In reaching this conclusion, CELA acknowledges that the *IAA* contains some new provisions not currently found in *CEAA 2012* that are potentially useful for assessment purposes, such as:

- establishing a new single authority (the Impact Assessment Agency of Canada) to conduct and coordinate impact assessments for designated projects;
- mandating an early planning phase intended to solicit Indigenous and public input on various aspects of the proposed project and the particulars of the upcoming impact assessment process;
- broadening the scope of impact assessment by requiring the evaluation of the need for, and alternatives to, the proposed project, and by reviewing potential changes in health, social, and economic conditions, rather than just environmental effects;
- setting out statutory considerations for decision-making under the Act, including whether the project makes a "contribution to sustainability"; and
- requiring reasons for decisions that approve (or reject) projects under the Act.

In our view, these reforms are important steps in the right direction, and they definitely should be retained (if not strengthened) in any serious legislative attempt to repeal and replace *CEAA 2012*.

However, CELA notes that there is a continuing absence of implementation details in the *IAA* that adequately explain how these new provisions are going to be interpreted and applied in project-specific assessments, let alone regional or strategic assessments under the Act.

This problem is compounded by the fact that to date, no draft regulations, policies, or guidelines have been released so that proponents, stakeholders and members of the public can understand precisely how the various stages of the new *IAA* process may work in practice.

[4] *Discussion Paper*, page 3.

For example, although the *IAA* is on the verge of being passed by Parliament, the long-promised projects list regulation still has not been circulated in draft form for public consultation purposes.[5] This means that it is completely unknown at this time which types of projects will – or will not – be subject to the new *IAA* regime, or whether this regulatory list will be longer or shorter than the current inadequate list under *CEAA 2012*.

Accordingly, on the basis of the currently available information, CELA is unable to conclude that the new impact assessment process will be as effective, efficient and equitable as claimed by some supporters of the *IAA*.

At the same time, CELA remains concerned that the *IAA* carries forward many of the same problematic provisions found in *CEAA 2012*, rather than starting afresh with a new comprehensive statute advocated by many participants in the Expert Panel and *Discussion Paper* consultations. As correctly noted by the Mining Association of Canada in its presentation to the Standing Senate Committee:

> [T]he *Impact Assessment Act* is fundamentally built on *CEAA 2012*, using the same architecture. *CEAA 2012* itself was a very significant departure from previous environmental assessment legislation but Bill C-69 is not.[6]

To illustrate this point, CELA prepared a table of concordance[7] that sets out a side-by-side comparison of *CEAA 2012* provisions with their relevant counterparts in the *IAA*. This comparative chart readily demonstrates that there are far more similarities than differences between the two laws. In short, the *IAA* largely replicates the same information-gathering and decision-making structure that currently exists under *CEAA 2012*. For this reason, CELA respectfully disagrees with the claim made during the Senate's Second Reading debate that the *IAA* "completely disposes of the previous environmental review process."[8]

At the same time, some *IAA* supporters in the Senate have argued that the proposed law "strengthens" the federal environmental review process, and thus represents an improvement over *CEAA 2012*.[9] In reply, CELA respectfully submits that this argument is not very persuasive since *CEAA 2012* sets a relatively low bar for comparative purposes. On this point, we generally agree with the Premier of Alberta when she recently advised the Standing Senate Committee that *CEAA 2012* is "broken, misguided and damaging."[10] Similarly, the Premier of Newfoundland and Labrador correctly stated that "the status quo is not acceptable," and that "*CEAA 2012* is not working."[11]

In addition, while some *IAA* supporters acknowledge that the proposed legislation is not perfect,[12] they generally concede that the *IAA* could be improved in several key areas. CELA concurs with this latter suggestion. Therefore,

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[5] Deputy Minister Stephen Lucas (Environment and Climate Change Canada) indicated to the Committee that the list will be available "in the coming months." *Evidence* (February 6, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54523-e. However, Blaine Pederson, MPP (Manitoba Minister of Growth, Enterprise and Trade) advised the Standing Senate Committee on March 29, 2019 that his deputy minister had been briefly provided with a confidential copy of the draft projects list at a closed door meeting with federal officials: https://www.winnipegfreepress.com/local/ottawa-kept-info-from-provinces-minister-507496342.html.

[6] *Evidence* (February 26, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54565-e.

[7] See https://www.cela.ca/CEAA-vs-IAA.

[8] *Debates of the Senate*, per the Hon. David Tkachuk: https://sencanada.ca/en/content/sen/chamber/421/debates/262db_2018-12-12-e?language=e#49.

[9] *Debates of the Senate*, per the Hon. Grant Mitchell: https://sencanada.ca/en/content/sen/chamber/421/debates/226db_2018-09-18-e?language=e#51; per the Hon. Tony Dean: https://sencanada.ca/en/content/sen/chamber/421/debates/242db_2018-10-31-e?language=e#50.

[10] *Evidence* (February 28, 2019): https://sencanada.ca/en/Content/Sen/Committee/421/ENEV/54580-e.

[11] *Ibid*.

[12] See, for example, the brief filed by the Wilderness Committee (https://sencanada.ca/content/sen/committee/421/ENEV/Briefs/2019-03-18_C-69_WildernessCom_e.pdf). See also the brief filed by the Native Women's Association of Canada: https://sencanada.ca/content/sen/committee/421/ENEV/Briefs/2019-01-24_C-69_Native_e.pdf.

the overall purpose of his brief is to offer the Standing Senate Committee some specific reforms that are intended to upgrade the *IAA* before it is enacted and proclaimed into force.

In terms of timing, CELA submits that this amendment exercise should be undertaken as expeditiously as possible so that the new and improved *IAA* is passed before the current Parliamentary session ends later this year. In our view, Parliament must not squander this opportunity to repeal the much-maligned *CEAA 2012*, and to replace it with stronger legislation that entrenches a robust, participatory and evidence-based impact assessment and decision-making process at the federal level in Canada.

In summary, CELA supports passage of the *IAA*, provided that it is amended to effectively address the key concerns and statutory recommendations described in this brief.

(b) CELA's Response to Industry and Governmental Claims about the *IAA*

Given the nation-wide importance of the *IAA*, CELA encourages the Standing Senate Committee to consider the diverse views, reasonable recommendations and informed commentary submitted by persons, non-governmental organizations, Indigenous communities and public authorities interested in, or potentially affected by, the new legislation.

However, CELA is dismayed by the extensive misinformation that some Bill C-69 opponents have conveyed about the *IAA* after the legislation was referred to the Senate. In fact, some of these anti-*IAA* comments are so erroneous that CELA questions whether these commentators have actually read or properly understood the Act.

It is beyond the scope of this brief to rebut every questionable or misleading public statement that has been made in recent months in relation to the *IAA*. Nevertheless, in order to assist the Senate Standing Committee in its deliberations, CELA is compelled to correct the record and respond to some of the highly inaccurate comments made by Bill C-69 critics.

(i) The Omnipresent Pipeline Perspective

Bill C-69 (including the *IAA*) has been criticized by some commentators as a "no pipeline" bill.[13] In addition, some witnesses at the Standing Senate Committee hearings have raised high-profile pipeline cases (e.g. Northern Gateway, Trans-Mountain and Energy East) as the partial basis for their attacks upon the *IAA*, although these cases were decided under *CEAA 2012*. Similarly, Senators who have debated the pros and cons of the *IAA* have often invoked or referred to specific pipeline projects in their remarks.[14]

In CELA's view, it is important to consider the pipeline sector (and other sectors) when deciding whether – or to what extent – that the *IAA* requires amendments. However, CELA submits that it is inappropriate and unduly restrictive to view the *IAA* largely through the lens of pipeline projects. This is because the current environmental review process under *CEAA 2012* applies to much broader classes of activities and facilities, and it is reasonable to anticipate that the *IAA* will similarly apply to a wide variety of major projects outside of the pipeline industry.

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[13] *Evidence* (February 28, 2019), per Premier Rachel Notley: https://sencanada.ca/en/Content/SEN/Committee/421/enev/54580-e.

[14] *Debates of the Senate*, per the Hon. Grant Mitchell: https://sencanada.ca/en/content/sen/chamber/421/debates/226db_2018-09-18-e?language=e#51; per the Hon. Andre Pratte: https://sencanada.ca/en/content/sen/chamber/421/debates/238db_2018-10-23-e?language=e#40; per the Hon. Eric Forest: https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#57; per the Hon. Paula Simmons: https://sencanada.ca/en/content/sen/chamber/421/debates/245db_2018-11-07-e?language=e#41; per the Hon. Denise Batters: https://sencanada.ca/en/content/sen/chamber/421/debates/262db_2018-12-12-e?language=e#49; per the Hon. David Tkachuk: https://sencanada.ca/en/content/sen/chamber/421/debates/262db_2018-12-12-e?language=e#49.

Accordingly, CELA recommends that the Standing Senate Committee should refrain from proposing amendments that are intended to expedite (or even exempt) pipeline projects under the *IAA*. In essence, the *IAA* establishes an information-gathering and decision-making process that should be applicable to all designated projects, not just pipelines. Put another way, no particular sector or project type should receive preferential treatment (or express legislative exemptions) under the *IAA*.

(ii) Unrealistic Doomsday Predictions

The Standing Senate Committee has heard claims that if enacted, the *IAA* will mean that no more major pipelines will be approved in Canada.[15] A variation of this theme is that no more oilsands projects will get approved if the *IAA* is passed, and that *IAA*-induced uncertainty will cause a flight of investment capital from Canada's resource development sectors.[16] Similar arguments were made by some Senators during Second Reading debate on Bill C-69.[17]

In addition, Saskatchewan's Minister of Energy and Resources asserted that under the *IAA*, it would take a uranium mine "seven to fifteen years" to get approved.[18] A representative of the Ontario government predicted that Bill C-69 "would make it impossible to build new or replace existing pipelines," "could potentially grind to a halt natural resource and economic development" in the province, and "stymie economic growth and competitiveness, kill jobs and rob hard-working Ontario families of the opportunities they have a right to access."[19]

In CELA's view, these kinds of sweeping claims are unsubstantiated, inconsistent with the provisions of the *IAA*, and contrary to the actual approval track record under the federal environmental review process under *CEAA 2012* (and its predecessor *CEAA 1992*). As noted above, the *IAA* is substantially similar to *CEAA 2012* in many key aspects, and it is well-documented that the vast majority of projects have been approved – not rejected – under the federal EA process.[20] Similar success rates exist in the National Energy Board (NEB) context, as Mr. Robert Steedman, NEB Chief Environment Officer, advised the Committee that he could not point to a single example of where Cabinet decision-makers refused to allow energy projects to proceed if they had been approved by the NEB.[21]

As noted by the Mining Association of Canada, it is commonplace to hear political or sectoral complaints about the relatively small number of individual major projects that failed to get approval for one reason or another, but there is often little or no public discussion about the far more numerous projects that are approved under the federal environmental review process.[22] While some of Canada's resource sectors may indeed be currently facing challenges (e.g. low oil or commodity prices, trade tariff wars, changed demand in overseas markets, investor

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[15] *Evidence* (February 6, 2019), per the Hon. Jane Cordy: https://sencanada.ca/en/Content/SEN/Committee/421/enev/54523-e.
[16] *Evidence* (February 19, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54536-e; *Evidence* (February 28, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54580-e.
[17] *Debates of the Senate*, per the Hon. Douglas Black: https://sencanada.ca/en/content/sen/chamber/421/debates/234db_2018-10-04-e?language=e#46; per the Hon. Pierre-Hugh Boisvenu: https://sencanada.ca/en/content/sen/chamber/421/debates/245db_2018-11-07-e?language=e#41; per the Hon. Nicole Eaton: https://sencanada.ca/en/content/sen/chamber/421/debates/252db_2018-11-27-e?language=e#43; per the Hon Denise Batters: https://sencanada.ca/en/content/sen/chamber/421/debates/262db_2018-12-12-e?language=e#49.
[18] *Evidence* (February 28, 2019), per Bronwyn Eyre, MPP: https://sencanada.ca/en/Content/SEN/Committee/421/enev/54580-e.
[19] *Evidence* (February 26, 2019), per Greg Rickford, MPP: https://sencanada.ca/en/Content/SEN/Committee/421/enev/54565-e.
[20] Martin Olszynski, "Sober Second Thoughts: Debunking the Myths and Clarifying the Impacts of Bill C-69" (March 7, 2019): https://law.ucalgary.ca/sites/default/files/teams/2/2019-sober-second-thoughts-c69.pdf?fbclid=IwAR10TysOFWVbIwS6UFWc-38XmSD1761XFPMiASFIfIJQOFmHf8KFA5sXUIc.
[21] *Evidence* (February 7, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54526-e.
[22] *Evidence* (February 26, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54565-e.

interest in clean energy, etc.), CELA submits that these macro-economic factors are beyond the purposes and scope of the *IAA*, which is not even in force yet. In short, the *IAA* should not be blamed or used as a scapegoat by industrial proponents (particularly those receiving taxpayer-funded subsidies) or their governmental supporters.

(iii) Regulators' Proper Role in Impact Assessment

Certain regulatory agencies, boards and commissions have appeared before the Standing Senate Committee to assert their institutional expertise in identifying and evaluating the potential environmental effects of the industries that they regulate. Moreover, during the Senate's Second Reading debate on the *IAA*, it was suggested that Bill C-69 unduly "trashes" regulators such as the NEB and Canadian Nuclear Safety Commission (CNSC).[23] In CELA's respectful submission, this unfortunate statement reflects a misreading of the *IAA* provisions which enable members of these regulatory bodies to serve on review panels that will conduct assessments of, and provide reports on, designated projects under the Act. In addition, the *IAA* fully permits these bodies to continue their post-assessment regulatory functions for designated projects that receive approval under the *IAA*, and for non-designated projects that are not subject to the *IAA*.

For its part, the CNSC submitted that as a life-cycle regulator, it has "significant and specialized nuclear expertise."[24] CELA does not disagree with this self-evaluation in the regulatory context under the *Nuclear Safety and Control Act* (*NSCA*), and CELA acknowledges the CNSC's experience in licencing nuclear projects. However, CELA concurs with the Expert Panel's conclusions that "regulation and assessment are two quite distinct functions that require different processes and expertise," and that "the narrow mandate of regulators prevents them from fully assessing projects in specific situations."[25]

Accordingly, CELA supports having nuclear impact assessments conducted by review panels, rather than by the CNSC itself. Significantly, during her testimony before the Standing Senate Committee, the President of the CNSC expressed no objection to the *IAA*'s proposal to have designated nuclear projects assessed by review panels which include appointees from the CNSC.[26] In doing so, she conceded that the new impact assessment agency will have a broader mandate to consider certain issues (e.g. socio-economic impacts) that the CNSC has not traditionally examined when conducting EAs under *CEAA 2012*.[27] This, of course, raises the threshold question of which nuclear projects will actually be subject to the *IAA* process, as discussed below.

More generally, CELA submits that properly framed, fairly conducted, adequately staffed and sufficiently resourced review panel hearings represent the highest and best form of public participation in the impact assessment process. Not only do review panels offer parties an important opportunity to present (or challenge) evidence on the subject matter of the hearing, but they also enhance the overall credibility, completeness and fairness of the information-gathering stage and significantly assist in facilitating informed decision-making under the *IAA*. In our view, this contributes to the legitimacy of, and public trust in, the assessment process under the *IAA*.

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[23] *Debates of the Senate*, per the Hon. Dennis Glen Patterson: https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#57; per the Hon. Scott Tannas: https://sencanada.ca/en/content/sen/chamber/421/debates/246db_2018-11-08-e?language=e#55. The Canadian Association of Petroleum Producers has similarly claimed that Bill C-69 "marginalizes" federal regulators: *Evidence*, February 19, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54536-e.
[24] *Evidence* (February 7, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54526-e.
[25] Expert Panel Report, pages 50 to 51.
[26] *Evidence* (February 7, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54526-e.
[27] *Ibid*.

(iv) Calls to Constrain the Application of the IAA

In general terms, the Standing Senate Committee is tasked with studying and reporting upon the *IAA*, and potentially proposing amendments to the legislation. Strictly speaking, the related but separate issue of the various regulations needed to implement the *IAA* is not before the Committee. Nevertheless, some Committee hearings have featured discussions on the types of projects which, in some stakeholders' views, should not be caught by the forthcoming projects list regulation under the *IAA* (e.g. in situ oilsands projects, offshore exploration drilling, etc.).[28]

For example, while the CNSC has reportedly provided advice to the federal government on which nuclear projects should be designated (or not), the President did not disclose to the Committee whether the CNSC believes that small modular reactors (SMRs) should be subject to the *IAA* process.[29] However, on behalf of the Ontario government, Greg Rickford, Minister of Energy, Northern Development and Mines, praised SMRs and recommended that all "nuclear energy projects should be outside the purview of Bill C-69," and should instead remain subject only to the regulatory control of the CNSC.[30]

In CELA's view, Ontario's unprecedented recommendation must be soundly rejected by the Standing Senate Committee. First, CELA notes that there has been no difficulty under *CEAA 2012* (or its predecessor *CEAA 1992*) for Ontario's nuclear fleet to obtain approvals for building, refurbishing or extending the operation of nuclear reactors (e.g. Pickering, Bruce and Darlington). Therefore, there is no air of reality to the Ontario government's argument that the substantially similar *IAA* will excessively constrain Ontario's nuclear power sector.

Second, the Ontario government appears to have conflated impact assessment with regulatory licencing, which are not synonymous for the above-noted reasons described by the Expert Panel. Moreover, the CNSC, on its own admission, does not evaluate socio-economic effects within its *NSCA* licencing process, which cannot be seriously construed as a robust and comprehensive impact assessment regime.[31]

Third, if nuclear energy projects in general (or SMRs in particular) are excluded from *IAA* coverage, then there will be no credible sustainability-based assessment of the environmental, health, economic or social impacts of new, expanded or refurbished nuclear energy projects before they proceed. In CELA's view, giving the nuclear power industry a free pass under the *IAA* is the antithesis of sound and precautionary environmental planning, and should not be countenanced by Parliament. This is particularly true since the Ontario government does not apply its own *Environmental Assessment Act* to the provincial nuclear fleet or to long-term energy planning exercises.

As a matter of public interest, CELA therefore recommends that all nuclear energy projects[32] should be fully subject to the *IAA* since they generally raise environmental, health and socio-economic issues, as well as broader sustainability considerations, which are best addressed by review panels. This recommendation is based on our experience to date in federal EAs and CNSC licencing proceedings in relation to various proposals to build, refurbish, extend the life of, dispose of waste from, or decommission nuclear energy facilities, such as:

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[28] *Evidence* (February 7, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54526-e; *Evidence* (February 19, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54536-e.
[29] *Evidence* (February 7, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54526-e.
[30] *Evidence* (February 26, 2019): https://sencanada.ca/en/Content/SEN/Committee/421/enev/54565-e.
[31] See http://www.cela.ca/blog/2018-12-07/erroneous-CNSC-message-could-allow-nuke-projects-escape-EA.
[32] These nuclear energy projects that should be covered by the *IAA* include, but are not necessarily limited to: new reactor projects such as SMRs; decommissioning projects; radioactive waste repositories; and reactor refurbishment/life extension projects which were excluded from review under *CEAA 2012*.

- the Deep Geological Repository for low- and intermediate level radioactive waste;
- the proposed underground repository for high-level (fuel) waste;
- the Near Surface Disposal Facility at the Chalk River site;
- the construction and operation of new reactors at the Darlington nuclear generating station;
- the refurbishment, continued operation and licencing of existing reactors at the Darlington, Pickering Bruce and Point Lepreau nuclear generating stations (and their emergency planning procedures), as well as the recently shut-down NRU reactor at the Chalk River site;
- the proposed export of radioactive steam generators from the Bruce nuclear generating station;
- the import of mixed oxide (MOX) fuel shipments from Russia to the Chalk River site; and
- the proposed decommissioning of nuclear facilities at Rolphton, Ontario and Whiteshell, Manitoba.

More generally, CELA recommends that the forthcoming projects list regulation must ensure that all environmentally significant activities which engage federal decision-making, and which may affect sustainability, are designated by regulation under the *IAA*.[33] Where there is uncertainty regarding the nature, extent, frequency, mitigability or significance of impacts associated with a particular activity, then, in accordance with the precautionary principle, the activity should be prescribed by the *IAA* regulation.

It should be recalled, however, that under the current *IAA*, merely listing a particular type of project in the regulation does not actually guarantee that an impact assessment will be carried out. This is because section 16 of the *IAA* empowers the Impact Assessment Agency of Canada to dispense with the need to conduct an assessment for specific designated projects. As described below, CELA recommends the deletion of section 16 due to the uncertainty and inconsistency that this provision creates if it is retained and used extensively under the *IAA*.

PART III - CELA'S RECOMMENDED AMENDMENTS TO THE *IAA*

It is beyond the scope of this brief to comment upon all of the *IAA* provisions that require changes (or not) before the Act is passed by Parliament.[34] Instead, this Part of CELA's brief describes our high-priority *IAA* recommendations to better ensure that the legislation achieves its intended purposes and the federal government's law reform goals.

For the convenience of the Standing Senate Committee, these recommendations have been organized into eight general topics or themes, and they reflect CELA's views on which key components of the *IAA* should be amended, added or deleted. For each recommendation, we have provided a brief statement of the rationale underlying our proposal.

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[33] See CELA's detailed comments on the *IAA* project listing criteria: http://www.cela.ca/CELASubmissionsReProjectListingCriteria.
[34] With respect to the *IAA* in general, CELA commends the numerous recommendations contained in the brief prepared by Dr. Robert Gibson: https://sencanada.ca/content/sen/committee/421/ENEV/Briefs/2019-03-15_C-69_RobertGibson_e.pdf.

(a) Definitions and Purposes of the *IAA*

- A restrictive definition of "directly affected person" or "interested party" should not be inserted into the *IAA*;

  Rationale: Since the *IAA*'s preamble, purposes and provisions are premised upon meaningful public participation in impact assessments, there is no public policy justification, or evidence-based reasoning, for excluding Canadians from participating in the impact assessment process.

- Section 2 should be amended by adding a new definition of "meaningful public participation" as follows:

  "Meaningful public participation" means a fair, accessible and flexible two-way communication process that engages persons, groups and communities in impact, regional and strategic assessments in a respectful, effective and iterative manner.

  Rationale: Section 11 of the *IAA* requires meaningful public participation, but fails to define it. In CELA's view, an upfront definition would assist in the interpretation and application of this section and other sections which reference public participation.

- Section 6 should be amended by adding a new detailed statement of purpose in relation to public participation, as follows:

  6(4)(a) For the purposes of providing meaningful public participation under this Act, the Agency, Minister, review panels, federal authorities and the Governor in Council shall take all reasonable steps to establish participatory processes in all stages of impact, regional and strategic assessments in order to:

  (i) identify public concerns;

  (ii) ensure that timely notification and all relevant information is provided to the public in appropriate means, formats and languages;

  (iii) provide reasonable timelines for public review and comment;

  (iv) use a mix of appropriate mechanisms for soliciting public input or resolving public concerns, including in-person meetings, workshops, open houses, information centres, mediation, or other forms of alternative dispute resolution;

  (v) ensure the provision of participant funding in amounts commensurate with the size, scale, complexity or effects of the subject matter of impact, regional or strategic assessments;

  (vi) facilitate the planning, assessment, design, implementation, monitoring and follow-up programs of a designated project; and

  (vii) enable the Minister or the Governor in Council to make an informed decision on whether a designated project is in the public interest.

  (b) When exercising discretion under this Act in setting, suspending or extending time limits under this Act, the Agency, Minister, review panels, federal authorities and the Governor in Council shall consider

and apply the purposes described in subsection 6(1), the duties described in subsections 6(2) and (3), and the requirements of subsection 6(4)(a);

(c) When exercising discretion in determining how meaningful public participation opportunities will be provided in impact, regional and strategic assessments, the Agency, Minister, review panels, federal authorities and the Governor in Council shall consider and apply the purposes described in subsection 6(1), the duties described in subsections 6(2) and (3), and the requirements of subsection 6(4)(a).

Rationale: Section 11 of the *IAA* merely contains a sparse sentence on public participation. Given the central importance of meaningful public participation in all stages of the impact assessment process (e.g. from early planning to follow-up program implementation), CELA submits that the *IAA* purpose statement should be expanded to address the essential elements of meaningful public participation. In our view, meaningful public participation means more than simply allowing people to file written submissions during a prescribed comment period.

(b) Designating Physical Activities as Projects under the *IAA*

- Section 9 should be amended to specify that any person or jurisdiction may request the Minister to issue an order to designate a physical activity (or set of activities) that is not prescribed by the regulatory projects list.

Rationale: CELA agrees that the Minister should have the residual authority, on a case-by-case basis, to designate physical activities that are not on the regulatory projects list. However, section 9 does not currently clarify who is entitled to make designation requests.

(c) Early Planning Phase under the *IAA*

- Section 11 should be replaced by a more prescriptive set of duties imposed upon the Agency (or review panel, if applicable) during the planning phase, as follows:

11(1) The Agency shall ensure meaningful public participation during the planning phase of an impact assessment of a designated project, including opportunities for public input on the following matters:

(a) the proposed impact assessment cooperation plan, consisting of a public participation plan and an Indigenous engagement and partnership plan;

(b) the proposed impact statement guidelines to be issued to the proponent;

(c) the proposed plan for addressing federal permitting requirements, if applicable.

(2) The Agency, or review panel if applicable, shall solicit and consider public input on the proposed impact statement guidelines in relation to the information, methodology and level of detail needed to address the factors set out in section 22(1), including:

(a) the purpose of, and the need for, the designated project being proposed by the proponent;

(b) the range of potentially reasonable alternatives to the proposed project, from which the preferred alternative is identified;

(c) the appropriate scope of the project (including alternative methods), with particular attention to relevant components, and their potential effects, including those of consequential and induced development;

(d) the identification of the government agency or other body that will be responsible for evaluating a potentially reasonable alternative that is identified and needed for comparative purposes, but is beyond the interests and capacities of the proponent;

(e) the assignment of responsibility for addressing any major cumulative effects or larger policy issues that are raised by the proposed project and need to be taken into account in the assessment, but are beyond the reasonable capacity of the proponent to address adequately;

(f) the specification of sustainability criteria that recognize the key considerations related to the case and its context as well as the generic requirements for progress towards lasting wellbeing;

(g) the application of sustainability criteria to evaluate the effects of reasonable alternatives, and to select a preferred alternative;

(h) the final design details of the preferred alternative and any necessary mitigation and enhancement measures; and

(i) the appropriate monitoring and follow-up programs and assignment of responsibility for implementation of these matters.

(3) For each impact assessment of a designated project, the Agency shall establish and maintain a multi-party planning advisory committee, consisting of representatives of the public, Indigenous governing bodies, and other jurisdictions, in order to assist in implementing the Agency's duties under subsection (1) at the earliest possible opportunity and before any irrevocable decisions are made.

(4) The Agency shall ensure that adequate participant funding will be made available during the early planning phase;

(5) The planning phase of an impact assessment of a designated project shall commence when the proponent files, in the prescribed form, a detailed description of a reasonable range of alternatives that address the need, issue or opportunity that the proponent intends to pursue.

Rationale: As noted above, CELA finds that the single sentence in section 11 does not provide sufficient detail about exactly how members of the public will be engaged, or for what purpose, during the early planning stage. CELA's suggested re-writing of section 11 provides the missing details and overall objectives of the critically important planning phase.

- Section 16 should be deleted.

Rationale: If a class or type of activity is sufficiently environmentally significant (and potentially affects areas of federal interest) to warrant inclusion on the regulatory projects list, then it is inappropriate for the Agency to have the extraordinary power to subsequently determine that an individual project does not require an impact assessment under the *IAA*. Not only would the Agency's exercise of this statutory discretion thwart or defeat the Cabinet's purposes in prescribing the activity on the projects list in the first

place, but it also opens the door to considerable uncertainty about whether impact assessments will – or will not – be required on a case-by-case basis. In addition, this provision will likely transform the planning process, in many instances, into an intractable battle over whether an impact assessment should be required at all, as opposed to actually planning the assessment process so that it is conducted in a fair, effective and efficient manner.

- Section 17 should be retained without amendment.

  Rationale: While some witnesses before the Standing Senate Committee have raised concerns about section 17, CELA supports this provision since it enables proponents, stakeholders and the public at large to learn, at a very early stage, whether the proposed project may be a complete non-starter under federal law, regulation or policy. If a section 17 notice is issued by the Minister, the proponent may still elect to proceed into the impact assessment process, but it does so at its peril, having been forewarned about the possible outcome.

- Section 18 should be amended to add a new section 2.1 as follows:

  2.1 Where the Minister refers the assessment to a review panel pursuant to sections 36, 40 or 43, the duties and responsibilities of the Agency in subsections (1), (1.1) and (2) shall be exercised by the review panel, and the review panel may confirm, vary or expand the Agency's initial list of studies or information as may be appropriate for the panel to prepare its report in accordance with the Act.

  Rationale: As drafted, section 18 is unclear about the status of the Agency's initial information-gathering directions where the impact assessment is subsequently referred to a review panel (which may have its own ideas about what information or studies are required for the panel to properly discharge its duties under the *IAA*). CELA's proposed amendment addresses this apparent gap.

(d) Impact Assessment by the Agency or Review Panels under the *IAA*

- Subsection 22(d) should be amended to clarify that the purpose of, and need for, a designated project shall be considered on the basis of sustainability criteria [see section 11(2)(f), *supra*] and the public interest, rather than the proponent's own perspective.

  Rationale: For environmental planning purposes, CELA submits that a proponent's own interests should not be used as the pretext for narrowly describing or assessing the need for, and the alternatives to, the proposed project. Instead, the impact assessment should determine whether there is a demonstrable public need for the proposed project, and a reasonable range of "alternatives to" (and their effects) should be evaluated in order to assess the acceptability of the preferred alternative being advanced by the proponent.

- Subsection 22(f) should be replaced by the following clause:

  (f) a reasonable range of alternatives to the designated project that may address the purpose of and need for the project under paragraph (d).

  Rationale: Section 22(f) purports to limit the "alternatives to" analysis to those options that "are technically and economically feasible and directly related to the designated project." This qualifier did not exist in the First Reading version of the *IAA* that was introduced in the House of Commons, but was unfortunately added to the Third Reading version that is now before the Senate. In our view, this vague

qualifier creates considerable uncertainty about the obligation to consider "alternatives to" under the *IAA*, and should therefore be deleted. CELA further notes that this explicit qualifier was not found in *CEAA 1992* or *CEAA 2012*. In our experience, the careful and systematic comparison of alternatives (including the "null alternative" and functionally different "alternatives to" the proposed project) forms the cornerstone of sound impact assessment and decision-making.

- The *IAA* should be amended by adding new subsections 22(3) and (4), as follows:

  22(3) When making scoping decisions under subsection (2), the Agency, or the Minister, acting on the advice of the review panel where an impact assessment has been referred under sections 36, 40 or 43, shall not omit, exclude or eliminate any of the enumerated factors in subsection (1) from consideration during the impact assessment.

  22(4) For the purposes of greater certainty, "scoping" in this section means focusing, adjusting, or setting geographic or temporal boundaries on the factors listed in subsection (1).

  Rationale: CELA is concerned that injudicious use of the scoping power in subsection 22(2) could be used to screen out or jettison any of the mandatory factors set out in section 22. CELA has no objection in principle to finetuning the scope of the factors as may be appropriate in the circumstances of a particular project. However, CELA submits that it defeats the purpose of the *IAA* (and undermines predictability and certainty) if the Agency or Minister is permitted to fully remove a mandatory factor from consideration in the impact assessment process.

- Section 27 should be replaced by an expanded section that more fully addresses the Agency's public participation duties, as follows:

  27(1) The Agency shall ensure meaningful public participation during its impact assessment of a designated project, including opportunities for public input on all factors listed in subsection 22(1) and any proposed scoping of these factors.

  (2) The opportunities provided by the Agency under subsection (1) shall be in accordance with any regulations made under section 109 or 112 of this Act in relation to public participation.

  Rationale: Like section 11 of the *IAA*, there is a dearth of detail in section 27 that explains how the Agency is going to ensure meaningful public participation in the impact assessment process. CELA's proposed amendment requires meaningful public participation during scoping exercises as well as the assessment process, although we suspect that some of the implementation details will be prescribed by regulation.

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

  Rationale: Some witnesses before the Standing Senate Committee have raised concerns about the fixed timelines under the *IAA* (which are generally shorter than those found in *CEAA 2012*), and have objected to the possibility of Ministerial or Cabinet extensions of these timelines. CELA does not share these views, but at the same time, we do not necessarily support arbitrary deadlines that are established by statute. First, faster decisions are not necessarily better decisions. Second, while some impact assessments could conceivably be completed in 300 days or less, it is our experience that some larger, more complex or

highly controversial projects might require more time. In short, the impact assessment is supposed to be an iterative and participatory process, and it is not unusual for field work, studies or public and Indigenous input to flag the need for additional information or reports. For this reason, CELA's preference is for the Agency to develop appropriate case-specific timelines after receiving input from the proponent, stakeholders and other parties.

- Subsection 28(3) should be amended to specifically require the Agency's final report to the Minister to provide its findings, conclusions or recommendations in relation to all factors listed in section 22 and all public interest considerations listed in section 63.

  Rationale: Despite section 18(1.1) of the *IAA*, subsection 28(3) appears to largely restrict the review panel's report to "effects," rather than the full suite of section 22 factors or, more importantly, the specific components of the section 63 public interest considerations. CELA's proposed amendment addresses this apparent disconnect, and helps ensure that panel members are not mere "note-takers" but are instead an integral mechanism for facilitating informed decision-making by the Minister or Cabinet under the *IAA*.

- Sections 29 and 31 to 35 should be deleted.

  Rationale: CELA supports the "one project, one assessment" approach, but does not support the delegation and substitution provisions found in the *IAA*, particularly in light of unresolved issues regarding the use of such devices.[35] In our view, where there are multiple jurisdictions that will be reviewing the same project, then the preferable approach is to ensure a joint, coordinated or harmonized assessment process that meets each jurisdiction's legal requirements.

- Section 36 should be amended to:

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

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

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

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

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

  (ii) public or Indigenous concerns about such effects;

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

[35] See Arlene Kwasniak, "Environmental Assessment: Overlap, Duplication, Harmonization, Equivalency and Substitution" (2009), 20 JELP 1, page 20. See also Martin Olszynski *et al*., *Strengthening Canada's Environmental Assessment and Regulatory Processes: Recommendations and Model Legislation for Sustainability* (August 18, 2017), pages 27 to 28.

(iv) the purposes of the Act;

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

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

(vii) any other relevant factor; and

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

Rationale: In CELA's view, section 36 requires additional details to ensure that the Ministerial decision to refer an impact assessment to a review panel (or not) is made in a timely, transparent and accountable manner.

- Section 37.1 should be deleted.

  Rationale: For the reasons outlined above, CELA does not support arbitrary "one size fits all" deadlines codified in legislation. Instead, it is far preferable for the review panel to determine the appropriate timeline after receiving input from the hearing parties.

- Subsection 39(2) should be deleted.

  Rationale: CELA is unaware of any compelling public interest justification for restricting the availability of joint review panels for projects regulated under the *NSCA* or *Canadian Energy Regulator Act*. In our view, the possibility of establishing a joint panel for such projects should be allowed under the *IAA* and utilized whenever feasible with other jurisdictions.

- Section 43 should be amended to:

  (a) require the Minister to refer energy-related projects to review panels forthwith (or within a specific timeline) after proponents file their initial project documentation with the Agency at the commencement of the planning phase; and

  (b) specify that for designated projects that are automatically referred to review panels, section 16 (if retained) does not apply.

  Rationale: CELA supports the section 43 requirement upon the Minister to refer certain energy projects to review panels. However, it is unclear to us precisely when, in the impact assessment process, that the referral will be made by the Minister (early planning? notice of commencement? other?). In our view, this referral should occur as early as possible so that review panels can play a meaningful role in establishing information-gathering needs and participating in scoping decisions. It will also be helpful for this section to clarify that the Agency cannot dispense with the need to conduct an impact assessment for such energy projects pursuant to section 16.

- Subsections 44(4) and 47(4) should continue to provide that members of the CNSC, or Commissioners of the Canadian Energy Regulator, cannot constitute the majority of the members of review panels, but these

subsections should be amended to further provide that these appointees cannot serve as Chairpersons of the review panels.

Rationale: Some witnesses at the Standing Senate Committee have objected to the role given to members of regulatory bodies when appointed as members of review panels. However, for the purposes of restoring public trust, CELA supports the inclusion of regulators as panel members, but submits that they should not form the majority on the panel, nor should they serve as the Chairperson of the panel.

- Sections 41, 42, 44 and 47 should be amended to require the Minister to post draft terms of reference for review panels (or joint review panels) on the Registry and/or internet site, and to solicit and consider any public comments received on the draft before establishing the terms of reference.

  Rationale: The establishment of terms of reference for review panels is of utmost importance, but should include opportunities for meaningful public participation.

- Subsection 50(a) should be amended to specify that the roster of review panel members shall consist of persons from different regions across Canada who:

  (a) have education, training, local or traditional knowledge, and experience in the assessment of environmental, health, economic and social impacts, including effects upon Indigenous rights and interests; and

  (b) have been interviewed and recommended by the Expert Committee established by the Agency under section 157.

  Rationale: To ensure the appointment of panel members who are independent, knowledgeable and free of bias or conflict of interest, CELA submits that the Expert Committee should review and recommend candidates for inclusion on the roster.

- Subsection 51(1) should be amended to specifically require the review panel's report to provide its rationale, conclusions or recommendations in relation to all factors listed in section 22 and all public interest considerations listed in section 63.

  Rationale: As outlined above in relation to Agency reports, CELA submits that review panel reports should not be primarily restricted to "effects", but should instead address all section 22 factors and all public interest considerations under section 63.

- Subsection 59(2) should be amended to specifically require that where the impact assessment is started by a review panel but completed by the Agency, the Agency's report will provide its rationale, conclusions or recommendations in relation to all factors listed in section 22 and all public interest considerations listed in section 63.

  Rationale: As outlined above, CELA submits that Agency-completed reports should not be primarily restricted to "effects", but should instead address all section 22 factors and all public interest considerations under section 63.

(e) Decision-Making under the *IAA*

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

  Rationale: CELA submits that the approval/rejection decision should focus on the project itself, not its adverse effects.

- The *IAA* should be amended by adding a new 63.1, as follows:

  63.1 Despite section 63, when the Minister or Governor in Council are making determinations under sections 60(1)(a), 61 or 62 respectively, no designated project shall be approved under this Act unless the available evidence, including the report on the impact assessment, demonstrates on a balance of probabilities that the project is in the public interest, and that the project:

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

  (b) will not cause, or materially contribute to, adverse direct, incidental or cumulative effects within federal jurisdiction;

  (c) will include appropriate mitigation measures and follow-up programs that are effective, enforceable and technically and economically viable;

  (d) will not adversely impact the rights of Indigenous peoples as affirmed by section 35 of the *Constitution Act, 1982*, and will not conflict with the United Nations Declaration of the Rights of Indigenous Peoples; and

  (e) will not hinder Canada's ability to meet its environmental obligations and climate change commitments.

  Rationale: While section 63 sets out various public interest "considerations," it does not, in our opinion, set out a precise legal test or evidence-based standard for the approval/rejection of designated projects. CELA's proposed amendment is aimed at addressing this omission.

- Subsection 63(a) should be amended to provide a definition of, or additional detail on, the "contribution to sustainability" consideration that must be taken into account by the Minister and the Governor-in-Council.

  Rationale: The first stated purpose of the *IAA* is to "foster" sustainability, while section 63 directs decision-makers to consider the extent to which the project contributes to sustainability. While "sustainability" is defined, "contribution to sustainability" is not defined in the Act. For the purposes of greater certainty, CELA submits that would be helpful for the *IAA* to include a broad definition of this key phrase that reflects the essential elements of sustainability identified by Dr. Robert Gibson in his brief to the Standing Senate Committee.[36] CELA anticipates that further direction or guidance regarding the "contribution of sustainability" consideration can be provided by regulation, policies and guidelines issued under the *IAA*.

[36] See: https://sencanada.ca/content/sen/committee/421/ENEV/Briefs/2019-03-15_C-69_RobertGibson_e.pdf

- Section 64 should be amended by adding a new clause that imposes a positive (and legally enforceable) duty upon proponents to immediately self-report to the Minister any non-compliance with conditions established under this section and set out in a decision statement issued under section 65.

  Rationale: It is important to ensure full compliance with all requirements imposed as conditions upon an approved project. However, the practical reality is that federal officials may lack the capacity to proactively monitor and inspect projects across Canada to determine if *IAA* conditions are being properly implemented. CELA therefore recommends that like other federal and provincial environmental laws, the *IAA* should be amended to include a self-reporting obligation upon proponents.

- Subsection 65(1) should be amended by adding a new clause that describes and assigns responsibility for monitoring programs, if any, to be conducted by federal authorities or agencies;

  Rationale: It is conceivable that some monitoring duties (e.g. cumulative effects) may fall to federal authorities or agencies rather than the proponent. In our view, the decision statement should address this monitoring obligation.

- Subsection 65(2) should be expanded to require that the reasons for decision in the decision statement shall include an evidence-based justification for any trade-offs made between the public interest considerations listed in section 63;

  Rationale: In CELA's view, the reasons for decision should adequately explain how trade-offs (if any) were made among and between the public interest considerations. Rather than offering "boiler-plate" reasons that merely repeat the language of section 63, CELA submits that the reasons for decision should include references to the specific evidence relied upon by the Minister or Cabinet in making their decisions under the *IAA*. This enhances transparency and accountability in the decision-making process under the *IAA*.

- Subsection 68(4) should be deleted.

  Rationale: CELA is concerned about the Minister's inability to adjust *IAA* conditions in relation to certain energy projects. In our view, the Minister should be empowered to add, remove or amend conditions imposed under the *IAA* where follow-up programs have identified the need for such adjustments.

- The *IAA* should not be amended to include a privative clause.

- **Rationale**: Some witnesses at the Standing Senate Committee have argued in favor of including a provision that that attempts to oust or restrict the supervisory jurisdiction of the Federal Court. CELA strongly disagrees with this proposition. The rule of law means that the Agency, review panels, Minister and Cabinet are not above the law, and must comply with the law at all times. Thus, persons should not face unnecessary legal barriers if they want to go to the Federal Court to seek judicial review under the *IAA*. Due to the cost and complexity of legal proceedings, it is CELA's view that the absence of a privative clause will not result in a floodgate of unmeritorious litigation under the *IAA*. To the contrary, the most recent *CEAA 2012* cases in the Federal Court of Appeal (e.g. Northern Gateway and Trans-Mountain) amply demonstrate that judicial review applicants' concerns were legitimate and well-founded.

- The *IAA* should be amended by adding a new section 116.1 to create an express right for persons to seek judicial review of certain *IAA* decisions in the Federal Court, as follows:

116.1(a) The Federal Court has jurisdiction to hear and determine applications for judicial review in respect of the statutory decisions, determinations, duties, or reports required under the following sections of this Act:

(i) section 16 (if retained in the *IAA*);

(ii) section 18;

(iii) subsection 22(2);

(iv) subsection 28(2);

(v) section 29 (if retained in the *IAA*);

(vi) section 31 (if retained in the *IAA*);

(vii) section 41;

(viii) section 51;

(ix) sections 60 to 65;

(x) sections 82 to 83; and

(xi) section 102.

(b) Any person may commence an application for judicial review in the Federal Court in relation to the statutory matters listed in paragraph (a).

(c) The Federal Courts Rules apply to applications for judicial review made under paragraph (b).

Rationale: For legal accountability purposes, CELA submits that the *IAA* should expressly contain an opportunity for any person (including proponents) to seek judicial review in the Federal Court to ensure compliance with the procedural and substantive requirements under the Act. For example, in the Trans-Mountain case, it appears to CELA that it would have been beneficial for all parties if the Federal Court was asked, at an early stage, to rule on the legality of the NEB's upfront scoping decision to exclude project-related tanker traffic from the EA.

(f) Duties of Certain Federal Authorities under the *IAA*

- Specific activities or facilities on federal lands or outside of Canada should be designated projects which trigger an obligation upon the Agency (not the federal authority in charge) to prepare an impact statement and submit a report to Cabinet in accordance with the Act (including meaningful public participation), where such projects are linked to federal interests.[37]

[37] On this point, CELA agrees with and adopts the broader suite of federal interests identified by the Expert Panel (e.g. federal lands, federal funding, federal proponency, etc.), rather than the relatively narrow definition of "effects within federal jurisdiction" found in section 2 of the *IAA*. See Expert Panel Report, page 18.

Rationale: CELA submits that activities on certain federal lands (e.g. national parks), or projects outside Canada funded by federal programs, should be independently assessed by the Agency, not self-assessed by the relevant federal authority.

- The *IAA* should be amended by specifying that the "public interest" considerations in section 63 for decisions on designated projects are also applicable to decisions made under the Act in relation to projects on federal lands or outside of Canada.

  Rationale: The public interest considerations in section 63 should be taken into account by decision-makers in relation to projects on federal lands or outside of Canada.

(g) Regional and Strategic Assessments under the *IAA*

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

  Rationale: CELA recognizes that many overarching policy issues are better addressed in higher-order assessments, rather than in project-level assessments. However, under the *IAA*, regional and strategic assessments are optional rather mandatory, and there are few implementation details on how such assessments will be conducted. Without such details, CELA remains concerned that despite their value and potential utility, regional and strategic assessments will likely be an underutilized tool under the *IAA*.

- The *IAA* should be amended by specifying that the "public interest" criteria in section 63 for decisions on designated projects are also applicable to federal decisions made in relation to strategic and regional assessments conducted pursuant to sections 92 to 103 of the Act.

  Rationale: The public interest considerations in section 63 should be taken into account by decision-makers in relation to the outcomes of regional and strategic assessments.

(h) Regulation-Making Authority under the *IAA*

- Sections 109 and/or 112 of the *IAA* should be expanded in order to specifically authorize the making of regulations in relation to:

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

  (b) general rules of practice and procedure to govern hearings held by review panels;

  (c) requirements for Agency-led impact assessments for projects (or classes of projects) on federal lands or outside of Canada; and

  (d) sustainability criteria and trade-off rules to be used in impact assessments and decision-making under the Act.

  Rationale: It appears to CELA that the regulation-making authority under the *IAA* has been drafted too narrowly, and should be broadened to expressly address other key matters under the Act.

PART IV - CONCLUSIONS

For the foregoing reasons, CELA concludes that the federal government's decision to use the flawed *CEAA 2012* model as the foundational basis of the *IAA* was both unfortunate and ill-advised. In our view, this questionable decision will not only continue some of the existing problems within the current federal EA regime, but it may also create new difficulties and considerable uncertainties if the legislation is enacted in its present form.

This intractable situation could have been easily avoided had the Government of Canada elected to start afresh with a new legislative approach that fully incorporated the recommendations of the Expert Panel's report on EA reform. Instead, the federal government has largely chosen to finetune *CEAA 2012* without making the fundamental changes suggested by the Expert Panel and supported by academics, practitioners, environmental groups and other stakeholders across Canada, including CELA.

Fortunately, the Standing Senate Committee has an important, but time-limited, opportunity to develop carefully tailored amendments to the *IAA* that will help achieve the stated objectives of this important law reform exercise. Accordingly, CELA calls upon Committee members to identify and pursue the full suite of appropriate *IAA* changes, including those recommended by CELA in this brief.

We trust that CELA's recommendations will be considered and acted upon by the Standing Senate Committee and, in due course, by the full Senate. Please contact the undersigned if you require any further information about this brief.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Maxime Fortin, Standing Senate Committee Clerk