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Re: *Building Canada Act* and Protecting Indigenous and Environmental Rights

The Canadian Environmental Law Association (“CELA”) writes to express serious concern about the *Building Canada Act*, SC 2025, c 2, s 4 (“*Building Canada Act*”) and its proposed use to fast-track mega-projects that may be environmentally risky and harmful to health and safety. The *Building Canada Act* improperly excludes the public from critical decision-making and exempts or fast-tracks projects from important federal environmental laws which have been designed to protect the environment, public health and safety.

CELA is opposed to the *Building Canada Act*’s approach to pre-approval of mega-projects and urges the federal government to adopt an approach which respects the rule of law, fair and democratic processes, intergenerational equity, the need for transparency, and meaningful public and Indigenous participation in environmental decision-making.

If the federal government proposes to designate any projects under Schedule 1 of the *Building Canada Act*, it must ensure that potentially impacted Indigenous peoples are appropriately consulted and their consent obtained, and that projects are co-developed and co-managed. Types of projects that should be considered which may advance reconciliation, environmental protection or public health include:

- projects to close the infrastructure gap between Indigenous and other communities,
- safe and healthy housing for under-served and under-resourced communities,
- safe drinking water infrastructure,
- expanded public transportation, including to rural and remote regions of the country, and
- expanded access to clean and renewable electricity.

Canadian Environmental Law Association

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A. Background on CELA

CELA is a public interest law clinic dedicated to environmental equity, justice, and health. Founded in 1970, CELA is one of the oldest environmental advocates for environmental protection in the country. With funding from Legal Aid Ontario, CELA provides free legal services relating to environmental justice in Ontario, including representing qualifying low-income and vulnerable or disadvantaged communities in litigation. CELA also works on environmental legal education and reform initiatives. CELA exists to ensure that low-income and disadvantaged people have access to environmental justice through the courts and tribunals.

On behalf of our clients (e.g., individuals, residents' groups, environmental organizations, and Indigenous communities), CELA lawyers have engaged in litigation, public hearings, and law reform activities which involve many of the statutes listed in Schedule 2 of the *Building Canada Act* (e.g. *Impact Assessment Act*, *Fisheries Act*, *Species at Risk Act*, *Canadian Environmental Protection Act*, 1999, etc.). In addition, CELA frequently participates in licencing hearings for nuclear facilities held by the Canadian Nuclear Safety Commission, which is the subject of new provisions in the *Building Canada Act*. Based on our five decades of experience protecting the environment and safeguarding public health and safety, we have applied the public interest perspective of our client communities in our analysis of the *Building Canada Act*.

Notably, CELA is not opposed to legislative attempts to create good green jobs or to facilitate Canada's just transition to a sustainable low-carbon (or net-zero) future. At the same time, however, CELA advocates the rule of law, fair and democratic processes, intergenerational equity, and the need for transparency and meaningful public and Indigenous participation in environmental decision making. This is why CELA remains highly concerned about, and strongly opposed, to the *Building Canada Act*.

B. Analysis of *Building Canada Act*

(a) Determination of Projects in Schedule 1

Section 4.1(1) of the *Building Canada Act* provides Cabinet with wide-ranging discretion to define, by order, the term “national interest”, although there is no mandatory duty on Cabinet to do so.¹ There is also a list of non-binding and vague factors to be considered for determination of projects that may be in the “national interest”:

5(6) In deciding whether to make an order under subsection (1) or (4) in respect of a project, the Governor in Council may consider any factor that the Governor in Council considers relevant, including the extent to which the project can

(a) strengthen Canada's autonomy, resilience and security;

(b) provide economic or other benefits to Canada;

(c) have a high likelihood of successful execution;

¹ *Building Canada Act*, SC 2025, c 2, s 4, (“*Building Canada Act*”) s. 4.1(1)

(d) advance the interests of Indigenous peoples; and

(e) contribute to clean growth and to meeting Canada's objectives with respect to climate change.

Section 5(6) does not make any of these factors binding or dispositive and it remains open to the federal government to add a project to Schedule 1 even if it only meets one – or none – of these factors.²

The term “clean growth” should be clarified to include renewable energy projects but not nuclear power or fossil fuel production facilities or infrastructure.³

(b) Pre-Authorization of Projects

CELA also notes that federal statutes – such as the key environmental laws currently listed in Schedule 2 of the *Building Canada Act* – have been democratically enacted and exist for important public policy reasons, including to ensure public safety, human and ecosystem health, and international security. Accordingly, these statutes should not be prevented by the *Building Canada Act* scheme from applying to Schedule 1 projects for reasons of administrative convenience or political expediency.

The *Building Canada Act*'s scope is uncertain and may expand, and the Cabinet retains authority to add, amend or delete additional environmental statutes or regulations from Schedule 2.⁴

Moreover, the controversial existence of the broad exempting powers in sections 22 to 23 appear to be inconsistent with the claim in the Act's preamble that “the Government of Canada is committed to upholding rigorous standards with respect to environmental protection.”⁵ If this statement is true, then the *Building Canada Act* should not authorize the exemption of “national interest” projects from important federal environmental laws. CELA recommends that the commitment to uphold rigorous standards with respect to environmental protection be considered with respect to any decision to designate a project as a “national interest project” and as part of any future regulatory definition of “national interest”.

Section 19 of the *Building Canada Act* ousts the application of the early planning phase and other key provisions of the federal *Impact Assessment Act* (IAA).⁶ This means that while some elements of the IAA's information-gathering and decision-making may be applicable to certain national interest projects, the automatic “pre-approval” regime effectively eliminates the Cabinet's option of refusing to approve risky undertakings that pose significant adverse environmental effects within federal jurisdiction (e.g. the Northern Gateway pipeline).

² *Building Canada Act*, s 5(6)

³ *Building Canada Act*, s 5(6)(e)

⁴ *Building Canada Act*, s 21(1)

⁵ *Building Canada Act*, preamble, ss 22, 23

⁶ *Building Canada Act*, s 19

In CELA's view, this unjustified retreat from fully applying the *IAA* to potentially large, expensive and environmentally risky infrastructure development and industrial resource extraction projects is unacceptable from a public interest perspective.

(c) Indigenous Consultation Provisions

The *Building Canada Act* does not sufficiently protect Indigenous rights. CELA notes that written consent of a province or territory is required if a project falls within the areas of exclusive provincial or territorial jurisdiction.⁷ There are no similar requirements for written consent from Indigenous communities in the *Building Canada Act*.

Pursuant to section 5(6), the extent to which a project may "advance the interests of Indigenous peoples" is only one, non-mandatory factor to be considered in determining whether a project is in the national interest.⁸

The *Building Canada Act* does include consideration of the interests of Indigenous peoples and consultation provisions, as would be required in any event pursuant to section 35 of the *Constitution Act, 1982*. However, CELA remains concerned that the provisions in sections 5(7), 7(2)(c), and 8(3)(b) will not be sufficient to ensure that the federal government does not pre-authorize projects without adequate Indigenous input and consultation.⁹

(d) Public Consultation is Absent From Key Decisions

The *Building Canada Act* has excluded the public from providing input on significant environmental decisions. This is a significant omission and should be rectified.

Environmental decision-making, especially for large infrastructure projects which can have very significant health and other impacts on local communities, benefit greatly from local input and knowledge. It is also a fundamental aspect of environmental justice that the public has access to sufficient information to understand decisions that impact them and has a meaningful opportunity for input and influence on decisions that impact them.

The *Building Canada Act* does not provide for any meaningful opportunity for the public to comment on what projects will be included in Schedule 1. Subsection 5(1.1) requires publication in the *Canada Gazette* of a proposal to designate a national interest project and requires consultation with the relevant province or territory but does not include any express requirement to consult the public. Subsection 5(10) provides for disclosure of the details of a project listed in Schedule 1, but only after the project has been listed and within thirty days of the order being made.¹⁰ The public registry for national interest projects also does not establish any disclosure of information, or opportunity for public input, before a project is listed in Schedule 1.¹¹

⁷ *Building Canada Act*, s 5(1.1)

⁸ *Building Canada Act*, s 5(6)

⁹ *Building Canada Act*, ss 5(7), 7(2)(c), and 8(3)(b)

¹⁰ *Building Canada Act*, s 5(1.1), (10)

¹¹ *Building Canada Act*, s 5.1(1)

In section 8.1(3), the Minister must make public the conditions that apply to the project, the full contents of the studies and impact assessments conducted regarding the project, the recommendations from federal departments and agencies, the reasons why any recommendations were not accepted, and a description of the normal regulatory process 30 days before the deemed authorization in section 7(1) is issued. However, there is no legislated opportunity for input or comment to influence the decisions.

C. National Interest Projects Should Improve Health, Safety and the Environment for Canadians

If the federal government decides to move forward with designating of any projects in Schedule 1, CELA recommends that the federal government focus on projects which would enhance the health, safety and environment of Indigenous peoples and under-served and under-resourced communities across the country. For any specific project, there must still be meaningful consultation and co-development of projects with impacted Indigenous peoples.

A priority for the federal government in choosing any national interest projects under the *Building Canada Act* should be to close the infrastructure gap between Indigenous and non-Indigenous communities in Canada. The Assembly of First Nations co-developed a report with Indigenous Services Canada to quantify the capital and operating costs to close the infrastructure gap in Canada and found that an investment of approximately \$349.2 billion is needed as a result of decades of underfunding, failed fiduciary duties, and unfair distribution of Canada's wealth.¹²

In Ontario, the Chiefs of Ontario has estimated that the following investments are needed to close the infrastructure gap between Indigenous communities and other Ontarians:

- Drinking water advisories - \$0.1 billion
- All season road access - \$5.5 billion
- Climate adaptation - \$4.8 billion
- Net Zero Carbon - \$2 billion
- Connectivity to internet and cell phone infrastructure - \$0.8 billion
- Housing - \$25.8 billion
- Infrastructure - \$9.2 billion
- Education - \$1.9 Billion
- First Nations Direct Asks - \$8.6 billion

¹² Indigenous Services Canada, *Closing the Infrastructure Gap by 2030: a Collaborative and Comprehensive Cost Estimate Identifying the Infrastructure Investment Needs of First Nations in Canada*, March 2023, pp 26-28. Online at <[1-AFN-Closing-the-Infrastructure-Gap-by-2030-National-Cost-Estimate-English-report-1.pdf](#)>.

-Accessibility - \$0.25 billion¹³

If the federal government moves forward with the designation of projects in Schedule 1, CELA recommends prioritizing the designation of projects that would help to close this inequitable infrastructure gap. CELA notes the particular need for better quality and safe housing in Indigenous communities. Any designated project must be co-developed with impacted Indigenous peoples and must meet all legal requirements under Canada's legislative framework, including legal requirements to respect Indigenous rights pursuant to section 35 of the *Constitution Act, 1982*.

CELA may support other nation building projects which would transition Canada to a safe and sustainable future. The housing crisis in Canada relates to affordability and availability of housing, but also to the safety, climate resilience, and adequacy of housing. A focus on projects to retrofit housing, including rental housing, which serve under-served and under-resourced communities, is a critical priority for CELA.

CELA also supports projects which would expand public transportation, including to remote and northern communities, clean water infrastructure, and a resilient east-west electricity grid, along with local and regional improvements.

However, for any designated projects, the government must ensure that potentially impacted Indigenous peoples are appropriately consulted and their consent obtained. Appropriate projects should be co-developed and co-managed by the government and Indigenous communities. The public must also be provided with a say in environmental decision-making that affects them.

We trust that the foregoing comments will be taken into account and acted upon as the Government of Canada considers implementation of the *Building Canada Act*. Please contact the undersigned if you have any questions about this submission.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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¹³ Chiefs of Ontario, *Closing the Infrastructure Gap: Ontario Regional Analysis*, January 2024, p 4. Online at <[Chiefs of Ontario](#)>