BC ASSEMBLY OF FIRST NATIONS

Written Submission for the Expert Panel Review of Environmental Assessment Processes

December 15, 2016

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EXECUTIVE SUMMARY

Criticism of the EA process has been mounting for many years, and we welcome the opportunity to send you our written submission on this important and contemporary issue that affects all Canadians, and First Nations across Canada. We are calling for a complete revision of the CEAA legislation.

In 2016 in this Province, how is it possible that a First Nation can be significantly, directly, and negatively impacted by a resource project that will unjustifiably infringe on their Aboriginal rights, and yet – the project moves ahead. Meanwhile, a non-Indigenous group can call themselves a municipality, and become entitled to a seat and vote at the regional district table, allowing them to have direct influence on the project.

This is one of many examples that highlights the persistent attitude of colonial governments in this country to run roughshod over our Title and Rights and continue to exploit the land and resources for profit while leaving our Nations with contaminated and barren land, depleted fish stocks, and a natural environment devoid of anything that could make our Aboriginal right to our lands and territories meaningful.

The current EA process in this country has been a complete failure, and is conducive to the continued minimization and exclusion of First Nations in the process, despite the Federal government having a fiduciary duty to act in the best interests of *Indians and Lands Reserved for Indians,* under section 91(24) of the *Constitution Act.*

How has the federal Crown protected the interests First Nations? They have not; we have had to protect ourselves from the Crown by entering into EAs with the proponent exclusively and leave the Crown out of negotiations altogether. This is a new strategy that First Nations have had to employ and involves requiring proponents to sign confidentiality agreements barring them from disclosing information, such as First Nations' Aboriginal rights information and environmental concerns, to the Crown. This has been done to ensure that this information could not be used by the Crown at a later date as "consultation", or allow time for the Crown to tailor their "accommodation" to gloss over and minimize the concerns outlined in the sensitive information.

There is a significant flaw in the current EA process if a First Nation must, through contract law, forbid information sharing between a proponent and the Crown to avoid a well-founded assertion that the information will later be used to override First Nations' concerns. This, in itself, speaks to the fact that the Crown is not fulfilling its fiduciary duty and is not acting in the best interests of First Nations.

Aboriginal Title and Rights are largely excluded from consideration in the current EA legislation, and are included only indirectly when assessing the strength of the Title and Rights analysis. This has resulted in a wholly insufficient consideration of Indigenous legal orders, and First

Nations cultural values, including environmental protection. This analysis is done by the Crown and proponents, who have historically shown indifference to First Nations assertions of Title and Rights.

Flying in the face of Administrative Fairness, First Nations are not privy to the methodology and information on which the Crown makes its determination on how a project will impact First Nations' rights. A major issue in the EA process is that First Nations are not recognized as decision makers. Both domestic and international law are pointing towards Free, Prior, and Informed Consent for projects that have the potential to impact on their Title, Rights and interests. To avoid costly and prolonged litigation, it is in the best interest of all parties to negotiate and reach consensus on projects.

Some individuals have suggested that the 2013 BC-Canada bilateral Harmonization Agreement was born out of embarrassment after Provincial and Federal assessments on the same project yielded significantly different results. This Agreement needs to be dissolved and re-written as a tri-partite with First Nations at the table to ensure that Free, Prior and Informed Consent is written into the approval process of EA decisions, and to re-frame the relationship as one that is Nation-to-Nation. The current EA process needs to be completely restructured to reflect Aboriginal Title and Rights, and to put First Nations in the position of decision-makers, and not merely stakeholders.

The legislation, relationship, and process needs to reflect ever-changing social and legal norms that hold the Crown and proponents to higher standards of collaboration with First Nations, and secures their Free, Prior, and Informed Consent. The Liberal government's commitments to renewing the relationship with Indigenous peoples will continue to lack integrity and acknowledgement by Indigenous peoples until Aboriginal Title and Rights are respected in every dealing with the Crown, especially regarding environmental concerns and resource development.

OVERARCHING INDIGENOUS CONSIDERATIONS

To address the Expert Panel questions in this area, we have included "*Consent and Environmental Assessment*" authored by Dr. Roshan Danesh:

Consent and Environmental Assessment
October 13, 2016

- On May 10, 2016 the Federal Crown endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* without qualification. UNDRIP includes the standard of free, prior and informed consent of Indigenous Peoples in multiple articles. Article 32 states:

  > States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

- Consent of Indigenous Peoples is also an established standard of section 35 of the *Constitution of Canada.* Indigenous consent is the standard for the use of lands and resources subject to Aboriginal Title. The Supreme Court of Canada has affirmed that Aboriginal Title is territorial in scope (e.g. it covers vast tracts of land), and is not dependent on court declaration or Crown recognition for its existence.

- The Federal Minister of Environment and Climate Change has established an Expert Panel to conduct a review of federal environmental assessment processes in Canada. The Expert Panel has specifically asked for input on the following question: "What is the best way to reflect the principles of United Nations Declaration on the Rights of Indigenous Peoples, including the principles of Free, Prior and Informed Consent and the right to participate in decision-making in matters that would affect Indigenous rights, in federal environmental assessment processes?"

- Reflecting the expectation of international law, the Federal Crown has committed to the fully upholding through domestic laws and policies the rights of Indigenous Peoples articulated in UNDRIP. At the same time, however, there is not a dictated way in which this implementation will occur. In other words, there are multiple ways in which the standard of consent may be upheld in federal laws and policies, including in relation to environmental assessment

- An approach to implementation of consent in relation to environmental assessment should ensure to have the following elements:

- An outcome that provides clear and compelling evidence of the decision of the proper Title and Rights holder, acting through their representative institutions and applying Indigenous laws, regarding the project.

- Affirmation that the decision of the proper Title and Rights holder will be respected by the Crown.

- Respect for the decision-making process, authorities, Indigenous laws, and structures of the proper Title and Rights holder.

- Clear, coherent, and defined processes for seeking to achieve harmony and alignment between decisions of the Federal Crown and those of the proper Title and Rights holder.

- Processes and structures throughout an environmental assessment that facilitate the development of consensus, collaborative conflict resolution, and increased likelihood of harmony in decision-making.

- Formal requirements for the inclusion, use, and application of Indigenous knowledge to environmental assessment, as well as the technical assessment standards applied by Indigenous governments.

- In addition to the above, part of the shift towards environmental assessment consistent with the standard of consent involves moving from regimes in which Indigenous peoples are asked to participate *within* Federal Crown processes that are structured around and only acknowledge Crown authority, to regimes that structure the relationship *between* the Crown and Indigenous governments, with their respective jurisdictions, laws, and authorities.

- There are multiple ways that these elements could be implemented in a new federal environmental assessment regime. Some examples include the following:

    1. Parallel Crown and Indigenous environmental assessments: Environmental assessment would involve parallel Crown and Indigenous assessments that interact and intersect in various ways. At the end, decisions would come from the Crown and Indigenous assessments. Prior to the decisions, steps would take place for information sharing, dialogue, and seeking alignment between potential conditions and decisions that may come of the of the parallel assessments. If decisions are not in harmony, there would be processes outlined to seek to achieve resolution. Measures would be taken throughout the processes to ensure that information gathering is not duplicated, and the assessments generally move in parallel with each other.

2. Jointly designed, structured, and authorized integrated environmental assessment: Indigenous governments and the Federal Crown would jointly adopt a model for an integrated environmental assessment pursuant to their respective authorities, jurisdictions, and laws. This may take a few forms. It could involve both the Crown and Indigenous governments authorizing a jointly structured and appointed body to conduct and a render a decision regarding the environmental assessment. In other words, a joint body would delegated the authority by both the Crown and Indigenous governments to conduct and render a decision regarding an environmental assessment, applying jointly agreed to standards and criteria. Alternatively, a joint body could be authorized to make consensus recommendations to the Federal and Indigenous decision-makers who would then render their respective decisions. Formal efforts to align decisions would be applied prior to, and post, decisions as necessary.

- These approaches, as well as others that will achieve the goal of implementing the standard of consent, will require multiple tools to shift from the status quo of environmental assessment.

    - Legislative change will be required to ensure the recognition of the role and authorities of Indigenous governments, and appropriately structuring the decision-making authority and use of discretion of Federal Crown decision-makers. Deciding on the approaches ultimately adopted, legislation adopting new structures and processes for decision-making will also be required.

    - New policy and process guidance will also be required to reflect the steps to be followed through parallel or jointly designed processes, and the types of information and technical standards to be applied.

    - Further, agreements between Federal and Indigenous governments may be used in all models to formalize agreement between respective Indigenous decision-makers about how the environmental assessment will be conducted for that project. Such agreements may also reflect the possibility that there may be multiple options for how the Federal Crown and Indigenous governments choose to apply the standard of consent on any given assessment, and an agreement that would formalize the choice of process for that particular assessment.

OVERARCHING INDIGENOUS CONSIDERATIONS

Additional BCAFN submissions:

Concerns:

a. Capacity funding may be negotiated through agreements with the proponent, but some First Nations feel that accepting this funding is taken as conditional support for the project, and are accordingly pressured by proponents after accepting funding.
b. The application process for capacity funding and reporting on expenses and activities from CEAA is onerous.
c. First Nations are participating in EAs with parties who do not fully understand Aboriginal Title and Rights, which results in a lack of recognition and respect for their inherent and legal rights. Title and Rights need to be understood and addressed early on as a foundation for the relationship, instead of an after-thought. It is critical that parties understand the difference between *Free, Prior and Informed Consent* and *veto*.
d. There is no legal means to protect the intellectual property rights of First Nations when asserting Traditional Knowledge (TK).
e. There is an artificial distinction between Current Use and Traditional Use. The relevance of TK is minimized and the focus has largely been on Current Use. However, it is the TK and Traditional Use that informs the Current Use in consideration of environmental changes – whether naturally occurring or as a result of development. First Nations are now in a position of 'use it or lose it' and if they cannot prove use, the Crown and proponent proceed with development.
f. There is no trust between First Nations and the Crown. Renewing the Nation-to-Nation relationship will require extensive and early engagement with First Nations not only on project-specific matters but also on matters that require decisions on the management and sustainability of the land, wildlife, fisheries, air and water.
g. Clarity is needed on what is required of the 'duty to consult' and which parties are accountable in fulfilling this duty.
h. Impact Benefit Agreements must be included and negotiated as part of the EA process to ensure that First Nations will benefit and be fairly compensated for project development.

ENVIRONMENTAL ASSESSMENT IN CONTEXT

How does, and how could, environmental assessment contribute to Canadians' and Indigenous Peoples' trust that the review process has been complete, fair, and effective, and that it aligns with these important commitments?

Trust in the EA process would best be achieved by the meaningful inclusion of First Nations **before the process begins, during the life of the project, and once the project has been completed and Nations desire to be involved in monitoring compliance and enforcement of recommendations and environmental effects.** Meaningful inclusion would include:

PLANNING ENVRIONMENTAL ASSESSMENT

1. CAPACITY AND INTEGRITY

Concerns:

a. Many First Nations lack the capacity to fully participate at the same level as the Crown and proponent. This includes access to adequate funding to contract independent consultants to report, critique, and verify information being put forward by the Crown and proponents.
   - Some proponents have spent up to $10 million on a single EA, while it has been reported that the Crown has spent up to $1 million in some circumstances. First Nations may be typically awarded between $20-40,000 to participate.
   - Crown and proponents should be barred from contracting individuals and companies who have a direct or indirect financial interest in the outcome of their reports.

b. Having a one-year timeline is not adequate to form a working relationship with the Crown and proponent, to review and respond to project information, and to participate in government and proponent meetings on the project. Longer timelines that extend beyond a year, and the ability to "stop the clock" to allow for the careful review and response to information provided by the Crown and proponent is required. Some Nations are equipped to respond more quickly than others due to their internal resources and capacity. Nations who require more time to adequately review and respond should be allocated the resources to do so.

c. Communication and Relationship Development: There is a need to develop a closer working relationship with the Crown and proponents prior to, during, and after an EA process.

Recommendations:

a. Provide adequate funding for capacity and resources so First Nations can be meaningfully involved throughout the EA process. Meaningful participation at the early stages of the project is critical to understanding project risks and benefits, and developing a working relationship with the Crown and proponent.
b. New timelines and mechanisms to allow for critical review and response.
c. Regular meetings between the Crown, proponent and First Nations for information sharing and collaboration regarding project plans.
d. Contracting First Nations consultants who can integrate TK and western science to reflect a holistic approach to the identification and mitigation of interests and issues.

2. EA REPORT DATA

Concerns:

a. Initial desktop reviews rely on baseline data, which may or may not exist, and may need to be updated. If baseline data is missing, how can the desktop review support the identification of data gaps and guide the planning of field work studies?
b. Engagement and participation in fieldwork provides for the inclusion of First Nations input through TK, Traditional Land Use Plans (TLUP), and Comprehensive Traditional Territorial Plans (CTTP). However, the methodology used by consultants in the collection and reporting of the study results is not standardized, and the weight that is given to TK and TLUP may not be considered significant by the regulator.
c. The lack of baseline data, standardization in the methodology, and lack of validation of TK and TLU raises critical questions as to how 'minimum thresholds' can be established. Without this knowledge, how can the Crown or proponent mitigate the impacts of a project? Furthermore, the lack of this data leads to conclusions on the assessment and measurement of cumulative impacts and effects that cannot be empirically substantiated because of data gaps.
d. Cumulative Effects: EA is lacking an advisory process that integrates multiple agencies and their respective frameworks for input to assess cumulative effects. The collection of baseline and prior data, if available, should be the first step of monitoring throughout the life of the project. At its completion, there must be a plan that requires a reasonable standard of monitoring involving First Nations stewardship, which would translate into meaningful employment opportunities.

Recommendations:

a. Thorough collection of baseline data and TK to inform TLUP and CTTPs. The collection of TK data should involve consideration the four seasons, migration, air and water quality, and traditional foods found on the land. A comprehensive data set must be collected to create a baseline from which to measure cumulative effects.

b. Develop a standardized and uniform methodology for the collection of TK. This will require financial resources for planning, implementation, collection, and maintenance of the data about the territory that would inform the completion of CTTP and the EA. Field studies should be conducted throughout to monitor effects.

3. **INVESTOR CERTAINTY AND EARLY ENGAGEMENT**

Concerns:

The practice of early engagement by the Crown and proponents is different in every instance, and it is unclear when it is to be commenced. Messaging from the Crown and proponents is frequently inconsistent and results in a lack of clarity about the project, which fuels distrust and division with other parties, and within the First Nation community.

Recommendations:

If the Crown and proponents would invest early in baseline data collection, TLU, and CTTP, the First Nation would have concrete information on which to base its decision if it was feasible to move to the next step. Early investment in understanding the potential risks and benefits of the project would provide more certainty for First Nations and investors.

4. ADVERSE IMPACTS, STANDARDIZATION, TIMELINES

Concerns:

a. There is a lack of clarity about how adverse impacts are measured. TK, TLU, and CTTP can provide information about the effects and impacts that have been noted over time, and what needs to be considered in a measurement formula. This data should be relied upon throughout the life of the project, and should be used to establish an institutional memory in moving into future project planning and development.

b. A more integrated process is required to consider impacts on a range of natural systems, such as water – including watersheds and wetlands, fisheries, and forests. In particular, forestry should be considered an activity that requires an EA given its impact on the environment.

c. First Nations must be at the table to contribute to the decision of whether a federal environmental assessment is required. It would be ideal for First Nations to have a federal environmental EA process in place, particularly where there is a potential conflict between the provincial EA process and First Nations interests and issues.

d. There is significant concern around the lack of standards for the collection, verification, weighing, and means of mitigating impacts and effects identified through community engagement and TK. First Nations must be resourced to develop a process that would give clear guidance and further inform the planning, collection, analysis, and review of EA-related science.

e. First Nations have expressed concern that project timelines are too short, and that there is no meaningful dispute resolution process that is accessible to them. Because of this, when proponents encounter delays in their project timelines, they resort to litigation and file applications with the Court. As noted earlier, First Nations have limited financial resources and this directly affects their ability to respond effectively to Court applications. Proponents should be barred from engaging in litigation to push a project forward; disputes should be dealt with in a forum that works towards resolution and maintaining a working relationship between parties. The adversarial and expensive nature of litigation does not promote values of partnership and collaboration, and often times First Nations are 'priced-out' of having their concerns fairly considered.

DECISION AND FOLLOW UP

What types of information should inform environmental assessments?

1. **Adaptive Management Considerations**: Conditions placed on projects do not contain thresholds, and mitigations may prove ineffective. Ongoing monitoring is required to better inform decision making in an effort to reduce uncertainty with adverse effects. First Nations have knowledge acquired over the past seven generations that put them in a unique position to inform adaptation based upon this knowledge, which will inform and plan for the future seven generations.

2. **Significant Adverse, and Cumulative Effects**: It has been reported that consensus was difficult to achieve among parties on significant adverse effects, and cumulative effects; it is likely that the discrepancy revolves around value-judgments for economic benefit and the cultural value of the land to First Nations. It has been suggested that a new formula of measurement be implemented to properly reflect the weight of cultural value and the value of maintaining a natural environment as a high-value asset that is worth protecting and investing in.

3. **TK and specific site profiles, TLUP, and CTTP that includes regional data sets.**

<u>Concerns:</u>

a. Mitigation measures are taken into account prior to a decision being made on whether there is likely to be significant adverse environmental effects resulting from a project. The success of the implementation of mitigation must be measureable. While a decision on the likelihood of significant adverse environmental effects of the project is required, there is a lack of clarity around how this is actually measured.

b. Enforcement of Recommendations and Conditions through Compliance Monitoring
First Nations are stewards of their respective traditional territories, and yet they do not have a role in the monitoring and enforcement of the project throughout its lifecycle, or in compliance monitoring for the future life of the development. Employing First Nations for ongoing monitoring and compliance enforcement would build trust between parties and provide valuable employment opportunities.

c. Are enforceable conditions the right tool to ensure that the Crown is meeting its environment assessment objectives, and, if so, who should have a role in compliance and enforcement?

- Enforceable conditions assist in meeting current conditions; however, the environment and the extent of development changes over time and these conditions need to be flexible to adapt to new circumstances that could be better predicted if ongoing monitoring were to occur.
- While the Crown and proponents are required to identify and mitigate issues, there is no requirement of the proponent to develop an improvement plan to ensure the reduction and elimination of adverse effects.
- As previously mentioned, funding and capacity limit the ability of First Nations to participate. Financial resources are required and an accessible fund of resources must be secured. One model the USA used was the adoption a Board-directed superfund for contaminated sites remediation. A similar model could be used in this jurisdiction with the Board given powers to enforce measures that direct the proponent to mitigate and remediate damage that occurs.

d. Environmental Assessment Decisions are made in the planning phase of proposed actions; how should these decisions manage scientific uncertainty?
    - Some degrees of uncertainty can be managed with the use of tools such as TK, TLUP, CTTP, collecting baseline data that can be measured and compared as the project progresses, peer-reviewed studies, and the use of the precautionary principle when risks cannot be accurately measured, or will cause irreversible harm.
    - Where there is a high degree of uncertainty and risk, or the likelihood that mitigation or remediation measures would not effectively counter adverse impacts, projects should not be allowed to proceed.

COORDINATION

Concerns:

a. Credibility and transparency: What are the Roles of the Federal and Provincial Crown? Early consultation and discussions around coordinating federal and provincial EA processes should be required.

b. Substitution and equivalency of EAs between CEAA and BCEAO has not provided confidence to First Nations. The issues raised in the EA are not being given their due consideration and there is no recourse when concerns regarding adverse impacts are dismissed.

c. While it may appear that there is duplication between the federal process and other jurisdictions, there is a depth of knowledge and expertise that lies with the federal process and as such, there is a continued need for the federal EA process to remain.

d. First Nations' inherent jurisdiction could best be reflected in the federal environmental assessment process by a declaration and policy change by the federal Crown that the government will be engaging with First Nations to promote and establish a Nation-to-Nation relationship based on Free, Prior and Informed Consent.

e. **Assessment of Strength of Claim**: Determination on the strength of an asserted claim often turns into an adversarial process between First Nations and the Crown. This results in the eventual breakdown of working relationships between parties, and is exacerbated when the Crown does not provide an explanation for arriving at its decision.

f. **Departmental Collaboration**: Different government departments make decisions on different project components, and First Nations have to deal individually with departments on various matters. Government departments should work collaboratively in determining the strength of a claim and be required to provide a sound explanation to First Nations that clearly articulates how elements of the claim of asserted Title and/or Rights has been weighed and considered.

g. **Consultation and Accommodation**: There is a significant lack of clarity and communication with First Nations on the standards that the Crown must meet.

CONCLUSION

Since 1973, First Nations have been forced to litigate against projects that infringe on their Aboriginal Title, Rights and interests to seek clarity on the authority of Nations in the use and development of their traditional territories. Across Canada, First Nations have accumulated over 200 judicial decisions in our favor – however, successive governments have refused to fully implement these decisions and have instead appealed many of them, and ignored the rest.

The Assembly of First Nations has previously stated in its 2011 submission that "In too many circumstances, First Nations are forced to resort to litigation because environmental assessment processes do not adequately consider Aboriginal and treaty rights. First Nations issues dominate litigation in environmental assessments, yet First Nations are not meaningfully involved in legislative or policy development."

First Nations continue to find themselves unwillingly married to a process that disrespects and undermines our rights in the name of progress and development. We are forced into a critical, determinative process unprepared, with parties who have deep pockets and who do not acknowledge our cultural values; parties who use information about a Nation's Aboriginal right against them to minimize their rights, as opposed to using this information to in a constructive way to inform the process and reach consensus based on the best possible information.

When financially feasible, First Nations have turned to litigation because there is no meaningful dispute resolution in the corrupted EA process, and all other efforts to sit at the table in a decision-making capacity have been shut down.

The relationship between First Nations, the Crown, and Proponents need to be founded on respect, transparency, and collaborative decision-making. The current EA process needs to be completely restructured to reflect Aboriginal Title and Rights, and position First Nations as decision-makers, not merely stakeholders. There is much at stake if EAs continue to be delivered as they have been in the past: irreversible environmental destruction, prolonged hostility towards Aboriginal rights, and the continual erosion of the honor of the Crown.

It is in the National Interest to honor and respect our Aboriginal rights that give effect to strong environmental standards, it is in the National Interest to protect our sacred resources for generations to come. Under the current system, this future is not possible.

Support and inclusion of First Nations in the EA process to reflect Free, Prior, and Informed Consent ensures integrity, transparency, fairness, and gives meaning and respect to Aboriginal Rights and Title that have been recognized and affirmed in Section 35 of the Constitution Act.

The Prime Minister and Attorney General continue to speak about how to bring the *United Nations Declaration on the Rights of Indigenous Peoples* into Canadian law, and we acknowledge the challenges that lay ahead in this regard. Reforming CEAA to reflect Aboriginal

Title and Rights, and the concept of Free, Prior, and Informed Consent would be an historic, foundational, and imperative action to begin the work needed to effect true reconciliation in this country. It would signal a critical and overdue shift in law and policy to Indigenous people, provincial governments, proponents, and Canadians, that the federal government is resolute in its commitment to recognizing Indigenous nations through a true Nation-to-Nation relationship.