FSIN OFFICES

Head Office
Asimakaniseekan Askiy Reserve
Suite 100 – 103A Packham Ave
Saskatoon, SK S7N 4K4
Business (306) 665-1215
Fax (306) 244-4413

Protecting and enhancing Treaty Rights for First Nations of Saskatchewan

FSIN

Federation of Sovereign Indigenous Nations
Final Report on Environmental Assessment Processes

December 23, 2016

OVERVIEW

The Federation of Sovereign Indigenous Nations ("FSIN") represents 74 First Nations in Saskatchewan, comprising 144,000 members. We are committed to honouring the spirit and intent of the Treaties, as well as the promotion, protection and implementation of the Treaties.

The legislative changes implemented on or about June 29, 2012 to the *Canadian Environmental Assessment Act* (referred to as "*CEAA*" and "the Act") have proved devastating for First Nations. In an ill-informed attempt to reduce the administrative burden and pave the way for new industry, the previous government failed in its duty to protect the Treaty and inherent Indigenous rights and interests of the First Nations, and the environment that all fish, wildlife, plants and people need to survive.

As the Supreme Court of Canada has repeatedly ruled, there is no administrative regime or cost-saving measure that justifies the infringement of the constitutional rights of First Nations. The goal is to ensure compliance with s. 35 of the *Constitution Act, 1982*. In addition, Canada has undertaken to operate in line with international norms requiring Indigenous participation in decision-making, and free, prior and informed consent on matters that concern their lands, waters and resources.

We presented our preliminary recommendations to the Expert Panel on federal environmental assessment ("EA") processes in Saskatoon on September 20, 2016, and again in Toronto on November 10, 2016. Our review has benefited from discussions with the FSIN Lands and Resources Commission, 74 Chiefs at the FSIN Legislative Assembly, and Tribal Councils in Saskatchewan, including most recently the Yorkton Tribal Council, the Battlefords Tribal Council, the Battleford Agency Tribal Chiefs, the Meadow Lake Tribal Council and the File Hills Qu'Appelle Tribal Council. On December 8, 2016, our eight recommendations were discussed and then adopted as a Resolution by the Assembly of First Nations ("AFN") at the AFN Special Chiefs Assembly in Gatineau, Quebec.[1] We now present you with those eight recommendations that we consider to be crucial to strengthen and improve federal EA processes.

[1] A copy of Resolution no. 86/2016 is found in the Appendix. There was one important abstention based on the requirement that First Nation laws and jurisdictions must take precedence. The Official version will be forthcoming.

SUMMARY OF FSIN RECOMMENDATIONS AS SUPPORTED BY THE AFN

RECOMMENDATIONS

1. Fund and Provide for the Creation of an Independent Indigenous Constitutional Rights Compliance Office[2]

There is a large gap in EA processes in Canada in that there is no direct Indigenous-specific consultation process commensurate with the nature and scope of rights, and to ensure respect for Indigenous and Treaty rights and interests. The burden of ensuring that First Nations rights are protected and that the EA process leads to a constitutionally-compliant result too often falls directly on First Nations, many of which are under-funded, over-extended and overlooked. As a result, s. 35 rights are forgotten, ignored or considered too late by government and industry. This state of affairs calls for a new Indigenous Engagement Process Model that is firmly entrenched in legislation.

> "Under current consultation policy, the government tells us when we are going to have Treaty rights that are impacted. They'll determine that a project will not impact Treaty rights and then they'll merely inform us that they've done their consultation and covered their legal duties. A Chief was asked if he was impacted by a project in a completely different area of the province. He said "no." The government gets enough "no's" from the wrong Chiefs and they falsely presume they can go ahead. We need a watchdog to make sure consultation is vetted through the right procedure. We need an Engagement Process Model."[3]

We Recommend fully involving First Nations from the outset of each project that will have the potential to impact Indigenous and Treaty rights and interests. The new Act should fund and support an independent Indigenous Constitutional Rights Compliance Office ("Compliance Office"). The Compliance Office would advise and assist First Nations throughout the EA process, as requested, and offer proponents and the Crown a first-step, single-window interface for Indigenous engagement. Proponents in Saskatchewan have expressed a keen interest in this model.[4] The goal is to ensure compliance with Indigenous and Treaty rights and interests under s. 35 of the *Constitution Act, 1982* and to operate in line with international norms such as the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").

Funded by proponents and the Crown, the Compliance Office would be staffed with independent experts ("Compliance Experts") well prepared to best represent the interests of First Nations from across each region. Compliance Experts must be skilled in artful listening. They must be familiar with the customs and protocols of the First Nations in the region. They must be able to hear and understand Indigenous knowledge, and ceremonial and resource

[2] The First Nations traditional name for the Compliance Office is "Keepers of the Lands and Waters."
[3] Feedback from FSIN consultations in Fall 2016.
[4] For example, FSIN has consulted with both Husky Energy and Enbridge regarding a "Compliance Office" and both corporations have expressed support.

issues. And then they must be able to reach out to the scientific community where necessary, and have a ready and reliable process of contracting for funded support where expertise must be engaged.

Ideally, the Compliance Office will consist of regional offices across Canada according to the First Nation leadership in each region to ensure that any projects in that province can be addressed with local expertise. For instance, the Saskatchewan Compliance Office could be housed in the already well established Saskatchewan First Nations Natural Resource Centre of Excellence.[5] Across Canada, First Nation leadership would be able to establish regional offices as they see fit.

The establishment of a Compliance Office is in line with Articles 18 and 32 of *UNDRIP*. Article 18 recognizes that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedure, as well as to maintain and develop their own indigenous decision-making institutions."[6] Article 32 recognizes that "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."[7]

The Functions of the Compliance Office

The Compliance Office would be responsible for implementing at least seven crucial functions for each project:

a) Preparation of s. 35 Compliance Plan

b) S. 35 Compliance and Indigenous Environmental Monitoring Throughout

c) Emergency Preparedness and Relief Action

d) Technical and Scientific Mentorship Programs to Fully Develop Local Expertise

e) Elder and Traditional Knowledge Advisory Committee

f) Contracting Capacity for Scientific, Traditional and Local Expertise

g) Easily Accessible Funding for Indigenous Participation and Consultation

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[5] More information available online at: <http://skfncentre.ca/about-us.php>: "On September 8, 2009, the Saskatchewan First Nations Natural Resource Centre of Excellence (Centre of Excellence) officially opened its doors. A creation of the Lands and Resources Commission of the Federation of Saskatchewan Indian Nations, the Centre of Excellence is mandated to provide support and work with First Nation communities in creating opportunities for the innovative, sustainable and environmentally responsible development of the natural resources within their lands and Indigenous territories".

[6] *United Nations Declaration on the Rights of Indigenous Peoples*, art. 18 [*UNDRIP*].

[7] *UNDRIP*, art. 32(2).

a) Preparation of s. 35 Compliance Plan

There are currently no systematic plans to protect s. 35 Indigenous and Treaty rights and interests before, during or after an EA. Nor are there systems in place to vet Constitutionally-required consultations and to ensure that all proponents have engaged in the proper process with all potentially impacted First Nations. For instance, in circumstances of traditional territory overlap, one Nation may be consulted while three Nations are not. The project should not go ahead until all potentially impacted First Nations are properly consulted.

We recommend that proponents of all projects having the potential to impact Indigenous and Treaty rights and interests, regardless of size, be required to meet with Compliance Experts prior to the submission of an EA Project Description document. This meeting is required to enable First Nations to offer input while the project is being developed and to create a *living document*, the s. 35 Compliance Plan ("Compliance Plan"). This Compliance Plan must ensure that proponents engage in the proper consultation processes with all potentially impacted First Nations.

Compliance Experts would involve all potentially impacted First Nations at the preliminary Compliance Plan stage so that First Nations can properly lead the EA from the outset. Issues included in the Compliance Plan would be project specific, and follow the needs of potentially impacted First Nations. For instance, the Compliance Plan would reflect local laws (traditional laws, by-laws, self-government laws, *First Nations Land Management Act* laws, consultation policies) and traditional land use plans prepared by the First Nations, to identify hunting, fishing, gathering, ceremonial and other culturally significant areas. Grants would be provided to First Nations through the Compliance Office to create and maintain traditional land use maps, self-government laws and consultation policies to prepare First Nations to meet with proponents at the preliminary Compliance Plan development stage.

The Compliance Plan would then be modified as a *living document* and implemented throughout various stages of the EA process and project up to the closure and remediation stages. For example, the Compliance Plan would be an integral part of the Project Description document and the Environmental Impact Statement. It would be produced in iterative drafts and updated by the Compliance Office with each significant stage of the EA process and project. As a result, s. 35 rights of Indigenous peoples will no longer be forgotten, ignored, and input will no longer be considered too late. Respect for consultation and accommodation obligations, and Title, Indigenous and Treaty rights and interests will be a part of the composition of each project.

b) S. 35 Compliance and Indigenous Environmental Monitoring

Under the current terms of *CEAA 2012*,[8] the Canadian Environmental Assessment Agency ("Agency") is tasked with monitoring compliance with the Act,[9] and the quality of EAs conducted under the Act.[10] However, neither the Agency nor the Act provides for s. 35

[8] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [*CEAA 2012*].
[9] *CEAA 2012*, s. 105(e).
[10] *CEAA 2012*, s. 105(f).

compliance monitoring or Indigenous environmental monitoring. As a result, no systematic studies are conducted during EA processes to establish environmental baselines, trends and cumulative effects based on Indigenous knowledge. Compliance with s. 35 rights is left entirely to the discretion of industry and the Crown, with no Indigenous input or oversight.

> "When projects release effluent into nearby rivers and creeks, they say it's safe. But we've had an experience where it kills our resources, and there's no monitoring. Where is the monitoring?"
>
> "How do you monitor what pollution is in the air, and where it's falling? We have lakes, rivers and creeks that are being affected. A lot of the time the federal and provincial representatives pass responsibility off to each other. With all the red tape and lack of progress, we lose momentum and sometimes are forced to give up."
>
> "Some of the big projects, like BHP, never triggered a baseline study."[11]

We recommend that a plan be designed for each project to ensure Indigenous environmental monitoring and s. 35 compliance monitoring ("Monitoring Plan") throughout the EA process and project. The Monitoring Plan would form part of, and be prepared alongside, the Compliance Plan. It would be designed by potentially impacted First Nations in collaboration with Compliance Experts, and establish ongoing Indigenous monitoring in at least four phases: (1) planning; (2) construction; (3) implementation; and (4) decommissioning.

Ongoing monitoring would be carried out by trained, independent First Nations monitors ("Compliance Monitors"). Compliance Monitors would report to Chiefs and Councils and the Compliance Office.

c) Emergency Preparedness and Relief Action

In the event of an "emergency or national emergency", the Minister may exclude a designated project from the application of *CEAA 2012*.[12] Moreover, neither the Crown nor the Agency requires an emergency preparedness and relief plan for designated projects. Emergency preparedness is left entirely to the discretion of the proponent. As we recently experienced with the Husky Oil Spill into the North Saskatchewan River, industry is not in the best position to protect s. 35 rights in the event of an emergency. We cannot wait for the next tailings pond to leak.

We recommend that Compliance Experts assist First Nations in establishing emergency preparedness and relief plans for every project to ensure that impacts to s. 35 rights are minimized in the event of an emergency ("Emergency Plan"). The Emergency Plan would form part of, and be prepared alongside, the Compliance Plan.

[11] Feedback from FSIN consultations in Fall 2016.
[12] *CEAA 2012*, s. 87(2).

The Emergency Plan would be carried out by trained First Nations emergency responders ("Emergency Responders") and would include specialized equipment (e.g. oil spill response equipment and boats). The Emergency Plan would apply to a wide range of emergencies and responses that have the potential to threaten the health, safety and security of First Nations, and the protection of s. 35 rights.

d) Technical and Scientific Mentorship Program to Fully Develop Local Expertise

CEAA 2012 requires the Agency, in carrying out its objects, to "provide information or training to facilitate the application of this Act."[13] However, the Act is silent with respect to funding requisite information sharing and training programs for First Nations. Nor does the Agency provide funding for necessary technical and scientific mentorship programs to train Compliance Monitors and Emergency Responders in traditional knowledge, land use mapping and planning, environmental coordination, ecology, hazardous materials and other areas required to protect and preserve s.35 rights. First Nations have a keen interest in these areas.

> "Right now, each member Nation doesn't have the capacity to do the monitoring or emergency response needed. Let's get our people trained and prepared."
>
> "First Nation leadership sometimes doesn't understand how a project starts: who are the players? What does government have to do with it? What role does Industry play? If you expect engagement, leadership needs to understand how the process works throughout the whole project. Where should leadership get involved and how? What does a typical forestry project look like? A typical mining project?"[14]

We recommend that funding be earmarked by the Compliance Office to establish a Technical and Scientific Mentorship Program to build scientific and technical capacity within First Nations, and train First Nation members to act as Compliance Monitors, Emergency Responders, and perform additional roles required to protect and preserve s. 35 rights and interests.

The Compliance Office could work with organizations such as the Building Environmental Aboriginal Human Resources ("BEAHR") Training Program[15] or the Saskatchewan Indian Institute of Technology ("SIIT")[16] to train Compliance Monitors and Emergency Responders in Indigenous environmental monitoring, s. 35 compliance monitoring, environmental coordination, ecology, emergency relief, hazardous materials, traditional knowledge, land use mapping and planning, and other relevant areas. The Program should ensure traditional knowledge is always included and respected.

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[13] *CEAA 2012*, s. 106(1)(c).
[14] Feedback from FSIN consultations in Fall 2016.
[15] More information on BEAHR is available online at: <http://www.eco.ca/beahr/>.
[16] More information on SIIT is available online at: < http://www.siit.sk.ca/>.

The Compliance Office would also offer education and training on the entire EA process to First Nation Leadership. The Compliance Office would function as the key education and critical information repository for all involved.

e) Elder and Traditional Knowledge Advisory Committee

Elders are the protectors of First Nations' history, language, ceremony, heritage, lands, waters and Treaty rights. Elders are persons recognized by a First Nation community as having lived an exceptional life based on knowledge, wisdom and understanding of the traditions, customs and culture of the Nation. Among other things, Elders support Treaty rights, are advocates of traditional leadership, governance and law, and work hard to ensure the intergenerational transfer of traditional knowledge, history, culture, language and practices.[17]

> "Our Elder's oral history is important; it's what we stand on; when we talk about land, we need to know what land we're talking about."
>
> "Our Elders know something isn't right with the fish when their scales turn red. They know the waters and the lands."[18]

We recommend that local Elders have an advisory role in every major decision and stage of the EA process and project, starting with preparation of the Compliance Plan, and that they be consulted in the preparation of traditional land use maps in their territories.

f) Contracting Capacity for Scientific, Traditional and Local Expertise

The Expert Panel has been asked to consider "how to ensure decisions [during the EA process] are based on science, facts and evidence and serve the public's interest".[19] This should include, among other things, consideration of "the role of science and Indigenous knowledge."[20]

CEAA 2012 and its associated policies and guidelines make no reference to the capacity and importance of Indigenous groups to contract independent scientific, traditional and local expertise. As a result, scientific expertise is compiled entirely by industry and the Crown. Traditional and local knowledge of First Nations are not considered. First Nations are not sufficiently funded to obtain independent scientific reports, and therefore they are seldom contracted by the First Nations. This is a major flaw in the current EA process.

We recommend that the Compliance Office have the capacity to grant funds to First Nations to contract for scientific, traditional and local expertise in areas such as ecology, biology, soil science, geology and Indigenous knowledge throughout the EA process and project,

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[17] Saskatchewan Indigenous Cultural Centre, "Who is an Elder?", available online at: <http://www.sicc.sk.ca/elders.html>.
[18] Feedback from FSIN consultations in Fall 2016.
[19] EA Review, "Expert Panel's Terms of Reference", available online at: <http://eareview-examenee.ca/panels-terms-of-reference/> ["Expert Panel's Terms of Reference"].
[20] Expert Panel's Terms of Reference.

beginning with the preparation of a Compliance Plan and up to closure and remediation. This would include independent studies, research initiatives and expert reports, and retaining experts to review technical documents and data from proponents.

g) Easily Accessible Funding for Indigenous Participation and Consultation

Under *CEAA 2012*, the Agency "must establish a participant funding program ("PFP") to facilitate the participation of the public in the environmental assessment of designated projects that have been referred to a review panel".[21] A responsible authority must establish a PFP when an EA is not referred to a review panel and includes physical activities that fall within the *CEAA 2012 Regulations Designating Physical Activities (SOR/2012-147).*[22] The "physical activities" under the *Regulations* make no reference whatsoever to activities impacting Indigenous and Treaty rights and interests, lands, waters or resources. Where an EA is substituted by a provincial process, there is no requirement for a PFP.[23] This is a significant gap that must be remedied.

The PFP National Program Guidelines[24] outline participant funding in one of two streams: Regular Funding and Aboriginal Funding. The Regular Funding stream "provides limited financial assistance"[25] for key public participation opportunities provided during EAs by the Agency, review panels or joint review panels. Indigenous groups follow the same application process, timeline and funding caps as individuals and incorporated not-for-profit organizations. The maximum funding available for EAs undertaken by the Agency is $10,500, while funding for EAs undertaken by a review panel or joint review panel is capped at $20,000.[26] The needs and interests of First Nations are different from those of individual citizens and incorporated not-for-profit organizations. First Nations should have access to designated funding commensurate with their needs, rights and interests.

The Aboriginal Funding stream "provides limited funding to Aboriginal groups to assist them to prepare for and participate in Aboriginal consultation activities and key participation opportunities"[27] associated with EAs by the Agency, review panels or joint review panels. "Aboriginal groups in receipt of funding from this component for a specific environmental assessment process are not eligible for participant funding under the Regular Funding for the same process."[28] By providing two mutually exclusive funding streams, Indigenous groups are forced to spend more time and energy seeking "limited funding" to engage in the EA process. First Nations should be provided with a single application process for all funding needs that takes into account the distinct needs, interests and rights of First Nations.

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[21] *CEAA 2012*, s. 57.
[22] *CEAA 2012*, s. 58(1).
[23] *CEAA 2012*, s. 58(2).
[24] *CEAA*, *Participant Funding Program National Program Guidelines*, available online at: <http://www.ceaa.gc.ca/Content/9/7/7/9772442E-9A6B-4302-968E-3946E19700D0/National_Program_Guidelines.pdf> ["PFP Guidelines"].
[25] PFP Guidelines at 1.
[26] PFP Guidelines at 3.
[27] PFP Guidelines at 1.
[28] PFP Guidelines at 1.

To be eligible for funding, an Indigenous group must demonstrate the value they will add by their participation in the EA and meet at least one of the following criteria: (1) direct, local interest in the project; (2) community knowledge or Indigenous traditional knowledge relevant to the EA; (3) expert information relevant to the anticipated environmental effects of the project; and/or (4) interest in the potential impacts of the project on Treaty lands, settlement lands or traditional territories and/or related claims and rights.[29] First Nations should not have to demonstrate the value they will add to an EA where a project has potential to impact their Indigenous and Treaty rights and interests. As Constitutional rights holders, the potentially impacted First Nations must always be fully involved.

The funding to be offered is identified by the Agency using undisclosed "pre-established maximum funding levels."[30] Moreover, "only expenses incurred after a Contribution Agreement has been signed by both the Recipient and the Agency can be reimbursed."[31] The amount of funding that is available to First Nations to participate in EAs should be based on the nature of a proposed project, and the needs of the particular First Nations. Given the urgency of protecting Indigenous and Treaty rights and interests, and the hurdles a First Nation must clear in order to obtain funding, First Nations often incur needless expenses prior to the signing of a Contribution Agreement. There is no funding for these significant expenses and this is a disincentive. All expenses incurred by First Nations related to the EA process and larger project, before or after the signing of a Contribution Agreement, must be reimbursed.

The stated objective of the PFP is "to encourage effective participation by helping to ensure that concerns about the potential effects of a project on the environment, Aboriginal groups and on existing or potential Aboriginal or Treaty rights are taken into consideration"[32] during the EA process. The funding programs in place do not meet this objective as they are insufficient and difficult to access. Application processes are overly burdensome and protracted. First Nations have been unable to afford independent studies, research initiatives and expert reports. Additionally, First Nations have been unable to retain experts to review technical documents and extensive data, limiting Indigenous participation in EAs and consultations. Funding cuts to Indigenous organizations in 2012 also reduced the capacity, staff and resources of these organizations to support and advocate for their member Nations with respect to the environment.

The UN Special Rapporteur on the Rights of Indigenous Peoples (James Anaya) raised concern that First Nations have historically been unable to effectively participate in EA processes. He writes that in many cases, they lack adequate expertise, or funding, to obtain expert reports, and to participate in consultation and negotiations on an equal footing. The

[29] PFP Guidelines at 4.
[30] PFP Guidelines at 4.
[31] PFP Guidelines at 7.
[32] PFP Guidelines at 1.

result is that First Nations are reliant on impact assessments provided by corporations that do not adequately evaluate the impacts on their Nations.[33]

> "The main problem is the complications involved when seeking funding. By the time you get the funding the damage has already been done. Funding has to be easily accessible; it's too late if we need to jump through various hoops."
>
> "If we don't have funding for a specific consultation, we need to take funds from our other programs. Funding has to be in place, or else we won't be able to consult our membership to get the mandate we need to participate in consultations and economic development."
>
> "How can we consult if we don't have funding? Funding has to be in place before we can protect our lands and waters. Funding that we can access easily."
>
> "We need funding to survive at both the community and regional level. The communities are the s. 35 rights holders, but the Tribal Councils provide key logistical and technical support."[34]

We recommend that funding for First Nations be increased and *easily accessible*. Along with annual Crown funding agreements, all proponents must be required by legislation to contribute funding to the Compliance Office. This would provide a single-window process for funding potentially impacted First Nations.

The Compliance Office should have funding earmarked to build scientific and technical capacity, and to train First Nation members to be Compliance Monitors, Emergency Responders, and take on other roles necessary to protect s. 35 rights and interests. Funding eligibility criteria must be broadened to include First Nations where there is potential impact to Indigenous or Treaty rights or interests. Specific funding ought to be allocated for obtaining expert reports and for retaining experts to review technical documents. This would allow First Nations to fully participate in consultation and negotiations on an equal footing with industry. There should be no hidden costs to apply for the necessary funding.

Implementation of all functions of the Compliance Office should be fully funded by industry through a consultation levy and by the federal government through annual appropriations. Funding should also flow to the Compliance Office for each First Nation to complete custom consultation policies and to create and maintain their own traditional land use maps, with input from the Elder and Traditional Knowledge Advisory Committee. All of these key tools will facilitate economic funding, protection for the ecosystem and new relationships.

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[33] Human Rights Council, "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories", 11 July 2011 at 46 [Report of the Special Rapporteur].

[34] Feedback from FSIN consultations in Fall 2016.

2. Engage Indigenous Communities at the Strategic Policy Level

Failure to engage First Nations on overarching policy issues

The Crown has a constitutional duty to consult and accommodate First Nations regarding "strategic, higher level decisions" that may have an impact on First Nations rights and claims.[35] Although one of the objectives of the Agency under *CEAA 2012* is "to engage in consultation with Aboriginal peoples on policy issues related to this Act",[36] there is no higher level body that properly includes First Nation leadership in critical overarching policy matters, and First Nations are rarely, if ever, consulted.

Failure to engage First Nations throughout Strategic Environmental Assessments

An EA of strategic policy, plan and program proposals is referred to as a Strategic EA, or "SEA." An SEA seeks to incorporate environmental considerations into the development of public policies and strategic decisions. Compared to a specific EA of a designated project, SEAs represent a more appropriate and effective scale for assessing biophysical and socio-economic changes and producing improvements.

Experts indicate that SEAs provide for greater Indigenous participation than specific EAs. For instance, an "SEA has the advantages of project EA processes (e.g., integration of environmental concerns in planning and decision making, a more transparent, open, and participative process, etc.), but also has the necessary scope and mandate to influence higher-level decisions such as plans or programmes that set the stage for subsequent projects."[37]

Furthermore, an "SEA has the potential to facilitate greater transparency and more effective public involvement at the strategic level. As such, SEA could serve as a means for Indigenous peoples to participate and influence strategic initiatives that shape and guide project-level assessment and decisions and provide a mechanism through which Indigenous peoples could influence the kinds of projects and the pace of development that are going to happen on their traditional lands. It is too late if First Nations receive the details after projects have already been considered."[38]

Indigenous engagement regarding strategic, higher level decisions is also in line with *UNDRIP*. Article 19 affirms that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[39]

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[35] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at 44.
[36] *CEAA 2012*, s. 105(g).
[37] Denis Kirchhoff, H.L. Gardner and L.J. Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples," (2013) 4:3 *The International Indigenous Policy Journal* at 10 [Kirchhoff *et al*].
[38] Kirchhoff *et al* at 10.
[39] *UNDRIP*, art. 19.

The *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* ("Cabinet Directive") and *Guidelines for Implementing the Cabinet Directive*[40] ("Guidelines") require an SEA when: (1) a proposal is submitted to an individual minister or Cabinet for approval; and, (2) implementation of the proposal may result in important environmental effects, either positive or negative. However, neither the Cabinet Directive nor the Guidelines require engaging First Nations at any stage of an SEA. Development of strategic, higher-level policy, plan and program proposals without input on environmental effects from First Nations is unconstitutional.

We recommend that it is critical to create a "Joint National Environmental Policy Secretariat." This important think tank would operate in the same way as our NAFTA Secretariat and other environmental roundtables. First Nations would be sitting members of the Secretariat, which would operate as an independent agency responsible for developing key environmental policies.

In addition to EAs of specific projects, all Government of Canada departments and agencies must also engage First Nations with respect to SEAs, higher-level policy, planning and program development processes and decisions that set the stage for subsequent projects that may impact First Nations rights and claims. The requirement for Indigenous-specific consultation and accommodation should be mandated in the Cabinet Directive and Guidelines. SEAs are a more appropriate way to respect Indigenous rights, governance and traditional knowledge, and to facilitate input at the strategic policy level.

3. Require Preliminary Comprehensive EAs for All Development Projects

Narrowed scope of projects subject to review

Canada failed to consult the First Nations of Saskatchewan in the development of *CEAA 2012*, and failed to protect their Indigenous and Treaty rights and interests.

Under *CEAA 1992*,[41] all development projects, regardless of size, were required to undergo an EA if there was a federal "trigger" (a federal proponent, federal money, federal land, or a listed federal permit or approval) and the project was not specifically excluded for review under the Act or Regulations. The designation process in *CEAA 1992* provided a necessary process for consultation and the consideration of Indigenous and Treaty land-related issues for all "projects" that altered the environment.

CEAA 2012 ended EAs for mid-size and minor projects. Combined with the *National Energy Board Act*, only "designated projects" are required to have an EA. Many non-designated projects involve lands that are critical to the exercise of Indigenous and Treaty rights and interests. Many of these non-designated projects interfere with the livelihood of First Nations. Assessment of these projects can no longer be left to the broad discretion of the Minister. *CEAA 2012* robs First Nations of a process where their s. 35 rights and impacts on

[40] CEAA, "Strategic Environmental Assessment: The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals and Guidelines for Implementing the Cabinet Directive", available online at: <http://www.ceaa.gc.ca/default.asp?lang=En&n=b3186435-1>.
[41] Canadian Environmental Assessment Act, S.C. 1992, c. 37 [CEAA 1992].

those rights can be heard prior to approval of the project. This results in a regime with non-transparent Ministerial control that fails to respect the duty to consult and related Indigenous and Treaty rights and interests.

Exemption from review of certain designated projects

CEAA 2012 contains a screening process under which the Agency may advise that an EA is not required.[42] After receiving a project description from a proponent, the Agency is required only to post a general notice of the project on the Internet and provide the *general public*, including Indigenous groups, 20 days to comment on the project. Within 45 days after posting notice on the Internet, the Agency must decide if an EA is required for that project.

The Crown is not required by *CEAA 2012* to contact potentially impacted Indigenous rights-holders directly. The Crown posting general notice of a project on the Internet and requiring comments within 20 days does not meet the most basic requirement with respect to the Crown's duty to consult and is the equivalent of unilateral information sharing. Indeed, the Crown is constitutionally obliged to inform itself of the impact that a proposed project will have on an affected First Nation and to communicate its findings to the First Nation.[43]

Narrowed type of EA required

CEAA 2012 fails to incorporate an information sharing, consultation and accommodation process into the EA process for the consideration of relevant Indigenous and Treaty rights and interests that will be impacted. The position of First Nations on adverse effects is critical at the preliminary project description stage.

Under *CEAA 1992*, various types of EAs were contemplated, including a screening, a class screening, a comprehensive study, mediation and a panel review. Under *CEAA 2012*, only two types of assessments are contemplated, a standard EA, or, and only if referred by the Minister, a full panel review.

While there is a pre-screening process contemplated by *CEAA 2012* in some circumstances, it is not comparable to the comprehensive and broad screening assessment provided for under *CEAA 1992*. Under *CEAA 1992*, the screening is an assessment which generates a report considering the environmental effects associated with all projects. Under *CEAA 2012*, a screening is merely a preliminary step to determine whether an EA is required and applies too narrowly; it only applies to designated projects where the Agency is the responsible authority.

Under *CEAA 2012*, the Project Description document supplied by the proponent for the preliminary screening process can be completed by a lawyer who has no knowledge of biology or ecology. If, as a result of this pre-screening process, the Agency decides that adverse environmental effects are not likely to result, then the project in question may be entirely exempt from the EA requirement. As a result of this narrowing in the type of EA

[42] *CEAA 2012*, s. 10(b).
[43] *Mikisew Cree First Nation v Canada*, 2005 SCC 69 at 55.

required, fewer projects are subject to review. This often results in missed opportunities for critical input and a significant decline in the environmental protection of Reserves, traditional lands and resources of many First Nations in Saskatchewan.

Failure to consider Indigenous traditional knowledge

CEAA 2012 specifies that an EA must take into account "the environmental effects of the designated project… and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out".[44] Indigenous traditional knowledge, on the other hand, is not required; an "EA of a designated project *may* take into account community knowledge and Aboriginal traditional knowledge."[45] Indigenous traditional knowledge is rarely, if ever, considered.

By failing to address Indigenous issues up front in any meaningful way and with no built-in legislative mechanism for Indigenous consultation and leadership in the operation of *CEAA 2012*, potential and ongoing negative impacts on all Indigenous and Treaty right-holders is significant.

We Recommend that all development projects that alter the environment, regardless of size, be required to undergo a preliminary comprehensive EA which takes into account Indigenous and Treaty rights and interests and generates a report considering the environmental effects associated with the project. For instance, a small project may have a large local impact on Treaty rights that would not be considered if a preliminary comprehensive EA is not conducted; e.g. wild rice harvesting, duck hunting, and fish spawning grounds. Section 35 rights-holders must be heard prior to the approval of all projects that could potentially impact their rights. The Crown must inform itself of the potential impacts that a proposed project may have on a First Nation, and communicate its findings directly to the First Nation.

4. End Substitution of Provincial and Regulatory Assessments and Decision-Making

Excessive substitution of provincial assessments and decision-making

Under *CEAA 2012*, the responsible authority is required to consult and cooperate with certain jurisdictions (including the provinces) regarding an EA of a project where that other jurisdiction also has an EA process for the project.[46] Where the Minister considers that a provincial process would be an appropriate substitute for the federal process and the province requests substitution, that Minister is obligated to approve the substitution request.[47] *CEAA 2012* provides for substitution of provincial EAs in a vast number of cases, but provides vague guidance as to that province's EA process.[48] This creates an unpredictable and inharmonious EA system for First Nations.

[44] *CEAA 2012*, s. 19(1)(a).
[45] *CEAA 2012*, s. 19(3).
[46] *CEAA 2012*, s. 18.
[47] *CEAA 2012*, s. 32(1).
[48] *CEAA 2012*, s. 34(1).

When the Minister approves the substitution of a process at a province's request, the Governor in Council may exempt the designated project from the application of *CEAA 2012*.[49] The substitution provisions of *CEAA 2012* adversely impact Indigenous and Treaty rights and interests in that they may exempt *CEAA 2012* from further application to a project with the implication that any provincial (not federal) decision is final. This process degrades the protection of federal jurisdiction for Treaty peoples and all Indigenous peoples under section 91(24) of the *Constitution Act, 1867,* and diminishes the principle of a Nation to Nation relationship through the substitution of provincial assessments and decision-making.

Excessive provincial decision-making in joint review panels

Under *CEAA 2012*, the Minister may refer an EA to a review panel jointly established by the federal government and a province or other jurisdiction.[50] A joint review panel agreement outlining the terms of reference and review process is negotiated between the federal government and the other jurisdiction,[51] following which a panel is appointed by the two jurisdictions.[52] The joint review panel then carries out the EA and prepares a report outlining its rationale, conclusions and recommendations to the two jurisdictions.[53] Where a project has potential to impact Indigenous and Treaty rights and interests, the only two jurisdictions that should make up the joint review panel are the federal government and the potentially impacted First Nations.[54] The federal government should be fully accountable for all decision-making throughout the EA process.

Excessive delegation to regulatory bodies

Under *CEAA 1992*, a project could trigger the requirement for an assessment by various federal authorities simultaneously. Under *CEAA 2012*, a single EA can be conducted by one of three federal agencies – the Agency, the National Energy Board ("NEB") or the Canadian Nuclear Safety Commission ("CNSC"), or any other federal regulatory authority that can hold public hearings and is designated in *CEAA* Regulations.[55]

Under *CEAA 1992*, other federal authorities were not allowed to issue permits or licenses until a required EA was complete.[56] Under *CEAA 2012*, regulatory agencies are able to issue licenses and permits without an EA,[57] conduct their own assessments,[58] and/or cancel existing assessments currently in process.[59]

Significant delegation to regulatory agencies such as the NEB or the CNSC is problematic. Regulatory agencies are more focused on technical issues. They are less interested and

[49] *CEAA 2012*, s. 37(1).
[50] *CEAA 2012*, s. 40(1).
[51] *CEAA 2012*, s. 42(2).
[52] *CEAA 2012*, s. 42(2).
[53] *CEAA 2012*, s. 43(1).
[54] *CEAA 2012*, s. 2(1): First Nations are included within the meaning of "*jurisdiction*".
[55] *CEAA 2012*, s. 14(4).
[56] *CEAA 1992*, s. 5(1)(d).
[57] *CEAA 2012*, s. 56.
[58] *CEAA 2012*, s. 22.
[59] *CEAA 2012*, ss. 62 and 63.

unable to appreciate the big picture planning issues so fundamental to effective EAs.[60] There are also concerns that some regulators may be captured by their industry, making it difficult for them to consider whether the industry sector they regulate offers the most sustainable long-term solution to the need or purpose being pursued with the proposed project. First Nations must work with those that understand and implement Constitutional rights in a global way.

We recommend that federal authority, decision-making power and accountability be considered throughout an EA, and that Indigenous lands, waters and resources be protected. EAs should not be delegated to the province or regulatory authorities.

5. Broaden the Definition of "Environmental Effects"

CEAA 1992 defined "environmental effect" as "any change that the project may cause in the environment".[61] The definition of environmental effects was significantly circumscribed under *CEAA 2012*, and there was no consultation regarding the sweeping changes. The new narrowed definition of environmental effects has allowed for greater impacts on the environment with the concurrent greater potential to infringe Indigenous and Treaty rights and interests.

With respect to Indigenous peoples, the environmental effects that must be considered under *CEAA 2012* are a small subset of the subjects that make up Canada's duty to consult and accommodate.[62] By narrowing the definition of environmental effects, the scope of projects subject to review, and the factors to be considered, *CEAA 2012* creates a redundant EA regime that ultimately amounts to little more than an information gathering process too late in the process and without accommodation.

CEAA 2012 runs counter to the International Association for Impact Assessment ("IAIA") and Institute of Environmental Assessment ("IEA") principles, which state that EAs should consider "biophysical impacts and relevant socio-economic factors, including health, culture, gender, lifestyle, age, and cumulative effects consistent with the concept and principles of sustainable development."[63]

CEAA 2012 fails to consider any change that a project may have on ground water and aquifers. Many First Nations in Saskatchewan rely on groundwater and aquifers for clean drinking water. Despite the Ministry of Environment and Climate Change's emphasis on the

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[60] Meinhard Doelle, "The End of Federal EA As We Know It?" (2012) 24:1 *Journal of Environmental Law and Practice* at 5.
[61] *CEAA 1992*, s. 2(1).
[62] *CEAA 2012*, s. 5(1)(c): "with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on (i) health and socio-economic conditions, (ii) physical and cultural heritage, (iii) the current use of lands and resources for traditional purposes, or (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance."
[63] International Association for Impact Assessment & Institute of Environmental Assessment, UK, "Principles of Environmental Impact Assessment Best Practice," (1999) at art 2.3, available online at: <https://www.eianz.org/document/item/2744> ["IAIA & IEA"].

importance of protecting groundwater and aquifers,[64] the potential impact of a project on groundwater and aquifers is not expressly taken into account by EAs under *CEAA 2012*.

> "Our drinking water is from the aquifers. The groundwater is very important. It must be protected. All our systems are interrelated. We must make decisions, not for today, but for our future, for the next seven generations."[65]

We recommend the definition of "environmental effects" be broadened to include any change that the project may cause in the environment, and any effect that could potentially have an adverse impact on potential or established Indigenous or Treaty rights or interests. All EAs should, at the very least, follow the IAIA and IEA norms and consider biophysical impacts and relevant socio-economic factors, including health, culture, gender, lifestyle, age, and cumulative effects consistent with the principles of sustainable development. For instance, the particular impact of projects on hunters, gatherers, fishers, trappers, Elders, youth, people with diabetes and people needing traditional medicines for cancer should be taken into account.

Moreover, the definition of "environmental effects" should include any change to groundwater and aquifers. The definitions of "federal lands" and "Reserve lands" in *CEAA 2012* include only "waters on and airspace above those lands".[66] Federal lands and Reserve lands should expressly include "waters on, *in and below* those lands, **including** *groundwater and aquifers*".

6. Remove Excessively Broad, Non-Transparent Government Discretion and Control

CEAA 2012 places a great deal of discretion in the hands of the federal Cabinet. For instance, *CEAA 2012* permits Cabinet to authorize projects likely to have significant adverse effects, if these effects are "justified in the circumstances",[67] without defining the relevant circumstances or providing criteria for justification. There is no opportunity for public engagement in this deliberation, or for First Nations to offer submissions on the issue of justification. Requirements to protect information around Cabinet decision-making makes it challenging for First Nations to determine how the Crown has accommodated Indigenous rights and interests.

Broad, non-transparent discretionary powers encourage secrecy and politicization of the EA process, and create unpredictability and inconsistency. It has resulted in the creation of a closed system whereby Indigenous peoples are unable to determine how, if at all, the executive has accommodated Indigenous rights and interests in particular circumstances. This system is not in keeping with the requirement that Crown decisions related to s. 35 rights be transparent and intended to promote reconciliation, resource sharing and respect for Treaty principles. There is a serious gap in the protection of Indigenous lands and waters where projects are on Reserve and other Indigenous lands.

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[64] The Ministry of Environment and Climate Change, "Groundwater" (2013), available online at: <https://www.ec.gc.ca/eau-water/default.asp?lang=En&n=300688DC-1>.
[65] Feedback from FSIN consultations in Fall 2016.
[66] *CEAA 2012*, s. 2(1).
[67] *CEAA 2012*, ss. 31(1)(a)(ii), 52(2), 67(b), 68(b), 69(3).

It is unacceptable to have an unstructured discretionary regime that fails to specifically address s.35 rights. In *R v Adams*, the Supreme Court of Canada affirmed:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights.[68]

Removal of excessively broad, non-transparent government discretion and control is in line with Article 27 of *UNDRIP*:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[69]

The basic principles of the IAIA and IEA state that an EA should be "[t]ransparent – the process should have clear, easily understood requirements for EA content; ensure public access to information; identify the factors that are to be taken into account in decision making; and acknowledge limitations and difficulties".[70] These requirements are critical in the context of s. 35 constitutional Indigenous rights and Title.

We recommend that broad, unstructured discretionary government powers over EAs be withdrawn in favor of a transparent process with clear, easily understood requirements. The Crown must be accountable for all decision-making throughout the EA process.

7. Lengthen Timelines for Indigenous-Specific Consultation

CEAA 1992 contained no timelines for the completion of EAs. One of the purposes of *CEAA 2012*, on the other hand, is to ensure that EAs are "completed in a timely manner."[71] This is preferable for First Nations, so long as key Indigenous concerns are considered first and foremost. To date, this is not the case. *CEAA 2012* imposes short, arbitrary and inflexible timelines for EAs. This results in decreased initial input and accelerated movement of the project to the legal hearing stage and without respect for Indigenous rights and concerns.

[68] *R v Adams*, [1996] 3 SCR 101 at 54.
[69] *UNDRIP*, art. 27.
[70] IAIA & IEA, art. 2.4.
[71] *CEAA 2012*, s. 4(1)(f).

The preliminary review of the Project Description document must be completed within 10 days.[72] The Agency is given 45 days to determine if an EA is required, of which 20 days are allocated to a *public* comment period.[73] If an EA is required, the Minister has 60 days to decide if a review panel is warranted.[74] Where is the Indigenous-specific input and inclusion? This is contrary to constitutional requirements.

Strict timelines are particularly problematic for more remote or isolated First Nations that require extra time and notice to attend meetings, hearings, etc. These timelines also fail to respect Indigenous governance, and the need for community consultation or consensus. Stringent timelines under *CEAA 2012* create an additional barrier for First Nations to participate in the EA process in a meaningful manner.

We recommend that EA timelines be lengthened and very flexible. They must take into account the needs of remote or isolated First Nations that require extra time and notice, as well as the needs of Indigenous governance that require community consultations or consensus to obtain the mandate to participate in Crown consultations and economic development.

8. Increase Opportunities for Indigenous Input within EA Processes

CEAA 2012 limits Indigenous input. Under *CEAA 1992*, an "interested party" included "any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious".[75] Under *CEAA 2012*, participation rights within EAs are granted only to interested parties that are, *in the opinion of the responsible authority or review panel*, "directly affected by the carrying out of the designated project" or have "relevant information or expertise."[76] This means First Nations are now forced to spend more time, more money and more energy in trying to establish that they are directly affected and have relevant information or expertise. Where projects are on or near Indigenous lands and Reserves, First Nations will always be directly affected and have significant expertise and traditional knowledge to share.

The IAIA & EIA Operating Principles state that EAs "should be applied as early as possible in decision making and throughout the life cycle of the proposed activity."[77] Under *CEAA 1992*, public participation was "throughout the environmental assessment process."[78] In *CEAA 2012*, on the other hand, public participation is "during an environmental assessment",[79] meaning that participation is only required at some point during the EA. Under *CEAA 2012*, an EA is required too late in the process. The decision of whether an EA is required happens only after detailed project planning. This prevents First Nations from

[72] *CEAA 2012*, s. 8(2).
[73] *CEAA 2012*, s. 10.
[74] *CEAA 2012*, s. 38(1).
[75] *CEAA 1992*, s. 2(1).
[76] *CEAA 2012*, s. 2(2).
[77] IAIA & EIA, art 2.3.
[78] *CEAA 1992*, s. 4(1)(d).
[79] *CEAA 2012*, s. 4(1)(e).

offering input while the project is being developed, and from forming the requisite partnerships that might otherwise be required.

In order to determine the rights that a First Nation enjoys, and the potential impact of a project on those rights, the Crown must engage in direct consultation and dialogue with affected First Nations on substance, not procedure. In practice, the consultation process under *CEAA 2012* is too generic. In assessing various rights enjoyed by Indigenous peoples, the Crown must look to Indigenous expertise and specifically address each Nation's concerns. It cannot otherwise make a proper assessment. In *Gitxaala Nation v Canada*, the Federal Court of Appeal held that "where the Crown knows, or ought to know, that its conduct may adversely affect the Aboriginal right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it."[80]

First Nations cannot answer "yes" to all projects. The Nations should retain the right to say "no," and thereby protect the environment and their Indigenous and Treaty rights and interests. *UNDRIP* has affirmed that "control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs."[81]

Under *CEAA 2012*, the Crown does not assess or discuss Indigenous Title, Treaty rights, or Indigenous governance rights and the impact on those rights. The result is a lack of understanding and respect between Indigenous peoples and industry on the rights and interests of the other parties.

The UN Special Rapporteur on the Rights of Indigenous Peoples (James Anaya) has commented on the importance of a minimum common understanding of Indigenous rights. Anaya argues that, "Without a minimum level of common understanding, the application of Indigenous rights standards will continue to be contested, Indigenous peoples will continue to be vulnerable to serious abuses of their individual and collective human rights, and extractive activities that affect Indigenous peoples will continue to face serious social and economic problems."[82] *UNDRIP* further affirms that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment."[83] This is where we want to be.

> "There is no process right now for the companies to engage with the communities. They're approaching us now for traditional knowledge on an *ad hoc* basis."
>
> "Idle No More and Standing Rock have become a real model on how to engage a government if things go wrong. It's actually growing.

[80] *Gitxaala Nation v Canada*, 2016 FCA 187 at 236.
[81] *UNDRIP*, preamble.
[82] Report of the Special Rapporteur at 48.
[83] *UNDRIP*, preamble.

> This is a potential outcome if First Nations are not engaged in a manner that is respectful to both sides."[84]

We recommend that the Crown consult First Nations whenever projects are on or near their lands, waters or Reserves, or have the potential to impact their Indigenous or Treaty rights or interests. Consultation must take place with First Nations throughout the EA process, and in accordance with each First Nation's local consultation policy. The Crown cannot take into account generic rights of First Nations. It must address the specific concerns of each First Nation. The Crown must assess and discuss Indigenous Title, Treaty rights and Indigenous governance rights, and the impact of any project on those rights. A minimum level of mutual understanding between Indigenous peoples, government and industry should be promoted in order to better understand and respect Indigenous concerns.

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In closing, we thank the Expert Panel for the opportunity to appear and to provide our recommendations in writing. We have both the support of FSIN Member Nations and the AFN on all eight recommendations. We would like to see this government fully adopt our recommendations and to put them into action. We remain available to assist.

[84] Feedback from FSIN consultations in Fall 2016.

Appendix

SPECIAL CHIEFS ASSEMBLY
DECEMBER 6, 7, & 8, 2016; GATINEAU, QC **Resolution no. 86/2016**

TITLE:	**Meaningful Consultation and Engagement with First Nations in the Environmental and Regulatory Review**
SUBJECT:	Environment, Fisheries
MOVED BY:	Chief Calvin Sanderson, Chakastaypasin Band, SK
SECONDED BY:	Chief Eileen Morrison, Buffalo River Dene Nation, SK
DECISION	Carried; 1 abstention

WHEREAS:

A. The United Nations Declaration on the Rights of Indigenous People includes the following articles:

- **i.** Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities.
- **ii.** Article 32 (2): 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.
- **iii.** Article 32, (3): States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

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B. As part of Bill C-38: *Jobs, Growth, and Long-term Prosperity Act,* and Bill C-45: *Jobs and Growth Act*, the previous Government of Canada introduced, debated and passed significant changes to the *Canadian Environmental Assessment Act, National Energy Board, Fisheries Act,* and the *Navigable Waters Protection Act* (known as the *Navigation Protection Act),* among many others, without engaging and consulting with First Nations.

C. The Crown has a clear duty to consult and accommodate First Nations on matters impacting First Nations' rights, and the honour of the Crown is always at stake in these scenarios.

D. The Assembly of First Nations (AFN) has passed four resolutions concerning this process: Resolution 12/2016: Moving Beyond Federal Legislation to Establish a Nation-to-Nation Relationship; Resolution 35/2016: *First Nations' inclusion in the review of Environmental and Regulatory processes*; Resolution 24/2012: *Consultation and Engagement on Amendments to the Fisheries Act*; and Resolution 47/2012: *Opposition to Unilateral Changes in Fisheries Management in Canada*

E. Prime Minister Justin Trudeau has publicly committed "to a renewed nation-to-nation relationship with First Nations (…) one that is based on recognition of rights, respect, cooperation and partnership" and to "conduct a full review of the legislation unilaterally imposed on Indigenous peoples by the previous government."

F. Instead of engaging First Nations in the review of "legislation unilaterally imposed on Indigenous Peoples by the previous government, on June 20, 2016, the Government of Canada announced a broad public review of various environmental and regulatory processes that includes:

- **i.** Reviewing federal environmental assessment processes.
- **ii.** Modernizing the National Energy Board.
- **iii.** Restoring lost protections and introducing modern safeguards to the *Fisheries Act* and the *Navigation Protection Act*.

G. The reviews are currently in progress and present serous challenges, including: the unrealistic timelines for preparation and participation; lack of adequate and timely funding; an overreliance on the internet to elicit opinion, low First Nations participation during the "engagement sessions"; and disregarded requests to appear before Standing Committees, among others.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Direct the Assembly of First Nations (AFN) to engage the Prime Minister in a focused dialogue with First Nations to substantively identify, recognize and engage the protocols, elements and processes of a renewed nation-to-nation relationship.

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2. Direct the AFN to call on the Prime Minister to reiterate his commitment to conduct a full review of the legislation unilaterally imposed on Indigenous peoples by the previous government, as well as to call on the Prime Minister to engage in a focused dialogue with First Nations to substantively identify, recognize and engage the protocols, elements and processes to conduct joint legislative drafting.

3. Direct the AFN to write a letter to the Prime Minister and Ministers of Environment and Climate Change, Natural Resources, Fisheries, and Transport Canada to express dissatisfaction with the existing environmental and regulatory review process, remind the federal government of their duty to consult, and call for meaningful engagement and shared decision-making for all First Nations.

4. Direct the AFN, in partnership with the Ministers of Environment and Climate Change, Natural Resources, Fisheries, and Transport Canada, to jointly develop the protocols, elements, and processes for meaningful First Nation engagement and consultation in the environment and regulatory reviews, including to extend the timelines.

5. Support the interventions of First Nations, regional organizations, and provincial/territorial organizations, such as that of the Federation of Sovereign Indigenous Nations, to strengthen and improve the federal environmental and regulatory processes, such as:

   a. Establishing an Indigenous Constitutional Rights Compliance Office.

   b. Broadening the definition of "Environmental Effects."

   c. Lengthening timelines for First Nations-specific consultation.

   d. Increasing opportunities for First Nations consultation within environmental processes.

   e. Engaging First Nations at the strategic policy level.

   f. Ensure adequate funding for First Nation engagement and consultation in all federal and provincial/territorial environmental assessment review processes.

6. Direct the AFN to collect the various positions and/or presentations on the federal environmental and regulatory review process and disseminate to the AFN member First Nations.

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