



May 2, 2017

Via email: ec.ministre.minister.ec@canada.ca
(Original to follow by mail)

The Honourable Catherine McKenna
Minister of Environment and Climate Change
Centre Block, Suite 433C
House of Commons
Ottawa ON K1A 0A6

RE: Expert Panel Report, Review of the Canadian Environmental Assessment Process

Dear Minister:

The Business Council of British Columbia (the Business Council) is pleased to submit these summary comments on the Expert Panel's recent report and review of the *Canadian Environmental Assessment Act* and process.

We commend the Expert Panel (the Panel) for undertaking the difficult task of synthesizing the many perspectives of stakeholders who took part in the cross-Canada review process. We understand the challenges the Panel faced in trying to find effective solutions given substantial differences of views among intervenors on a number of issues. The Business Council acknowledges the federal government's desire to identify ways to bolster public confidence, improve transparency, and ensure certainty in the review process for new projects, in support of the important goal of moving Canada's natural resources and other traded goods to market.

We endorse the Panel's statement that any process needs to be "predictable, consistent, comprehensive and open ... disciplined in duration and cost ... and fosters a culture of learning." However, taken in total, we have significant concerns that operationalizing all the ideas suggested by the Panel will not "modernize" project assessment in Canada. If implemented as proposed, there is a very real risk the process will end up becoming more complex and less certain than it is today, with increased delays in reaching decisions, higher costs, and less satisfaction among stakeholders.

A necessary starting point is to provide some context to understand where Canada stands globally as a location to invest and to undertake industrial development. Of concern, Canada currently ranks near the bottom (30th out of 34 OECD countries) among advanced economy jurisdictions in barriers to trade



and investment.¹ And there is growing evidence — notably in flows of capital spending — that Canada’s relative attractiveness has diminished for greenfield investment across large parts of the natural resource, infrastructure, and manufacturing sectors. We see the hesitation to deploy risk capital in Canada in conversations with potential investors every day.

On the other hand, the Yale Environmental Performance Index² ranks Canada 25th out of 180 countries, ahead of the United States and not far behind first-place Finland. This indicates that Canada scores quite well on a number of social and environmental indicators, contrary to the claims of many stakeholders including some environmental groups. Furthermore, there is no comparative evidence from any international organization or research body, including the International Association of Impact Assessment, suggesting that Canada’s existing project assessment process is as deficient as some people seem to believe. So, while there are certainly areas where Canada can improve, a wholesale overhaul of the EA process, as proposed by the Panel, may end up further weakening Canada’s already fragile investment climate.³

The Business Council is also troubled by the perception — reinforced by the Panel’s report — that business and industry had little interest in the Panel’s work. This judgement seems to be based on a count of submissions and presentations to the Panel, by category of stakeholder. What this fails to appreciate is that submissions from organizations like the Business Council, the Canadian Chamber of Commerce, the Mining Association of Canada, the Canadian Association of Petroleum Producers and numerous others, in fact speak for the views of thousands of companies that are members of these organizations.

The Business Council’s advice to the Panel reflects a cross-section of industry perspectives based on input from dozens of individual companies affected by legislative and policy change in the realm of environmental assessment. As you know, projects proposed in British Columbia account for almost 40% of all those requiring CEAA reviews in Canada. It makes little sense for every member company with an interest in CEAA matters to make individual submissions. Instead, most companies choose to work through their industry organizations to provide substantive and thoughtful input. This explains the relatively small number of business community submissions received by the Panel.

That said, we find that several of the Panel’s recommendations make conceptual sense, including some around transparency, data and data management, opportunities for Indigenous peoples in the process, the advantages of enhanced early planning, and the need to increase the capacity of federal agencies. Positive elements in the report include the following:

¹ [OECD Economic Surveys: Canada 2016](http://dx.doi.org/10.1787/888933370960). OECD, Product Market Regulation database: <http://dx.doi.org/10.1787/888933370960>.

² <http://epi.yale.edu/country/canada>.

³ [Equipment Failure: Feeble Business Investment Costs Canadians their Competitive Edge](http://www.bcbc.com/bcbc-blog/2017/the-investment-conundrum), William B.P. Robson, Aaron Jacobs and Benjamin Dachis, C.D. Howe Institute, March 24, 2017. Also see <http://www.bcbc.com/bcbc-blog/2017/the-investment-conundrum>.



- **One administrative authority for designated projects:** “One project one assessment” is critical and is also a central feature of the current BC *Environmental Assessment Act* and process. The benefits include the efficiency gains from a single process window, opportunities for project management capacity-development and cross-sectoral learning, and the potential for administrative and communication efficiency. In the case of the federal government, one risk from amalgamating the existing three-process approach, as recommended by the Panel, may be a loss of specialized expertise in complex areas of energy development and energy policy that now resides in the National Energy Board and the Canadian Nuclear Safety Commission. We advise you and your colleagues to proceed with caution on this item given the pivotal role that energy plays in Canada’s economy.
- **Retaining substitution:** This is a must-have for business and industry in British Columbia. Cooperation is a laudable goal that all levels of government should strive for, in all policy domains. But pre-2012, there was also much talk of federal-provincial cooperation in project assessment, when the reality was a significant duplication of effort and lengthy review processes for even modest projects. The problem with simply calling for intergovernmental cooperation is the absence of formal requirements for information-sharing or synchronized decision-making. Substitution must be retained, as it better addresses both jurisdiction and information-sharing and can be expanded to ensure active Indigenous participation in the process.
- **Science, evidence, and data:** The use of science and evidence in decision-making is of paramount importance, as the Panel notes. We also support the development of a “central, consolidated, and publicly available federal government database.” Taking this concept one step further and working with provinces to build joint data infrastructure (i.e., shared data warehouses) to enable systems integration would improve information-sharing (original study and monitoring data), increase transparency (common data model, format, access, etc.), and reduce costs related to duplicate filings in different data formats.
- **Indigenous participation:** A more active and properly resourced response by government in fulfilling its duty to consult with Indigenous peoples is critical. At the same time, Canada must guard against downloading or delegating the Crown’s general reconciliation obligations (and the related costs) into the assessment process around individual projects. There is more work to do to refine and elaborate on the role of Indigenous people in project assessment in a manner that is consistent with the Constitution, evolving jurisprudence, and provincial government roles and responsibilities. This is a cross-government issue, rather than one that is mainly applicable to project assessment. Canada may want to consider some work now underway in British Columbia with First Nations groups on capacity development and governance models.



- **Planning:** “Maximizing the role of planning” is a sound concept that should allow time for stakeholder and Indigenous engagement and understanding. The BC environmental assessment process is a possible model, in which “planning begins early in project design” and facilitates collaboration and dialogue among stakeholders.
- **Decisions:** Inclusion of outcome-based conditions and an amendment process for project approvals are important. We are pleased to see the Panel’s recognition of these components.
- **Project list:** Continuing with a project list and allowing for additions to the list based on Ministerial discretion is a sensible idea.
- **Capacity:** As noted in our original submission to the Panel, we support increasing the capacity of federal departments and agencies involved in project reviews.

While we applaud the Panel’s focus on the above noted items, the Business Council has significant concerns with a number of aspects of the Panel’s recommended approach:

- **Scope of authority – responsibility and governance:** A government agency should not be the entity charged with “preparing the Impact Statement.” This is counter to private sector driven project development and risks sidelining proponents, effectively forcing them to cede control of investment decisions while making proponents pay every step of the way. Under this model, government officials may become a kind of *de facto* “board of directors,” rather than providing regulatory guidance and oversight in the public interest. Further, a quasi-judicial model of governance would eliminate the decision-making authority of legitimately elected officials, leading to an adversarial process rather than fostering collaboration or facilitating consultation and accommodation with Indigenous peoples.
- **Process:** The process, as described by the Panel, strikes us as overly prescriptive and complex. While there is value in having multi-stakeholder committees offer insight and guidance, having mandated and multiple committees threatens to create an industry of stakeholders. One only need look at utility regulation to see some salient examples. As such, our view is that formally mandated committees are inappropriate for most projects. Further, the Panel identifies but provides little detail on the evaluation criteria or process to be used to get to a “clear decision, informed by the sustainability test.” What is the exact nature of such a test? There is also considerable uncertainty about the scope of review, particularly where there is split management jurisdiction with the provinces.
- **Alternative assessment:** There is no place in project assessment for alternatives that are evaluated by a government authority; this is a role for company management and boards. The assessment process is an opportunity to adjust project design based on findings and input from those affected by a proposed development.



- **Jurisdiction:** The Panel's proposed changes do not adequately acknowledge provincial jurisdiction over natural resource policy and development and hence project assessment. Co-management cannot be imposed by contract or otherwise; it must be negotiated. The federal government must steer clear of compelling action by proponents or provinces that is outside the scope of federal jurisdiction.
- **Project list:** In our view, there should be no reintroduction of statutory criteria as triggers. History tells us this is costly, ineffective, and produces highly uncertain results. Section 67 of CEAA 2012 and related guidance⁴ already gives government agencies the tools to determine whether a project is likely to result in significant adverse effects before making decisions on permits. Amendments to the project list using an interpretation of "consequential impact on federal interests" must be accompanied by clear decision criteria.
- **Decisions:** Consensus seeking is an appropriate principle for stakeholder engagement and for inclusion in guidance documents. It is not appropriate for decision-making, which by its very nature involves trade-offs that may be irreconcilable and touches on broader public policy questions that ultimately fall within the purview of elected representatives, not regulatory processes or bodies.
- **Conditions of approval, compliance and enforcement:** The assessment process must not become focused on licensing/permitting, as the Panel seems to contemplate based on the combined effect of its recommendations concerning outcomes, monitoring, compliance, and enforcement.
- **Science, evidence, data:** There is potential for abuse of power and increased costs stemming from an Authority's ability to compel and retain expertise. How this is exercised is a significant outstanding issue, as is the definition of "best available scientific information and methods."
- **Public participation and funding:** The proposed "open to anyone" recommendations for public participation are problematic. Process administrators must be able to differentiate among affected stakeholders (i.e., those with a very general interest versus those directly affected), determine standing, and award costs, appropriately. It makes perfect sense to give more weight to parties who are directly affected or who possess some special expertise. We see a risk of the impact assessment process being overwhelmed with participants with no direct stake in the outcome.

⁴ <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/projects-federal-lands-outside-canada/projects-federal-lands-making-determination-under-section-67-canadian-environmental-assessment-act-2012-part-1-context.html>.



- **Use of regional and strategic environmental assessment:** We see value in enabling regional approaches as part of the wider assessment regime. But the government should not make such assessments pre-conditions or pre-requisites to project applications. In addition, government should be the primary funders of regional/strategic assessment work, although in certain circumstances industry may want to contribute either funding or expertise.
- **Timelines:** Adopting project-by-project timelines would be a major step backward, in our view. While one-size may not fit all, a commitment to predictable and known timelines with some flexibility is greatly valued by proponents and investors. Unknown/undefined timelines provide no certainty and undermine a proponent's ability to make prudent investment and business planning decisions.
- **Indigenous governance models:** A process that can integrate "distinctive governance institutions, laws and customs of the relevant Indigenous Peoples" is unworkable in British Columbia with 203 First Nations – the most of any province or territory in Canada, and with substantial overlapping land claims and few treaties. As a result, both the Business Council and the BC Environmental Assessment Office are working on alternative ways of ensuring Aboriginal communities can "select their own representatives to participate on their behalf within IA processes, and maintain and develop internal decision-making institutions and distinctive customs." Discussions are underway at the Business Council's Champions Table⁵ on the topics of economic reconciliation through partnership. The BC EAO's First Nations Energy and Mining Council⁶ is looking at how BC's environmental assessment process can address many of the issues identified in the Panel's report, acknowledging the unique challenges we face.

The Business Council supports continuous improvement of regulatory processes. Among our member companies, there is considerable practical experience with the assessment process — federally, and in the BC context — as it has evolved over the past 20-30 years. We welcome the opportunity to help the federal government digest and analyze the menu of recommendations presented by the Panel. In the end, our hope is that national policy-makers will be committed to a vision of predictable, timely, and credible project reviews that advance the broad public interest and improve the well-being of Canadians.

The Business Council, established in 1966, is an association representing 260 large and medium-sized enterprises engaged in business in every sector of British Columbia's economy. We are a public policy organization, providing research, analysis, commentary, and advocacy on issues relevant to strengthening Canadian and BC competitiveness and prosperity. We support competitive taxes, effective and nimble regulation, and responsible fiscal government budgets to enable vigorous business activity and provide the resources to pay for education, health care, and other public services for citizens. We

⁵ <http://www.bcbc.com/news-releases/2017/an-innovative-meeting-place-between-the-bc-business-community-and-first-nations-leadership-launches-to-support-economic-reconciliation-in-bc>.

⁶ <http://fnemc.ca/>.



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have a proven record of constructive policy advocacy on environmental sustainability, economic reconciliation with First Nations, innovation and productivity, climate change and energy, tax and fiscal policy, sound regulation, trade policy, and the development and attraction of skills and talent.

Our members come from all major sectors of the province's economy, including forestry, energy, mining, manufacturing, transportation, advanced technology, health research and life sciences, tourism, retail and wholesale trade, construction, utilities, post-secondary education, and professional, scientific, and technical services. Taken together, the enterprises, academic institutions, and sectoral associations affiliated with the Business Council account for approximately one-quarter of all private sector payroll jobs in BC.

We would welcome further dialogue with you and your colleagues on these matters.

Yours sincerely,

*Original signed by
Greg D'Avignon*

Greg D'Avignon
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DM/vjc

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