
Assembly of First Nations

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Assemblée des Premières Nations

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ANNUAL GENERAL ASSEMBLY
July 23, 24 & 25, 2019, FREDERICTON, NB

Resolution no. 06/2019

TITLE: Respecting First Nations inherent and constitutionally-protected rights in the Project List for the Impact Assessment Act

SUBJECT: Environment; Fisheries; Impact Assessment

MOVED BY: Sally Whiteknife, Proxy, Mikisew Cree First Nation, AB

SECONDED BY: Chief Calvin Sanderson, Chakastaypasin Band of the Cree Nation, SK

DECISION: Carried; 1 objection, 7 abstentions

WHEREAS:

- A. The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) states:
- i. Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
 - ii. Article 32 (2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
 - iii. Article 32 (3): States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

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- B.** The Assembly of First Nations (AFN) has passed nine resolutions concerning this process: Resolution 69/2018, *First Nations Full, Direct, and Unfettered Participation in Bill C-69 including Regulatory and Policy Co-Development*; Resolution 07/2018, *Addressing First Nations Rights, Title, and Jurisdiction in Bill C-69: Impact Assessment Act, Canadian Energy Regulator Act, and the Navigation Protection Act*; Resolution 73/2017, *Environmental and Regulatory Reviews – Phase 3*; Resolution 20/2017, *Respecting Inherent Jurisdiction over Waters Parallel to the Review of Canada's Navigation Protection Act*; Resolution 19/2017, *Resetting the Role of First Nations in Environmental and Regulatory Review*; Resolution 86/2016, *Meaningful Consultation and Engagement with First Nations in the Environment and Regulatory Review*; Resolution 64/2016, *Support for Stk'emlupsemc te Secwepemc Nation Project Assessment Process*; Resolution 12/2016, *Moving Beyond Federal Legislation to Establish a Nation-to-Nation Relationship*; and Resolution 35/2016, *First Nations' Inclusion in the Review of Environmental and Regulatory Processes*.
- C.** Prime Minister Justin Trudeau publicly committed "to a renewed nation-to-nation relationship with First Nations (...) one that is based on recognition of rights, respect, cooperation and partnership" and to "conduct a full review of the legislation unilaterally imposed on Indigenous peoples by the previous government."
- D.** Following two and a half years, where First Nations overwhelmingly participated in a House of Commons committee, a Senate Committee, two expert panels, a federal discussion paper, and in-person technical sessions, Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts* received Royal Assent on June 21, 2019.
- E.** This is despite, since entering the Senate, significant opposition from oil and gas lobbyists, provinces, and other stakeholders, with opponents calling on Senators to either kill or delay the Bill in perpetuity. The Senate Committee on Energy, the Environment, and Natural Resources emboldened by this opposition proposed over 180 amendments to the Bill, many of which, in particular those proposed by Conservative Senators, were antithetical to the meaningful inclusion of First Nations' rights, jurisdiction, and knowledge.
- F.** In response, the Government responded to the Senate indicating that the vast majority of proposed amendments were unacceptable. In total, this meant accepting 62; modifying 37; rejecting 130; and making 6 consequential amendments.

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- G. While Bill C-69 is not a drastic change from the current federal assessment laws (Canadian Environmental Assessment Act, 2012 and the National Energy Board), it brought the law in compliance with the existing case law on:
- i. Broadened scope of assessment;
 - ii. Section 35 as part of the public interest test;
 - iii. Duty to give reasons;
 - iv. Increased engagement with First Nations; and
 - v. Indigenous Knowledge.
- H. At the same time, Canada is engaging in a process of reviewing policies, regulations and guidelines relating to Bill C-69. This has included important regulations for the functioning of the Acts, which were released at the same time as the Senate's study on the Bill. This has resulted in less attention on those important regulations by First Nations.
- I. In particular, two draft regulations pertaining to *the Impact Assessment Act* were released for comment: *Regulations Designating Physical Activities (Project List)*; and *Information Requirements and Time Management Regulations*. The deadline for comments closed on May 29, 2019; however, many First Nations concerns were not addressed in the Discussion Papers.
- J. The proposed approach on the Project List largely maintains the flawed system of Canadian Environmental Assessment Agency, 2012 (CEAA 2012) by focusing solely on a very limited interpretation of major projects in areas of federal jurisdiction, including exemptions for existing oil and gas development, and small modular nuclear reactors, as well as decreases in thresholds for pipelines, coal mines, and renewable energy projects (such as wind).
- K. The proposed approach on the Project List for oil sands projects encourages project splitting. The exemption for mine expansions under 40% and *in situ* projects under 2000m³/day incentivizes proponents to submit multiple smaller applications that result in very large projects. At the same time, similar provincial exemptions mean that future expansion of oil sands development may see only minimal impact assessment that does not fully assess impacts to First Nations' rights.

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- L. Alberta's position that energy projects should be excluded from federal oversight because of Alberta's rigorous regulatory process is not justified. Alberta's approach to consultation is regressive and does not consider important potential impacts of industrial development on Aboriginal and Treaty rights.
- M. This is despite First Nations' concerns with the CEAA 2012 Projects, as well as the *Consultation Paper on The Project List* released by the Government in February of 2018. First Nations require a functioning *Project List* to understand, participate, and make decisions on which projects are entering (and potentially threatening) the exercise of their inherent and constitutionally-protected rights. The release of a *Consultation Paper* with one month to comment before regulations proceed to Gazette Two does not constitute meaningful consultation, which is required for regulatory development.
- N. Affirm and assert the rights of First Nations to develop their own self-determination plans that are First Nation-led processes and that have not participated nor consented to discussions and processes that impact or impede First Nations.
- O. First Nations expect to draft policies, regulations, and guidelines for the environmental and regulatory processes, at, or above, the precedent set in the development and eventual passage of the *Species-at-Risk Act*, which involved full, direct, and unfettered participation of First Nations (Resolution 07/2018, *Addressing First Nations Rights, Title and Jurisdiction in Bill C-69: Impact Assessment Act, Canadian Energy Regulator Act, and the Navigation Protection Act*).

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

1. Demand that the Government of Canada listens to First Nations in their calls for improvements to the Project List and Time Management regulations, in order to include existing (or "in situ") oil sands projects, small modular nuclear reactors, and other projects but not limited to projects that may impact First Nations rights, title, and jurisdiction, and further respecting the sovereignty of each Nation.
2. Call on Canada to engage in a focused dialogue with First Nations to substantively identify, recognize, and engage the protocols, elements, and processes to support joint regulatory and policy drafting; in particular the Project List regulation and the Indigenous Knowledge policy framework.
3. Call on Canada to provide adequate funding directly to individual First Nations for their full, direct, and unfettered participation in the joint regulatory and policy drafting of the Impact Assessment Act.

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4. Call on Canada to ensure that regulatory and policy development fully respects the constitutional and other legal obligations of the Crown to First Nations and standards set by the United Nations Declaration on the Rights of Indigenous Peoples.
5. Call on Canada to work with First Nations in the Athabasca region to establish a Terms of Reference for a Regional Strategic Assessment of the Alberta Oil Sands and initiate this Regional Strategic Assessment by Summer 2020.

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