

December 1, 2023

Rt. Hon. Justin Trudeau
Prime Minister of Canada
House of Commons
Parliament Buildings
Ottawa ON K1A 0A6

Re: Strengthening Impact Assessment and Regulatory Efficiency

Dear Prime Minister,

We write to you as experts with decades of experience in environmental law and impact assessment. Each of us participated in the 2016 review of federal environmental assessment processes as members of Minister McKenna's Multi-Interest Advisory Committee, intervened in the *Impact Assessment Act* reference case, or both.

We are concerned that the Supreme Court of Canada's recent opinion on the constitutionality of the *Impact Assessment Act* is being viewed as an opportunity to weaken federal impact assessment in the name of regulatory efficiency. We urge you and your Cabinet to resist these calls and instead use this occasion as an opportunity to consider ways to strengthen federal impact assessment and apply it to a wider range of projects that impact areas of federal jurisdiction.

Since the Act was first introduced, there has been a profusion of false and misleading statements about federal assessments causing undue delay and uncertainty. These claims proliferated after the Court released its opinion in October and fly in the face of the principles of sound decision making.

Impact assessment is the best, and often only, tool we have for serving the public interest by identifying the impacts, risks, benefits and uncertainties of proposals before they occur. Often called a 'look before you leap' process, impact assessment is a cornerstone of environmental policy around the globe. It is a requirement of the 1992 Rio Declaration, the Convention on Biological Diversity, the Kunming-Montreal Global Biodiversity Framework, and numerous other international, regional and development bank instruments, and can be integral to fostering sustainability.

The Supreme Court's opinion need not undermine impact assessment's potential for Canada. A majority of the Court identified four elements of the Act that require amendment in order to bring the Act into conformity with the Constitution. We believe that these amendments can be drafted in a way that largely preserves informed decision making and helps Canada contribute to sustainability and meet its climate and biodiversity targets.

Drafting amendments should avoid compromising the integrity of the Act, retain requirements respecting meaningful public participation and Indigenous engagement, and facilitate the more frequent use of panels and committees. Specifically, we recommend the following:

1. Collaborate with Indigenous nations and organisations on amendments.
2. Work with Department of Justice lawyers to include greenhouse gas (GHG) as a federal effect in a manner that meets the test for the particular head of power under which jurisdiction is being asserted. We believe it is possible to do so, and would be pleased to work with your ministers to explore options.
3. Amend the section 7 prohibitions so they prohibit proponents of designated projects from doing any act or thing in connection with the carrying out of the designated project, in whole or in part, that may cause *adverse* effects on areas of federal jurisdiction.
4. Retain the current list of factors to consider (section 22).
5. Avoid any amendments that would encourage or result in project-splitting.
6. Craft new decision-making provisions that ensure the sustainability of matters within federal jurisdiction:
 - a. For federally-regulated projects, the Supreme Court was clear that decision makers may consider all relevant positive and negative effects (see para 173). The full suite of considerations under section 63 should therefore be retained, and additional safeguards should be added to prohibit decision makers from approving any effects that would undermine sustainability, would hinder Canada’s ability to meet its climate commitments or environmental obligations, or that do not have the consent of Indigenous peoples. References limiting consideration to “federal jurisdiction” can be removed as superfluous.
 - b. For provincially-regulated projects, it is critical that decisions foster the sustainability of federal matters. For example, we recommend provisions that only allow the Minister or Governor in Council to authorise adverse federal effects where:
 - i. The effects will not undermine the long-term health of the federal interest;
 - ii. The benefits have been rigorously reviewed and the decision maker is satisfied they will be lasting and equitably distributed, particularly among those who will be most negatively impacted; and
 - iii. The effects are consented to by the Indigenous peoples in whose territories the project or effects will occur.
7. Amend the regional and strategic assessment provisions to expand the ability of the Minister to appoint committees to conduct regional and strategic assessments with or without provincial cooperation, in order to better understand and more effectively manage cumulative effects on areas of federal jurisdiction. If Parliament is limited to regulating and protecting federal matters, it should excel at doing so.¹ Specifically:

¹ Regional and strategic assessments are under-used tools for predicting, avoiding and managing cumulative effects and can be tailored to focus on areas of federal jurisdiction. For example, regional assessment committees could assess the cumulative effects of past, current and future activities on federal matters in order to inform federal decisions under various environmental laws, such as the *Fisheries Act*. Co-appointing committees with other ministers could significantly improve the involvement of their departments in regional assessments as well as better ensure that the outcomes inform their future decisions. Similarly, strategic assessments of projects not designated in the *Physical Activities Regulations* could help inform federal regulatory permitting processes. Through greater use of these tools, the federal government could significantly improve its data collection and management of areas within its constitutional authority.

- a. Amend section 93 to enable the Minister, on their own or with other federal ministers, to establish a committee for conducting regional assessments outside federal lands.
 - b. Amend section 95 to enable the Minister to order strategic assessments of policies, plans, programs and issues beyond those pertaining to impact assessment.
8. Avoid amendments that would lower the standards that must be met in order for the Minister to approve a substitution request. The goal for collaborating with provincial authorities should be harmonization of assessments upward to the highest standard.
 9. Avoid shortening timelines or introducing other measures that would reduce flexibility and reduce the ability for Indigenous peoples, the public and independent experts to engage meaningfully.

One of the greatest obstacles to efficiency has long been inadequate coordination between regulatory permitting departments and assessment authorities, which results in inconsistent requirements, duplication and delay after assessments in the permitting stage. As a result, the greatest opportunity to gain efficiencies in the delivery of effective assessments and informed decisions is by encouraging and facilitating the close involvement of federal regulatory departments, knowledge holders and independent experts, beginning in the earliest stages and continuing throughout assessments.

The *Impact Assessment Act* attempted to streamline the transition between assessment and regulatory permitting by requiring federal authorities to make their specialist or expert information or knowledge available to the Impact Assessment Agency of Canada. However, the engagement of federal authorities has not been meaningful in practice. Establishing mechanisms for more closely involving key experts, knowledge holders and authorities (including Indigenous authorities) could simultaneously improve impact assessment's effectiveness while achieving desired efficiencies. In our view, these mechanisms do not require legislative amendments, simply improved policy and practice.

Impact assessment is unique among environmental approval processes in that it is a planning tool, not a regulatory one. Its participatory nature and its consideration of different ways of carrying out projects – or even, in some cases, alternatives to the projects themselves – provide credibility to decision making and allow proponents, authorities, the public and Indigenous peoples to avoid harms and ensure that projects deliver lasting benefits for communities. Amendments to the *Impact Assessment Act* should advance these goals, not undermine them.

This year marks the 50th anniversary of environmental assessment in Canada. Let's get it right.

Sincerely,



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