Canadian Environmental Law Association
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PRESENTATION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT RE PART 1 OF BILL C-69 (*IMPACT ASSESSMENT ACT*)

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The Canadian Environmental Law Association ("CELA") welcomes this opportunity to present our views to the Standing Committee on Environment and Sustainable Development in relation to Bill C-69. This submission focuses on Part 1 of Bill C-69, the proposed *Impact Assessment Act* ("*IAA*").

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental and public health issues. For example, CELA has participated in various administrative and legal proceedings under *CEAA 2012* and its predecessors, *CEAA 1992* and the *Environmental Assessment and Review Process Guidelines Order*.

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

CELA's overall conclusion is that in its current form, the *IAA* will not achieve the federal government's stated objective of establishing federal assessment processes that "regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous persons, ensure good projects go ahead, and resources get to market."[1] In our view, there are a number of substantive amendments that are required to improve and strengthen the information-gathering and decision-making process under the *IAA*. Our proposed amendments are set out below.

This submission is a condensed version of our more detailed analysis of the *IAA*, which has been posted to the CELA website.[2] For further information about the rationale for each of CELA's proposed amendments, members of the Standing Committee are encouraged to review our more comprehensive brief on the *IAA*.

(a) Interpretation, Application and Purposes of the Act

In relation to the interpretation, application and purposes of the *IAA*, we offer the following recommendations and proposed amendments.

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

[1] *Discussion Paper*, page 3.
[2] https://www.cela.ca/proposed-IAA-appropriate-amendments. See also http://www.cela.ca/collections/justice/canadian-environmental-assessment-act.

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

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

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

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

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

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

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

(b) Designation of Physical Activities

The proposed *IAA* continues the narrow *CEAA 2012* approach of developing a regulatory list of the major projects that warrant an impact assessment. However, section 9 of the *IAA* confers discretion upon the Minister to issue orders that apply the Act to non-designated activities. This provision appears to duplicate the discretionary power found in subsection 14(2) of *CEAA 2012*, which, to our knowledge, has rarely – if ever – been used to date. In CELA's view, section 9 should be revised to clarify who can request such designations.

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

More generally, in the absence of a draft projects list at the present time (and the lack of listing criteria in the Act), CELA questions how the public or Standing Committee members can adequately review the *IAA* (or its alleged efficacy) without knowing which physical activities will – or will not – be subject to the new law.

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

(c) Early Planning Phase

CELA strongly supports the creation of a statutory "planning phase" for project-level assessments under the *IAA*.

Unfortunately, the proposed *IAA* does not adequately remedy the early planning shortcomings that the Expert Panel identified under the existing *CEAA 2012* regime. Moreover, the *IAA* does not establish or mention the early planning steps or documents which have been discussed by the federal government, such as: (a) Impact Assessment Cooperation Plan (e.g. Indigenous Engagement and Partnership Plan and a Public Participation Plan); (b) "tailored" Impact Statement Guidelines; and (c) Permitting Plan (if requested).

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

We are also concerned that the early planning phase requires the proponent to submit an initial project description that provides the information to be prescribed by regulation.[3] This requirement appears to allow the proponent to lock in (and defend) its preferred option long before public participation has even commenced. CELA submits that this approach also renders meaningless the section 22 obligation to publically consider alternatives to the project, and alternative means of carrying out the project, within the assessment process.

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

RECOMMENDATION #11: Sections 10 to 15 of the *IAA* should be amended by:
(a) setting out prescriptive details on how the Agency will ensure that meaningful public participation occurs during the early planning phase;
(b) specifying that adequate participant funding will be made available during the early planning phase;
(c) providing a time-limited opportunity to appeal the Agency's planning phase determinations to the Minister, or, in the alternative, to a specialized appellate tribunal; and
(d) requiring the early planning phase to commence with the proponent's filing of a detailed description of a reasonable range of alternatives that address the need, issue or opportunity that the proponent intends to pursue.

Section 16 of the *IAA* purports to empower the Agency to wholly dispense with the need to conduct impact assessments of designated projects. In CELA's view, there is no public interest justification for this *de facto* exemption power. If a designated project is environmentally significant enough to warrant inclusion on the regulatory projects list, then the requisite impact assessment must be commenced by the Agency or review panel.

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

(d) Impact Assessments by the Agency

[3] *IAA*, section 10.

The *IAA*'s review panel provisions[4] are substantially similar to those currently found in *CEAA 2012*,[5] except that the new proposed 300 day timeline is shorter than the 365 day timeline used under the current *CEAA 2012*.[6] CELA submits that the new timeline may not fit all the different types, scales and locations of designated projects that are subject to Agency-led assessments. CELA therefore recommends that this specific timeline should be deleted, and that the Agency should be enabled to set reasonable timeframes on a case-by-case basis.

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

In general terms, CELA is content with the section 22 inventory of matters that must be addressed in every impact assessment, provided that these matters are not narrowly "scoped" by the Agency.[7]

However, we recommend that section 22 (and other related provisions, including section 28 and 51) should be amended to clarify that the reports prepared by Agency and review panel must include a sustainability-based comparative analysis of the pros/cons of alternatives to the project, alternative means of carrying out the project, and the null (or "no go") alternative. Given that *IAA* approval is premised on the public interest, it is also necessary and appropriate for the Act to ensure that a proponent's mandate or objective does not skew or narrowly constrain the sustainability-based consideration of purpose, need and alternatives under the Act.

RECOMMENDATION #14: The *IAA* should be amended to:
(a) require that the assessment reports submitted by the Agency and review panels to the Minister must include a comparative analysis of alternatives to the project, alternative means of carrying out the project, and the null alternative; and
(b) specify that the purpose of, and need for, a designated project shall be considered on the basis of sustainability criteria and the public interest, rather than the proponent's own perspective.

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

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

CELA further notes that the *IAA* merely obliges the Agency to provide the public with an "opportunity to participate" in the impact assessment of a designated project.[8] This sparse sentence in section 27 of the Act makes no reference to ensuring "meaningful" public participation, and provides no substantive direction on how and when this obligation should be implemented by the Agency.

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[4] *IAA*, sections 25 to 29.
[5] *CEAA 2012*, sections 22 to 27.
[6] *CEAA 2012*, subsection 27(2).
[7] *IAA*, subsection 22(2).
[8] *IAA*, section 27.

While the *IAA* contains a commitment to "meaningful" public participation,[9] the Act itself does not define this term, nor does it provide any indicators to help identify how and when "meaningful" participation opportunities should be provided to the public, stakeholders and Indigenous communities. For these reasons, CELA submits that section 27 must be significantly strengthened and expanded through appropriate amendments that ensure that the public can do more than merely file written comments from time to time in Agency-led assessments.

RECOMMENDATION #16: The *IAA* should be amended to:
(a) impose an affirmative duty on the Agency to take all necessary steps to ensure meaningful public participation occurs in all stages of the impact assessment and reporting process, starting from the early planning phase and continuing to post-approval monitoring and follow-up programs; and
(b) provide further prescriptive details on how and when the Agency shall implement its duty to ensure meaningful public participation.

(e) Substitution of Other Assessment Processes

Section 31 of the *IAA* generally enables the Minister to approve the use of another jurisdiction's assessment process instead of the federal process if he/she opines that the other process is an "appropriate substitute." However, the section 33 list of Ministerial considerations does not require the availability of participant funding in the other jurisdiction's assessment process as a precondition for substitution.

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

On this issue, CELA acknowledges that the Expert Panel concluded that substitution could "remain an option in an enhanced federal IA process," and the Panel went on to articulate eight restrictive criteria as to when substitution should – or should not – be permitted.[10] However, some of the Panel's key criteria are not reflected in the section 33 list of substitution considerations under the *IAA*.

For example, the Expert Panel recommended that "the principles of UNDRIP; specifically consent" should be reflected in the substituted decision-making process.[11] In contrast, section 33 of the *IAA* merely requires Indigenous "consultation" in the substituted process, and the UNDRIP itself is not mentioned anywhere in the Act. Since the Expert Panel's key safeguards have not been incorporated into the *IAA*, CELA concludes that the Act's substitution provisions are inadequate, and we recommend that they should be deleted in their entirety.

In summary, CELA submits that when a designated project is subject to multi-jurisdictional assessment by various levels of government, then, to the maximum extent possible, governmental officials should work together in a coordinated and cooperative manner to implement an efficient and rigorous "one project – one assessment" approach that satisfies all applicable requirements for all stages of the federal assessment process (e.g. from early engagement/planning to post-approval monitoring and follow-up).[12] For the same reason, CELA further recommends the deletion of the overbroad[13] delegation power in section 29 of the proposed *IAA*.

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[9] *IAA*, subsection 6(1)(h).
[10] Expert Panel Report, page 26.
[11] Expert Panel Report, page 25.
[12] See also MIAC, *Advice to the Expert Panel Reviewing Environmental Assessment Processes* (December 2016), pages 49 to 52.
[13] See also Arlene Kwasniak "Multi-Jurisdictional Assessment and Bill C-69 – The Further Fading Federal Presence in Environmental Assessment" (March 26, 2018), http://ablawg.ca/wp-content/uploads/2018/03/Blog_AK_Multijuris_BillC69.pdf.

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

(f) Impact Assessments by Review Panels

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

However, CELA strongly supports the automatic referral of designated energy projects that are regulated under the *Nuclear Safety and Control Act* or *Canadian Energy Regulator Act*, provided that the regulatory projects list includes a broad range of activities licenced under these statutes. Unfortunately, the actual trigger or timing of this mandatory referral does not appear to be specified in the *IAA*.

To remedy this lack of clarity, CELA submits that this referral must occur at the earliest possible opportunity in the impact assessment process, preferably immediately after the initial documentation has been filed by the proponent. In our view, earlier engagement of the review panel will enable panel members to assist in the identifying the issues to be addressed in the forthcoming hearing.

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

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

In relation to the Minister's discretionary power to refer other projects to review panels, CELA notes that section 36 does not describe who can request referral to a review panel. Additional amendments regarding the Minister's referral power are set out below.

RECOMMENDATION #20: Section 36 of the *IAA* should be amended to:
(a) enable any person or jurisdiction to request the Minister to refer a designated project to a review panel;
(b) allow such referral requests to be made at any time up to 45 days after the proponent's Impact Statement has been placed on the Registry;
(c) require the Minister to make a decision on such referral requests within a prescribed timeline, and to provide reasons for decision to the person or jurisdiction that requested referral to a review panel;
(d) place a mandatory duty on the Minister, on request or on his/her own initiative, to refer a designated project to a review panel when it is in the public interest to do so, taking into account the following considerations:

- **(i) the extent to which the project may cause, or contribute to, direct, indirect or cumulative effects that are adverse;**
- **(ii) public or Indigenous concerns about such effects;**
- **(iii) opportunities for cooperation with other jurisdictions in the assessment of such effects;**
- **(iv) the purposes of the Act;**
- **(v) the federal government's duty to foster sustainability and apply the precautionary principle;**
- **(vi) the extent to which referral to a review panel may facilitate informed decision-making by the Minister or Cabinet under the Act;**
- **(vii) any other relevant factor; and**

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

The Expert Panel correctly recommended that the new Agency should be established as an independent, quasi-judicial authority (subject to Cabinet appeal).[14] Unfortunately, the *IAA* does not implement this sound recommendation, and instead carries forward the same basic *CEAA 2012* mechanism (e.g. preparation/submission of advisory reports to political decision-makers).

As we have noted in our previous submissions,[15] there is nothing legally necessary or inherently preferable about having the Minister or Cabinet make decisions under the *IAA*, as there are other notable federal and provincial precedents where independent tribunals (e.g. CRTC, Ontario's Environmental Review Tribunal, etc.) make binding decisions on matters of profound public importance or environmental significance.

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

CELA remains concerned by the continuation of the *ad hoc* roster-based approach for establishing review panels under the *IAA*. In our view, establishing a permanent hearing tribunal (equipped with necessary administrative support, resources and capacity) under the *IAA* is both feasible and, in our view, preferable to the vagaries, inefficiencies and inconsistencies associated with the *ad hoc* approach imported from *CEAA 2012*.

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

If, however, the roster-based model is retained within the *IAA*, then CELA strenuously objects to the ill-conceived proposal that rosters of regulators shall be maintained and used to appoint members of review panels to hear matters that are subject to the *Nuclear Safety and Control Act* and *Canadian Energy Regulator Act*.

In particular, the *IAA* requires the Minister to appoint "at least" one member of the Canadian Nuclear Safety Commission ("CNSC"), or "at least" one commissioner of the Canadian Energy Regulator, to such panels. However, there is no statutory cap on the overall number of regulators that can be appointed to review panels, and there is nothing in the Act to prevent the Minister from appointing regulators as the Chairpersons of review panels. Indeed, there is nothing in the *IAA* to prevent the Minister from wholly stocking a review panel with members of regulatory bodies.

In our view, the skewed membership of review panels assessing energy projects under the *IAA* essentially repeats the same contentious types of regulator-led assessments that occurred under *CEAA 2012*, and that resulted in a loss of public trust which prompted the above-noted commitments by the federal government to review and revise the national EA regime in the first place. In short, public confidence cannot regained by creating a system that still allows regulators to lead, control or otherwise dominate assessments of projects that the regulators also happen to licence under other statutes.

CELA's view is shared by several dozen other non-governmental organizations across Canada that sent a joint letter to the Environment Minister and Natural Resources Minister in December 2017 to vigorously object to

[14] Expert Panel Report, pages 49 to 55.
[15] See, for example, http://www.cela.ca/preliminary-submissions-federal-ea-act, pages 14 to 18; http://www.cela.ca/publications/1132-supplementary-submissions-environmental-and-regulatory-reviews-discussion-paper-june-20, page 2.

allowing federal regulators to conduct or co-lead impact assessments.[16] Similarly, the Expert Panel correctly concluded that regulators should not lead or conduct assessments under the new regime.[17]

CELA therefore recommends *IAA* amendments that would enable regulators to provide its "specialist or expert information or knowledge" in the assessment process (like any other federal authority under section 23 of the *IAA*), but not to actually conduct or co-lead the assessment process or to prepare the review panel's report to decision-makers under the Act.

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

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

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

In this regard, CELA submits that it would be helpful to engage the review panel in any scoping determinations at the earliest possible opportunity in order to ensure meaningful evaluation of all section 22 factors by the time that the proponent's Impact Statement is received by the panel and the public hearing process is commenced.

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

Sections 41, 42, 44 and 47 of the *IAA* empower the Minister to establish the terms of reference for review panels. To order to ensure meaningful public participation – and meaningful review panel hearings – the Minister should be obliged to post draft terms of reference on the Registry and/or internet site, and to solicit and consider any public comments received on the draft before finalizing and issuing the terms of reference.

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

The content requirements for panel reports largely replicate what is currently found in *CEAA 2012*,[18] and are largely focused on the question of whether there may be adverse effects within federal jurisdiction, rather than the full set of factors under section 22. Similarly, section 51 does not actually require review panel to provide its

[16] http://www.cela.ca/LetterToMinistersReNuclearEA.
[17] Expert Panel Report, pages 50 to 51.
[18] *CEAA 2012*, section 43.

"rationale, conclusions or recommendations" on whether project is in the "public interest," as outlined by the section 63 list of considerations.

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

In our view, clarifying the legal nexus between the information-gathering and decision-making stages under the Act will enhance accountability and achieve the stated purposes of the *IAA*. Having directly heard the evidence, review panel members are closer to the action and are better positioned than political decision-makers to make the key findings on whether, for example, the project will – or will not – make a contribution to sustainability, as required by section 63.

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

CELA submits that the proposed *IAA* contains inadequate legislative details on review panel practice and procedure, other than merely directing panels to hold hearings that offer an "opportunity" for public participation,[19] and that emphasize "flexibility and informality."[20] In principle, CELA agrees that review panel hearings should not be transformed into highly adversarial civil trials featuring complicated interlocutory stages, unwieldy production/disclosure obligations, or unduly prescriptive evidentiary rules.

On the other hand, CELA submits that there must be sufficient rigour and minimum procedural safeguards (e.g. examination and cross-examination of expert witnesses) within the hearing process in order to: (a) achieve the purposes of the Act; (b) to test the evidence adduced by the proponent, federal authorities and other parties; and (c) enable the review panel to properly complete its statutory tasks in a fair and credible manner.

Accordingly, CELA strongly submits that the *IAA* should entrench basic procedural rights conferred upon hearing parties in review panel proceedings. These and other rights can be supplemented or operationalized as rules of practice[21] issued under the regulation-making authority under the Act. These procedural safeguards could resemble those found in Ontario's *Statutory Powers Procedure Act* (*SPPA*),[22] which generally applies to administrative boards (e.g. Environmental Review Tribunal) that hold public hearings in the exercise of statutory powers of decision under provincial legislation (e.g. *Environmental Assessment Act*).

RECOMMENDATION #28: The *IAA* should be amended to:
(a) entrench basic procedural rights for parties involved in hearings held by review panels; and
(b) expand the regulation-making authority in section 109 (or, in the alternative, section 112) to enable the promulgation of rules of practice and procedure to govern hearings held by review panels.

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[19] *IAA*, subsection 51(1)(c).
[20] *IAA*, section 54.
[21] See, for example, the Ontario Environmental Review Tribunal's *Rules of Practice and Procedure* (September 12, 2016), which serve as an excellent illustrative example of how to define and entrench public participation rights in public hearings, including impact assessment proceedings.
[22] RSO 1990, c.S.22.

The proposed *IAA* goes on to prohibit the Minister from entering into a joint review panel agreement where the designated projects include physical activities regulated under the *Nuclear Safety and Control Act* or the *Canadian Energy Regulator Act*.[23] We are unaware of any persuasive public interest rationale for this highly questionable prohibition, and CELA therefore recommends that this prohibition should be deleted from the Act.

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

CELA notes that section 37 of the *IAA* requires review panels to submit their reports to the Minister no later than 600 days after the panel is first appointed. This timeframe is shorter than the current timeframe (720 days) used under *CEAA 2012*, ostensibly because of the alleged efficacy of new early planning phase under the *IAA*.

While the 600 day timeline may be workable for some projects, it may be inadequate for other projects, particularly those posing sizeable environmental risks, transboundary effects, or impacts upon Indigenous rights or interests. Accordingly, the 600 day limit strikes CELA as an arbitrary "one size fits all" rule that is unrealistic and inappropriate, and that should be deleted.

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

(g) Decision-Making by the Minister or Cabinet

As noted above, CELA supports the Expert Panel's recommendation that the Agency should be established as an independent quasi-judicial authority that gathers information and makes decisions under the *IAA*. Nevertheless, in the event that political decision-making is continued under the *IAA*, then CELA has a number of concerns about certain provisions regarding Ministerial or Cabinet decisions under the Act.

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

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

In making this "public interest" determination, the *IAA* specifies that the Minister or Cabinet "must" consider five enumerated factors.[24] While some observers (including the Minister[25]) have described these provisions as a public interest "test," CELA submits that section 63 does not delineate a clear legal standard for granting/refusing approvals under the Act.

Instead, section 63 is best characterized as a loose collection of vague terms that must simply be "considered," possibly traded off against each other, and described in reasons for decision, without any requirement to explain or justify any trade-offs or compromises made between the five factors.[26] Even for political (or "ballot box")

[23] *IAA*, subsection 39(2).
[24] *IAA*, section 63.
[25] Transcript, Standing Committee Meeting 99 (March 22, 2018).
[26] *IAA*, subsection 65(2).

accountability purposes, section 63 falls considerably short of the mark, and requires immediate revision to ensure that the *IAA* decision is based on these five factors, and does not merely "consider" them.

To remedy these fundamental concerns about transparency and accountability, CELA submits that there are several *IAA* amendments that are required.

RECOMMENDATION #32: The *IAA* should be amended by:
(a) creating a new legal standard for decision-making under section 63 of the Act, which should specify that no designated project shall be approved by the Minister or Cabinet unless the impact assessment record demonstrates, on a balance of probabilities, that the project is in the public interest because it:
- **will provide a positive, equitable and long-lasting contribution to sustainability by providing net benefits to environmental, social, economic, health and cultural well-being;**
- **is consistent, or does not conflict, with Canada's targets and timetables under international climate change agreements, treaties or conventions, or under federal law or regulations; and**
- **does not adversely impact the rights of Indigenous peoples as affirmed by section 35 of the *Constitution Act, 1982*, and is consistent, or does not conflict, with the UNDRIP or the FPIC principle;**

(b) providing additional details, rules and criteria on the "contribution to sustainability" component of the new legal standard, which should be further supplemented by regulations under the Act;
(c) establishing a statutory right of appeal that lies from Ministerial or Cabinet decisions on designated projects to a specialized or independent body established under the Act, or in the alternative, to the Federal Court on questions of law and mixed questions of law/fact;
(d) specifying that the revised "public interest" criteria in section 63 for decisions on designated projects should also be made applicable to federal decisions made in relation to strategic and regional assessments conducted pursuant to sections 92 to 103 of the Act;
(e) requiring the Minister's reasons for decision under subsection 65(2) to include an evidence-based justification for any trade-offs made between the public interest factors listed in section 63;
(f) deleting subsection 68(4); and
(g) requiring the proponent to immediately self-report to the Minister any non-compliance with conditions contained in a decision statement issued under the Act.

(h) Projects on Federal Lands or Outside of Canada

Sections 81 to 91 of the proposed *IAA* impose duties upon certain federal authorities in relation to different types of physical activities to be carried out on federal lands (e.g. national parks) or outside of Canada. In essence, these provisions duplicate what currently exists in *CEAA 2012*.[27]

CELA notes that these *IAA* duties do not require these authorities to actually conduct an impact assessment in accordance with the Act. Instead, these authorities are merely directed to determine whether their proposals are likely – or are not likely – to cause significant adverse environmental effects ("SAEE").[28] This key term remains undefined in the *IAA*, but the Act lists some "factors" that must be considered in making this determination.[29] More alarmingly, there is no apparent duty upon federal authorities to ensure meaningful public participation within this self-assessment process, except that the authorities must, at some point, web-post notice of its intent to make the SAEE determination, and to "invite" public comments thereon.[30]

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[27] *CEAA 2012*, sections 66 to 70.
[28] *IAA*, sections 82 and 83.
[29] *IAA*, section 84.
[30] *IAA*, section 86.

This questionable and unaccountable approach attracted strong criticism from the Expert Panel,[31] and CELA submits that sections 81 to 91 should be deleted and replaced by more robust and participatory provisions.

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

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

(i) Regional and Strategic Assessments

CELA agrees with the Expert Panel[32] that strategic and regional assessments are important tools for not only evaluating cumulative effects, but also for addressing broader policy issues, comparatively evaluating alternative approaches and development scenarios, and understanding the overall environmental, socio-cultural and economic context for individual projects.

However, the proposed *IAA* fails to provide any operational details on how strategic and regional assessments are to be triggered, structured and implemented under the Act. In short, the *IAA* does not create a legally binding duty to conduct strategic or regional EAs of federal plans, policies and programs, and essentially leaves these matters to virtually unfettered governmental discretion. This situation should be addressed by detailed *IAA* amendments.

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

Moreover, CELA submits that properly designed strategic- or regional-level sustainability assessments should not be confined to certain discrete matters within the Government of Canada's exclusive constitutional jurisdiction (e.g. fisheries, migratory birds, etc.). To the contrary, CELA envisions that the information-gathering phase of strategic- and regional-level assessments will inevitably involve other matters and other jurisdictions across Canada. In this regard, CELA endorses the "cooperative assessment" approach recommended by the Expert Panel.[33]

April 6, 2018

[31] Expert Panel Report, page 57.
[32] Expert Panel Report, pages 76 to 85.
[33] Expert Panel Report, pages 22 to 24.