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Re: KNC Perspectives on Environmental Assessment Issues and Themes for Federal Review

The Ktunaxa Nation Council (KNC) was pleased to be able to present to the panel in Nanaimo, B.C. and contribute to the Review of Environmental Assessment Processes. The KNC wishes to emphasize the critical importance of these processes as a central component of reconciliation between Indigenous communities and the Crown, and to suggest that review and revision of any component of the 2012 *Canadian Environmental Assessment Act* (CEAA) be undertaken with the process of reconciliation in mind.

The KNC appreciates the panel's engagement with the process, including thoughtful questions about the various means through which Environmental Assessment can be improved in Canada, particularly from the perspective of Indigenous people. One key question from the panel focused on our mixed experiences with the EA process in the past, including collaborative approaches with proponents and the Crown. In our view, collaborative approaches to the various stages of EA can be exceptionally useful; past experiences with collaborative approaches, such as work between KNC and Teck Resources in the Elk Valley, have been generally successful, and often positive.

However, based on our extensive experience, a stronger and more clearly defined role for the Crown is needed to encourage and support early collaborative work in the EA process—i.e., long before an Environmental Impact Statement is written. Without Crown support, the success of the EA process and its outcomes for Indigenous people are almost entirely dependent on different proponents' willingness to collaborate and work in tandem on finding ways to achieve equitable outcomes. Mechanisms that do not make the success of the process so dependent on proponents are needed.

Below is a summary of some of the most important concepts and sections in CEAA 2012 that KNC would like to see addressed. The table also provides recommendations and potential mediations for these concerns that are possible through revisions to the EA process. KNC recognizes that, although experiences with EA processes are specific to different communities, the concerns that we present here are likely shared with many Indigenous communities across Canada.

The KNC would be happy to work further with the panel in order to frame particular recommendations as to how Environmental Assessment processes may be improved in the short- and long-term. Please contact me if you have any questions, or are interested in working with us further on this.

Sincerely,

A handwritten signature in black ink that reads "Nicole Kapell". The signature is written in a cursive, flowing style.

Nicole Kapell
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CEAA: Key Concepts & Concerns	Details	CEAA Sub-section references <i>(if any)</i>	Recommendations/Mediations
<p>1) Foundational concepts of an environmental assessment must be shared, explicit, and informed by Ktunaxa perspectives and thresholds of acceptability</p> <p>Definition & interpretation of “environment” – when Ktunaxa talk about changes in environment that have affected our communities, time-frame is often very different from the time-frame a proponent uses</p>	<p>Traditional Knowledge still an after-thought, often not meaningfully included in technical decisions, or part of decision-making</p> <p>E.g., Ktunaxa consider salmon an important part of environment and is supposed to be in that environment. In one current EA, KNC wants an assessment that will indicate the potential for salmon to be part of the environmental system; from proponent’s POV, there are no salmon there (dams have already removed them), and are therefore not part of the environment or impacts.</p>	<p>Factors to be considered 19(3)</p> <p>“Environment” defined in Interpretation 2(1)</p> <p>and</p> <p>Environmental Effects (5 (1))</p>	<p>Develop mechanism to arbitrate disputes between Indigenous groups, Crown, and proponents, and to generate guidance on incorporation of TK</p> <p>Joint drafting of ToR/EIS with Ktunaxa TK holders to ensure integration of TK is appropriate</p> <p>Requirement for pre-industrial/pre-development baseline</p>
<p>2) CEAA needs to provide practitioner guidance regarding the scale at which impacts on Indigenous title and rights should be assessed, and the</p>	<p>(see point 5)</p> <p>In cases where only a handful of knowledge holders maintain a critical practice in</p>		<p>Joint determination of methodologies for assessment of impacts → must clearly define unit of analysis appropriate to each project, most sensitive receptor</p>

appropriate scale should be one that relates to actual practice (see point 5)	a particular area, a Project's impacts need to be assessed at the level of practice: i.e. individual or household level.		(i.e., who/what will be most significantly impacted? Individual, family, community, etc.).
<p>3) CEAA practitioner guidance must take a stronger role in supporting proponents (ideally through collaborative process) to create EAs that deliver the information needed by both government and Ktunaxa decision-makers, using clear and culturally-informed thresholds of significance. Many Indigenous governments create their own EA process to fill this gap, which takes time and can be costly.</p> <p>E.g., an assessment of impact on fisheries is not the same as assessment of impact on ability of a Ktunaxa person to fish</p>	Identifying meaningful thresholds of acceptable change is critical. Several useful examples of culturally informed thresholds exist in northern Alberta and B.C.	<p>Significant adverse effects defined in Environmental Effects 5(1)</p> <p>Decision-making 52(1)</p> <p>Conditions 53(1-3)</p>	<p>Identification of agreed upon and culturally informed significance thresholds in environmental impact statement</p> <p>Issue early Indigenous engagement guidelines with appropriate funding.</p> <p>Collaborative approaches to EA need to become an expected standard, including minimum mitigations and actions that would apply to all CEAA projects, setting a benchmark that we do not need to constantly fight for.</p> <p>Collaborative EAs could qualify for particular time lines.</p>
4) Accommodation of UNDRIP principles: where clear process and governance is in place, Indigenous government decisions must be taken on par with decisions made by statutory decision-makers. If decision-makers disagree,	<p>Process currently run by CEAA with Indigenous input is considered refuse-able</p> <p>FPIC demands joint decision-making process by both levels of government in Nation-to-Nation relationship.</p>	<p>Purposes 4(1)(d)</p> <p>Environmental effects 5(1)(c)</p> <p>Environmental Assessment by a Review Panel—</p>	<p>Joint/collaborative drafting of Decision Statements, potential for inclusion of Ktunaxa representative as part of panel</p> <p>Define in federal EA legislation and policy how UNDRIP will be adhered to, including more than FPIC</p>

<p>reconciliation of differences should be required.</p> <p>See also points 5) and 6)</p>		<p>General Rules (5)</p> <p>Agency's Objects 105(g)</p>	<p>clauses</p> <p>Co-management system including joint</p> <ul style="list-style-type: none"> - Development of EIS guidelines - EIS completeness review - Time-frame decisions (stopping and starting the clock) - Determination of information requests and/or adequacy of responses - Topics for technical sessions - Co-drafting Assessment Report/Decision Statement and Conditions, especially in relation to rights, culture, and current use of land
<p>5) Clear policy or practitioner guidance that establishes or defines how project impacts are weighed against the public good and how unique constitutional rights must be considered or weighed within that context</p> <p>E. g., Site C, Jackpine Mine—significant impacts to treaty rights determined, but...?</p>	<p>What does significance mean if projects found to have significant adverse effects are still approved?</p>	<p>Interpretation – Interested Party 2(1)</p> <p>Prohibitions 7</p> <p>Factors to be Considered 19(1)</p> <p>Environmental Assessment by Responsible</p>	<p>Develop a federal EA “justification” assessment framework for Indigenous rights consistent with Sparrow, Tsilhqot’in, UNDRIP, etc.</p> <p>Separate rights infringement and accommodation tribunal may be necessary</p>

		<p>Authority 28-31</p> <p>Environmental Assessment by a Review Panel – public interest 38-43</p> <p>Decision Making 52-53</p> <p>Administration 86</p>	
<p>6) Early involvement prior to finalization of project design and collaborative preparation of application materials, including explicit recognition of Ktunaxa perspectives on all VCs of interest</p>	<p>VCs often assessed without consideration for interconnections</p> <p>Many VCs put forward by KNC are not considered as a part of the assessment</p>	<p>Environmental Effects 5(1)</p> <p>Factors to be Considered 19(2)</p>	<p>Requirement for joint development of VCs and indicators; VCs should reflect Ktunaxa values as well.</p> <p>Use VCs and indicators in combination (holistic approach)</p>
<p>7) The EA time-frame, process and manner in which hearings take place is quasi-judicial and often antagonistic; this gets in the way of the collaborative approach to environmental decision-making that should be the hallmark of the CEAA process</p>	<p>Timelines for document review too tight</p> <p>We feel that we are playing “catch up”; engagement occurs too late, we are typically swamped by paperwork that may bury key details</p>	<p>Throughout (reference to 305-day cycle and specific stages, as well as beyond EA)</p>	<p>Pre-, during-, and post-construction Indigenous monitoring, adaptive management, and communication conditions should be a standard for all federal EA Decision Statements that we do not have to fight for</p> <p>Federal funding for Ktunaxa representatives to sit on panels trained in EA practice</p>

<p>8) Importance of time-frame and long-term monitoring: the EA process does not stop with a permit.</p>	<p>Very little post-EA engagement with Ktunaxa Nation Council.</p>	<p>Interpretation (“follow-up program”) 2(1)</p> <p>Recommendations included in environmental assessment report, (29 – 31)</p> <p>Equivalent Assessment 37(1)</p> <p>General Rules 43(1)</p> <p>Project Files 80(2)</p>	<p>Include capacity funding for monitoring and compliance of conditions related to the EA certification, reclamation and restoration periods</p>
<p>9) Ktunaxa perspectives and role in strength of claim (SOC) assessments used to inform EA</p> <p>Needs to include weight of evidence approach and peer review by Indigenous and non-Crown professional specialists</p> <p>Needs to include a government-to-government process</p>	<p>Role of consultation and consideration of SOC</p> <p>Crown’s role in disclosing evidence of SOC, and in requesting proponent to do the same</p>	<p>Interpretation 2(1)</p> <p>Administration 83</p>	<p>Develop requirement to assess impacts on Indigenous rights and title into federal EA</p> <p>Require Crown to share SOC’s with KNC allowing for iterative process to determine SOC.</p>
<p>10) Critical importance of recognizing cumulative effects and requiring Crown process for addressing cumulative effects</p>	<p>Need for assessment of effects on tangible and intangible elements of culture</p>	<p>Purposes 4(1)</p> <p>Factors to be Considered 19(1)(a)</p>	<p>Requirement for pre-industrial/pre-development baseline</p>

<p>prior to approving additional impacts, especially where KNC identified thresholds have already been exceeded</p> <p>E.g., salmon and sturgeon on the Columbia River, water quality in the Elk Valley.</p>	<p>Need to establish standards including pre-development consideration to understand trends and total cumulative effects (“weight of recent history” as well as foreseeable future)</p>		<p>Where any degree of adverse residual project effect exists, explicit requirement to assess cumulative effects on Ktunaxa rights and title</p>
<p>11) CEAA practitioners guide needs to recognize that assessments related to Ktunaxa rights must consider preferred places, preferred resources, preferred modes of practice</p>	<p>Practice of rights inherently tied to places, resources, and modes of practice → “go elsewhere” argument ignores these rights, and doesn’t work in highly fragmented landscapes or in places where Ktunaxa rights are already constrained</p>	<p>Interpretation 2(1) Administration 83</p>	<p>Ktunaxa perspectives regarding the underlying requirements sufficient for the practice of rights must be considered, including cultural acceptability, quantity, and quality of available resources and conditions</p>