

Submission to the Canadian Environmental Assessment Agency  
from the Environmental Planning and Assessment Caucus of the  
Canadian Environmental Network  
Regarding Key Regulation and Guidance Requirements under the  
proposed *Impact Assessment Act*

April 30, 2019

The Environmental Planning and Assessment Caucus (“the Caucus”) of the Réseau Canadian Environmental Network is pleased to submit recommendations on regulations and guidance under the proposed new *Impact Assessment Act* (“IAA”). The Caucus represents approximately 60 national, provincial, regional and local conservation, environmental and community groups, academics and environmental assessment (“EA”) experts from across Canada. As a Caucus and as individual organizations, its members have a long history of work on, and involvement with, EA in Canada, many dating back to the first federal guidelines order that introduced EA in the federal regulatory framework. These recommendations are based in part on the outcomes of a 2½ day meeting held on February 15-17, 2019, with financial support from the Canadian Environmental Assessment Agency, attended by 16 Caucus delegates and 2 directors from the Agency. The purpose of the meeting was to develop consensus direction on key areas of concern in the lead-up to the coming into force of the *Act*. Our resulting recommendations fall into the following theme areas:

1. Sustainability
2. Regional and strategic assessment
3. Meaningful public participation (with case study)
4. Funding for public participation
5. Evidence
6. Gender based analysis +
7. Environmental obligations

As the Caucus’ purpose is to present a strong public interest analysis of all facets of environmental planning and assessment, we submit this report in order to induce action on key areas or regulation and guidance that need to be addressed before the Act comes into force. This document presents an overview of each theme area, recommendations, and rationales.

# 1. Sustainability

## Overview

The term sustainability has a variety of connotations. At the outset, a credible determination as to whether and how a project contributes to sustainability requires a shared understanding of what sustainability means. Sustainability is also rooted in precaution. As the precautionary principle does not align perfectly with the process of assessment, there must be agreement on how to apply a precautionary approach in assessment. At its core sustainability is about identifying, assessing and comparing alternatives to the project and alternative means of carrying it out. To make that process consistent across assessments and provide transparent and credible results, metrics must be established for identifying, assessing and comparing how the alternatives on the table contribute to sustainability, and deciding among options. Without these key elements, there is a significant risk that assessments will fail to contribute to sustainability or restore credibility.

### **Recommendation 1: If sustainability regulations are off the table, establish the framework in Ministerial Guidelines**

We must emphasize at the outset that a basic framework for taking into account the extent to which a project contributes to sustainability under section 22(1)(h) and considering contribution to sustainability when deciding whether the project is in the public interest under section 63(a) must be set out in regulations. We have enough knowledge at this time to prescribe basic definitions, principles and requirements in regulation. Detailed guidance has an important role in implementing a sustainability approach, but some basic, binding requirements would bring greater consistency and certainty to processes.

However, we have been informed that a regulatory framework for sustainability is not an option at this time. Instead, the Agency intends to issue policy guidance on sustainability. *We strongly recommend that any sustainability policy be issued in the form of Ministerial Guidelines in order to have greater authority.*

Throughout this section, we state where our recommendations would be most appropriate in regulations, and specifically the Information Requirements and Time Management (IRTM) Regulations that are part of the IAA Forward Regulatory Plan. Where we believe our recommendations would be better suited to Ministerial Guidance, we make that recommendation. If prescription in regulations is not an option, the alternative should be Ministerial Guidance.

### **Recommendation 2: The IRTM Regulations should clearly set out roles and responsibilities**

Contributing to sustainability requires action by proponents and authorities. As a planning tool, assessments help plan projects as well as shape ultimate decisions in order to achieve the most desirable results. Through a sustainability lens, proponents should therefore iteratively design projects in response to information about potential impacts, benefits, risks and uncertainties in light of any criteria or metrics established in regulation or policy, or identified in the assessment (see below).

But proponents' responsibility during the planning and assessment (review) phases should be limited. It should be the authority (Agency or review panel) that has authority over such matters as: identifying project-specific criteria/metrics; the public and Indigenous engagement required to identify those metrics; identification, assessment and comparison of alternatives; and drawing conclusions about which alternative best contributes to sustainability. While the proponent should be involved in these steps, ultimate responsibility for them must lie in the hands of public authorities.

Also, as sustainability touches human, environmental, social, health and economic matters, assessments and decisions may involve many government departments. We therefore recommend that the IRTM Regulations set out the basic responsibilities of the Agency, review panels, and proponents, while Ministerial Guidance should provide direction on how government departments will work with the Agency to identify and apply sustainability metrics, provide expert information and advice that draws on scientific evidence and Indigenous Knowledge, impose conditions on approval, and design and implement follow-up programs.

### **Recommendation 3: Ministerial Guidance should define “sustainability” with an ecosystem and human focus**

Bill C-69 defines sustainability as including environmental, social, health and economic considerations: “*sustainability* means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations” (section 2).

We read this definition as prescribing three minimum standards, or conditions precedent:

1. The ability to protect the environment in a manner that benefits present and future generations;
2. The ability to contribute to Canadians’ social and economic well-being in a manner that benefits present and future generations; and
3. The ability to preserve Canadians’ health in a manner that benefits present and future generations.

All of these conditions must be met in order for a decision-maker to determine that a project will contribute to sustainability. As the terms are broad, clarification is needed on what each aspect of the definition means. For example, what constitutes protection of the environment, and what does social and economic well-being for present *and* future generations entail?

We recommend that Ministerial Guidelines recognize that ecosystems are integral to an assessment of environmental impacts. Using the term ‘ecosystem’ is important because it refers to how certain elements of the environment (i.e. a particular watershed or forest) interacts with and affects other elements. Considering the entire ecosystem will require decision makers to give greater deference to the whole environment that may be adversely affected by the proposed project.

Additionally, the approval must emphasize the human social and health implications of a proposed activity. As health is not defined in bill C-69, we recommend that the IRTM Regulations (or guidance) describe health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (World Health Organization description).

Furthermore, the term ‘economic’ needs to be elaborated on with a focus on long-term economic productivity and sustainable income and livelihood options for Canadians – shifting the conversation from proponent-centred gains to providing benefits to a variety of interests while avoiding such risks as boom and bust cycles.

The description of sustainability in the guidance document will have a significant impact on strategic and regional assessment, so these definitions should also apply to any assessments under sections 92, 93 and 95.

#### **Recommendation 4: Ministerial Guidance should establish a framework for applying a precautionary approach**

As multiple versions of the precautionary principle exist, the IRTM Regulations (or Ministerial Guidance) should include a definition to clarify which standard should be used. We recommend the following definition in order to ensure that decisions favour low-risk options and anticipate errors in predictions:

“Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation. Assessments and decisions should respect uncertainty, avoid even poorly-understood risks of serious or irreversible damage to the foundations of sustainability, plan to learn, design for surprise and manage for adaptation.”

However, a definition by itself is not sufficient. The IRTM Regulations (or Ministerial Guidance) should set out when and how a precautionary principle should be applied in assessments.<sup>1</sup> Based on best practices and the literature, the IRTM Regulations (or Ministerial Guidance) should:

1. Require assessment authorities to identify the degree of certainty in impact predictions, mitigation and proponent commitments.
2. Establish that a higher degree of precaution is required where the degree of seriousness and irreversibility of the threat is high, or where there is a considerable degree of uncertainty. Where there is risk of significant adverse impact on the environment, health, social conditions or Indigenous rights, or a project would hinder Canada’s ability to meet its environmental obligations, the degree of precaution should prevent the project from proceeding unless the alternative is an even more significant impact.
3. Direct decision-makers to apply precautionary measures where possible risks are adequately backed up by the scientific data but where the likelihood and extent of risk have not been fully demonstrated by conclusive scientific evidence and/or Indigenous Knowledge.

#### **Recommendation 5: Regulations and Ministerial Guidance should establish a framework for the identification, assessment and comparison of alternatives**

Assessing a *project* for its contributions to sustainability must be understood as assessing and comparing *all reasonable alternatives* – including the null alternative – for the extent to which they contribute to sustainability. It is important to understand assessment of alternatives as an approach. Alternatives assessment entails the identification, assessment and comparison of alternatives, culminating in the selection of the preferred option. An iterative process, it should also begin in the early planning stage and continue throughout the assessment.

To this end, the IRTM Regulations (or Guidance) should establish principles or criteria to guide the identification and selection of alternatives. This identification cannot be exclusively or even primarily the responsibility of the proponent; the Agency and review panels must have clear requirements to identify potential alternatives based on meaningful public and Indigenous engagement. As we recommended in our submission to the EA expert panel in 2016, the alternatives process must begin with the identification

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<sup>1</sup> It should be noted that adaptive management is not meant to “counterbalance” precaution, although applying a precautionary approach could result in the use of adaptive management in a follow up program. To ensure that adaptive management is used correctly, the IRTM Regulations (or Ministerial Guidance) should define and set the role of adaptive management in the context of applying a precautionary approach.

of the public interest or societal purpose, need and rationale for the project.<sup>2</sup> Once the Agency has identified the public interest or societal purpose, need and rationale, it should identify alternatives to the project that could best achieve those goals. See recommendation 6 for our recommendation respecting the use of metrics in the alternatives approach.

**Recommendation 6: Regulations and Ministerial Guidance should establish and require metrics for identifying, assessing and comparing alternatives**

An alternatives approach and sustainability analysis require a clear understanding of what is meant by “contribution to sustainability.” The expanded definition we recommend above is only a starting place; the IRTM Regulations (or at the very least Ministerial Guidelines) should prescribe metrics for determining whether and to what extent a contribution will be made to each aspect of sustainability. As an alternative to metrics, principles may be used, but the principles must be substantive in nature and not just procedural.

The notion of principles or metrics (what we have elsewhere referred to as criteria) is key; throughout EA history, to varying degrees of transparency, clarity and rigour, assessment authorities have used metrics or criteria to identify alternatives to the project and then compare those alternatives to select preferred options. For example, when assessing a proposed highway project, a review panel (or the Agency) may identify both the avoidance of wetlands, community access to the highway, and cost as environmental, proponent and community priorities. Using these priorities as metrics or criteria, the panel may then identify alternative routes (e.g., one that avoids a wetland but bypasses the community, a second that would require draining a wetland but provides community access, and a third, costlier option that both avoids the wetland while providing an access route to the highway). Further criteria may refine the choices and help identify the option that best contributes to sustainability.

The Agency’s guidance on significance determination – or the proposed approach for the determination of what entries should be on the new project list – is a useful example. In those cases, the Agency has set out a matrix that includes such factors as frequency, duration and magnitude of effect. Similarly, certain metrics should be established in the Regulations (or Guidelines) to provide clarity and transparency on contributions to sustainability determinations. These metrics should include absolutes (i.e., “the option should not”) and measurements (i.e., which option is best).

Examples of absolutes include:

1. No community should bear a disproportionate burden of the impacts.
2. Not crossing any ecological limits established on the basis of best available science and Indigenous knowledge.
3. Not infringing on Indigenous rights without the free, prior, informed consent of the rights-holder(s).

Examples of measurements include:

1. Equitable distribution of benefits, with affected/at risk communities receiving a fair share of the benefits.
2. Contribution to livelihood options, taking into account factors including class, race, and gender.
3. Extent to which the project helps Canada meet its international environmental obligations.

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<sup>2</sup> Environmental Planning and Assessment Caucus, *Achieving a Next Generation of Environmental Assessment: Submission to the Expert Review of Federal Environmental Assessment Processes* (December 14, 2016) at p.32: [http://rcen.ca/sites/default/files/epa\\_caucus\\_submission\\_to\\_expert\\_panel\\_2016-12-14.pdf](http://rcen.ca/sites/default/files/epa_caucus_submission_to_expert_panel_2016-12-14.pdf).

The IRTM Regulations (or Guidance) should also require the Agency to identify project-specific metrics in the early planning phase and into the assessment to use as guides for identifying, evaluating and comparing alternatives in the assessment and final decision. These metrics must be identified through public and Indigenous engagement and collaboration with other jurisdictions. As the definition of sustainability includes considering benefits for “present and future generations,” metrics should be identified and applied using a precautionary approach, that centrally integrates an intergenerational approach.

## 2. Regional and Strategic Assessments

The Caucus discussed implementation of the regional and strategic assessment provisions (ss. 92-103) of Bill C-69, the *Impact Assessment Act* (IAA). The Caucus supports other proposals addressing regional and strategic assessment including: previous Caucus submissions to the Agency and the Regulatory and Implementation Framework for the *Impact Assessment Act* prepared by several Caucus members (January 2019).

### Regulations for Regional and Strategic Assessment

The Caucus recognizes that development of a regulation and policy on regional assessment (RA) and strategic assessment (SA) has not been a priority for the Agency, for reasons that are understood. Nonetheless, our view is that successful conduct of RAs and SAs is integral to the functioning of the IAA. Well-conducted RAs and SAs can lead to better understanding of issues, reduced conflict, and more efficient project-level assessments. Achieving the purposes of the IAA therefore depends on RAs and SAs.

The Caucus takes the view that stand-alone regulations to implement the IAA’s provisions on regional and strategic assessment are preferable to policies or guidelines that are not legally binding. The regulations would likely need to be Governor-in-Council regulations pursuant to the s. 109 IAA authority to make regulations prescribing anything that the IAA says is to be prescribed, and generally, for carrying out the purposes and provisions of the IAA.

In addition to, or for some matters instead of, regulations, the Agency should develop policy and guidance on regional and strategic assessments in such areas as public participation, gender-based analysis (GBA+), sustainability and treatment of evidence. The differences between regional and strategic assessments should be clarified in any such documents.

### Previous Regional Assessments

The Caucus discussed examples of regional assessments including the following:

- Beaufort Sea Oil and Gas (1970s)
- Bay of Fundy Tidal Power
- Quebec uranium mining (conducted by Indigenous groups)
- Upcoming regional study under CEAA 2012 of offshore oil and gas exploration in Newfoundland and Labrador

It is the Caucus’ view that the Newfoundland and Labrador regional study should *not* be used as a model for a regional assessment, particularly given that it is being conducted pursuant to CEAA 2012 and not the *Impact Assessment Act*. An independent review of this pilot project is needed and processes by which conclusions are to be implemented need to be identified.

The Caucus considered that a regional assessment conducted jointly by Canada and Ontario for the Ring of Fire mineral deposits in northwest Ontario could still be valuable.

## Key Regional or Strategic Assessment Issues

Key regional or strategic assessment issues that need to be addressed in regulations, policies or guidance include the following:

- How do provincial processes fit with regional assessments carried out under IAA? The harmonization or integration of federal and provincial processes will likely vary from province to province.
- How are regional or strategic assessments to be triggered? The IAA does not provide direction on triggering of such assessments; this issue should be addressed through either regulations or policy. The Minister's Advisory Council, established under s.117(1) of the IAA, has responsibilities with respect to RAs and SAs and thus could recommend priorities for RAs or SAs, and refer specific matters indicating a need for an RA or SA to the expert committee established under s.157(1) of the IAA, which would in turn advise the Agency and the minister on priorities for RAs or SAs.

Criteria for referring matters to RAs or SAs could include: whether or not there is provincial cooperation; and whether there is significant potential for adverse cumulative effects.

Finally, any person should be entitled to request an RA or SA, and the Minister should be required to respond to that request within a time period prescribed in regulations.

- What are the minimum standards for RAs and SAs? Minimum standards should be prescribed by regulations or set by policies with respect to: public participation, analysis, methods, inducing proposals, cumulative effects, and sustainability.

The Caucus was informed that the Agency's budget for implementing the IAA includes funding for up to five regional assessment pilots.

## 3. Meaningful Public Participation

### Overview

Ensuring meaningful public participation (MPP) in environmental assessment is an essential component of rebuilding public trust in Canada's environmental assessment processes, as it improves the democratic legitimacy of outcomes. The focus of impact assessment (IA) has shifted from a technical exercise of predicting biophysical impacts of proposed undertakings to a consideration of a full range of social, economic, health and cultural impacts. Input from the public will become even more vital to decision-making to achieve outcomes that are in the best interest of all Canadians.

Incorporating meaningful public participation in IA is a complex task, in that it arises in several stages and should address all factors considered in the final decision of a proposed assessment. For example, how and when should the public comment on alternatives, gender-based analysis (GBA+), or scientific reports, among other factors that need consideration? Impact assessment should be centred on learning by all participants from the earliest planning stages – a sentiment supported by the Expert Panel's

recommendation: “impact assessment must place a heavy reliance on knowledge/evidence inputs of various kinds throughout almost all stages of the process.”<sup>3</sup>

The public needs to be recognized as a key stakeholder with a seat at the table, since proposals drastically impact the lives of individuals in local, national and global communities. Therefore, we applaud the removal of the standing clause that was added in CEEA 2012 and restoring the right of any interested member of the public to participate in the assessment process. The key challenge is ensuring that the opportunity to participate is meaningful.

The Caucus met with the Director of Engagement at the Canadian Environmental Assessment Agency to discuss the “Draft Guide to Public Participation for Impact Assessment under the Proposed IAA” as well as public participation in IA more generally. Our purpose here is not to comment on the draft guide directly. Members have already sent comments in and we are happy to engage further as this guidance develops. We have also provided input to the Expert Panel and Agency directly on MPP, and we do not here repeat all of that input. Rather, we seek to underscore some of the key elements of discussion at our meeting for consideration as the Agency moves forward.

Two things are critical to the development of guidance.

The first is reflecting the principles of meaningful participation that the Multi-Interest Advisory Committee agreed to, including the following:<sup>4</sup>

- Participation begins early in the decision process, is meaningful, and builds public confidence;
- Public input can influence or change the outcome/project being considered;
- Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;
- Formal processes of engagement, such as hearings and various fora of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;
- Adequate and appropriate notice is provided;
- Ready access to the information and the decisions at hand is available and in local languages spoken, read and understood in the area;
- Participant assistance and capacity building is available for informed dialogue and discussion;
- Participation programs are learning oriented to ensure outcomes for all participants, governments, and proponents;
- Programs recognize the knowledge and acumen of the public; and
- Processes need to be fair and open in order for the public to be able to accept a decision.

The second is providing a clear definition of meaningful public participation in any policy and guidance material. We endorse the following definition for working purposes:

*Meaningful public participation establishes the needs, values, and concerns of the public, provides a genuine opportunity to influence decisions, and uses multiple and customized methods of engagement that promote and sustain fair and open two-way dialogue.*

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<sup>3</sup> Expert Panel for the Review of Environmental Assessment Processes “Building Common Ground: A New Vision for Impact Assessment in Canada” (2017) at 37, online:

<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.

<sup>4</sup> RCEN “Consensus Report of the RCEN EPA Caucus in Response to the Report of the Expert Panel Reviewing Federal Environmental Assessment Processes, Building Common Ground: A New Vision for Impact Assessment in Canada” (May 26, 2017) at 54. Online: [http://rcen.ca/sites/default/files/epa\\_caucus\\_consensus\\_response\\_to\\_expert\\_panel\\_-\\_may\\_2017.pdf](http://rcen.ca/sites/default/files/epa_caucus_consensus_response_to_expert_panel_-_may_2017.pdf).



For the Caucus, the bottom line is that the Agency has produced good guidance for meaningful participation in the past but it has not been used. We must find a way to move beyond a check-box approach taking place at one static moment in the assessment, to incorporating interactive and iterative public engagement at each stage of the assessment process. In our discussions with the Director of Engagement, we spent a considerable amount of time discussing open houses, for example, and how this form of engagement can serve as a good on-ramp for meaningful participation. But it should not be the go-to option, especially in the case of the types of large assessments that the IAA contemplates. The opportunities for engagement in these cases should be varied and abundant throughout, as discussed in the rationale detailed recommendation below.

## Recommendations

After reviewing the Agency's draft proposals for public participation<sup>5</sup>, we still feel strongly that a regulation on public participation is required to meet the needs of meaningful MPP as we have previously communicated. Such a regulation would address the following:

### **Recommendation 1: Encourage engagement throughout the assessment**

If the public is going to be meaningfully engaged in under the IAA, opportunities for participation should be captured at each stage of the process. The early planning process, for example, is an important new opportunity for the public to help set the stage for the assessment and show how participation will unfold during the process. Soliciting public comment on proposals that are already so far along in the process that the public cannot influence decisions about alternatives and other important issues can no longer be the norm. Participation in the early planning phase must enable communities and individuals to raise concerns before the project design is finalized, and the process must appropriately engage each stakeholder.

During our meeting with the Agency, Caucus members raised concerns about effectively engaging in the short early planning period. Guidance is needed on how this is going to occur for all involved – including government. It was also noted that since timelines are manufactured and do not reflect the considerations that will need to be made in any given case, that the early planning stage and the assessment/panel review stage need to be more flexible in terms of deadlines. The Caucus recognizes industry's concern over timeline certainty, so we suggest having a range or sliding scale of dates that is adjusted depending on the level of interest in that particular case.

### **Recommendation 2: Create guidelines on the required and optional forms of engagement**

One of the tenets of meaningful engagement is asking people how they want to participate and requirements to consider this in the early planning stage are a very positive step forward. Currently, most public participation comes in the form of online comments or open houses, which are examples of information sharing rather than real engagement. Proponents and the Agency must shift from the decide-defend approach where the public's comments are recorded and shelved.

Based on our collective years of experience with open houses, it became clear at the Caucus meeting that these do not foster an open discussion, and proponents share disjointed information which leaves participants feeling manipulated and defeated. One Caucus member shared an anecdote about having several proponents 'swarm' someone who was asking questions too loudly. We believe open houses are a

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<sup>5</sup> See documents "Draft Policy on Public Participation under the Proposed Impact Assessment Act" and "Draft Guide to Public Participation for Impact Assessment under the Proposed Impact Assessment Act"

significant source of public mistrust in the current assessment system. Other issues include a miscommunication on the objectives of the open house, a lack of public involvement in selecting the time and location, and a lack of follow up after comments are made. Most problematic is the fact that open houses tend to be the only form of face-to-face engagement. The Caucus stresses the importance of not allowing open houses to become the default or only participation method used. Part of the purpose of meaningful MPP should be to promote public education, which must be done through other forms of engagement.

We recommend that the Agency engage with the community in the early planning phase to determine *which* tools and methods it would like to use (where the options are outlined in the Agency’s ‘tools’ document). Attempting to set criteria for engagement steps does not allow the process to be flexible to the community’s needs. A ‘tools’ document could include a one-pager of the description, objectives, time commitment, and accessibility of each method that is circulated to the community to enable informed decision-making on how to carry out the MPP process. We recommend having a ‘town hall’ (a wording change may remove some of the stigma around open houses) as a possible first gathering where information about the IA process and engagement opportunities is shared, with a requirement for subsequent and more engaging participation to follow. One example of an engagement process that comes from PEI that included components of MPP is attached as Appendix 1. There are others of course, such as the Crown Castle Management Plan in Alberta.

To ensure a range of groups are engaged, the process must offer a variety of outreach for people across several mediums. For example, call-in radio shows are less formal and act as a “cross-country check-up” to share information with those who may be interested in, but not know much about impact assessment. When thinking about the type of engagement to use, the proponent and public should consider whether it is an opportunity for information in or information out – and whether either option aligns with the objectives of the participation method. Furthermore, we recommend the Agency guide proponents by indicating when certain methods are, or are not, appropriate, rather than having an open-ended toolbox.

### **Recommendation 3: Provide varied types of notice to improve accessibility**

The challenge with notice is that entirely local dissemination excludes citizens across the country that may be interested in participating, and such notice will be important to the large projects that the IAA will apply to. Online notice may not reach those who cannot access computers or internet (due to resources, remote locations, etc.) and would not reach individuals who do not consistently check the registry – which includes most of the public. We recommend that notice occur multiple times and on multiple platforms including mainstream media, radio, social media, newspapers, and so on – and this strategy should be detailed in policy guidelines.

In terms of accessibility, the science tends to be so technical that it is difficult for the public to engage. We recommend that plain-language summaries should be available for all technical documents. In addition, proponent-led research and reports are not accessible to the public because of commercial confidentiality.

### **Recommendation 4: Delineate proponent and Agency responsibilities**

The current public participation process relies too heavily on the role of proponents, giving them too much discretion on how the public participates in impact assessment. The Agency indicated that the new process requires it to be responsible for initial engagement, and the Caucus is pleased that this new procedure is stated very clearly. If the Agency sets the tone by asking the public *how* they want to be consulted, the rest of the impact assessment will be based on meaningful public participation. The Caucus also recommends the Agency – or an independent third party – be responsible for reporting publicly on MPP.

The Caucus has also highlighted the difficulty in carrying out real engagement in the review panel process because of its highly technical nature and the secretariat's reputation of not respectfully considering the public's concerns. We recommend that the Agency exercise authority over the secretariat's roles and responsibilities in the public participation process, and suggest a dynamic exchange between the public and the review panel before the engagement process begins. The panel should take a more inquisitorial approach to MPP to actively pursue questions in public discourse including early, active, and ongoing pursuit of MPP with the secretariat.

Another issue raised was the repeated incidents of threats and intimidation following public participation. The Agency must take steps to protect the public so that intimidation does not prohibit individuals from engaging with impact assessments.

### **Recommendation 5: Create a public advocate/liaison position**

The Caucus recommends the creation of a public advocate/liaison that would aid citizen participation in all stages of the impact assessment. This position could tie together many of our previous recommendations by making IA more accessible to the public and by streaming public participation so that citizens can engage more efficiently in the process.

### **Conclusions**

We believe that implementing these recommendations would meet the foundations for meaningful public participation that the Agency has set, that include: openness, accessibility, transparency, timeliness and providing an opportunity to inform decision making – all of which reflect the trust-building objective of the IAA. The Agency's planned deliverables include a policy document, a guide for roles and responsibilities, a public participation plan template, and tools for proponents. We strongly advise the use of a regulation for greater prescription and standards that will clarify how proponents and the Agency are to integrate MPP into the assessment process.

## **Text Box – Meaningful Public Participation**

### **A Prince Edward Island Experience – Gary Schneider**

There are many examples of bad public participation processes. For this reason, it has become common to insert the word “meaningful” into any description of public participation. Fortunately, we have some good examples of public participation that was indeed meaningful. Here is just one of them, warts and all.

Public involvement in the process to develop a new *Water Act* for the province of Prince Edward Island got off to a shaky start, and has to date finished poorly. But the middle was a thing of beauty, something we can be proud of and that could serve as a model for this type of process.

Cavendish Farms and the PEI Potato Board wanted government to lift the moratorium on high-capacity wells. This had been in place since 2002, in response to public concerns over the irrigation of potato fields and the potential for this practice to affect both groundwater and surface water.

In 2014, there was a sense that pressure from the industry would result in the lifting of the moratorium, but it was not an issue the provincial government wanted to take a stand on before the 2015 election. The Standing Committee on Agriculture and Fisheries held public meetings on the topic and the public eloquently expressed their concerns.

In November of 2014, the Standing Committee released their report, recommending that the moratorium stay in place and that the province should develop a new Water Act. In response, community, conservation and environmental organizations united to form the Coalition for the Protection of PEI Water (CPPEIW).

Minister Robert Mitchell and the Department of Communities, Lands and the Environment took the lead role in this process. He released a White Paper on the subject and called for a series of public consultations. The Coalition supported the process but asked Minister Mitchell to ensure that the process included meaningful public participation, including an open and transparent process, adequate timelines, and the ability of participants to actually influence the decision.

The Environmental Advisory Council (EAC), a government-appointed body made up of people from a variety of backgrounds, was in charge of the meetings. JP Arsenault, a very well-respected ex-civil servant, was hired to chair the consultations.

Initially, there were some private meetings with a variety of groups and industry associations. The Coalition declined an invitation, stating that all meetings should be public with the presentations made available to the public.

Minister Mitchell listened to public input and decided to have all presentations posted to the web site. He also expanded the number of meetings from seven to twelve, and made sure that all input was quickly made available to the public. Minister Mitchell was justifiably proud of what he referred to as a “leading edge” process of consultation. In a first on PEI, all presentations were uploaded to the provincial web site created for these consultations. These were easily accessible, and also included the public questions and responses that took place after the scheduled presentations. There were also opportunities for written submissions, online submissions, and online discussions (even by phone or letter).

Twelve meetings were held across the province, and the Minister attended every meeting. He didn’t take up a lot of space, but it showed to the public that it was an important issue to him, one that he took seriously. As in any small place, a politician, much less a cabinet minister, has huge demands on his time. This show of support for the integrity of the consultations did not go unnoticed, and allowed the public to have greater faith in the process. Minister Mitchell also publicly stated many times that if more meetings were needed, then he would schedule them. Again, at least on PEI, we rarely hear politicians talk about extending timelines to meet public interest.

As one would expect, the results of this excellent process were high-quality presentations and a high level of public engagement.

In the end, there were:

- 46 presentations at the public consultations
- 14 presentations at the one on one consults
- 14 written submissions
- 61 online comments

There was a high level of satisfaction with the process. The public felt that their collective voice had been heard in a fair and open process. The provincial government had avoided the dreaded Open House style of public involvement and actually seemed to be listening to suggestions and concerns.

In the spring of 2016, the EAC released the report on the public consultations. It was a well-organized, careful analysis of the submissions. The 434 issues and concerns raised were fitted into six key themes. It was an accurate reflection of what had been said at the consultations and on-line. It was accompanied by a department report about how the government planned to address these concerns and issues in the development of the *Water Act* (“*Addressing EAC Water Act Public Consultations*”).

This process was an excellent model of collaboration, openness to feedback, and transparency. Don Mazer from the CPPEIW later wrote “The Coalition was a vigilant observer and commentator on the development of this process, met regularly with the Minister in what was an often challenging, sometimes testy, but ultimately mutually respectful relationship. Generally, he was quite interested in what citizens had to say, and was very committed to this process.”

Then came a long year of waiting until the Water Act draft was released in the Spring of 2017. The absence of the word “agriculture” from this draft Act, which came about because of the pressures to remove the moratorium on high-capacity wells, left people concerned that a very public and meaningful process had now become political.

A second round of public consultations was held in April 2017, and Minister Mitchell promised to continue this inclusive style of public consultation. Even Premier MacLauchlan seemed to buy into the idea of public participation. In the November 17, 2018 Hansard, the Premier said: “Mr. Speaker, it’s been clear in the development of the bill that the public has a great interest and a part to play and a contribution to make in developing and advancing our work together to protect our Island water and to ensure that we live up to the responsibilities that are spelled out in the purpose section of the bill and through its many provisions. It’s been very clear that the work that is done subsequent to the bill or further to the bill in making regulation will also have that element of public engagement.”

Yet despite the promises, it felt like a much less collaborative process.

During this time, there were four public consultations, opportunities for written submissions data, and ten public talks. About 80 people and groups took the time to make written and online submissions. Many of the ideas raised in the first consultations were reflected in the Water Act draft. We had more meetings with the Minister and staff, offering suggestions and ways to collaborate in making changes to the Act before the legislature sat. One Coalition member, Marie-Ann Bowden, a former Professor of Environmental Law at the University of Saskatchewan, offered to work with government drafters of the legislation to make such changes. This offer was not accepted. It seemed there were limits to the collaboration.

Though the *Water Act* was passed in December of 2017, we only received the draft regulations on Water Supply and Waste Water Treatment in February of 2019. We still haven’t seen the draft regulations on the most important part of the document – the extraction of water for irrigating agricultural land. Part of the delay was undoubtedly political, especially since we had a change in Ministers in early 2018. Despite numerous requests from groups such as the Environmental Coalition of PEI, Citizen’s Alliance, and the CPPEIW, Minister Richard Brown was not in the mood to meet, at least until it came out that Robert Irving had a private meeting with him about breaking the moratorium.

In the meantime, dozens of holding ponds have been constructed across the Island, with farmers circumventing the moratorium by drilling household wells on adjoining properties and pumping the water into these ponds. In effect, they’re using the same amount of water that drew the original concerns, only they’ve found a way to get around the moratorium.

Speculation is that we won’t see the extraction regulations until after this year’s provincial election. It is a touchy issue, and bound to either upset the public or the powerful potato lobby, something this government wants to delay having to face.

A great process that went off the rails, and now we’re trying to get it back on track.

## 4. Public Participation Funding

### Overview

Public participation funding allows individuals and groups with knowledge of, and an interest in, proposed projects to more fully engage in the impact assessment process. For the process to be meaningful, the public requires funding for community consultation and technical review and input. Applicants must pay for experts, travel, report writing and review of relevant studies in order to sufficiently inform their participation. The challenge with participant funding is ensuring that the funds are disbursed equitably and in a timely manner, and that the amount meets the needs of participants for meaningful engagement.

### Recommendations

The following recommendations come from the Caucus' review of the existing public participation funding model, which would require nominal changes to significantly enhance the accessibility of the impact assessment process to Canadians.

### Rationale

#### **Recommendation 1: Expand of the criteria under eligibility requirements**

The eligibility requirements should use broader language and extend beyond a 'direct' interest to anyone in Canada with an interest in the proposal as the IAA envisions with the removal of the 'interested party' standing clause. An interest in an impact assessment should not be limited to living or owning property in the project area.

We also recommend including non-incorporated groups to improve accessibility and foster community capacity building. Non-incorporated groups could include community members or existing community groups that band together – but do not wish to create a legal entity – to pool their knowledge and resources. Note, this model could also include a category for individual community members or independent experts who hold important information about project proposals.

#### **Recommendation 2: Develop guiding principles on how to determine funding amounts**

The Caucus recommends the Agency create guiding principles on how to allocate public participation funding. The amount of funding should be sufficient to meet the needs of the participants and the proposed activities (e.g. experts, lawyers, analysis, reports) and reflect the **true cost of meaningful engagement**. The amount should not be based on the number of people represented because it presumes that proposals with more significant or widespread potential impacts will result in more engagement, but it also marginalises smaller communities and presumes a correlation between the number of interested people and the depth of their knowledge and interest.

#### **Recommendation 3: Increase the amount of funding in total with coverage of both Agency-Lead and Panel Reviews**

We recommend that the overall participant funding envelope amount should be increased, and factor in inflation. There should not be a total cap for participant funding for each assessment. The amount available should be based on need as established through the application assessment process. In the absence of a per-project cap, funding envelope estimates could be made based on a percentage of the total expected cost of the EIS, to account for the relative costs to public participants. To help participants

gauge funding needs, the Agency could develop a schedule for specific types of costs (e.g. experts, lawyers) so that participants can expect funding to cover adequate technical support.

#### **Recommendation 4: Develop a staged approach to funding over the life of the IA**

We recommend that funding be made available early enough in the process so that applicants have time to retain experts and generate reports. A staged approach should be used, where funding is released incrementally and based on the type of activity required in each stage of the assessment, starting in the early planning phase. The challenge with receiving money too late is that it prevents many organizations from retaining experts or legal counsel and/or actually having the time to provide thoughtful input. Many groups do not have reserves to dip into if initial payments are insufficient to pay retainers, for example, or if payments are delayed. The staged approach could involve hiring an expert to determine what issues are relevant in the early planning phase, followed by a review of the EIS and participation in hearings during the substantive part of the impact assessment. If the information is deemed immaterial in the early planning phase, further funding can be denied. We also recommend making advances available to overcome the liquidity challenges of participants.

#### **Recommendation 5: Maintain and expand definition of eligible expenses**

The Caucus recommends keeping all of the existing eligible expenses outlined in the current funding framework, with a few additions. Funding should be in place to enable individuals to attend engagement sessions, workshops, hearings and so on (i.e. through a travel stipend or providing child care services). At present, staff salaries under the umbrella of professional services are not eligible unless a report is being produced. We recommend allocating some funding to the administrative arm of organizations participating in the impact assessment. There also should be an honorarium to recognize an applicant's time and effort. For example, a rancher who has been living in one area for generations could provide considerable local knowledge, while a long-time fisher may have valuable knowledge about weather conditions and patterns in specific areas. This would put a value on community knowledge.

#### **Recommendation 6: Establish a public advocate/liason position to increase access to funding opportunities**

We recommend creating a public advocate/liason position – further discussed in our Meaningful Public Participation section – to assist participants in the application process. Additionally, this person – or a designate – could provide workshops to help people understand the IA process before the early planning phase to determine if a funding application is necessary. This would help streamline funding applications whereby participants are fully aware of the requirements and process. We also recommend providing applications in both French and English, as well as other prevalent regional languages (for example, Inuktitut, Dene, and Cree dialects).

## **5. Evidence**

### **Overview**

'Evidence' includes scientific information, community knowledge, and Indigenous knowledge. Since the project design, impact assessment, and decision are all based on evidence, the data must be as accurate and in depth as possible.

Below is a list of recommendations that should be included in the Information Requirements and Time Management (IRTM) Regulations to guide the collection and analysis of evidence.

1. Create an evidence oversight model

2. Extend s. 6(3) to all participants in the IA

### **Recommendation 1: Emphasize the collection of non-proponent evidence**

The new impact assessment process should place more emphasis on sources of information and analysis that are independent of the proponent. For example, there may be situations where the proponent should not be collecting data, such as sensitive cultural or archaeological information on an Indigenous group's traditional territory. For other information, such as cumulative effects assessment or community baseline information and potential impacts, the proponent may not be best-placed to conduct the studies.

Alternative sources of such information include, but are not limited to, community knowledge, academic research, Indigenous knowledge, government science and Agency-commissioned research. Additionally, external (peer) review of the evidence is critical. (Peer review of community knowledge and Indigenous knowledge may take the form of validation or endorsement by community peers.)

Much depends on the successful operation of the planning phase. The 180-day timeline is short, and without discipline and regulatory requirements ensuring that the planning phase result in detailed plans for the collection, review and analysis of the information to be used in the assessment, there is serious risk that the evidentiary basis of assessments will not be greatly improved.

To this end, the IRTM Regulations should require the Agency, in the tailored impact statement guidelines (TIGS), to prescribe not only what information is required for the initial Impact Statement, but also what other information is required from sources other than the proponent, who provides that information, and methods for its collection and analysis. To avoid disputes during the assessment, the Regulations should require the Agency to cooperate with other participating jurisdictions and engage the public, Indigenous peoples and other interested parties early on and throughout the development of the TIGS.

We stress that all of the evidence gathered must be weighed based on the source, concerns over bias or credibility, and whether some evidence conflicts or complements other evidence, in the context of applying a precautionary approach.

### **Recommendation 2: Establish guidance for independent review of the evidence**

The Caucus has deep concerns about the over-reliance on proponent-led data without any meaningful oversight, as proponents have the greatest interest in elaborating on or excluding certain facts. It may not be possible to peer review every study, but the Agency should establish guidance on when peer reviews should take place. For example, where there are contentious issues or conflicting evidence from different sources, proponent-led studies should be independently reviewed.

Additionally, the IRTM Regulations should clearly require that all information that the proponent seeks to use in support of its application must be publicly available.

### **Recommendation 3: Impose a duty of scientific integrity on proponents**

We commend the federal government for its inclusion of section 6(3) – the duty on all federal authorities to adhere to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy. However, the IRTM Regulations should extend this duty onto proponents, whose information comprises the majority of the evidence relied on in impact assessments.



#### **Recommendation 4: Place the burden of proof on proponents, and require oversight of the Technical Advisory Committee**

It is the rare completed assessment that does not result in a project approval. There is a tendency among assessment authorities when weighing competing evidence to accord more weight to that of proponents. Further, lack of capacity and funding can make it difficult for the public and Indigenous peoples to compete with and critique proponents' evidence.

We therefore recommend that the IRTM Regulations specify that the onus is on the proponent to prove the integrity of its information and that it meets the public interest test under the Impact Assessment Act and any criteria established in regulations and guidance.

We further recommend that the Technical Advisory Committee be tasked with ensuring the thoughtful and equitable weighing of evidence. Specific tasks should include commenting on methodology, studies to be completed, the participation plan, and determining when peer review should occur. The committee should also have a mandate for evaluating, analysing and comparing evidence from proponents, Indigenous groups, communities, and experts. Finally, the committee should be responsible for advising on and reviewing any follow up and enforcement plans and implementation.

## **6. Gender Based Analysis +**

The Caucus is of the strong view that Gender Based Analysis Plus (“GBA+”) is an important and helpful tool for impact assessments in Canada. The proposed legislative requirement to consider the impacts of proposed projects on sex and gender and other identities is a long overdue and welcomed addition to impact assessment.

It is our understanding that Bill C 68 and C 69 represent the first legislative provisions in Canada which require consideration of the intersection of sex, gender and other identity factors relating to environmental decision-making.

In order to ensure compliance with this requirement and given the facility with which it can be deemed “too complicated” to undertake a GBA+, it will be important for Canada (via the Impact Assessment Agency of Canada, the “Agency”) to establish clear guidelines with concrete examples for all involved in impact assessments. The argument that “it's too complicated” cannot be used as an excuse to do nothing. The Caucus hopes our proposed comments and recommendations can assist the Agency in clarifying the usefulness and need for GBA+ in impact assessments.

### **Overview of GBA +**

According to the Status of Women Canada, GBA+ is “an analytical process used to assess how diverse groups of women, men, and non-binary people may experience policies, programs and initiatives.”<sup>6</sup> The “plus” in GBA + “acknowledges that GBA goes beyond biological (sex) and socio-cultural (gender) differences” and that individuals have “multiple identity factors that intersect to make us who we are” such as “race, ethnicity, religion, age, and mental or physical disability”.

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<sup>6</sup> <https://cfc-swc.gc.ca/gba-acs/index-en.html>

Bill C-68 and C-69 state that when making decisions under the relevant Act, decision-makers must consider, among other things, “the intersection of sex and gender with other identity factors”.<sup>7</sup> The preamble of Bill C-69 states:

*whereas the Government of Canada is committed to assessing how groups of women, men and gender-diverse people may experience policies, programs and projects and to taking actions that contribute to an inclusive and democratic society and allow all Canadians to participate fully in all spheres of their lives.*

In its draft Guidelines, the Agency states that GBA+ asks the “important questions about how designated projects may affect diverse groups of men, women or non-binary gender people differently.”

## Why is GBA+ important?

Based on our understanding, the GBA+ analysis borrows from the intersectionality approach coined by Professor Kimberlé Crenshaw. Professor Crenshaw describes intersectionality as “a lens through which you can see where power comes and collides, where it interlocks and intersects.” Intersectionality brought to light the fact that certain persons and groups of people are often ignored and excluded in decision-making by decision-makers. Specifically, it is rooted in black feminism and recognizes the unique experiences of women living at the “intersection” of sexism, racism, able-ism, and other forms of oppression.

Both the intersectionality and GBA+ lens explicitly acknowledge that power dynamics have disproportionate and negative impacts on disadvantaged groups such as women, persons with disabilities, persons of minority ethnic and racial backgrounds and LGBTQ2S+.

The literature has identified significant differences in terms of how development projects impacts different identities, particularly women and men, in different ways.<sup>8</sup> This includes: access to employment and training opportunities (women continue to be under-represented in resource industries); the cost of living can be higher due to influx of people; resource extraction is associated with the increase of gender-based violence, sexual exploitation and human trafficking as well as higher rates of sexually transmitted infections; and resource development can change and reinforce power dynamics particularly in smaller communities.<sup>9</sup>

GBA+ is an important tool for impact assessments which requires concrete action to address the barriers to equality facing disadvantaged groups, including in impact assessments. In practice, it considers how “differing needs, interests, and values of diverse sub-groups within communities [are] relevant to the potential social impacts of the proposed project.”<sup>10</sup>

Identifying the range of interests and needs of the individuals and groups affected by proposed projects fosters more meaningful engagement and leads to better decisions and outcomes.

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<sup>7</sup> See proposed section 2.5(i) of the Fisheries Act (“may”), section 22(1)(s) of the proposed Impact Assessment Act (“must”), and sections 183(2)(c), 262(2)(c) and 298(3)(c) of the proposed Canadian Energy Regulator Act (“must”).

<sup>8</sup> See for example, Heidi Walker et al “Gender and Diversity Analysis in Impact Assessment” (February 2019) submission to CEEA

<sup>9</sup> Heidi Walker et al “Gender and Diversity Analysis in Impact Assessment” (February 2019) submission to the CEEA

<sup>10</sup> Ibid.

## Recommendations

The Caucus proposes that the Agency incorporate the following recommendations as it moves forward with the creation of GBA+ guidance and methodology documents.

1. Review all guidance and methodology documents to incorporate reference to GBA+ where appropriate, ensuring consistency throughout the impact assessment process, including but not limited to:
  - the public participation guidelines and in particular, in the early planning phase with clear examples of its usefulness and purpose;
  - the inclusion of a requirement to include roles and responsibilities relating to the GBA+ in monitoring and follow up plans; and
  - the fact that GBA+ should form part of regional and strategic assessments.
2. Include specific reference in the GBA+ Guideline and Methodology documents to:
  - additional practical examples of how the GBA+ can be helpful;
  - the importance of avoiding a check-box approach to GBA+;
  - the need to move away from dichotomies when referring to gender identities;
  - the direct link between colonization and GBA+;
  - the direct link between the GBA+, impact assessments, and Missing and Murdered Indigenous Women and Girls (“MMIWG”) as an example of why GBA+ is a required to ensure the safety and security; and
  - the importance of involving Grandmothers and other knowledge keepers, including those from the two-spirited community.
3. Include acknowledgment in the Guideline and Methodology documents which explicitly recognize that GBA+ may have a unique meaning from the perspective of Indigenous worldviews.
4. Designate and/or create an independent office/organization responsible for:
  - Actively working with organizations responsible who are frontline with issues affecting GBA+, including but not limited to rape crisis centres;
  - creating guidelines for research methods and information gathering from a GBA+ perspective;
  - answering questions by proponent and others involved in impact assessments on how to apply GBA+ in practice;
  - receiving and reviewing complaints relating to sexual assault or exploitation; and
  - the collection of baseline information relating to GBA+.
5. Outline the roles and responsibilities of the Minister in applying GBA+.

## Rationale

### **1. Review all guidance and methodology documents to incorporate GBA+ where appropriate**

It appears that guidance documents relating to Bill C 68 and 69 have been created by various expert teams within different departments or groups within the federal Government. This type of siloed drafting approach can lead to inconsistencies and challenges in implementation. GBA+ should be used consistently throughout impact assessment processes and reference documents should make explicit mention of such.

As an immediate next step, it is recommended that all guidance documents be reviewed to ensure consistency and that reference to GBA+ be included where appropriate. It is also recommended that the guidance documents be reviewed by experts from other Government of Canada departments such as Indigenous and Northern Affairs, Women and Gender Equality, Justice, Health, and Environment and Climate Change, as well as Fisheries and Oceans.

The Agency should continue to work actively with these departments and other relevant departments (such as Statistics Canada and the Police when requires).

### ***Using GBA+ in Engagement***

The public participation and engagement guidance document could benefit from explicit mention to GBA+. The GBA+ approach must be an integral part of creating the methods for engagement and identifying the individuals to engage.

In the early planning phase, the GBA+ lens can assist in ensuring that the needs, interests and values of various sectors of the community/nation are reflected in planning for and decision-making. Setting the standard in the early planning phase could assist in ensuring the subsequent impact statement, assessment, decision-making, follow-up, compliance and enforcement appropriately address GBA+.

### ***GBA+ Monitoring and Follow up***

The Caucus recognizes the importance of including a requirement to identify roles and responsibilities relating to the GBA+ in monitoring and follow up plans. Given the sensitive nature of some monitoring data, there must be clear mechanisms for reporting results to the Agency. These mechanisms may necessarily involve the collaboration of Statistics Canada and the Police and must be done respectfully.

For example, there must be indications of who should be responsible for aggregating information in order to ensure respect for confidentiality and remove sensitive information while reporting the results annually. History has shown that there may be a need to work closely with law enforcement agencies in order to do so.<sup>11</sup>

Currently, there are no ‘next steps’ once baseline GBA+ information is gathered. Implementation could include conditions such as the proponent not setting up the project in a specific way and reporting/publishing information on the ongoing analysis of GBA+ factors.

## **2. Including specific references in the Guidelines**

Based on our literature review and experience, the Caucus recommends including the following specific references in the Guidelines:

- *Additional practical examples of how the GBA+ can be helpful*: one such example is the responsibility of proponents towards workers and their families flowing from the workers having to travel to distant worksites and continuing to work far from home. This may involve the responsibility to pay for family therapy, couples counselling, and/or medical assistance flowing from sexually transmitted diseases.
- *the importance of avoiding a check-box approach to GBA+*: the assessment must go deeper than simply “checking off” different groups as part of the engagement process. It must be integrated at each step so as to avoid siloed decision-making and the exclusion of important voices;

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<sup>11</sup> See for example: <https://www.cbc.ca/news/canada/manitoba/keeyask-workplace-culture-assessment-report-racism-1.4802971>)

- *the need to move away from dichotomies when referring to gender identities*: a GBA+ analysis goes far beyond identifying the impacts of proposed projects on men and women. It recognizes that male and female dichotomies can be problematic and acknowledges the impact of proposed projects on diverse gender identities in addition to other intersecting identities;
- *the direct link between colonization and GBA+*: the legacy of colonialism in Canada has had long lasting inter-generational impacts on Indigenous peoples. This legacy has continuing effects on impact assessments in Canada. Specifically - colonialism, racism, oppression, sexism and patriarchy have worked together to perpetuate poverty and violence against Indigenous women, girls as well as Indigenous people who are gender non-conforming.<sup>12</sup> These dynamics must be considered in impact assessments.
- *the direct link between the GBA+, impact assessments and Missing and Murdered Indigenous Women and Girls (“MMIWG”) as an example of why GBA+ is a required to ensure the safety and security-* During the recent MMIWG National Inquiry, there were multiple references to the impacts of resource extraction projects on the safety and security of Indigenous women and girls. Specifically, stories were shared during the National Inquiry about the correlation between violence against the land (Mother Earth) and violence (including but not limited to sexual exploitation, human trafficking and sexual violence) against Indigenous women and girls and two-spirited individuals;<sup>13</sup> and
- *the importance of involving Grandmothers and other knowledge keepers, including those from the two-spirited community*: For example, the Clean Environment Commission of Manitoba recommended the creation of a Grandmothers Circle which would act as an advisory group of elders and grandmothers “whose mission would be to oversee safeguarding the environment. The group would provide advice and its terms of reference would be the teachings of honesty, respect, courage and truth.”<sup>14</sup>

### 3. Indigenous worldviews on GBA+

The preamble of Bill C 69 recognizes Canada’s commitment to achieving reconciliation with Indigenous people through a renewed nation-to-nation relationship. Considering this explicit recognition, it is necessary for the GBA+ documents to acknowledge that the “GBA+” is a western concept which may have a different meanings and unique practical implications for Indigenous people. As stated by the Native Women’s Association of Canada (the “NWAC”) a culturally relevant gender-based analysis should be used.<sup>15</sup> Specifically, this approach should reflect and balance the unique needs of Indigenous women.<sup>16</sup>

For example, according to some Indigenous teachings, women are the protectors of water. As explained by Anishinaabe Elder Niizhoosake Copenace, the responsibility of women to protect the water is “immediate as well as forward looking”:

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<sup>12</sup> See generally: NWAC “Culturally Relevant Gender Based Analysis: An Issue Paper” (2007).

<sup>13</sup> MMIWG NI Transcripts Page 155-156 on 14 September 2018; MMIWG NI Transcripts Page 160-1 on 14 September 2018. Please note: it is anticipated that the Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls will be released at the end of April 2019. The Caucus recommends that CEEA undertake a review of the Final Report to identify what, if anything, is of direct relevance to GBA+ within the context of impact assessments.

<sup>14</sup> Clean Environment Commission, “Report on Public Hearing: Keeyask Generation Project” (April 2014) at p 191 available online: <http://www.cecmantoba.ca/resource/hearings/39/Keeyask%20WEB.pdf>

<sup>15</sup> NWAC “Culturally Relevant Gender Based Analysis: An Issue paper” (2007), see: <https://www.nwac.ca/wp-content/uploads/2015/05/2007-NWAC-Culturally-Relevant-Gender-Based-Analysis-An-Issue-Paper.pdf>

<sup>16</sup> NWAC “Culturally Relevant Gender Based Analysis: AN issue Paper” (2007) see: <https://www.nwac.ca/wp-content/uploads/2015/05/2007-NWAC-Culturally-Relevant-Gender-Based-Analysis-An-Issue-Paper.pdf>

*I have a deep love and respect for all of Creation but the responsibility of women is water. I've been taught that fulfilling my duty replenishes us; spirits love to see us doing that and they watch over us when we do. We each need to fulfill our duties – for us, our children, our grandchildren and those yet to be born.<sup>17</sup>*

In practice, this may mean that if a proposed project affecting an Anishinaabe nation is close to or affects the water in any way, the proponent may have the responsibility to ensure they have spoken to the women in the community about their potential concerns and proposed mitigation measures.

Importantly, the Agency should engage with appropriate organizations, including Indigenous representative organizations to seek guidance as to how to respectfully and meaningfully approach GBA+.

#### **4. An Independent Office/Organization**

As a way of putting GBA+ into practice, the Caucus recommends that the Agency set up an independent office responsible for:

- *creating guidelines for research methods and information gathering from a GBA+ perspective* - Current practices include a proponent-heavy role in the collection and analysis of information, which is problematic because the baseline data – which informs much of the ensuing IA – is skewed to one stakeholder's perspective. We recommend that the Agency take an active role in overseeing the information gathering and analysis processes so that knowledge from communities, academics, and civil society can inform the GBA+ analysis.
- *answering questions by proponent and others involved in impact assessments on how to apply GBA+ in practice* – this would be an important element of the office as it addresses the criticism that GBA+ is too complicated to put into practice;
- *receiving and reviewing complaints relating to sexual assault or exploitation*: an independent and accessible office is required for individuals to feel safe in reporting incidents of sexual violence, exploitation and trafficking. This independent office should be created in collaboration with regional and diverse input with a focus on areas where significant development projects are in operation or will be built in the future<sup>18</sup>; and
- *the collection of baseline information relating to GBA+*: One challenge with current impact assessments is the compiling and collection of baseline data. The independent office could develop a framework for the collection of data and baseline information with respect to GBA+ identity factors. Methodologies developed by the office could include a broader analysis of disaggregated data beyond simply breaking down and categorizing information.

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<sup>17</sup> Aimée Craft, "Reflecting the Water Laws Research Gathering Conducted with Anishinaabe Elders: June 20-23 2013 at Roseau River, Manitoba (Spring 2014) at p 30 available online: [http://create-h2o.ca/pages/annual\\_conference/presentations/2014/ANI\\_Gathering\\_Report\\_-\\_June24.pdf](http://create-h2o.ca/pages/annual_conference/presentations/2014/ANI_Gathering_Report_-_June24.pdf).

<sup>18</sup> In Manitoba, the Regional Cumulative Effects Assessment Report represented the first time instances of historic sexual violence along the Nelson River were publicly reported and discussed: <http://www.cecmanitoba.ca/resource/hearings/42/RCEA%20Design%20Web%20Accessible%20May24.pdf>

## 5. Proponent and Agency Responsibilities

The Caucus recommends that the Agency create a process outlining how the Minister will use the GBA+ lens when determining whether a project is in the public interest. We suggest including GBA+ in the reasons for a Minister's decision to approve or deny a project. The decision should include a discussion of how the GBA+ analysis was considered and applied.

## 7. Environmental Obligations

### Overview

Environmental obligations (“EOs”) refer to the domestic and international commitments Canada has made in the form of policy commitments, targets, goals or legal obligations. Assessing EOs is a new factor to consider in the proposed *Impact Assessment Act* under s. 22(1)(i): “the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.”

The IAA also requires the same factor to be considered when determining whether a project is in the public interest (s. 63(e)).

Canada is party to numerous international and domestic environmental agreements. Some EOs impose substantive obligations on the federal government, while others are focused on process (such as information-sharing). To complicate matters, international treaties do not give rise to federal jurisdiction over the subject matter of the treaty, meaning that the federal government may have exclusive, shared or no jurisdiction over the matter. Where there is shared jurisdiction (such as climate change and biodiversity), both provincial and federal authorities should cooperate to fulfil their obligations to the best of their ability. An appropriate assessment of EOs will therefore require cooperation among jurisdictions and clear guidance on how to identify and meet those obligations.

Assessment of EOs will require the involvement of various federal departments, other jurisdictions, non-government experts, Indigenous authorities and peoples, and potentially the international community, giving rise to the need for reciprocal relationships of information sharing. Indeed, section 23 of the Act requires that “Every federal authority that is in possession of specialist or expert information or knowledge with respect to a designated project that is subject to an impact assessment must, on request, make that information or knowledge available” to the assessment authority. Thus it is critical that each requirement respecting EOs be done in the full collaboration with other jurisdictions and authorities, and the meaningful involvement of the public, consultation with Indigenous peoples, and engagement of federal departments.

To begin with, the Caucus recommends that the Agency identify key priority international instruments, such as the Convention on Biological Diversity, the Aarhus Convention and the Paris Agreement. For each of these, we recommend that the Agency create a brief summary document for each relevant environmental obligation that sets out its main substantive requirements and generic metrics for the assessment.

Further, we recommend that Ministerial Guidelines be issued to govern the assessment of the extent to which a project helps or hinders Canada’s ability to meet its international environmental and climate obligations, and that those Guidelines include the following:

1. A broad definition of “environment” that expands on that set out under section 2 of the IAA

2. Guidelines for scoping environmental obligations, including:
  - a. A non-exhaustive list of priority environmental obligations, and any domestic laws, policies, plans or programs for fulfilling those obligations, as well as any policy gaps
  - b. A requirement for the Agency to conduct a relevancy review in the planning phase
3. Guidelines for assessing projects' alignment with EOs
  - a. A requirement for the Agency to identify the studies needed in order to assess the extent to which the project and alternatives will help or hinder Canada's ability to meet its EOs and include those studies in the TIGS (see section on Evidence)
  - b. Requirements respecting the identification of alternatives
4. Generic metrics for assessing the extent to which a project and alternatives helps or hinders Canada's ability to meet key obligation, and a requirement to identify assessment-specific metrics (see section on Sustainability)
5. Prescription for decisions and follow up programs

Each of these is discussed below.

### **Recommendation 1: Establish brief descriptions of key international instruments**

The Caucus recommends that the Agency publish brief, plain language documents for each key international instrument so that parties have a similar understanding of whether and how the different instruments may apply in an impact assessment. Each summary should set out: obligations established under the instrument; what environmental, social, economic, or health impacts are implicated; any domestic laws, regulations, policies, plans and programs established pursuant to those instruments; any policy gaps in meeting Canada's obligations; and generic metrics for determining whether and to what degree projects and alternatives help or hinder Canada's ability to meet the obligations.

Any such descriptions and metrics should be non-exhaustive, in recognition that they are made on certain assumptions about our relationship with the natural environment which do not necessarily align with the worldviews of Indigenous communities.

### **Recommendation 2: Expand on the definition of environment in Ministerial Guidance**

Despite general acceptance that the term "environment" includes broader socio-economic and human systems, the definition of environment provided in section 2 of the IAA appears to be restricted to the biophysical environment and systems. An overly narrow interpretation of environment for the purposes of sections 22 and 63 will undermine the credibility of assessments and foster dispute over what EOs should be included.

We therefore recommend that Ministerial Guidance expand on the definition of "environment" in section 2 of the Act, and include such broader socio-economic matters as human health and well-being, social conditions and Indigenous rights.

### **Recommendation 3: Establish regulations and Ministerial Guidance on scoping environmental obligations**

It is important to recognize that not all international instruments are created equal. Emphasis should be placed on those instruments that establish substantive obligations (as compared to information sharing, for example). Key areas include biodiversity, climate, migratory birds, air and water quality, transboundary impacts, and human rights. Key instruments include (but are not limited to): the



Convention on Biological Diversity, the Paris Agreement and the United Nations Declaration on the Rights of Indigenous Peoples.

Ministerial Guidance should describe priority issue areas and instruments, and require the identification of relevant instruments in the planning phase, in collaboration with other jurisdictions and the meaningful participation of the public and consultation of Indigenous peoples. It is critical that the Guidance require this scoping to be broad and include all relevant EOs.

**Recommendation 4: Establish regulations on assessing projects' alignment with EOs**

As per our recommendations in the Evidence section of this report, the IRTM Regulations should require the Agency, in the tailored impact statement guidelines (TIGS), to prescribe the information required to assess whether and to what extent the project and alternatives will help or hinder Canada's ability to meet its EOs. This information will not only include what information the proponent will be required to provide in the Impact Statement, but also what other information is required from sources other than the proponent, who provides that information, and methods for its collection and analysis.

The IRTM Regulations should also establish criteria for the selection, assessment and comparison of alternatives (see Sustainability section of this report) which includes a requirement to consider EOs in that process.

**Recommendation 5: Establish Regulations and Ministerial Guidance on metrics for assessing alignment with EOs**

In accordance with Recommendation four and our recommendations respecting Sustainability, the IRTM Regulations (or Ministerial Guidance, if Regulations are not an option) should establish basic metrics for assessing the extent to which a project and alternatives helps or hinders Canada's ability to meet key obligation. They should also require the Agency to identify assessment-specific metrics in the planning phase (see section on Sustainability).

**Recommendation 6: Establish Regulations and Ministerial Guidance on decisions and follow-up plans**

Though the IAA requires the Minister or Cabinet to provide detailed reasons for decision, there is nothing in the Act to ensure that a project actually helps Canada meet its environmental obligations. We recommend that Ministerial Guidance encourage decision makers to be consistent with international environmental commitments by requiring them to impose relevant conditions on projects that would best ensure their consistency with our EOs. Guidance should also require reasons for decision to justify any non-alignment with Canada's environmental obligations.