

January 15, 2024

Sent via electronic mail to: ministre-minister@ec.gc.ca

Honourable Steven Guilbeault Minister of Environment and Climate Change
House of Commons Ottawa, Ontario K1A 0A6

Dear Minister Guilbeault

When you met with the Minister's Advisory Council on Impact Assessment (MINAC) on October 5, you invited us to provide advice on how the Agency might respond to the Supreme Court of Canada's decision on the constitutionality of sections of the *Impact Assessment Act* (IAA). This decision was subsequently released on October 13 (*Reference re Impact Assessment Act*, 2023 SCC 23). MINAC then met again on November 28-30 to discuss this matter, and we are pleased to provide these comments to you.

Our comments relate to key principles we believe the Government should use in determining what legislative amendments are required to ensure all parts of the Act are constitutional and the valuable work of impact assessment can continue in an effective and collaborative manner.

The overarching principle identified by the Council is as follows:

Principle #1: While the Government of Canada must make targeted changes to address the jurisdictional issues raised by the Supreme Court of Canada (SCC), the government should not pursue major amendments that would lead to undue delay in project reviews. Implementation of the Act has been steadily improving in efficiency and predictability and broad amendments that would add more process uncertainty should be avoided as they would reduce the confidence of proponents, Indigenous Peoples, and affected communities in the overall implementation of the Act.

In addition, the Council identified several other principles for your consideration. The next two relate to amendments that we believe should be pursued by the Agency.

Regarding adverse trivial and non-trivial impacts, the Council emphasizes the need to provide enough flexibility in the Act to ensure that the thresholds or boundaries can be defined by affected communities. This could be achieved by making sure the federal government does not go beyond the words used by the SCC.

Principle #2: *The federal government should refrain from going beyond the wording in the SCC decision regarding trivial and non-trivial effects and should not attempt to define these concepts. In particular, the Council observes that such boundaries or thresholds regarding what is trivial or not should not be imposed on Indigenous Peoples but should be defined by Indigenous Peoples as they relate to their rights, their health, and the impacts affecting them.*

The Council notes that the federal government already has an international legal obligation to prevent significant transboundary pollution. We believe that given the critical importance of reducing greenhouse gas (GHG) emissions and the lack of clarity around jurisdictional authority as it relates to climate change, the federal government should explore changes needed to ensure that the impact of GHG emissions can be effectively assessed through the Act.

Principle #3: *The federal government should assess the options for establishing, in accordance with the Supreme Court's decision, federal jurisdiction over transboundary pollution, including GHG emissions, in the impact assessment context.*

The Council notes that the IAA is limited in its application and is only one tool of many that are important for mitigating climate change and addressing other transboundary pollution. Any amendments to the IAA should complement those other federal environmental and climate levers.

The next principle relates to a critical issue that may not require specific amendments to the Act but should still be pursued by the federal government in its implementation.

The Council strongly believes that cooperation between governments is essential to implement the Act effectively and efficiently. Using examples of existing or recent successful collaboration agreements, the Council encourages the federal government to pursue new agreements with provincial governments and Indigenous Peoples. We also strongly support the development of the *Indigenous Impact Assessment Co-Administration Agreement Regulations*. We understand that the Agency is committed towards furthering the collaboration objective as part of their response to the SCC decision.

Principle #4: *The federal government should pursue the development and implementation of cooperation agreements with provincial governments and Indigenous Peoples.*

We conclude our letter with two additional principles regarding the process for developing the government's response to the SCC decision. First, the Council recognizes the need for the federal government to move promptly to ensure the language of the Act is constitutional. However, we believe that expediency should not be prioritized over effectiveness. Much of the ongoing discontent with the IAA is linked to the perceived duplication and disconnect between provincial and federal assessment processes. The Council believes that a firm commitment is needed from the government to engage in the design and implementation of the mechanisms supporting the implementation of the Act and address concerns such as the cooperation between federal and provincial governments, and Indigenous Peoples.

Principle #5: While the government should address the SCC issues with legislated amendments as quickly as possible, it should also clearly demonstrate its commitment to address relevant implementation issues.

The Council believes that the federal response to the SCC decision, while providing an opportunity to improve the Act and its implementation, could also lead to future legal challenges. We suggest that seeking guidance from the SCC as soon as the legislative amendment process is finalized would be useful.

Principle #6: Once the proposed amended legislation has gone through the third reading and the Senate, the Government should refer it back to the SCC at the same time that it is brought into force. While somewhat unusual, this step would allow the federal government to get back to the review and approval of major projects while streamlining the path for constitutional certainty.

We hope this letter is helpful and will guide your reflection while preparing the government response to the SCC decision. We are grateful for the opportunity to provide our comments and advice to support you in this important task.

Sincerely,

A handwritten signature in black ink that reads "Lesley Griffiths". The signature is written in a cursive style and is positioned above a long, sweeping horizontal line that underlines the name.

Lesley Griffiths
Chair, Minister's Advisory Council on Impact Assessment (MINAC)

Signatory Members

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