

**SUBMISSION TO
FEDERAL REVIEW OF
ENVIRONMENTAL
ASSESSMENT
PROCESSES**

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**AMNESTY
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INTRODUCTION

In November 2016, Amnesty International released a major research report¹ documenting how decisions about energy development in the Peace River region of British Columbia have had serious unintended consequences for the health, safety, and well-being of women and men in the host communities, with the most marginalized members of those communities – particularly Indigenous women and girls – suffering the greatest harms. These harms include dramatic loss of land needed to sustain Indigenous cultures and traditions and foster individual and collective healing; the loss of access to necessities like affordable housing as the high wages of the resource sector drive local prices beyond the reach of families without access to such wages; strains on local infrastructure and community services that similarly put support and services out of reach for many; growing problems with drug and alcohol abuse linked to the influxes of such large numbers of outside workers; and very high rates of violent crime, including violence against women. Although these impacts have been documented in previous studies dating back over three decades,² our research found little indication of their having been considered or addressed in any substantive way in decision-making processes.

The wide range of harms identified in Amnesty International's research -- which are clearly not limited to one sector of industry or to one region of Canada³ -- deny women and men the enjoyment of their fundamental

1 Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights and Energy Development in Northeast British Columbia, Canada*, November 2016, AMR20/4872/2016

2 Northern Health, *Population Health and Oil and Gas Activities: A Preliminary Assessment of the Situation in North Eastern BC*, 10 January 2008, [available at prrd.bc.ca/board/meetings/agenda/documents/rd/cfour011008.pdf](http://prrd.bc.ca/board/meetings/agenda/documents/rd/cfour011008.pdf)

3 See for example, The Labrador West Status of Women Council et al., *Effects of Mining on Women's Health in Labrador West*, 7 November 2004; Alison Cretney et al., *Boom to Bust: Social and cultural impacts of the mining cycle*, Pembina Institute, 2008; Catherine Coumans and Mining Watch Canada, 'Research on Contested Ground: Women, Mining and Health,' in *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health*, 3:1, Winter 2005, pp. 9-32; Ginger Gibson and Jason Klinck, 'Canada's Resilient North: The Impact of Mining on Aboriginal Communities,' in *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health*, 3:1, Winter 2005, pp. 116-139; First Nations Women Advocating Responsible Mining, *Submission to Committee on the Elimination of Racial Discrimination, 80th Session*, January 2012; Conseil du statut de la femme Quebec, *Opinion - Women and Plan Nord: for Equality in Northern Development*, October 2012; Janis Shandro et al., *Ten Steps Ahead: Community Health The Social Dimension of Sustainable Development and the Mining Industry: A Background Paper and Safety in the Nak'at'la/Stuart Lake Region During the Construction Phase of the Mount Milligan Mine*, December 2014; Lisa Aurore Lapalme, *The Social Dimension of Sustainable Development and the Mining Industry: A Background Paper*, Natural Resources Canada, November 2003, p. 14; Robert James Early, *DISCONNECT: Assessing and Managing the Social Effects of Development in the Athabasca Oil Sands*, University of Waterloo, 2003, p. 167; Nobel Women's Initiative, *Breaking Ground: Women, Oil and Climate Change in Alberta and British Columbia*, 2013, pp. 18-20; Pauktuutit, *The impact of resource extraction on Inuit women and families in Qamani'tuaq, Nunuvut Territory: a qualitative*

human rights including the right to health, the right to an adequate standard of living, the right to a healthy environment, the right to live free from violence, and the right of Indigenous peoples to maintain their ties to their lands and make decisions about their futures. In Canada, these rights entail legal responsibilities set out in the Charter of Rights and Freedoms, the Constitutional affirmation of Aboriginal and Treaty Rights, and in the wide body of binding international human rights law that Canada has actively contributed to developing.

All governments have a fundamental duty to ensure that the decisions they make are consistent with their human rights obligations. In every instance, there is a duty of due diligence: the responsibility to take every reasonable measure to ensure that the decisions and actions of government do not contribute to the erosion or violation of human rights.

Environmental assessments can play a crucial role in meeting this standard of due diligence. EIA's can provide an opportunity for claimed benefits and potential harms of any project to be scrutinized in a public manner with the direct participation of potentially affected individuals, communities, and Indigenous peoples. The role of EIA's in fulfilling the standard of due diligence is particularly important in the absence of other processes or mechanisms that can examine these matters in a similarly public and transparent manner.

The Canadian Environmental Assessment Act 2012 sets out only a limited range of environmental effects explicitly requiring assessment. The framework of the Act -- which states that a project can be given federal approval only if an environmental assessment is not needed, if the proposal is found "not likely to cause significant adverse environmental effects," or if such harms are deemed "justified in the circumstances" -- implicitly invites scrutiny of the claimed benefits of a proposed project but provides no framework or guidance for doing so.

assessment, January 2014; Linda Archibald and Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project*, November 1999; National Aboriginal Health Organization, *Resource Extraction and Communities in Northern Canada: Gender Considerations*, 2008; World Health Organization, *Managing the public health impacts of natural resource extraction activities: a framework for national and local health authorities*, Draft Discussion Paper, 17 November 2010; Shira M. Goldenberg et al., 'Sexually Transmitted Infection (STI) Testing among Young Oil and Gas Workers: The need for Innovative, Place-based Approaches to STI Control,' in *Canadian Journal of Public Health*, 99:4, July-August 2008, pp. 350-254; Shira M. Goldenberg et al., 'And they call this progress? Consequences for young people of living and working in resource-extraction communities,' in *Critical Public Health*, 20:2, p. 162; S. Barton, 'Aspects of the effect of substance use on health, wellness and safety of employees and families in northern remote work sites,' in *Social Indicators Research*, 60:1. p. 267; S. Markey and K. Heisler, 'Getting a fair share: Regional development in a rapid boom-bust rural setting,' in *Canadian Journal of Regional Science*, 33:3, p. 56; Northern British Columbia Women's Task Force, *Report on Single Industry Communities: Kitimat, BC; Fraser Lake, BC; Mackenzie, BC*, 1977; Northern Health, *Men's Health Matters Because Men Matter: Community Consultation on Men's Health: What We Heard*, September 2011; and Northern Health, *Where are the Men? Chief Medical Health Officer's Report on the Health and Wellbeing of Men and Boys in Northern BC*, November 2011.

The example of the joint federal-provincial assessment of the Site C hydroelectric dam, now under construction on the Peace River, is compelling in this regard. The review⁴ was notable in the detailed scrutiny given to the purported benefits of the project. The analysis set out in the final report examined how some of these benefits, such as job creation, could also have unintended negative side effects such as driving up local prices for housing. Despite the unusual degree of attention to social and economic impacts, there were also significant gaps in the report's analysis, particularly in respect to gender. For example, nowhere does the report examine the potential that harms identified could have a different or more serious impact on women than on men even though some of these harms, such as housing insecurity, are well-established risk factors for violence against women.

It is also worth noting that in the case of the Site C EIA, although the Joint Review panel found numerous serious harms to the environment and Indigenous peoples' use of the land (an independent review suggested that the number and seriousness of harms identified in the report was "unprecedented in the history of environmental assessment in Canada."⁵), the federal decision to grant approval to the project provided no substantive explanation of the government's conclusion that these harms "are justified in the circumstances."⁶ Furthermore, the federal government cannot be compelled to provide further explanation because CEAA 2012 put the decision in the hands of Cabinet and thus subject to Cabinet secrecy. In Amnesty International's view, this lack of transparency and accountability is fundamentally incompatible with the potential for serious harm to the human rights that are at stake in such a decision.

In the following submission, Amnesty International sets out recommendations in four areas where reforms of the Environmental Assessment Act and the broader process of government decision-making around resource development are urgently needed to ensure compliance with the federal government's human rights obligations under the Constitution and international law.

Our recommendations are as follows:

1. A reformed assessment act should include in its purposes the protection of human rights, with express reference to Aboriginal and Treaty rights and other rights protected under domestic and international law.

4 Canadian Environmental Assessment Agency, *Report of the Joint Review Panel: Site C Clean Energy Project: BC Hydro*, 1 May 2014, available at www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf

5 Programme of Water Governance, *Statement of Concerned Scholars on the Site C Dam project*, University of British Columbia, 24 May 2016.

6 The Honourable Leona Aglukkaq, Minister of the Environment, *Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012*, 14 October 2014.

2. A reformed assessment act should include explicit recognition that impacts on the culture and heritage of Indigenous peoples, and on Indigenous peoples' use of lands and resources, are matters of rights protected by the Treaty, the Constitution and international law.
3. The assessment process should require disclosure of the federal government's assessment of the strength of the rights of potentially affected Indigenous peoples and provide an opportunity for Indigenous peoples to put forward contending interpretations and such supportive evidence as they may wish to provide.
4. Legislation brought forward to amend or replace CEAA 2012 should include in its preamble an acknowledgement of the harm done to Indigenous peoples by colonial policies and practices.
5. A new or reformed assessment act should include explicit direction that assessments must factor into the evaluation of the seriousness of impacts, the extent to which previous harms experienced by Indigenous peoples have created heightened vulnerability to further harm.
6. A reformed assessment act should include explicit direction that Indigenous perspectives be incorporated in determining the seriousness of potential impacts.
7. The assessment act should be reformed to require that any review: a) evaluate and report on the claimed social and economic benefits of proposed projects; and b) evaluate and report on the potential negative social and economic impacts caused directly by a project or in interaction with other cumulative impacts.
8. The assessment act should require examination of differential impacts by gender, including gender interacts and intersects with other aspects of identity, including sexual identity, ability, ethnicity and Indigenous identity.
9. The assessment act should contain explicit requirements that information submitted by project proponents include such an intersectional gender-based analysis.
10. The government should allocate resources to developing capacity for gender-based analysis within relevant Ministries and, with each specific assessment, within potentially affected communities.
11. Reform of the assessment process should take place in the context of broader reform of government laws and policies to ensure their

consistency with domestic and international laws pertaining to women's rights and gender equality.

12. Reform of the assessment process should take place in the context of broader reform of government laws and policies to ensure their consistency with the rights of Indigenous peoples in domestic and international law, including the right of free, prior and informed consent and recognition of Indigenous title and jurisdiction.
13. Governments should collaborate with Indigenous peoples in establishing the terms of reference for each assessment.
14. Factors considered in an environmental assessment should include whether the affected people have given their free, prior and informed consent.
15. In the interests of transparency and accountability, the report of an assessment should contain recommendations and reasoning for whether a project should be approved.
16. CEAA 2012 should be amended so that the final decision is made by the Minister of the Environment, rather than Cabinet, and that the Minister be required to provide a written rationale for the decision, and the factors considered, including any potential infringement of the rights of Indigenous peoples.

I. The assessment process must explicitly acknowledge and incorporate Canada's human rights obligations

Reviews carried out under *CEAA 2012* are mandated to consider potential impacts on Indigenous peoples' "health and socio-economic conditions," their "physical and cultural heritage," "the current use of lands and resources for traditional purposes," and impacts on "any structure, site or thing that is of historical, archaeological, paleontological or architectural significance."⁷ Review panels are required to work in cooperation with Indigenous peoples⁸ and take into consideration their traditional knowledge systems.⁹ Although these are all matters of human rights protected in Treaties, the Constitution, and international human rights law, CEAA makes

⁷ Canadian Environmental Assessment Act, 2012 (Index: SC 2012, c19, s52), section 5(1)(c).

⁸ Canadian Environmental Assessment Act, 2012 (Index: SC 2012, c19, s52), section 4(1)(c).

⁹ Canadian Environmental Assessment Act, 2012 (Index: SC 2012, c19, s52), section 19(3).

no reference to the rights of Indigenous peoples or the sources of these rights.

The federal government has elsewhere affirmed its intent that CEEA conform to and uphold Canada's human rights obligations. For example, the Cabinet Directive on Regulatory Management, states that all federal "[d]epartments and agencies are to respect Canada's international obligations in areas such as human rights, health, safety, security, international trade, and the environment. They are also to implement provisions related to these obligations *at all stages of regulatory activity*, including consultation and notification, as applicable [emphasis added]."¹⁰ The federal guidance document on the duty to consult and accommodate also names the EIA process as a key means to fulfil this obligation which derives from the Constitutional protection of Aboriginal and Treaty rights.¹¹ However, the absence of explicit language about human rights in the Act itself affects its interpretation, taking away essential context for interpreting the severity of harms or when these harms could be justifiably balanced against other benefits. Further, the absence of explicit rights language within the Act has opened the door to the creation of Terms of Reference for individual reviews that restrict consideration of crucial elements of rights protection¹² and have allowed government to claim that assessment of impacts on rights such as Treaty rights was not necessary in the decision-making process.¹³

II. Assessments must be responsive to the situation of marginalization and disadvantage experienced by Indigenous peoples

When the federal and provincial governments promote resource development on the traditional territories of Indigenous peoples anywhere in Canada, there is a crucial historical context that must guide their actions and decisions. First, Indigenous peoples have already experienced widespread

10 Treasury Board of Canada. *Cabinet Directive on Regulatory Management*. 1 April 2012.

11 Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011*.

12 See for example the terms of reference for the review of the Site C dam which explicitly stated that the review could not make any conclusions or recommendations concerning the scope of rights at stake, the scope of the duty to consult and accommodate, whether or not this duty had been met, whether the project might potentially infringe treaty rights, or "any matter of treaty interpretation." Canadian Environmental Assessment Agency, *AGREEMENT To Conduct a Cooperative Environmental Assessment, Including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project Between The Minister of the Environment, Canada and The Minister of Environment, British Columbia*, 11 March 2004, p. 15, available at www.ceaa.gc.ca/050/documents/54272/54272E.pdf

13 *Prophet River First Nation v. Canada (Attorney General)* (Index: 2016 FCA 120), 2016.

and profound harm as a consequence of past government decisions. Secondly, Indigenous peoples continue to suffer problems of impoverishment, ill-health, discrimination, and social marginalization that are the product of these harms remaining largely unaddressed.

In the context of the criminal justice system, the Supreme Court of Canada has said “courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools” and how that history “continues to translate” into the contemporary social challenges facing First Nations, Inuit and Metis communities.¹⁴ The standard of due diligence requires that the same principle apply to any decision-making that potentially affects the rights of Indigenous peoples. In the context of the lasting, unresolved harms caused by past government actions, governments must take precaution to ensure that their decisions do not further compound this harm. More than that, the requirements of justice mean that governments should prioritize decisions and approaches that support the restoration of Indigenous societies and communities.

III. The scope of assessments must be broadened to include a range of social and economic impacts where rights are potentially at stake

As noted above, CEEA 2012’s provision that projects found likely to cause significant environmental harm can be approved if the government determines that the harm is justified, assumes that factors other than the “environmental effects” set out in the Act will be weighed in the final decision. In Amnesty International’s view, government has a clear and substantial obligation to carefully and rigorously consider a wide range of factors necessary to ensuring that human rights are upheld and not undermined by the decisions that it makes about the projects that it approves and any conditions that are attached to such approvals. International human rights bodies routinely call for “human rights impact assessments” of government decisions. Such assessments must include such factors as impacts on safety, security, health, culture and heritage and harm to the specific rights of Indigenous peoples.

¹⁴ *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

IV. All assessments should include specific consideration of how a proposed project may have different impacts for people of different genders

There is no acknowledgement in CEAA 2012 that the effects of resource development projects may be experienced differently by people of different genders. Incorporating a gender-based analysis is an essential tool for identifying potential risks that may otherwise be overlooked, assessing the seriousness of these risks, and proposing appropriate and effective mitigation strategies.¹⁵ Where Indigenous peoples have carried out their own gender-based analysis of projects proposed in their territories, the result has often been to highlight critical issues that might otherwise have been ignored. For example, a study for the Nak'azdli First Nation in central BC found that loss of access to wild foods could have potentially greater impact on female-headed households than on male-headed households because they were more likely to hunt or fish and were much more likely to eat traditional foods.¹⁶

The World Bank has stated that failure to consider impacts on women and girls can contribute to and exacerbate a number of risks including “lack of voice and representation in the formal decision making process,” “risk of violence and sexual abuse as a result of domestic disputes, alcoholism, drug use, or gambling,” “rise in prostitution and HIV/AIDS and other STDs,” “poor working conditions and incidences of sexual abuse for women in the project workforce,” and “loss of safety and security due to influx of construction workers.”¹⁷ These concerns mirror the gendered impacts experienced by Indigenous women and girls that Amnesty International observed in our recent report regarding northeast BC.

While nothing in CEAA 2012 precludes a gender-based analysis, it is extremely rare for federal environmental assessments to incorporate such an analysis.¹⁸ Amnesty International is aware of only one assessment which has done so.¹⁹ The failure to conduct gender-based analysis prior to the approval

15 UN, *Beijing Declaration and Platform for Action: The Fourth World Conference on Women*, September 1995; and Status of Women Canada, ‘Gender-Based Analysis Plus,’ www.swc-cfc.gc.ca/gba-acis/index-en.html

16 Quintessential Research Group Inc., *Socio-Economic Impact Assessment of Spectra Energy’s Westcoast Connector Gas Transmission Project on Nak’azdli Band and Community Members*, prepared for the Nak’azdli Band, 28 October 2014, p. 34.

17 World Bank, *Gender in Extractive Industries*, 21 November 2013.

18 Barbara Clow, et al., *Gender-based analysis meets environmental assessment: Aligning policy mechanisms to address the resource development in Canada’s North*, Canadian Research Institute for the Advancement of Women, October 2016.

19 Linda Archibald and Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey’s Bay Nickel Project*, November 1999.

of projects in Canada stands in contrast both to the federal government's broad commitment to GBA for all government decisions and to the federal government's stated policy on providing development assistance in relation to development projects in other countries. Global Affairs Canada, which is responsible for administering Canada's overseas development assistance, states that "Gender analysis is required for all DFATD policies, programs and projects."²⁰

V. The process by which assessments are conducted must be consistent with the rights of Indigenous peoples

Canadian courts and international human rights bodies have consistently recognized the need for an especially rigorous standard of protection for the human rights of Indigenous peoples. In part, this is in recognition of the heightened risk of harm created by the historic denial of Indigenous peoples' rights and the continued failure to provide timely and adequate redress for these past harms. Basic principles of justice, fairness and the honour of the Crown are at stake in how governments make decisions in such a context. Thus, for example, the Supreme Court of Canada's *Haida Nation* decision states that "[t]he Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests" while matters like Indigenous ownership and jurisdiction over lands and resources are the subject of unresolved disputes.²¹

In decisions potentially impacting Indigenous peoples' use of their traditional lands, the standard of protection must also reflect the central importance of secure access to and use of the land in fulfilling a wide range of other rights. In the report of its recent investigation into violence against Indigenous women and girls in BC, the Inter-American Commission on Human Rights (IACHR) stated that "special protection for the right of indigenous peoples to their lands and resources" is essential because the "economic, social, spiritual, and cultural development" of their communities as a whole depends on their relationship to the land.²²

The participation of Indigenous peoples in the decision making process is key to ensuring that potential harms are understood from the perspective of

²⁰ Global Affairs Canada, 'Gender Equality,' www.international.gc.ca/development-developpement/priorities-priorites/ge-es/index.aspx?lang=eng

²¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73.

²² Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada* (Index: OEA/Ser.L/V/II. Doc.30/14), 21 December 2014, para. 117, available at www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf (hereinafter: IACHR, BC Investigation).

those who will bear the burden. The late Rodolfo Stavenhagen, who was the first UN Special rapporteur on the rights of Indigenous peoples, stated that when large-scale economic activities are carried out on the lands of Indigenous peoples, “it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them.”

The UN Declaration on the Rights of Indigenous Peoples repeatedly calls not only for consultation with Indigenous peoples – which is understood in international law as encompassing a good faith willingness on the part of government to consider the possibility that a project should be rejected in order to avoid harm to Indigenous peoples – but also for cooperation and collaboration between Indigenous peoples and the state. Furthermore the *UN Declaration* and a larger body of rulings and interpretative statements by UN and Organization of American States (OAS) human rights mechanisms are consistent in setting out that whenever there is risk of serious harm to the cultures, well-being, and safety of Indigenous peoples, decisions should be taken only with their free, prior and informed consent (FPIC). This is consistent with the Supreme Court’s decision in *Haida Nation* that included consent within the spectrum of possible accommodations required when the process of consultation reveals the potential for serious harms.

Like most other human rights protections in Canadian law, the right of free, prior and informed consent is not absolute and allows for the reconciliation of competing rights. The understanding of when consent is applicable should reflect the underlying purpose of providing substantial protection to rights that are highly vulnerable to abuse. The former UN Special rapporteur on the rights of Indigenous peoples James Anaya noted that states should generally presume that FPIC is required for any large-scale resource development project because of the inherently high risks to Indigenous land use and traditions. He argues that before an exception to this requirement can even be considered, there must be a compelling and objective rationale, alternatives must be fully explored, any harmful impact must be minimized, and care must be taken to ensure that Indigenous peoples enjoy more benefit than harm.²³

23 S. James Anaya, *Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples* (Index: A/HRC/24/41), UN Human Rights Council, 2013, paras. 31-36.

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